

1. DR. OLUSEGUN AGAGU

V.

1. RAHMAN OLUSEGUN MIMIKO
2. PEOPLES DEMOCRATIC PARTY
3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)
4. RESIDENT ELECTORAL COMMISSIONER/REC ONDO STATE
5. THE RETURNING OFFICER, AKOKO NORTH EAST L.G.A.
6. THE RETURNING OFFICER, AKOKO NORTH WEST L.G.A.
7. THE RETURNING OFFICER, AKURE NORTH LGA
8. THE RETURNING OFFICER, ESE-ODO L.G.A.
9. THE RETURNING OFFICER, ILAJE L.G.A.
10. THE RETURNING OFFICER, IRELE L.G.A.
11. THE RETURNING OFFICER, ILE-OLUJI/OKE-IGBO L.G.A.
12. THE RETURNING OFFICER, ODIGBO LGA
13. THE RETURNING OFFICER, OKITIPUPA LGA
14. THE RETURNING OFFICER, OSE L.G.A.
15. THE NIGERIA POLICE
16. THE COMMISSIONER OF POLICE, ONDO STATE
17. THE NIGERIAN ARMY
18. THE NIGERIAN NAVY

CA/B/EPT/342A/08

PEOPLES DEMOCRATIC PARTY (PDP)

V.

1. RAHMAN OLUSEGUN MIMIKO

2. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)
3. RESIDENT ELECTORAL COMMISSIONER (REC ONDO STATE)
4. THE RETURNING OFFICER, AKOKO NORTH EAST L.G.A.
5. THE RETURNING OFFICER, AKOKO NORTH WEST L.G.A.
6. THE RETURNING OFFICER, AKURE NORTH L.G.A.
7. THE RETURNING OFFICER, ESE-ODO L.G.A.
8. THE RETURNING OFFICER, ILAJE L.G.A.
9. THE RETURNING OFFICER, IRELE L.G.A.
10. THE RETURNING OFFICER, ILE-OLUJI/OKE-IGBO L.G.A.
11. THE RETURNING OFFICER, ODIGBO L.G.A.
12. THE RETURNING OFFICER, OKITIPUPA L.G.A.
13. THE RETURNING OFFICER, OSE L.G.A.
14. THE NIGERIA POLICE
15. THE COMMISSIONER OF POLICE, ONDO STATE
16. THE NIGERIAN ARMY
17. THE NIGERIAN NAVY
18. DR. OLUSEGUN AGAGU

CA/B/EPT/342B/08

1. INDEPENDENT NATIONAL ELECTORAL COMMISSION
2. RESIDENT ELECTORAL COMMISSIONER (REC ONDO STATE)
3. THE RETURNING OFFICER, AKOKO NORTH EAST L.G.A.
4. THE RETURNING OFFICER, AKOKO NORTH EAST L.G.A.
5. THE RETURNING OFFICER, AKURE, NORTH L.G.A.
6. THE RETURNING OFFICER, ESE-ODO L.G.A.
7. THE RETURNING OFFICER, ILAJE L.G.A.
8. THE RETURNING OFFICER, IRELE L.G.A.
9. THE RETURNING OFFICER, ILE-OLUJI OKE-IGBO L.G.A.

10. THE RETURNING OFFICER, ODIGBO L.G.A.
11. THE RETURNING OFFICER, OKITIPUPA L.G.A.
12. THE RETURNING OFFICER, OSE L.G.A.

V.

1. RAHMAN OLUSEGUN MIMIKO
2. DR. OLUSEGUN AGAGU
3. PEOPLES DEMOCRATIC PARTY
4. NIGERIA POLICE
5. THE COMMISSIONER OF POLICE, ONDO STATE
6. THE NIGERIAN ARMY
7. THE NIGERIAN NAVY

CA/B/EPT/342C/08

1. THE NIGERIA POLICE
2. THE COMMISSIONER OF POLICE, ONDO STATE

V.

1. RAHMAN OLUSEGUN MIMIKO
2. DR. OLUSEGUN AGAGU
3. PEOPLES DEMOCRATIC PARTY (PDP)
4. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)
5. RESIDENT ELECTORAL COMMISSIONER (REC ONDO STATE)
6. THE RETURNING OFFICER, AKOKO NORTH EAST L.G.A.
7. THE RETURNING OFFICER, AKOKO NORTH WEST L.G.A.
8. THE RETURNING OFFICER, AKURE NORTH L.G.A.
9. THE RETURNING OFFICER, ESE-ODO L.G.A.
10. THE RETURNING OFFICER, ILAJE L.G.A.
11. THE RETURNING OFFICER, IRELE L.G.A.
12. THE RETURNING OFFICER, ILE-OLUJI/OKE-IGBO L.G.A.
13. THE RETURNING OFFICER, ODIGBO L.G.A.
14. THE RETURNING OFFICER, OKITIPUPA L.G.A.
15. THE RETURNING OFFICER, OSE L.G.A.

CA/B/EPT/342D/08

INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

V.

1. RAHMAN OLUSEGUN MIMIKO
2. DR. OLUSEGUN AGAGU
3. PEOPLES DEMOCRATIC PARTY (PDP)
4. THE NIGERIA POLICE
5. THE COMMISSIONER OF POLICE, ONDO STATE
6. THE NIGERIAN ARMY
7. THE NIGERIAN NAVY

CA/B/EPT/267/07

INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

V.

1. RAHMAN OLUSEGUN MIMIKO
2. DR. OLUSEGUN AGAGU
3. PEOPLES DEMOCRATIC PARTY (POP)
4. RESIDENT ELECTORAL COMMISSIONER (REC ONDO STATE)
5. THE RETURNING OFFICER, AKOKO NORTH EAST L.G.A.
6. THE RETURNING OFFICER, AKOKO NORTH WEST L.G.A.
7. THE RETURNING OFFICER, AKURE NORTH L.G.A.
8. THE RETURNING OFFICER, ESE-ODO L.G.A.
9. THE RETURNING OFICER, ILAJE L.G.A.
10. THE RETURNING OFFICER, IRELE L.G.A.
11. THE RETURNING OFFICER, ILE-OLUJI/OKE- IGBO L.G.A.
12. THE RETURNING OFFICER, ODIGBO L.G.A.
13. THE RETURNING OFFICER, OKITIPUPA L.G.A.
14. THE RETURNING OFFICER, OSE L.G.A.
15. THE NIGERIA POLICE
16. THE COMMISSIONER OF POLICE, ONDO STATE
17. THE NIGERIAN ARMY
18. THE NIGERIAN NAVY

CA/B/EPT/267A/07

INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC) & 11 ORS.

V.

1. RAHMAN OLUSEGUN MIMIKO

2. DR. OLUSEGUN AGAGU
3. PEOPLES DEMOCRATIC PARTY (PDP)
4. THE NIGERIA POLICE
5. THE COMMISSIONER OF POLICE, ONDO STATE
6. THE NIGERIAN ARMY
7. THE NIGERIAN NAVY

CA/B/EPT/3 20/07

INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC) & 11 ORS.

V.

1. RAHMAN OLUSEGUN MIMIKO
2. DR. OLUSEGUN AGAGU
3. PEOPLES DEMOCRATIC PARTY (PDP)
4. THE NIGERIA POLICE
5. THE COMMISSIONER OF POLICE, ONDO STATE
6. THE NIGERIAN ARMY
7. THE NIGERIAN NAVY

COURT OF APPEAL (BENIN DIVISION)

CA/B/EPT/321/07

UMARU FARUK ABDULLAHI. P.C. A. (Presided and Read the Leading Judgment)

ISA AYO SALAMI, J.C.A. KUMAI BAYANG AKAHHS. J.C.A.

AMINA AD AMU AUGIE. J.C.A.

UZO NDUKWE-ANYANWU. J.C.A.

MONDAY. 23RD FEBRUARY. 2009

APPEAL - Court of Appeal - Judgment it can give - Nature of.

APPEAL - Decision of election tribunal - Decision declaring candidate as winner of election - Appeal against by INEC and Nigeria Police – Impropriety of.

APPEAL - Finding not appealed against - How treated.

APPEAL - Fresh issue on appeal - Rising of- Procedure therefore.

APPEAL - Preliminary objection to an appeal - Raising of - When raised in respondent's brief-
How moved.

COURT - Court of Appeal - Power of to give judgment which the trial court ought to have given
- Source of - When will not exercise - Section 15, Court of Appeal Act - Order 4 rule 7, Court of
Appeal Rules, 2007.

COURT - Decision of court - Basis of.

COURT - Evaluation of evidence - Charts - Use of to illustrate evaluation of evidence by court -
Whether permissible.

COURT - Judgment of court - Charts - Use of as illustration in judgment - Propriety of.

COURT - Judgment of court - Error and mistake therein - Whether every error or mistake
therein will result in setting aside of judgment - Relevant consideration.

COURT - Judicial notice - Geographical distance - Power of court to take judicial notice of -
Section 74(l) (g), Evidence Act.

COURT - Jurisdiction of court - Source and scope of - What determines.

ELECTION - Conduct of election - Non-compliance with electoral rules - When will be deemed
substantial.

ELECTION - Invalidation of election - Basis of.

ELECTION - Polling agent - Appointment of - Principal place of duty-Whether can an end at two
polling units.

ELECTION - Votes cast at an election - Primary evidence of- What constitutes - Where absent -
Effect.

ELECTION - Voting - Vote cast by person without voter's card or duplicate voter's card -
Whether lawful.

ELECTION - Voting - Person seeking to cast vote - Where name not on voter's list and docs not
produce voter's card - Whether' entitled to ballot paper.

ELECTION PETITION - Allegation of crime in election petition -Where petitioner also claims to
have majority of lawful votes -Failure of petitioner to prove crime alleged beyond reasonable
doubt - When petitioner entitled to succeed in the petition.

ELECTION PETITION - Applications - Application to set aside election petition or proceedings arising there from for irregularity-When should be made - Where made Duty on tribunal to determine before any further step in proceedings.

ELECTION PETITION - Election tribunal - Decision of-Decision declaring candidate as winner of election - Appeal against by INEC and Nigeria Police - Impropriety of.

ELECTION PETITION - Election result - Challenge thereof- Where petitioner claims to have highest number of valid votes cast -Course open to respondent returned as winner - How to challenge allegation.

ELECTION PETITION - Election tribunal - Finding thereof that candidate returned as elected was not duly elected-Proper order to make.

ELECTION PETITION - Election tribunal - Power of to illustrate evaluation of evidence with charts - When exercisable.

ELECTION PETITION - Election tribunal - Quorum of- What is.

ELECTION PETITION - Election tribunal - Jurisdiction of- Source and scope of- What determines.

ELECTION PETITION - Evidence-in-chief at hearing of election petition - How adduced - Whether can be given viva voce.

ELECTION PETITION - Invalidation of election - Basis of.

ELECTION PETITION - Parties to an election petition - Respondent thereto - Who qualifies as - Electoral Officer or other person at an election - Where conduct thereof is complained of- Need to join as a party - Non-joinder of- When will not void petition

ELECTION PETITION - Proper order - Result of election -Challenge of- Where tribunal makes finding that candidate returned as elected was not duly elected - Proper order to make.

ELECTION PETITION - Reply - Where not filed by respondent -Effect,

ELECTION PETITION - Reply to election petition - Where petitioner complains of undue return and claims seal - What reply must contain - Need to clearly and distinctly set out facts and figures controverting claim of petitioner.

ELECTION PETITION - Reply lo election petition - Where petitioner claims highest number of valid votes cast - What reply must contain - Need to state particulars of votes objected to.

ELECTION PETITION - Votes cast at an election - Primary evidence of - What constitutes - Where absent - Effect.

ELECTION PETITION - Conduct of election - Non-compliance with electoral rules - When will be deemed substantial.

ELECTION TRIBUNAL - Quorum of election tribunal - Section 285(4) of the 1999 Constitution.

EVIDENCE - Admissibility - Evidence not rendered in admissible by law - Where admitted with concurrence of parties or without objection - How treated - Whether objection thereto can be raised on appeal.

EVIDENCE - Admissibility - Evidence relevant to a case - Whether can be excluded merely by the way it was obtained.

EVIDENCE - Admission - Fact admitted - How treated.

EVIDENCE - Evaluation of evidence - Charts - Use of to illustrate evaluation of evidence by court - Propriety of.

EVIDENCE - Evidence of a party to proceedings - Where unchallenged by the opposing party - Effect - Duty on court with respect thereto.

EVIDENCE - Evidence-in-chief at hearing of election petition - How adduced - Whether can be given viva voce.

EVIDENCE - Judicial notice - Geographical distance - Power of court to take judicial notice of- Section 74(1)(g), Evidence Act.

EVIDENCE – Proof - Burden of proof in civil cases - On whom lies - Shifting nature of- How discharged.

INTERPRETATION OF STATUTE - Clear and unambiguous words in a statute - How construed.

JUDGMENT AND ORDER - Decision of court - Basis of - How made.

JUDGMENT AND ORDER - Judgment of court - Charts - Use of as illustration in judgment - Propriety of.

JUDGMENT AND ORDER - Judgment of court - Error and mistake therein - Whether every error or mistake therein will result in setting aside judgment - Relevant consideration.

JUDGMENT AND ORDER - Proper order - Election tribunal -Where finds that candidate returned as elected was not duly elected - Proper order it should make.

JURISDICTION - Jurisdiction of court - Source and scope of- What determines.

NOTABLE PRONOUNCEMENT - On Impropriety of appeal by INEC and Nigeria Police against decision of election tribunal declaring a candidate winner of election.

PRACTICE AND PROCEDURE - Appeal - Fresh issue on appeal -Rising of- Procedure there for.

PRACTICE AND PROCEDURE - Appeal - Invalidation of election - Basis of.

PRACTICE AND PROCEDURE - Appeal - Preliminary objection to an appeal - Rising of- Where raised in respondent's brief -How moved.

PRACTICE AND PROCEDURE - Decision of court - Basis of -How made.

PRACTICE AND PROCEDURE - Evidence-in-chief in election petition - How adduced - Whether can be given viva voce.

PRACTICE AND PROCEDURE - Election tribunal - Quorum of -What is - Section 285(4) of the 1999 Constitution.

PRACTICE AND PROCEDURE - Evaluation of evidence - Charts - Use of to illustrate evaluation of evidence by court – Propriety of.

PRACTICE AND PROCEDURE - Irregularity in procedure -Application to set aside election petition or proceedings arising there from for irregularity When must be made - Where made Duty on tribunal to determine before any further step in proceedings.

PRACTICE AND PROCEDURE - Irregularity in proceedings -Acquiescence thereto by parties - Effect.

PRACTICE AND PROCEDURE - Judgment of court - Chart - Use of as illustration in judgment - Propriety of.

PRACTICE AND PROCEDURE - Judgment of court - Error and mistake therein - Whether every error or mistake therein will result in setting aside of judgment - Relevant consideration.

PRACTICE AND PROCEDURE - Jurisdiction of court - Source and scope of- What determines.

PRACTICE AND PROCEDURE - Litigation - Need to put an end thereto.

PRACTICE AND PROCEDURE - Parties to an action - Parties to an election petition - Respondent - Who qualifies as - Electoral Officer or other person at an election - Where conduct thereof is complained of- Need to join as a party - Non-joinder of -When will not void petition.

PRACTICE AND PROCEDURE - Pleadings - Bindingness of on court and parties.

PRACTICE AND PROCEDURE - Pleadings - Fact pleaded - Failure to adduce evidence thereon - Effect.

PRACTICE AND PROCEDURE - Pleadings - Fact pleaded by a party - Whether adverse party entitled to adduce evidence thereon.

PRACTICE AND PROCEDURE - Pleadings - Reply - Where not filed by respondent - Effect.

PRACTICE AND PROCEDURE - Pleadings - Reply to election petition - Where petitioner claims highest number of valid votes cast - What reply must contain - Need to state particulars of votes objected to.

PRACTICE AND PROCEDURE - Pleading be pleaded.

PRACTICE AND PROCEDURE - Proof- Burden of proof in civil cases - On whom lies - Shifting nature of- How discharged.

PRACTICE AND PROCEDURE - Reply to election petition - Where petitioner complains of undue return and claims seat - What reply must contain - Need to clearly and distinctly set out facts and figures controverting claim of petitioner.

PRINCIPLES OF INTERPRETATION - Interpretation of statutes -Clear and unambiguous words in a statute - How construed.

PUBLIC POLICY - Litigation - Need to put an end thereto.

STATUTE - Clear and unambiguous words in a statute - How construed.

TRIBUNAL - Election tribunal - Quorum of- What is - Section 285(4) of the 1999 Constitution.

Issues:

1. Whether the Election Tribunal was right when it failed or refused to strike out the petition or part of the same notwithstanding that some paragraphs of the petition were fundamentally defective because they violated mandatory provisions of the Electoral Act. 2006.
2. Whether the judgment of the Tribunal was not void or invalid in view of the participation in the delivery of the judgment by a member who did not take part in the hearing of all evidence of the case.
3. Whether the tribunal was right in its evaluation of the evidence before n and resultant findings nullifying the election in several polling units and wards in the various Local Government Areas.

4. Whether the tribunal was right when it admitted and relied on inadmissible evidence in spite of the objections raised thereto by the appellant which objection the tribunal failed to pronounce on.
5. Whether the tribunal was right when it based its decision on evidence adduced on facts which were not joined and thereby set up a different case for the appellant.
6. Whether the tribunal was right in its interpretation and application of sections 19, 46 and 50 of the Electoral Act, 2006.
7. Whether in the circumstance of the case, and particularly in view of the final order of the tribunal, it was right in nullifying the election result of all polling units in APOI II Ward 02 and APOI III Ward 003 of Ese-Odo Local Government Area.
8. Whether the tribunal was right when it suo mom sorted/ arranged ballot papers which were tendered from the Bar and relied on inadmissible and unreliable documents on which it made vital and decisive findings.
9. Whether the tribunal was justified in omitting lawful results in the final computation of the result of the election when the results were not nullified by the tribunal.
10. Whether the tribunal was right in placing the onus of producing election results (Form EC8A) on the 1s1 appellant.
11. Whether the conclusion of the tribunal as to lawful votes scored by the parties was valid and justifiable having regard to the failure of .the tribunal to determine the number of votes affected by the electoral malpractices and improprieties alleged by the 1s' respondent.
12. Whether the tribunal was right when it declared the I51 respondent as the winner of the Governorship election held in Ondo State on 14th April, 2007.

Facts:

At the election to the office of Governor of Ondo State. Nigeria held on 14th April 2007, Dr. Rahman Olusegun Mimiko. The 1st respondent herein contested the election as the candidate of the Labour Party. Dr. Olusegun Agagu. The appellant herein also contested the election as the candidate of the Peoples Democratic Party. At the end of the election, the Independent National Electoral Commission (3ai respondent) declared the appellant as the candidate duly elected as Governor of Ondo State at the election. The 1st respondent was aggrieved with that declaration. He therefore filed a petition at the Governorship/Legislative Election Tribunal, Akure, and Ondo State.

The kernel of the 1s' respondent's case was that election was not conducted in six Local Government Areas of Ondo State and that he ought to be declared as the duly elected Governor of Ondo State because he scored the highest number of valid votes cast in the other parts of the State where election was conducted. The 1s' respondent pleaded the electoral

Forms EC8A - EC8D in support of his assertion and he illustrated his averments with charts in his petition.

In response, the 1st appellant filed a reply to the petition. He averred that there was free and fair election throughout Ondo State, Nigeria on 14th April 2009, and that he scored the highest number of valid votes cast at the election. He also illustrated the averments in his reply with charts, but he did not plead the particulars required of him by paragraph 15 of the First Schedule to the Electoral Act, 2006.

The 2nd – 14th respondents did not file their replies within time. They sought an enlargement of time to do so but their application was refused. The 15th – 18th respondents filed their replies. Eventually, the 2nd - 16th respondents informed the tribunal that they had no evidence to adduce at the hearing. But the 1st respondent and the appellant adduced evidence. They tendered several electoral materials and forms which were admitted in evidence by consent of parties on the one hand and without objection on the other hand. A State Security Service (SSS) report pleaded by both the 1st respondent and the appellant was also tendered in evidence by the 1st respondent and it was admitted in evidence by consent of the 1st appellant's counsel even though the SSS denied its existence. However, the electoral Form EC8A (results Form) of polling booth in the areas where the 1st respondent alleged election did not hold were not tendered in evidence though the electoral Forms EC8B, EC8C and EC8D, which were based on the contents of electoral Form EC8A were tendered and admitted in evidence, and they showed the result of the polling booths and stations which were challenged by the 1st respondent.

Furthermore, some of the electoral result forms (Form EC8B) in respect of three wards that were several kilometers apart showed that they were signed by the same person as ward agent for the 2nd respondent, thereby indicating that he was at each ward collation centre simultaneously. The 1st respondent called a witness as PW47. The witness adopted his written statement on oath in which he stated that he inspected the ballots allegedly used during the election, and also stated his findings. The 1st respondent also adduced evidence that there was no accreditation and non-delivery of voting materials at some polling booths and stations. Though the evidence of lack of accreditation and non-delivery of voting materials was challenged by the appellant, the 1st respondent's PW47 was not cross-examined.

In the course of its proceedings, the tribunal delivered some rulings. The 3rd – 14th respondents were dissatisfied with the rulings and they filed four interlocutory appeals against the rulings of the tribunal. At that stage, the composition of the tribunal also changed. One of the members of the tribunal withdrew from its proceedings and the four remaining members of the tribunal including its Chairman, continued with the proceedings until a new fifth member was appointed and sat with them till the conclusion of the tribunal's proceedings.

In its judgment, the tribunal evaluated the evidence adduced by the parties. It discredited the electoral Forms EC8B - EC8D and nullified the results relating to the polling booths and polling stations which did not have electoral Form EC8A. It found that the evidence adduced by one of the witnesses of the appellant was incredible but relied on the evidence of the 1st respondent's PW47. The tribunal also used a chart to illustrate its evaluation of evidence adduced on the votes cast for the appellant and the 1st respondent. The tribunal found that some votes were not allotted in three units in an electoral ward, but failed to allot the same as appropriate. The tribunal, however, found that the appellant scored the highest number of valid votes cast at the election held on 14th April, 2007. Consequently, the tribunal declared the 1st respondent as the candidate duly elected Governor of Ondo State at the election.

Dissatisfied with the tribunal's final decision, the appellant appealed to the Court of Appeal. The 2nd, 3rd and 15th respondents (Peoples Democratic Party, Independent National Electoral Commission and the Nigeria Police) were also dissatisfied with the decision of the tribunal and they also appealed to the Court of Appeal.

The 1st respondent, for his part, filed notices of preliminary objections against some of the grounds of appeal in some of the notices of appeal filed. However, the objection was not taken before the hearing of the appeal even though it was canvassed or argued in the 1st respondent's brief of argument. It was taken after all the appeals had been argued.

In determining the appeal, the Court of Appeal considered Sections 19, 50, 144(2) and 147(1), (2) of the Electoral Act, 2006 and paragraphs 12, 15 and 49(2) & (5) of the First Schedule to the Act. These provisions read as follows:-

"19(1) Whenever a voter's card is lost, destroyed, defaced, torn or otherwise damaged, the voter shall, at least thirty (30) days before polling day, apply in person to the Electoral Officer or any other officer duly authorized for that purpose by the Resident Electoral Commissioner, stating the circumstances of the loss, destruction, defacement or damage.

(2) If the electoral officer or any other officer is satisfied as to the circumstances of the loss, destruction, defacement or damage of the voter's card, he shall issue to the voter another copy of the voter's original voter's card with the word "DUPLICATE" clearly marked or printed on it, showing the date of issue.

(3) No person shall issue a duplicate voter's card to any voter on polling day or within thirty (30) days before polling day.

(4) Any person who contravenes subsection (3) of this section commits an offence and is liable on conviction to a fine not exceeding N200.000 or imprisonment not exceeding two years or both."

"50(1) Every person intending to vote shall present himself to a presiding officer at the polling unit in the constituency in which his name is registered with his voter's card."

"144(2) The person whose election is complained of is in this Act referred to as the respondent, but if the petitioner complains of the conduct of an Electoral officer' or any other person who took part in the conduct of the election such officer or person shall for the purpose of this Act be deemed to be a respondent and shall be joined in the election petition in his or her official status as a necessary party. Provided that where such officer or person is shown to have acted as an agent of the commission his non-joinder as aforesaid will not on its own operate to void the petition if the commission is made a party."

"147(1) Subject to subsection (2) of this section, if the tribunal or the court, as the case may be, determines that a candidate who was returned as elected was not validly elected on any ground, the tribunal or the court shall nullify the election.

(2) If the tribunal or the court determines that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the tribunal or the court, as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the election and satisfied the requirement of the Constitution and this Act."

"Para. 12(2) Where the respondent in an election petition, complaining of an undue return and claiming the seat or office for a petitioner intends to prove that the claim is incorrect or false, the respondent in his reply shall set out the facts and figures clearly and distinctly disproving the claim of the petitioner."

"15, When a petitioner claims the seat alleging that he had the highest number of valid votes cast at the election, the party defending the election or returned at the election shall set out clearly in his reply particulars of votes, if any, which he objects to and the reasons for his objection against such votes, showing how he intends to prove at the hearing that the petitioner is not entitled to succeed."

"49(2) An application to set aside an election petition or a proceeding resulting there from for irregularity or for being a nullity, shall not be allowed unless made within a reasonable time and when the party making the application has not taken any fresh step in the proceedings after knowledge of the defect.

(5) An objection challenging the regularity or competence of an election petition shall be heard and determined before any further steps in the proceedings if the objection is brought immediately the defect on the face of the election petition is noticed."

The Court of Appeal also considered paragraph 4(1) and (3) of the Election Tribunal and Court Practice Directions 2007, which reads thus:

"4(1) Subject to any statutory provisions or any provisions of these paragraphs relating to evidence any fact required to be proved at the hearing of a petition shall be proved by written deposition and oral examination of witnesses.

(3) There shall be no oral examination of a witness during his examination - in - chief except to lead the witness to adopt his written deposition and tender in evidence all disputed documents or other exhibits referred to in the deposition."

Held (Unanimously striking (tin the preliminary objection and dismissing the appeals):

1. On When a prospective voter is not entitled to ballot paper -

Ordinarily, no person seeking to vote at an election under the Electoral Act, 2006 shall be served with voting paper if he failed to produce a voter's card and his name is not on the voter's register. (P. 418, paras. B-C)

2. A person who claims to have voted without a voter's card or a duplicate voter's card cannot be said to have voted lawfully, because such act of voting is contrary to the provisions of sections 19 and 50 of the Electoral Act, 2006. (P. 41K. paras. A-B)

3. On Whether one polling agent can attend at two polling units -

By virtue of section 46(1) of the Electoral Act, 2006, each political party may by notice in writing addressed to the Electoral Officer of the Local Government or Area Council appoint a person, referred to as a polling agent in the Act, to attend at each polling unit in the Local Government or Area Council for which it has candidate and the notice shall set out the name and address of the polling agent. The section talks of the appointment of a person to attend at each polling unit. These rules out the possibility of appointing a person to attend at more than one polling unit. (P. 410, paras. F-H)

4. On Basis of invalidating an election -

Where more than half of the polling booths or units results of an election are discredited, the tribunal would be entitled to declare invalid the whole election. In the instant case, the tribunal rightly nullified the entire result of the ward where the results of ten of the thirteen polling units were tainted by discrepancies. [Ojukwu r. Onwudiwe

(1984) 1 SCNLR 247; Yusuf v. Obasanjo (2005) 10 NWLR (Pt. 956) 96 referred to.] (Pp. 421-422, paras. F-F)

5. On Source and scope of jurisdiction of election tribunal
6. The jurisdiction of a special court, indeed of all courts, is circumscribed by the statute creating such court or tribunal. In the instant case, the jurisdiction of the election tribunal is confined, limited and restricted by the provision of paragraph 49(2) and (5) of the First Schedule to the Electoral Act, 2006. [A.N.N. Lid. v. F.R.N. (1985) 2 NWLR (Pt. 6) 137 referred to.] (P. 390. paras. B-D) *On Quorum of election tribunal –* Section 285(4) of the 1999 Constitution states that the quorum of an election tribunal established under the section shall be the chairman and two other members. In the instant case, the chairman and three members of the tribunal were constant throughout the whole proceedings of the tribunal. In the circumstance, the complaint of the appellant relating to the change of composition of the tribunal was unfounded. (P. 397, paras. G-H)
7. *On When non-joinder of electoral officer or person whose conduct of election is complained as respondent will not void election petition –*
By virtue of section 144(2) of the Electoral Act, 2006, the person whose election is complained of is in the Act referred to as the respondent, but if the petitioner complains of the conduct of an electoral officer or any other person who took part in the conduct of the election such officer or person shall for the purpose of the Act be deemed to be a respondent and shall be joined in the election petition in his or her official status as a necessary party. Provided that where such officer or person is shown to have acted as an agent of the Commission, his non-joinder as aforesaid will not on its own operate to void the petition if the Commission is made a party. This is a clear departure from the provisions of the Electoral Act, 2002 because the proviso under section 144(2) of the Electoral Act, 2006 was never in the Electoral Act, 2002. Accordingly, decisions of courts, including the Supreme Court and Court of Appeal, voiding election petitions on account of non-joinder of officials whose conduct were impugned under the Electoral Act, 2002 are no longer good law. In the instant case, the tribunal was right when it held that the non-joinder of electoral officers, returning officers and presiding officers whose conduct was complained of did not void the 1st respondent's petition [*I.N.E.C. v. Action Congress* (2009) 2NWLR (Pt. 1126) 524 referred to.] (Pp. 393-395, paras. E-D) Per ABDULLAHI, P.C.A. at pages 395-396, paras. E-A:

"The proviso making the commission liable for the conduct of its agents, that is returning officers, electoral officers, presiding officers or polling officers is conspicuously missing from the Electoral Act of 2002. It is peculiar to the 2006 Act.

The decisions of courts including the Supreme Court and Court of Appeal, voiding election petitions on account of non-joinder of officials whose conducts were impugned under the Electoral Act, 2002 are no longer good law. The provisions of the two enactments are not *in par! maleria*. The proviso to section 144(2) of the Electoral Act, 2006 has saved such petitions. They can no longer be voided solely on the account of non-joinder.

The two enactments, that is 2002 and 2006 Electoral Acts, provide in their respective sections that a returning officer, an electoral officer, a presiding officer or a person whose conduct is complained of be deemed to be a necessary party who should be joined in the election petition otherwise the petition would be void. But the proviso to the 2006 Act tempers the severity or strictness of the sub-section (2) of section 144 by saving the petition where the commission itself is made a party. It follows as in the instant appeal where the commission is a party, the non-joinder of a returning officer, an electoral officer or a presiding offer to the election petition will not have any adverse effect on the petition. The petition subsists notwithstanding the non-joinder of the electoral officials whose conducts are complained of or impugned."

8. *On When application to set aside election petition or proceedings arising therefrom must be made and determined -*

By virtue of paragraph 49(2) and (5) of the First Schedule to the Electoral Act, 2006, an application to set aside an election petition or a proceeding resulting therefrom for irregularity or for being a nullity shall not be allowed unless made within reasonable time and when the party making the application has not taken any fresh step in the proceedings after knowledge of the defect. And an objection challenging the irregularity or competence of an election petition shall be heard and determined before any further steps in the proceedings if the objection is brought immediately the defect on the face of the election petition is noticed. In the instant case, at the time the appellant raised the issue of competence of ground one of the petition, for the first time, the tribunal had become bereft of the jurisdiction to entertain the issue having regard to the provision of paragraph 49(2) of the First Schedule to the Electoral Act, 2006. Furthermore, the appellant could not complain about the change in the composition of the tribunal at the appellate stage. He ought to have complained immediately upon the occurrence of the change at the tribunal. His failure to complain at that stage of the proceeding was a waiver of his right to complain. [*I.N.E.C. v. Action Congress* (2009) 2 NWLR (Pt. 1126) 524; *Saudc v. Abdullahi* (1989) 4 NWLR (Ft. 116) 387; *Ibeanu*

v. Ogbeide (1994) 7 NWLR (Pt. 359) 697; *Ngwuv. Mba* (1999) 3 NWLR (Pt. 595) 400 referred to.] (Pp. 390 paras. A-B; 390-393, paras. H-E; 397, paras. C-G; 437, paras. A-B)

9. *On When non-compliance with electoral rules will be deemed to be substantial -*
It is only where non-compliance with electoral rules affects the result of an election that it is said to be substantial. [*Yusuf v. Obasanjo* (2005) 18 NWLR (Pt. 956) 96 referred to.] (P. 436. para. G)
10. *On When a petitioner can succeed without proving allegation of crime in an election petition –*
A petitioner who makes in his election petition allegations of criminal acts during an election but claims he won the majority of lawful votes in that election, will still be entitled to his relief even when he fails to prove the crime alleged beyond reasonable doubt as long as he succeeds in proving civil allegations, which amount to non-compliance with the Electoral Act. [*Omoboriowo v. Ajasin* (1984) 1 SCNLR 108 referred to.] (Pp. 401-402, paras. F-E)
11. *On What constitutes primary evidence of votes cast at an election and effect where absent –*
The absence of the primary evidence (Form EC8 A) of the votes cast at a polling booth discredits any oral evidence of voting at that polling booth. In the instant case, the tribunal rightly nullified the votes of the units which were without the relevant Form EC8A. (P. 409, paras. A-B)
12. *On What constitutes primary evidence of votes cast at election -*
Form ECS A is the primary evidence of the votes cast in an election. It is the foundation or base on which the pyramid of an election process is built. In the instant case, the appellant or the Independent National Electoral Commission ought to have tendered the results (Form EC8A) from the polling booths or stations to counter the 1st respondent's case that there was no election in some polling booths or stations. The failure of the appellant or the Independent National Electoral Commission to tender the results (Form EC8A) of the polling booths or stations paved the way for the inference the tribunal drew that if truly there was election as asserted by the appellant and other respondents to the petition, the primary evidence (Form EC8A) ought to have been tendered. Thus, the finding of the tribunal that in the absence of the primary evidence (Form EC8A) the results contained in the various Forms EC8B, EC8C and EC8D could not be authentic was not perverse. [*Awuse v. Odili* (2005) 416 NWLR (Pt. 952) 416; *Sabiya v. Titkur* (1983) 11 SC 109; *Nwobodo v. Onoh* (1984) 1 SCNLR 1 referred to.] (P. 432, paras. C-F)

Per ABDULLAH!, P.C.A. at page 432, paras. G-H: "The petitioner, who averred that election was not held, cannot be required to prove the holding of the election by producing its results. It is the respondent/appellant who alleged that there was a free and fair election that is under ; the obligation to tender the result of the election in the nature of form EC8A in proof of their assertion that election was freely and fairly conducted and results duly collated and declared. Their failure to do so means that they failed to prove that elections were held and, therefore, impliedly admitted that their was no election."

13. *On Whether evidence relevant to a case can be excluded merely by the way it was obtained –*
Evidence relevant to a case is admissible, however obtained. The illegality may only attach to the person who obtained it illegally. In the instant case, the fact that the SSS report which was pleaded by the two principal parties to the appeal but alleged by the SSS not to be in existence was produced and tendered in evidence does not detract from its evidential value or the weight to be attached to the document. [*Torti v. Ilkpabi* (1984) 1 SCNLR 214; *Sadau v. State* (1968) 1 All NLR 124 referred to.] (Pp. 403-405. paras. G-A)
14. *On What reply to election petition must contain where petitioner complains of undue return and claims seat of office -*
By virtue of paragraph 12(21 of the First Schedule to the Electoral Act, 2006. where the respondent in an election petition, which complains of an undue return and claiming the seat of office, intends to prove that the claim is incorrect or false, he must set out in his reply the facts and figures clearly and distinctly disproving the claim of the petitioner. Thus, the provision demands much more than the reply merely denying and joining issues with the petitioner, and averring additional facts. (Pp. 413-414, paras. H-D)
15. *On What reply to election petition should contain where petitioner claims highest number of valid votes –*
Paragraph 15 of the First Schedule to the Electoral Act, 2006 provides that when a petitioner claims the seat alleging that he had the highest number of valid votes cast at an election, the party defending the election or returned at the election must set out clearly in his reply particulars of votes, if any, which he objects to and the reasons for his objection against such votes, showing how he intends to prove at the hearing that the petitioner is not entitled to succeed. Thus, under the provision, a respondent is required to specifically:
 - (a) state the particulars of the votes he objects to;
 - (b) state the reason or reasons for his objection against such votes; and

- (c) show how he intends to establish at the trial that the petitioner was not entitled to succeed or to be returned.

In the instant case, the consequences of neglect or failure of the appellant to comply with the provisions of paragraph 15 of the First Schedule to the Electoral Act, 2006 was that the result tendered by the 1st respondent was deemed unchallenged or uncontraverted. [*Hassan v. Tumu* (1999) 10 NWLR (Pt. 624) 700 referred to.] (Pp. 414-415, paras. D-C)

16. *On Failure of respondent to file reply to election petition –*
Where a respondent to an election petition fails to file a reply to the petition, as the 2nd - 14th respondents/appellants did in the instant case, he is deemed by that conduct or default to have admitted the averments in the petition, which are left unchallenged and uncontroverted or uncontradicted. [*Haway v. Medicowa (Nig.) Ltd* (2000) 13 NWLR (Pt. 683) 77; *United Nigeria Insurance Co. Ltd. v. Universal Commercial & Industrial Co. Ltd.* (1999) 3 NWLR (Pt. 593) *M: Akibu v. Odnntan* (1992) 2 NWLR (Pt. 222) 210 referred to.] (P. 386, paras. D-E)
17. *On Proper order to make where candidate returned as elected was not duly elected -*
By virtue of section 147(1) and (2) of the Electoral Act, 2006, if the tribunal or court, as the case may be, determines that a candidate who was returned as elected was not validly elected on any ground, the tribunal or the court shall nullify the election. But if the tribunal or the court determines that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the tribunal or the court, as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the election and who satisfied the requirement of the Constitution and the Act. In the instant case, the tribunal found that the appellant was not duly elected and returned by the highest number of lawful votes cast in the Ondo State Governorship election held on 14th April, 2007 and that the 1^M respondent scored the highest number of valid votes cast at the election. In the circumstance, the tribunal rightly declared the 1st respondent as the candidate duly elected at the election. (Pp. 43V-440. paras. C-H)
18. NOTABLE PRONOUNCEMENT:

On Impropriety of appeals by IN EC and Nigeria Police against decision of election tribunal declaring a candidate winner of an election –

Per ABDULLAHI, P.C.A. at page 441, paras. A-D: "The only appeal outstanding for consideration is that of the second respondent/appellant who can really claim to be an aggrieved party. The other appellants are nominal parties who have no slake as

to the outcome of the appeal. It is none of their business to decide the person whom the electorates elect and consequently declared by the court to be the winner and person returned. The primary functions of these purported appellants are to ensure that there is fairness and security at the election. Public policy demands that the two institutions do not descend into the arena, and theirs is to tend the rope in the interest of peace and stability in the land. Thus, they should learn to remain neutral and strive to attain the aura of neutrality bestowed on them by the Constitution of the Federal Republic of Nigeria. I commend to these appellants the attitude of the Nigerian Army and the Nigerian Navy, who were equally joined as respondents but did not enter the fray to further complicate proceedings that were already complicated.”

19. *On Contents of pleadings -*

Only facts need to be pleaded, and not the evidence required to establish a fact averred. In the instant case, the acts of lack of accreditation of voters and non-delivery of voting materials until far beyond the close of poll were evidence to establish the 1st respondent's allegation that there was no election in some electoral wards. In the circumstance, they were not required to be pleaded. (Pp. 411. paras. C-D: 413. paras. E-F).

20. *On Bindingness of pleadings on court and parties –*

Parties as well as the court are bound by the pleadings. In the instant case, the substance of the 1st respondent's case was that there were no elections in six Local Government Areas of the State. The appellant appreciated and effectively met that case by averring that there were free and fair election in those six Local Government Areas. It was on that basis that the tribunal proceeded. (P. 408, paras, A-D)

21. *On Effect of 'failure to adduce evidence on fact pleaded*

The effect of a party's failure to lead evidence in support of his pleadings, which is denied by the adverse party's pleading, is that such averment is deemed abandoned notwithstanding evidence supporting it, produced by the adverse party. [*Yu.uif v. Oyetunde* (1998) 12 NWLR (Pt. 579) 483 referred to.] (P. 433, paras. F-G)

22. *On How evidence-in-chief adduced a; hearing of election petition -*

The provision of paragraph 4(1) and (3) of the Election Tribunal and Court Practice Directions, 2007 dispensed with oral evidence-in-chief by witnesses. The witnesses are to enshrine their evidence-in-chief in depositions, which will be adopted at the trial by the deponent who will then be cross-examined and be re-examined. In other words, evidence is adduced by witnesses statements, and *viva voce* examination of the witnesses. Thus, after a witness has been led to adopt his

statement, he can then be cross-examined and re-examined *viva voce*. (Pp. 424-425, paras E-A)

23. *On Whether a party can adduce evidence on averment in opponent's pleading -*
A party can rely on an averment contained in his opponent's pleading. In the instant case, the 1st respondent pleaded Form EC8A. In the circumstance, the appellant who asserted that there was election in all the polling booths or stations could have tendered the Form EC8A even though he did not plead the forms. [*Onyekaowni v. Ekwubiri* (1966) 1 SCNLR 55 referred to.] (P. 433, paras. B-F)
24. *On Burden of proof in civil cases -*
The burden of introducing evidence otherwise known as evidential burden squarely rests on the party who substantially asserts the positive before evidence is adduced. Thereafter, the burden of proof rests on the party who will fail if no further evidence is produced. Where this is done, the burden of proof shifts on the other party to introduce evidence which, if accepted, will defeat the claim of the petitioner. In effect, the question of burden or onus of proof is not static but shifts. In the instant case, the appellant who asserted substantially that the election was conducted had the evidential burden of proving that the election was held. He ought to have done that by production of the results from the polling stations or booths but he did not. (Pp. 431, paras. C-G; 432, paras. B-C)
25. *On Standard of proof in civil cases -*
In civil cases, to which category an election petition belongs, the only way to arrive at a final decision is by determining on which side the weight of evidence tilts. If a defendant opts or chooses not to adduce or proffer any evidence, the issue calling for determination will be proved by minimal evidence. (P. 387, paras. C-D)
26. *On Treatment of admitted fact -*
The law does not require proof of impliedly admitted facts, and where proof is required, only minimal evidence would be necessary to ground the claim.

[Ralo^un v. U.S.A. (1992) 6 NWLR (Pt. 247) 366; Eghunike v. A.C.B. Ltd. (1995) 2 NWLR (Pt. 375) 34 referred to.] (P. 386, paras. F-G)
27. *On Treatment of unchallenged evidence adduced by a party -*
Where an adversary or a witness called by him testifies on a material fact in controversy in a case, the other party should, if he does not accept the witness's testimony as true, cross-examine him on the fact, or at least show that he does not accept the evidence as true. Where, as in this case, he fails to do either, a court can take the silence as an acceptance that the party does not dispute the facts. In the instant case, the appellant

elected not to cross-examine the 1st respondent's forty seventh witness who identified and testified on his findings on the ballot papers after his inspection of the same. In the circumstance, the witness's testimony remained unchallenged, uncontroverted and unimpugned. Consequently, the tribunal was entitled to act on it. [*Amadi v. Nwosu* (1992) 5 NWLR (Pt. 241) 273; *Ajao v Alao* (1986) 5 NWLR (Pt. 45) 802; *Leadwav Assurance Co. Lid, v. Zeco Nigeria Ltd* (2004) 11 NWLR (Pt. 884) 316 referred to.] (P. 425. paras. A-H)

28. *On Effect where party fails to object to admissibility of evidence -*

Where evidence that is not by law rendered inadmissible in any event was admitted at the trial court without objection or by consent of the parties or was used by the opposite party at the trial, it would be within the right of the trial court to act on it. And the Court of Appeal will not entertain any complaint as to its admissibility. Thus, where evidence admissible only under certain conditions is adduced by a party, it is the duty of the opponent or his counsel to object immediately to its admissibility. But where such other party fails or neglects to raise any objection to its admissibility at the trial, he cannot thereafter object to its admissibility. In the instant case, the SSS report, which was not admissible except under certain conditions, was admitted in evidence by consent of the appellant's counsel. In the circumstance, the appellant should not complain on appeal about its admissibility or the use to which the tribunal put it. Similarly, the electoral materials tendered at the tribunal without objection were impliedly admitted with consent of the parties. Consequently, the admissibility of the materials could not be challenged on appeal, and the tribunal rightly acted on them. [*Akunne v. Ekwuno* (1952) 14 WACA 59; *Okuladee v. Alade* (1976) 1 All NLR 67; *Etim v. Ekpe* (1983) 1 SCNLR 120 referred to.] (Pp. 405-406, paras. A-B)

29. *On Power of court to take judicial notice of distances –*

By virtue of section 74(l)(g) of the Evidence Act, the court has the power to take judicial notice of geographical divisions of the world. In the instant case, the tribunal rightly, without pleadings and evidence, took judicial notice of the boundary lines of wards and the distance between one collation center and another and found that one of the polling agents of the appellant's political party who signed Form EC8B for three electoral wards that are several kilometers apart could not have signed the forms at the wards collation centers because the collation of results of electoral units into Form EC8B was supposed to be done at the same time at different wards collation centers. In the circumstance, the Tribunal rightly nullified the results of the election in the three wards. (Pp. 409-410, paras. E-D

)

30. *On When defendant entitled to judgment -*

There are instances where a defendant who did not adduce any evidence may still be entitled to judgment. Such instances include where the plaintiff failed to adduce evidence on material facts of his case or where the evidence adduced by the plaintiff is so patently discredited or unreliable that no reasonable tribunal can accept or act on it. A defendant may also be entitled to judgment without adducing oral evidence if through cross-examination of the plaintiff and his witnesses and tendering of documents through them, he is able to destroy the plaintiff's case and establishes a valid defence. [*Ofomaja v. Comm. for Education* (1995) 8 NWLR (Pt. 411) 69; *Aduke v. Aiyelabola* (1942) 8 WACA 43; *Onyekaonwu v. Ekwubiri* (1966) 1 SCNLR 55; *Lawal v. U.B.N. Plc* (1995) 2 NWLR (Pt. 378) 407 referred to.] (Pp. 386-387, paras. H-C)

31. *On Power of court to illustrate evaluation of evidence and findings with charts in its judgment*

—
A court or tribunal is entitled to make use of charts in the course of evaluating evidence adduced by parties, and to illuminate its judgment. In the instant case, the appellant and the 1st respondent made charts the cornerstone of erecting or advancing their cases. In the circumstance, the tribunal rightly used charts to clarify issues in its judgment without calling on the parties to comment and address on the charts. [*Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1 referred to.] (P. 427, paras. A-D)

Per ABDULLAHL P.C.A. at page 426, paras. F-H:

"At the close of pleadings, the appellant's reply carried 61 charts for the tribunal to contend with. PWs 45, 46, 47, 49, 50 and 51 demonstrated in open court facts and figures contained in tables and charts in the course of their testimony. In fact their respective witnesses' statements extensively elaborated with charts and tables. The appellant made use of 80 charts in his own address. It is, therefore, reasonably deducible that the tribunal, in resolving all the issues raised by the parties in their respective charts and tables while evaluating the evidence, should also adopt the same method. The submission of the learned senior counsel for the appellant in the appellant's brief is misconceived in the circumstance of this case. The appellant and first respondent made charts the corner stone of erecting or advancing their case."

32. *On Construction of clear and unambiguous words in a statute -*

When the provision of an enactment is clear, plain and unambiguous, as in the case of section 46 of the Electoral Act, 2006, it ought to be given its ordinary meaning. [*Adefemi v. Abegunde* (2004) 15 NWLR (Pt. 895) 1 referred to.] (P. 4JO, paras. E-F)

33. *On Need to put an end to litigation -*

Public policy demands that there should be an end to litigation. In the instant case, even if the interlocutory appeal by INEC complaining of the refusal by the tribunal to

grant it extension of time to file a joint reply to the petition succeeded, it would not have had any effect on the main appeal because INEC did not adduce any evidence at the tribunal. (P. 386, para. G)

34. *On How to move preliminary- objection to an appeal where raised in respondent's brief -*
A notice of preliminary objection to an appeal may be given in the brief of argument. But the party raising the preliminary objection in his brief of argument must ask the court for leave to move the notice of objection before the oral hearing of the appeal commences; otherwise, the objection will be deemed to have been waived and therefore abandoned. In the instant case, though the 1st respondent raised and argued his preliminary objections in his brief of argument, the same was not taken before the hearing of the appeals. Rather, it was taken after the appeals had been argued. In the circumstance, all the preliminary objections were deemed abandoned. [Lagga v. Sar/iuna (2008) 16 NWLR (Pt. 1114) 427; Ofarkire v. Maduikere (2003) 5 NWLR (Pt. 812) 166; Nsirim v. Nsirim (1990) 3 NWLR (Pt. 138) 285 referred to.] (Pp. 385-386, paras. D-D)
35. *On Effect of acquiescence to procedural irregularity -*
A preliminary objection cannot be taken in a civil case where the defendant has waived or acquiesced to any irregularity or informality or alleged incompetence. (P. 390, paras. D-H)
36. *On Treatment of finding not appealed against -*
A finding of court subsists until set aside, Consequently, a party dissatisfied with a finding ought to appeal against it. In the instant case, the tribunal found evidence adduced by the appellant unreliable and, therefore, incredible. The appellant ought to have appealed against that finding rather than assert the contrary and predicate arguments on that assertion on appeal without appealing against the finding. (P. 416, paras. E-G)
37. *On Nature of judgment Court of Appeal empowered to give -*
Section 15 of the Court of Appeal Act and Order 4 rule 1 of the Court of Appeal Rules, 2007 empower the Court of Appeal to give any determination which the trial court ought to have arrived at. In the instant case, there was an error in the judgment in respect of the results for some units in electoral ward 9 and the Court of Appeal could have given a determination the tribunal ought to have arrived at. However, sufficient material was not presented to the Court of Appeal to enable it invoke its statutory power. [Agbabiaka v. Okojie (2004) 15 NWLR (Pt. 897) 503; Obim v. Achuk (2005) 6 NWLR (Pt.922) 594 referred to.] (P. 430, paras. A-B)

38. *On Whether every error or mistake in a judgment will lead to its reversal -*
It is not every misdirection or error in a judgment that will justify the reversal of the judgment of court unless the error has resulted or caused a miscarriage of justice in the sense that if the misdirection or lapse had not occurred, the decision of the court would have been different. In the instant case, the tribunal's error in respect of the votes cast in three units in electoral ward 9 was insignificant or immaterial having regard to the disparity in the total lawful votes credited to the appellant and the 1st respondent. In the circumstance, it would amount to greater injustice to deny the 1st respondent his lawful victory at the election on account of the tribunal's error. [*Ibrahim v. J.S.C.* (1998) 14 NWLR (Pt. 584) 1; *Atoyebi v. Gov., Oyo State* (1994) 5 NWLR (Pt. 344) 290; *Ukaegbu v. Ugoji* (1991) 6 NWLR (Pt. 196) 127 referred to.] (Pp. 430-431, paras. E-A) Per ABDULLAHI, P.C.A. at page 430, para. C-E:

"The account of votes cast in the three units is as follows - unit 8,171; unit 18,400 and unit 24 the number of votes cast was not stated. Even in the two units where returns were stated in the table drawn by the tribunal at page 7075, the votes were not apportioned between the political parties that contested the election to the office of the Governor, particularly the scores of each of the appellant's and first respondent's political parties. We are, for this reason, unable to apportion the votes between the contestants. In the circumstance of this case, the error is insignificant or immaterial in the sense that first respondent herein is credited with 198, 269 votes as against appellant's 128, 669 so even if I credit the votes cast in units 8 and 18 to the appellant, the first respondent would still hang on to his lead. The error is, therefore, not substantial."

39. *On Procedure for raising fresh issue on appeal -*
An appellant must first obtain the leave of an appellate court before he can raise, on appeal, an issue that he did not raise at the lower court. (Pp. 436-437, paras. H-A)

Nigerian Cases Referred to in the Judgment:

A.-G., *Oyo State v. Fairlakes Hotels Ltd. (No. 2)* (1989) 5NWLR (Pt. 121)255

A.N.P.P. v. I.N.E.C. (2004) 7 NWLR (Pt. 871) 16

Abubakar v. Joseph (2005) 13 NWLR (Pi. 1104) 307

Adefemi v. Abegunde (2004) 15 NWLR (Pt. 895) 1

Adene v. Dantimbu (1994) 2 NWLR (Pt. 328) 509

Aduke v. Aiyelabola (1942) 8 WACA 43

African Newspapers (Nig.) Ltd. v. F.R.N. (1985) 2 NWLR (Pt. 6) 137

Agbabiaka v. Okojie (2004) 15 NWLR (Pt. 897) 503

Agbeotu v. Brisibe (2005) 10 NWLR (Pt. 932) 1

Ajao v. Alao (1986) 5 NWLR (Pt. 45) 802

Akibu v. Oduntan (1992) 2 NWLR (Pt. 222) 210

Akinfosile v. Ijose (1960) SCNLR 447

Akunne v. Ekwuno (1952) 14 WACA 59

Amadi v. Nwosu (1992) 5 NWLR (Pt. 241) 273

An go v. Achida (1999) 3 NWLR (Pt. 594) 246

Atoyebi v. Gov., Oyo State (1994) 5 NWLR (Pi. 344) 290

Awuse v. Odili (2005) 16 NWLR (Pt. 952) 416

Bakare v. A.C.B. Lid. (1986) 3 NWLR (Pt. 26) 47

Balogun v. U.B.A. (1992) 6 NWLR (Pt. 247) 336

Balonwu v. Ikpeazu (2005) 13 NWLR (Pt. 942) 479

Buhari v. Yusuf(2003) 14 NWLR (Pt. 841) 446

Effiong v. Ikpeme (1999) 6 NWLR (Pt. 606) 260

Egbunike v. A.C.B. Ltd. (1995) 2 NWLR (Pt. 375) 34

Enm v. Ekpe (1983) 1 SCNLR 120

Hassan v. Tumu (1999) 10 NWLR (Pt. 624) 700

Haway v. Medicowa (Nig.) Ltd. (2000) 13 NWLR (Pt. 683) 77

Ibc.anu v. Ogbeide (1994) 7 NWLR (Pt. 359) 687

Ibrahim v. J.S.C.. Kaduna (1998) 14 NWLR (Pt. 584) 1

INEC r. Action Congress (2009) 2 NWLR (Pt. 1126) 524

K. T.L v. V mar (1994) 1 NWLR (Pt. 319) 143

Kossen (Nig.) Ltd. u Savannah Bank (Nig.) Ltd. (1995) 9 NWLR (Pt. 420) 439

Kudu v. Aliyu (1992) 3 NWLR (Pt. 231) 615

Lagga r. Sarhuna (2008) 16 NWLR (Pt. 1114) 427

lawal v. U.B.N. Plc (1995) 2 NWLR (Pt. 378) 407

Leadway Assurance Co. Ltd v. Zeco (Nig.) Ltd. (2004) 11 NWLR (Pt. 884) 316

Ngige v. Obi (2006) 14 NWLR (Pt. 999) 1

Ngwn v. Mba (1999) 3 NWLR (Pt. 595) 400

Noibi v. Fikolati (1987) 1 NWLR (Pt. 52) 619

Nsirim v. Nsirim (1990) 3 NWLR (Pt. 138) 285

Nwabuoku v. Ottih (1961) 2 SCNLR 232

Nwobodo v. Onoh (1984) 1 SCNLR 1

Obim v. Achuk (2005) 6 NWLR (Pt. 922) 594

Ochia Invest. Co. v, Talabi (1991) 1 NWLR (Pt.170) 761

Odiver. V. Obor (1974) 2SC23

Ofomaja v. Comm. for Education (1995) 8 NWLR (Pt. 411) 69

Oforkire v. Maduike (2003) 5 NWLR (Pt. 812) 166

Ogbonna v. A.-G., Imo State (1992) 1 NWLR (Pt. 220) 647

Ojomo v. Ijeh (1987) 4 NWLR (Pt. 64) 216

Oju Local Government v. I.N.E.C. (2007) 14 NWLR (Pt. 1054) 242

Ojukwu v. Onwudiwe (1984) 1 SCNLR 247

Okulade v. Made (1976) 1 All NLR 67

Omoboriowo v. Ajasin (1984) 1 SCNLR 108

Onasanya v. Odubela (1964) NMLR 36

Onobruchere v. Eaegine (1986) 1 NWLR (Pt. 19) 799

Onuoha v. N.B.N. Ltd. (1999) 13 NWLR (Pt. 636) 621

Omwudinjo v. Dimobi (2006) 1 NWLR (Pt. 961) 318

Onyekaonwu v. Ekwubiri (1966) 1 SCNLR 55

Onyekwuluje v. Animashaun (1996) 3 NWLR (Pt. 439) 637

Onyemeh r. Egbuchularn (1996) 5 NWLR (Pt.448) 255

S.P.D.C. (Nig.) Pic v. Dino (2007) 2 NWLR (Pt. 1019) 438

Sabiya v. Tukur (1983) 11 SC 109

Sadau v. Stale (1968) 1 All NLR 124

Saude v. Abdullah (1989) 4 NWLR (Pt. 116) 387

Shell B.P. Ltd v. Abedi (1974) 1 SC 23

Tambco Leather Works Ltd. v. Abbey (1998) 12 NWLR (Pt. 579)548

Torti v. Ukpabi(1984) 1 SCNLR 214

Tsokwa Oil Marketing Co. Ltd. v. B.O.N. Ltd. (2002) 11 NWLR (Pt. 777) 163

Ubwa v. Tiv Area Traditional Council (2004) 11 NWLR (Pt. 884)427

Ukaegbu v. Ugoji (1991) 6 NWLR (Pt. 196) 127

United Nigeria Insurance Co. Lulv. Universal Commercial & Industrial Co. Ltd. (1999) 3 NWLR (Pt. 593) 17

Yusuf v. Obasanjo (2005) 18 NWLR (Pt. 956) 96

Yusuf v. Oyetunde (1998) 12 NWLR (Pt. 579) 483

Foreign Case Referred to in the Judgment:

Gilbert v. Endeam (1878) 9 Ch. D. 259

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, 1999, S. 285(4)

Court of Appeal Act, Cap, 75, Laws of the Federation of Nigeria, 1990,S.16

Electoral Act, 2006, Ss. 19,46,50,73, 144(2), 145(1), 147(1) (2); Para. 49 (1), (2), (5) and 12(2) of First Schedule Evidence Act. Cap. E14 Laws of the Federation of Nigeria, 2004. Ss. 74(1)(g) 137

Nigerian Rules of Courts Referred to in the Judgment:

Practice Directions 2007, para. 4(1) & (3) Court of Appeal Rules, 2007. O. 4, r. 1

Appeal:

These were interlocutory and final appeals against the decisions of the Governorship/Legislative Election Tribunal, Ondo State, which in its final judgment declared the 1st respondent, Dr. Rahman Olusegun Mimiko, as the duly elected Governor of Ondo State, Nigeria on the ground that he was the candidate that scored the highest number of valid votes cast at the election held on 14th April, 2007. The Court of Appeal, in a unanimous decision, dismissed all the appeals.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which The appeal was brought: Court of Appeal. Benin

Names of Justices that sat on the appeal: Umaru Faruk Abdullahi. P.C.A. (*Presided and Read the Leading Judgment*): Isa Ayo Salami, J.C.A.; Kumai Bayang Akaahs, J.C.A.; Amina Adamu Augie. J.C.A.; Uzo Ndukwe-Anyanwu, J.C.A.

Appeal Nos.: CA/B/EPT/342A/08

CA/B/EPT/342B/08

CA/B/EPT/342C/08

CA/B/EPT/342D/08

CA/B/EPT/267/07

CA/B/EPT/267A/07

CA/B/EPT/3 20/07

CA/B/EPT/321/07

Dale of Judgment: Monday, 23rd February, 2009 *Names of Counsel:* For Dr. Olusegun Agagu - Lateef O. Fagbemi, SAN (*with him.* Dr. Alex Izinyon, SAN, Chief Ademuyi Akintola, SAN, D.D. Dodo,

SAN, I. A. Adedipe SAN, A. O. Adelodun, SAN, Dr. Kayode Olatoke, Esq.. H. T. Fajemite, Esq., B. O. Adesina, Esq., Olusola A. Dare. Esq., FLO. Afolabi, Esq., B. K. Abu, Esq., Ahmed Akanbi, Esq.. Sayo Akinwande. Esq., Ismail Ajibade, Esq., Sunday Ojile, Esq.. R. Isamotu, Esq., Tehemba Gbashima, Esq.. and A. Abdulkarim. Esq.)

For Rahman Olusegun Mimiko - Chief Wole Olanipekun. SAN (*with him*, Mallam Yusuf Ali, SAN, John O. Baiyeshea, SAN, Augustine Alegeh, SAN. Chief Olu Ogidan. Esq., Dr. Tunji Abayomi, Esq., Chief Anthony Adeniyi. Esq.. Femi Falana, Esq., Chief B. F. Adeyeye, Esq.. Dr. Olumide, F. Ayeni, Esq. Hon. A. O. Bayegun. Esq., Chief Yinka Adeyosoye, Esq., Hon. Boluwaji Kunlere. Esq., Edwin Anikwem, Esq., Dayo Akinlaja. Esq.. B. A. Amuwo. Esq.. Hon. Aderemi Olatubora, Esq.. Chief Tunde Atere, Esq.. Rotimi Ekundayo. Esq.. Olufemi Fadare. Esq.. Opeyemi Fadoju. Esq.. Ahmed Tafa. Esq.. Yakubu Daudu. Esq., A. O. Aderibola. Esq., Fola Amure. Esq., Miss Toy in Aladegbami. Kabiru Akmgbolu. Esq.. Yesiru Oladele. Esq.. Gabriel Uduafi. Esq.. S.A. Ayesa. Esq.. Oludotun Ogunlolu, Esq., Otenghabun Ebose. Esq.. Cleats Agogo. Esq.. I. O. Atofarati, Esq.. O. D. Adeomo. Esq.. Miss O.F. Obadiani and A. O. Isakolu. Esq.)

For the Peoples Democratic Party - Abdullahi Ibrahim SAN (*with him*. Adetunji Oyeyipo. SAN, Olabisi Soyebola ' SAN, O. Oke. Esq.. Oiadipo Tolani, Esq., Rotimi Ogueso, Esq. and Oludipe Sola. Esq.)

For INEC and 11 Ors. - J. B. Daudu, SAN, (*with him*, p. J O. Jimoh-Lasisi, SAN, Obi Okwusogu, SAN, Chief Jim If Omo, Esq.. J. K. Adeyi Odunbaku, Esq., S. Agbawere 'I Mustapha, Esq., Uche Okoro, Esq. and M.B. Jimoh Akogun. Esq.

For the Nigeria Police and 1 Or - J.C.A. Idachaba, Esq., (*with him*, A.J. Dagbi, Esq.)

Tribunal:

Name of Tribunal: Governorship/Legislative Election Tribunal, Ondo State

Name of Members; G.N. Nabaruma, Chairman; A.E, Okon, D.I. Okungbowa. M.B. Goji, and A.S. Umar, JJ. *Date of Judgment:* Friday. 25th July. 2008

Counsel:

For Dr. Olusegun Agagu - Lateef O. Fagbemi, SAN (*with him*, Dr. Alex Izinyon, SAN, Chief Adeniyi Akintola, SAN, D.D. Dodo. SAN, I. A. Adedipe SAN, A. O. Adelodun, SAN, Dr. Kayode Olatoke, Esq. H. T. Fajemite, Esq., B. O. Adesina, Esq.. Olusola A. Dare, Esq.. H.O. Afolabi, Esq., B. K. Abu, Esq., Ahmed Akanbi, Esq., Sayo Akinwande, Esq., Ismail Ajibade, Esq., Sunday Ojile, Esq., R. Isamotu, Esq., Tehemba Gbashima, Esq.. and A. Abdulkarim Esq.)

For Rahman Ohisegun Mimiko - Chief Wole Lampekun. SAN (*with him*, Mallam Yusuf All. SAN, John O. Baiyeshea, SAN, Augustine Alegch. SAN. Chief Olu Ogidan. Esq.; Dr. Tunji Abayomi. Esq., Chief Anthony Adeniyi. Esq.; Femi Falana, Esq.; Chief B. F. Adeyeye, Esq.; Dr. Olumide, F. Ayeni. Esq. Hon. A. O. Bayegun. Esq., Chief Yinka Adeyosoye. Esq.; Hon. Boluwaji Kunlere. Esq. Edwin Anikwem, Esq. Dayo Akinlaja, Esq.. B. A. Amu wo. Esq.) Hon. Aderemi Olatubora. Esq., Chief

Tunde Atere. Esq., Rotimi Ekundayo, Esq., Olufemi Fadare, Esq., Opeyemi Fadoju. Esq., AhmedTafa, Esq., Yakubu Daudu. Esq., A. O. Adenbola. Esq.. Fola Amure, Esq., Miss Toyin Aladegbami, Kabiru Akingbolu, Esq., Yesiru Oladele, Esq., Gabriel Uduafi, Esq., S.A. Ayesa, Esq., Oludotun Ogunfolu, Esq , Olenghabun Ebose, Esq., Cletus Agogo, Esq., I. O. Atofarati, Esq.. O. D. Adeomo, Esq., Miss O.F. Obadiaru and A, O. Isakotu, Esq.)

For the Peoples Democratic Party - Abdullahi Ibrahim, SAN (with him. Adetunji Oyeyipo, SAN, Olabisi Soyebos, SAN, O. Oke, Esq., Oiadipo Tolani, Esq., Rotimi Ogueso, Esq., and Oludipe Sola, Esq.)

For INEC and 11 Ors. - J. B. Daudu, SAN, (with him, P. O. Jimoh-Lasisi, SAN, Obi Okwusogu, SAN, Chief Jim Omo, Esq., J. K. Adeyi Odunbaku, Esq., S. Agbawere Mustapha, Esq., Uche Okoro, Esq. and M.B. Jimoh Akogun, Esq.

For the Nigeria Police and 1 Or. - J.C.A. Idachaba, Esq., (with him, A.J. Dagbi, Esq.)

ABDULLAHI P.C.A. (Delivering the Leading Judgment): The Governorship/Legislative Election Tribunal in Akure, Ondo State (Coram G.N. Nabaruma, Chairman, A.E. Okon, D. I. Okungbowa, M.B Goji and A.S Dinar JJ. members), delivered its judgment on the 25th day of July 2008, wherein it declared the Petitioner, Dr.

Rahman Olusegun Mimiko as the duly elected Governor of Ondo State of Nigeria, being the candidate that scored the highest number of valid votes cast at the 14th April, 2007 Governorship election. The first, second, third, fourteenth, fifteenth and sixteenth respondents being dissatisfied have separately appealed to this court.

Petition culmination in this appeal was brought on 14th May. 2007 against the election of Dr. Olusegun Agagu who had contested the Governorship election in Ondo State on the platform of the Peoples Democratic Party and was the first respondent at the tribunal.

The petitioner, Dr. Rahman Olusegun Mimiko, was the candidate of the Labour Party and first respondent herein, Dr. Olusegun Agagu filed his reply to the petition on 13th June, 2007 thereby pinning issues with the petitioner. The fifteenth and sixteenth respondents equally joined issues with the petitioner on 6th June, 2007. The second as well as the third to fourteenth respondents failed to file their respective replies to the petition. The application for enlargement of time to file their replies was refused. Seventeenth and eighteenth respondents neither filed a reply nor participated in the proceedings. The second, third to fourteenth respondents as well as the fifteenth and sixteenth respondents informed the tribunal that they had no evidence to proffer. The fifteenth and sixteenth respondents thereby completely abandoned their reply to the petition.

At the hearing of the appeal, Prince Lateef Fagbemi, learned Senior Counsel for Dr. Olusegun Agagu adopted both the appellant's brief and appellant's reply brief. He briefly elucidated upon the briefs. In the second appeal filed by the 2nd respondent in the petition, Alhaji Abdullahi Ibrahim (SAN) adopted and elucidated on its appellant's brief and the appellant's reply brief. Mr. J. B Daudu (SAN) adopted the appellant's briefs and reply briefs of the third to fourteenth respondents to the petition, who filed a substantive appeal and four interlocutory appeals. He elaborated on all the briefs. Mr. J.C.A. Idachaba, Esq., also adopted the appellants' brief and appellants' reply brief in the fourth and final substantive appeal filed by the fifteenth and sixteenth respondents to the petition. Chief Wole Olanipekun. Learned senior counsel for the petitioner, Rahman Olusegun Mimiko, adopted the first respondent's briefs to all the appeals, both substantive and interlocutory. Chief Wole Olanipekun (SAN) also filed notices of intention to rely on preliminary objections against some of the grounds of appeal in some of the notices of appeal filed on the ground of incompetence and he prayed that they should be struck out.

Dr. Olusegun Agagu filed 207 grounds of Appeal in the Amended Notice of Appeal. The grounds of appeal sought to be struck out are grounds 2. 3. 4. 5, 6. 7. 8. 9. 10. 11. 12. 13. 14, 15, 16, 17. 18. 19. 20. 21. 22. 23. 24. 25. 26, 27. 28. 29. 30, 32, 33. 34. 35, 36. 37. 38. 39. 41. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 56. 58, 59. 60. 61. 71. 78. 79. 90. 91. 92. 93, 94. 95. 96. 97. 98. 99. 100, 101. 102. 103. 104. 105. 106. 109. 110, 113. 114. 115. 116. 118. 119, 120, 121, 123, 124, 125. 126. 129, 130, 132, 133, 134. 135. 136, 137, 138, 139, 142, 143. 153, 155, 158, 161, 168, 169. 171, 172, 173, 175, 178, 180. 181, 182. 183. 184, 185, 186, 187, 188, 189, 190. 191, 192, 193, 194, 196, 197, 199, 200 and 202.

The grounds that survived the onslaught are -1, 31, 40, 42, 54, 55, 57, 62, and 63. 64, 65, 66. 67. 68, 70, 71. 73, 74, 75, 76, 77, 80, 67, 70, 72, 73, 74, 75. 76, 77, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 107, 108, 111, 112, 127, 128, 131, 140, 141, 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 156, 157, 159, 160, 162, 163, 164, 165, 166, 167, 170, 172, 176, 177, 179. 195, 198. 201, 203, 204, 205, 206 .and 207.

The survivors in spite of the weeding are quite a mouthful. I therefore agree with the learned senior counsel for the respondent that the situation "is a study in prolixity". However, the objection was not taken before the hearing of the appeal, even though it was canvassed or argued in the petitioner/first respondent's brief of argument. It was taken after all the appeals had been argued. This omission can be traced directly to the multiplicity of appeals taken together, which provided learned senior counsel for Dr. Olusegun Agagu an escape route. The situation was founded on the Supreme Court decision in *Lagga v. Surhuna* (2008) 16 NWLR (Pt. 1114), 427 at 480 - 1 Counsel contended that the preliminary objection was abandoned or deemed abandoned having not been raised prior to the hearing of the appeal. It

makes sense. It is to demonstrate the futility of bolting the stable after the horse had escaped. See also *Oforkire & Anor. v. Maduike & Others* (2003) 5, NWLR (Pt. 812) 166. 178-179.

The notice of preliminary objection can be given in the respondent's brief, but a party filing it, in the brief, must ask the court for leave to move the notice of objection before the oral hearing of the appeal commences. Otherwise, it will be deemed to have been waived and therefore abandoned. In *Nxirim v. Nsirim* (1990) 3 NWLR (Pt. 138) 285 at 296-297 the Supreme Court, per Obaseki, J.S.C. stated as follows:

"The respondent in the instant appeal has contended that although the objection was stated in the brief, the court was not moved at the oral hearing of the appeal to strike out the grounds for failure of particulars of errors. He therefore submitted that the appellant herein should be taken to have abandoned the objection more so as it was not an issue for determination in the appeal before the court of appeal. In my opinion, there is substantial merit in the contention of the respondent. Being a preliminary objection, the objection should have been by motion on notice before the hearing of the appeal so that arguments on it can be heard by the court. While *notice* of objection may be given in the brief, it does not dispense with the need for the respondent to move the court at the oral hearing for the relief prayed for. This preliminary objection not having been raised and argued at the oral hearing the Court of Appeal cannot be condemned as having erred in allowing the then appellant (now respondent) to argue his appeals."

In the circumstances, all the preliminary objections concerning the grounds of appeal filed by all the appellants are hereby disposed of. "

Before going further, it will be necessary to consider the interlocutory appeals. The second respondent/appellant as well as the third to fourteenth respondents/appellants failed to file replies to the petition and have by their conduct or default admitted the averments in the petition, which are left unchallenged, and uncontroverted or uncontradicted. See *Hawa v. Medicowa (Nig.,) Ltd.* (2000) 13 NWLR (Pt. 683) 77; *United Nigeria Insurance Co. Ltd v. Universal Commercial & Industrial Co. Ltd.* (1999) 3 NWLR (Pt. 593) 17, 25; *Akibu v. Oduntan* (1992) 2 NWLR (Pt. 222) 210 at 226. In such circumstance, the law does not require proof of impliedly admitted facts and where proof is even required, only minimal evidence would be necessary to ground the claim. See *Balogun v. UBA* (1992) 6 NWLR (Pt. 247) 366; *Egbimike v. ACB Ltd.* (1995) 2 SCNJ 58, 78; (1995) 2 NWLR (Pt. 375) 34. With regard to the interlocutory appeal by 1NEC complaining of the refusal by the Tribunal to grant the extension of time sought to file their joint reply to the petition, it is my view that even if it succeeds, it will be of no moment in this appeal because they led no evidence. After all, public policy demands that there should be an end to litigation.

In the case of the fifteenth and sixteenth respondents/appellants, they failed to adduce evidence in support of their joint statement of defence. In determining this appeal, it must be borne in mind that there are instances in which a defendant who did not call any evidence may still be entitled to judgment. Such instances include where the Plaintiff failed to call evidence on material facts of this case or where the evidence by the plaintiff or petitioner is so patently discredited or unreliable that no reasonable tribunal can accept and act on it. See *Aduke v. Aiyelabola* (1942) 8 WACA 43, 45; *Ofomaja v Commissioner for Education & Ors* (1995) 8 NWLR (Pt. 411) 69, (*Onyekaomvu v. Ekwitbiri* (1966) 1 All NLR 32; (1966) 1 SCNLR -55. A

defendant may also be entitled to judgment without adducing oral evidence, if through cross-examination of the plaintiff and his witnesses and tendering of documents through them destroys the plaintiff's case and establishes a valid defence. See *Lawal v. U.B.N. pic & others* (1995) 2 NWLR (Pt. 378) 407. In a civil case (to which category an election petition belongs) the only way to arrive at a final decision is by determining on which side the weight of evidence tilts. If a defendant opts or chooses not to call or proffer any evidence, the issue calling for determination will be proved by minimal of evidence. See *Nwabitokit v. Ottih* (1961) ANLR 507; (1961) 2 SCNLR 232; and *Attorney-General, Oyo State v. Fail-lakes Hotels Ltd, (No. 2)* (1989) 5 NWLR (Pt. 121) 255. The end result is that the four interlocutory appeals filed by INEC and its officials lack merit. They fail and are hereby dismissed. : Coming to the main appeals, learned counsel for all the parties identified issues for determination in their various briefs, and in appeal No. CA/B/EPT/342A/08, the appellant formulated the following issues:-

1. Whether the trial tribunal was right when it failed/refused to strike out the entire petition or part of same when certain paragraphs of the petition were fundamentally defective in that they violated mandatory provisions of the Electoral Act, 2006 which regulates election Petitions?
2. Whether the judgment of the election tribunal was not void or invalid in view of the participation in the delivery of the judgment by a member who did not take part in the hearing of all the evidence of the case?
3. Whether the trial tribunal was right in its evaluation on the evidence before it and resultant findings nullifying the election in several polling units and wards in the various Local Government Areas?
4. Whether the trial tribunal was right when it admitted and relied on inadmissible evidence in spite of the objections raised thereto by the appellant which objection the tribunal failed to pronounce upon?
5. Whether the trial tribunal was right when it based its; decision on evidence led on facts which were not joined and thereby set up a different case for the 1st respondent?,
6. Whether the trial tribunal was right in its interpretation and application of sections 46, 50 and 19 of the Electoral Act, 2006?
7. Whether in the circumstances of the case and particularly in view of the final order of the tribunal, the trial tribunal; was right in nullifying the election result of all polling units in APOL II Ward 02 and APOL III Ward 003 of Ese-Odo LGA?
8. Was the trial tribunal right when it suo motu sorted out/arranged (polling unit by polling unit) ballot papers which were tendered from the Bar and relied on inadmissible and unreliable documents on which no evidence was led to produce charts in chambers, upon which it made vital and decisive findings?
9. Was the trial tribunal justified in omitting lawful results in the final computation of the result of the election when the said results were not nullified by the tribunal?

10. Whether the trial tribunal was right in placing the onus of producing results (Form EC8A) on the appellant?

11. Whether the conclusion of the lower tribunal as to what lawful votes scored by the parties was, is valid and justifiable having regard to the failure of the tribunal to determine the number of votes affected by the alleged malpractices and improprieties raised by the petitioner? 12. Whether the tribunal was right in declaring the petitioner/ 1st respondent winner of the 14th April, 2007 Governorship election in Ondo State?

The first respondent, however, submitted that the issues that call for determination in the appeal are as follows:-

- 1 Whether the lower tribunal was/is not right in holding that ground one of the petitioner/1st respondent's petition is/was competent and valid.
- 2 Whether the lower tribunal was not right in dismissing the objection of the appellant on non-joinder of certain persons alleged to be necessary parties to the petition.
3. Whether the lower tribunal did not rightly make use of exhibits and charts in arriving at its decision in the circumstances before it.
4. Whether having regard to the pleadings and the totality of evidence oral and documentary before the lower tribunal it was not right in holding that the petitioner/1st respondent was entitled to the relief granted.
5. Whether the participation of the Hon. Justice Goji in the hearing of the petition in the lower tribunal from 15th April, 2008 till 25th July, 2008 operates to vitiate the judgment of the lower tribunal and render it a nullity.

In my view, the issues formulated by the appellant encompass the gist of the complaints in his grounds of appeal, and I will adopt same in dealing with this appeal.

I am now to consider appellant's issue 1, which deals with propriety or otherwise of the holding of the trial tribunal in failing or refusing to strike out the entire petition or certain grounds or paragraphs of the petition which were fundamentally defective in that they violate mandatory provisions of the Electoral Act, 2006. This issue;

- (a) Whether ground of petition is competent; and that
- (b) Effect of non-joinder of the presiding officers, Electoral officers, the police officers and certain government officers etc who were alleged to have continued to perpetrate various electoral malpractices and irregularities.

On the first sub-ground, it is submitted that the tribunal erred in law when it held that ground 1 of the petitioner's petition is competent and that the use of the word "malpractice" instead of the word "corrupt practices" used in section 145(1) of the Electoral Act, 2006 denotes the same thing and the pleadings by the petitioner that the election was void by reason of malpractices is a valid and sufficient ground.

The appellant filed its reply to the petition on 13th June, 2007. Prior to the filing of the appellant's reply, no objection was taken to the competence or otherwise of the petition. The issue of competence of the petition was raised for the first time by the appellant in his final address.

There is substance in the submission of learned senior counsel for the first respondent that at the time the appellant raised the issue of the competence of ground 1 of the petition for the first time, the tribunal had become bereft of the jurisdiction to entertain such issue having regard to the provisions of paragraph 49(2) of the First Schedule to the Electoral Act, No. 2 of 2006. The jurisdiction of a special court, indeed of all courts, is circumscribed by the statute creating such court or tribunal. In *African Newspapers of Nigeria Ltd. v. Federal Republic of Nigeria* (1985) 2 NWLR (Pt. 6) 137, 159-160 the Supreme Court held *inter alia* as follows: -

"Although the courts have great powers yet these powers are not unlimited. They are bound by some lines of demarcation... Courts are creatures of statutes and the jurisdiction of each court is therefore confined, limited and circumscribed by the statute creating it.

The jurisdiction of the tribunal is confined, limited and restricted by the provisions of paragraph 49(2) and (5) of the First Schedule to the Electoral Act 2006. A preliminary objection cannot be taken in a civil case, where the defendant has waived or acquiesced to any irregularity or informality or alleged incompetence. See *Odive v. Obor*(1914) 1 SC 23, 37 where the Supreme Court held as follows:-

"We think that the learned trial Judge was clearly in the wrong when he decided to uphold the preliminary Objection of counsel for the defendants at the particular stage of the proceeding when the statement of defense has already been filed and the issue joined between the two parties. The learned trial judge should have pointed out to counsel for the defendants that the preliminary objection should have been made after the delivery to him of the statement of claim. Another important point in this appeal is that once issues had been joined between the parties including an allegation by the 1st defendant that the marriage between him and 2nd defendant had been made under customary law. it was wrong to entertain a preliminary objection without any further evidence on the merits."

In the unreported decision of this court in appeal No. CA/J/EP/ GOV/419A/2007 - *Miinahi N\ako v. Action Congress* delivered on 26th February 2008, (now reported as *INEC u Action Congress* (2009) 2 NWLR (Pt. 1126) 524, this court considered in extensor the import Of the paragraph 49 of the First Schedule to the Electoral Act, No. 2 of the relevant part of the judgment reads as follows:

"I concur. There is no merit in the submission of the learned senior counsel for sixth respondent/appellant that even if the objection were raised at the close of the trial, paragraph 49(2) and (5) of the First Schedule to the Electoral Act do not shut out the appellants from raising objection against the petition after the close of trial. The provisions do not merely enjoin that an objection should be brought timorously, but also mandated that they should be heard and determined before any further steps are taken in the proceedings. Paragraph 49(2) and (5) read as follows:

'(2) An application to set aside an election petition or a proceeding resulting there from for irregularity or for being a nullity, *shall not be allowed unless made within a reasonable time and when the party making the application has not taken any fresh step in the proceedings after knowledge of the defect.*

(5) An objection challenging the regularity or competence of an election petition *shall be heard and determined before any further steps in the proceedings* if the objection is brought immediately the defect on the face of the election petition is noticed.' (Italics mine)

A reading of the two sub-paragraphs recited above together shows that the objection must be brought within reasonable time and when the party making the application had not taken any fresh step in the proceedings since acquiring knowledge of the defect. The tribunal is enjoined to hear and determine the objection before any further step in the proceedings provided the application is brought timeously. It is not in dispute that the application was brought within reasonable time before the applicant took further steps. But the same was not heard and determined before further steps were taken. The applicant apparently filed his reply and the matter proceeded to hearing at his instance. The request that the hearing and determination of the application be differed was a move, could be tactical, made by learned counsel for sixth respondent/appellant. He cannot blame the tribunal for giving effect to clear and unambiguous words of the provisions of, paragraph 49(1) and (5) of the First Schedule of the'; Electoral Act having goaded it to take the step it took. The non-compliance with the rules of procedure alleged cannot be raised on appeal. The party, having participated in the hearing of the petition, cannot complain or raise objection now. He has acquiesced in the validity of the procedure and will not be permitted to otherwise contend at this stage. See *Ogbonnu v. A.-G., Imo State* (1992) 1 NWLR (Pt. 220) 647; *Noibi v. Fikolati* (1981) 1 NWLR (Pt. 52) 619; *Effiong v. Ikpeeme* (1999) 6 NWLR (Pt. 606) 260, 272; *Adene v. Dannmbu* (1994) 2 SCNJ 130; (1994) 2 NWLR (Pt. 328) 509, 528. The appropriate place to raise objection, in the circumstance of the instant appeal, is at the tribunal where it was filed. The decision to postpone the argument at the tribunal was fatal. Because it is settled principle of law that whenever a preliminary objection is raised as to the competence of the trial court to hear a matter, as in the instant case, such a court is duty bound to determine the objection, one way or the other, before examining the substantive case even where the objection is or appears frivolous. *Ouvekwuhije r. Animasluini* (1996) 3 NWLR (Pt. 439) 637, 644; *Onvemeh v. Egbuchulam* (1996) 5 NWLR (Pt. 448) 255, 262; *Onuoha v. N.B.N.* (1999) 13 NWLR (Pt. 636) 621, 624; *Tambco Leather Works Ltd. v. Abbey* (1998) 12 NWLR (Pt. 579) 548, 554-5.

I agree with the learned counsel for the first - third petitioners/cross-appellants that the intendment of paragraph 49 of the First Schedule to the Electoral Act is to enshrine the principle of waiver. What then is a waiver? It has been held in *Kudu v. Alivn* (1992) 3 NWLR (Pt. 231) 615, 621 per Akanbi. JCA (as he then was) thus -

'Where a person having full knowledge of his rights, interests, profits or benefits conferred or accruing to him by and under the law but he intentionally decides to give up all these or some of them, he cannot be heard to complain afterwards that he has not been permitted the exercise of his rights. He should be held to have waived those rights. Therefore a person will generally not be allowed to complain of an irregularity he has himself accepted and condoned.'

See also *Odi 'a Investment Co. v. Talabi* (1991) 7 SCNJ 600, 653, (1991) 1 NWLR (Pt. 170) 761; *Tsokwa Oil Co. Ltd. v. Bank of the North* (2002) 5 SCNJ 176, 192; (2002) 11 NWLR (Pt. 777) 163; *Kossen (Nig.) Ltd. v. Savannah Bank* (1995) 12 SCNJ 29; (1995) 9 NWLR (Pt. 420) 435; *Ojomo v. Ijch* (1987) 4 NWLR (Pt. 64) 216, 244 - 5 and *K.T.L. v. Umar* (1994) 1 NWLR (Pt. 319) 143."

See also *Saude v. Abdullahi* (1989) 4 NWLR (Pt. 116) 387, *Ibeami v. Ogbeide* (1994) 7 NWLR (Pt. 359) 697, 716; *Ngwu v. Mba* (1999) 3 NWLR (Pt. 595) 400. The tribunal at the time it

entertained the issue of competence of the petition had lost *vires* to do so. Thus, its decision is a nullity *ab initio*.

The second arm of the appellant's first issue deals with non joinder of electoral officers against whom allegation of wrongdoings were leveled, It touches upon the electoral officers, returning officers and presiding officers whose conduct were seriously called into question or impugned in the petition. Learned senior counsel read the following passage from the tribunal's judgment-

"No doubt, numerous cases cited by the learned counsel to the 15th and 16th respondents in support of his arguments on this issue are cases decided under the provisions of the Electoral Act, 2002. The present petition is file under the Electoral Act, 2006. The relevant provision under the Electoral Act, 2006 by which learned counsel is bringing his argument is section 144(2) of the Act. This section provides thus:

"(2) The person whose election is complained of is in this Act referred to as the respondent, but if the petitioner complains of the conduct of an Electoral officer or any other person who took part in the conduct of the election such officer or person shall for the purpose of this Act deemed to be a respondent and shall be join in the election petition in his or her official status as a necessary party. Provided that where sue! officer or person is shown to have acted as an agent of the commission his non-joinder as aforesaid will not on its own operate to void the petition if the commission is made a party"

This section is a clear departure from the provisions of the Electoral Act, 2002. The proviso under section' 144(2) of the Electoral Act, 2006 was never in the Electoral Act, 2002. Therefore, since all the cases cited by learned counsel for the 15th and 16th respondents are case decided under the 2002 Act these cases could not -be relevant. Consequently since INEC the umbrella body, which conducted the election, is a party to the petition, we do into see any reason why all the officials or the ad-hoc staff of INEC should be joined as parties; to this petition. The proviso to section 144(2) is clear on this issue which provides that once INEC is joined as a party, it is not necessary to join everyone that participated in the election. For the aforementioned reasons, we hold that this application lacks merit and is' hereby refused. The petition is competent and necessary *parties* are before the tribunal."

Having held m sub- head A of this issue that the objection brought at the address stage challenging the petition was belated, this sub-issue is equally incompetent. I can, however, not find anything wrong with the reasoning and the conclusion arrived at in the tribunal's¹, judgment. I agree with it in to In a not dissimilar situation, in the case of *Mitrtala Nvako v. Action Congress & Others* (supra) this court observed at pages 58-59 as follows-

"The various result sheets confirm their claim to the effect that on instruction of the first respondent, the second, third, fourth and fifth respondents directed the first respondent's "field officers", "officers" or "agents" to cancel some voting papers used in some parts of the State. It is settled' law that if an agent is authorized to do an act as indeed it is manifest in the instant appeal which is not *ex facie* illegal, the principal assume full responsibility for his conduct. See *Natyaauui v. Thomas & Anor.* (1975) 5 SC 51, *Baker v. Furlong* (1891) 2 Ch 172 and also *Chancy v. Maclow* (1929j 1 Ch 461. It seems to me that the proviso to section 144(2) of the Electoral Act, No. 2 of 2006 is a declaration of the common law principle stated above. The proviso to the subsection provides as follows:-

'(2) ... PROVIDED that where such officer or person is shown to have acted as an agent of the commission, his non joinder as aforesaid will not on its own operate to void the petition if the commission is made a party,'

It is therefore, unnecessary to join a presiding officer or agent for carrying out the directive of the commission. See *Obasanjo v. Yusuf (2004) 9 NWLR (Pt. 877) 144, 185*. If the proviso holds the commission responsible for the conduct of its agent, it follows that it has to defend the action."

The proviso making the commission liable for the conduct of its agents, that is returning officers, electoral officers, presiding officers or polling officers is conspicuously missing from the Electoral Act of 2002. It is peculiar to the 2006 Act. The decisions of courts including the Supreme Court and Court of Appeal, voiding election petitions on account of non-joinder of officials whose conducts were impugned under the Electoral Act, 2002 are no longer good law. The provisions of the two enactments are not *in pan material*. The proviso to section 144(2) of the Electoral Act, 2006 has saved such petitions. They can no longer be voided solely on the account of non-joinder.

The two enactments, that is 2002 and 2006 Electoral Acts, provide in their respective sections that a returning officer, an electoral officer, a presiding officer or a person whose conduct is complained of be deemed to be a necessary party who should be joined in the election petition otherwise the petition would be void. But the proviso to the 2006 Act tempers the severity or strictness of the sub-section (2) of section 144 by saving the petition where the commission itself is made a party.

It follows as in the instant appeal where the commission is a party, the non-joinder of a returning officer, an electoral officer or a presiding officer to the election petition will not have any adverse effect on the petition. The petition subsists notwithstanding the non-joinder of the electoral officials whose conducts are complained of or impugned. The appellant's issue 1 therefore fails and it is: dismissed.

The appellant's issue 2 deals with the composition or change in the composition of the tribunal which tried the petition. The issue sought the determination of the court as to whether the participation of a member of the tribunal, who did not take part in the whole of the proceedings, in the delivery of the judgment did not render the judgment null and void. Learned senior counsel stated that the "election tribunal commenced hearing on 23rd October, 2007. The *S coram* of the tribunal on that day was Nabaruma, Chairman, and Oredola, Okon, Okungbowa and Urnar, Members. The constitution; or membership of the tribunal remained the same till the 31st day of January 2008. As of that date, 36 witnesses had been called by the *petitioner* while at least 1128 exhibits had been tendered *and* admitted. Hon. Justice Oredola who commenced the trial of the petition leading to this appeal withdrew from the tribunal on 21st February, 2008 and did not participate again in the proceedings. Upon the withdrawal of Oredola, J., as he then was, the four 5 remaining members continued with the trial from 21st February, 2008 -till 8th April, 2008 and took about 29 witnesses. On the 15th day of -April 2008, when the petition came up for continuation of hearing; the existing four Judges were joined by Goji, J., who then sat with the other members of the tribunal till the conclusion of the matter.

It was submitted that the principle that it is mandatory that all members of the court that gave judgment to have heard all the evidence has been stated in a plethora of cases. Learned senior counsel, in the appellant's brief read the cases of *Agbeotu v. Brisibe & Ors. (2005) 10 NWLR (Pt. 932) 1. 18*; *Onusanya v. J.A. Odubela (1964) NMLR 36. 38*; *Ubwa v. Tiv Area Traditional*

Council (2004) 11 NWLR (Pt. 884) 427. 434-436; *All Nigeria Peoples Parrv v. Independent National Electoral Commission & 300 Ors.* (2004) 7 NWLR (Pt. 871) 16.

Learned counsel submitted further that the case in *Ngige v. Peter Obi & Ors.* (2006) 14 NWLR (Pt. 999) 1. 130 - 133 should not be followed in the light of the Supreme Court judgment in *Wavo Ubwa v. Tiv Area Traditional Council* (supra). Learned senior counsel for appellant finally submitted that this case is distinguishable from the case of *Ngige* (supra) which was mainly documentary whereas the present appeal is made up of oral testimony of several witnesses none of whom Goji. J. saw.

Learned senior counsel for the 1st respondent, after reviewing the facts, submitted that the appellant having not complained at the election petition tribunal cannot do so at this stage. See paragraph 49(2) of the First Schedule to the Electoral Act, 2006 which stipulates that even where an act is a nullity the same is deemed to have been waived if not raised timeously. See also *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1.

I am respectfully of the view that the question is answered by the provisions of paragraph 49(2) of the First Schedule to the electoral Act, 2006, which provides as follows.

"(2) An application to set aside an election petition or *a proceeding resulting there from* for irregularity or for being a nullity shall not be allowed unless made within a reasonable time and when the party making the application has not taken any fresh step in the proceedings after knowledge of the defect.

"The appellant who acquired knowledge of Goji. J., participating in the proceedings of the court on 15th April. 2008 nevertheless did not take objection to his participation, and cannot at this stage, object. They appeared before him on 17th April. 2008 when the proceedings continued up till 25th July. 2008 when judgment was delivered. They are deemed to have waived their right to complain. See *Odive v. Odor* (supra). *Noibi v. Fakokiti* (supra) and *Ibeamt v. Ogbeide* (supra). The appellant having waived his right to object to the presence of Goji. J. Promptly and timeously. he cannot be heard to complain at the appellate stage. The correct point to take objection was at the sudden appearance of Goji. J on the bench of the tribunal which advantage they failed to take. Furthermore, section 285(4) of the 1999 constitution states that "The quorum of an election tribunal established under this section shall be the Chairman and two other members" In the instant case, the Chairman and three members were constant throughout the whole proceedings. The appellant's issue 2 is therefore resolved against him. As to issue 3. Learned senior counsel submitted that the tribunal erred in law when n heavily relied on exhibit 1098(36) to reach its conclusion and nullified line result of the election without taking into account contradictory evidence adduced by the petitioner/1st Constituted devastated virus, which has destroyed the collation in the three wards."

The finding of the tribunal is impeccable. It is entitled by virtue of section 74(1) (g) of the Evidence Cap. E14 of the Laws of the Federation, 2004 to take judicial notice of geographical divisions of the world. The relevant paragraph reads as follows:

"74(1) The court shall take judicial notice of the following facts :-

- a)
- b) The divisions of time times the geographical divisions of the world, and public festivals, feasts and holidays notified in the Gazette or fixed by Act of Law; " (Italic mine)

The tribunal without pleadings and evidence can take judicial notice of the boundary lines of wards and the distance between one collation centre and another.

The submission of learned senior counsel for the appellant that no provision of the Electoral Act, 2006 prohibits the same person from acting as ward collation agent for the same political party in " more than tine ward, is without merit. I agree with the learned senior-: counsel that the provision of section 46 of the Electoral Act, 2006 is clear and unambiguous; but cannot agree that it does not contain-such a prohibition. I agree further that it is trite that when a provision of an enactment is clear, plain and unambiguous, as in the case of section 46 of the Electoral Act, it ought to be given its ordinary meaning. See *Kola Adefemi & Anor. v, M.E. Abegunde* (2004) 15 NWLR (Pt. 895) 1 at 26 - 27. Section 46 provides as follows:-

"46(1) Each Political Party may by notice in writing addressed to the Electoral Officer of the Local Government or Area Council appoint a person (in this Act referred to as a polling agent") to attend at each polling unit in the Local Government or Area Council for which it has-candidate and the notice shall set out the name and address of the polling agent....."

The relevant part of this section is "appoint a person (....) to attend at each polling unit." It talks of appointment of *a person* to attend at *each* polling unit. This rules out the possibility of appointing a person to attend at more than one polling unit. In any case, the section to which this court is referred to by learned senior counsel for the appellant is not apt. The section deals with appointment of a polling agent at a polling station and not of a polling agent station and not of a collation agent. In the circumstances, the nullification of the results of the three wards of Ago Alaye, Araromi-Obu and Ayesan is proper and is affirmed.

In Ugbo IV ward 10, Ugbo V Ward 11 and Ugbo III Ward 12. learned senior counsel for the appellant conceded that the wards could be accommodated under the facts averred in sub-paragraph (xiv) of paragraph 21.7 of the petition but submitted that the allegations contained in the sub-paragraph and paragraph do not avail the petitioner/first respondent because the allegation contained in the said paragraphs are either that there was no election at all or that they are criminal in nature and has no bearing on lack of accreditation of voters or existence of discrepancies in the entries in electoral forms. In my respectful opinion, lack of accreditation is the evidence to establish the allegation that there was no election and need not be pleaded. It is trite that only facts need to be pleaded and not evidence required in establishing the averment. In furtherance of this, the petitioner produced relevant voters' register, which do not bear evidence of accreditation coupled with existence of discrepancies in the entries in electoral documents.

Learned senior counsel for the appellant, with regard to Ugbo IV ward 12, where the tribunal held that it could not prefer one to another of the two Forms EC8B tendered, since both were certified by the INEC, submitted they should explain the disparity in the two Forms EC8B placed before the tribunal. I think the burden of resolving the conflict was not on the first respondent. The burden of proffering explanation in the circumstance squarely falls on the third respondent, the maker of the two exhibits 553(1) and 553(2). In the absence of explanation coming from the third respondent, or the appellant who seeks to rely on them, the two documents should be treated as conflicting evidence, which should be ignored. There is, therefore, no substance to the appellant's complaint on Ilaje Local Government.

On Irele Local Government, learned senior counsel for the appellant again raised the issue of the tribunal countenancing and giving effect to the testimony of PW32 whereas no facts were pleaded to accommodate the substance of the evidence. Learned senior counsel for the

appellant argued that while PW 32 gave evidence of violence, massive rigging of the election, snatching of ballot materials and multiple thumb printing of ballot papers by thugs of the appellant, the only paragraph of the pleadings concerning Irele V. ward 10 to which PW 32 testified is devoid of violence, massive rigging of election or snatching of ballot materials.

I am respectfully unable to agree with learned senior counsel for the appellant's submission that the only plea of the first respondent on Irele V ward 10 was as per paragraph 21.6(x)(i) which reads as follows-

"Form EC8B for Irele V ward 10 is not signed by any party and the form is severally altered without any endorsement.

The petitioner pleaded in paragraph 21.6(x) (i) and (j) of his petition as follows:-

"Your petitioner .states that-in the entire -Irele Local Government Area, no. votes were counted at any polling unit and no result was declared. No results were declared at the ward collation centres and the respondents only concocted fictitious results contained in several INEC Forms. All ballot boxes and papers hijacked by thugs and agents of the 1st and 2nd respondents were later in the day of the purported election taken by fierce looking soldiers of the 19th Merchandised Battalion of the Nigerian Army to the house of a political office holder in the Ondo State Administration headed by the 1st respondent and votes allocations were later made in the said political office holder's house. The said political office holder later signed INEC Form EC.8C for Irele Local Government. The petitioner shall found on the INEC Forms EC.8A, EC.8B and EC.8C concocted by the respondents for the 10 wards of Irele Local Government Area which were recovered from the Akure Office of INEC upon inspection and which Forms, amongst others, contain the following anomalies amongst many others,

(a)

(i) Form EC.8B for Irele V Ward 10 is not signed by any party agent and the Form is severally altered without any endorsements, (j) Many of the INEC Forms EC.8A. EC.8B and EC.8C relating to Irele Local Government Area subsequently obtained from INEC on application for inspection and discovery, were later found to have been signed by serving political office holders as agents of the 1st and 2nd respondents."

This averment is consistent with the first respondent's case that was no election and that the results do not emanate from designated polling booths. In the circumstance, the submission of learned counsel for the appellant is not only erroneous but misleading.

In Okitipupa Local Government, learned senior counsel claimed that the tribunal once more abandoned the issue joined by the parties to set up another case for the first respondent/petitioner. The new case llegendly made for the first respondent herein is in respect of Iju-Odo/Erekiti/Iju-Oke ward 5 of Okitipupa Local Government where the tribunal held that:-

"Evidence that up to 4.30 pm on the election day no electoral materials were delivered to the units was not controverted."

Learned counsel then submitted that the decision of the tribunal in this regard cannot be supported by pleadings. This submission again is misconceived; the first respondent's case had

always been that there was no election for various reasons including diversion of electoral materials and violence.

The finding of the tribunal set out above is another evidence of no election. There can be no election in a polling station or stations where voting materials were not delivered until far beyond the close of poll. It is evidence which does not require pleading contrary to the contention of learned senior counsel for the appellant.

Before closing this issue, and in furtherance of imperativeness of pleadings urged on us by learned senior counsel for the appellant, it is incumbent on me to examine whether or not the appellant as the first respondent to the petition or the person who was declared winner and therefore returned as the Governor of Ondo State at the election held on 14th April, 2007 complied with the provisions of paragraphs 12 and 15 of the First Schedule to the Electoral Act, 2006. Where the petitioner/first respondent herein claimed that he scored the highest number of lawful or valid votes cast at the election. As in the instant appeal, the first respondent, that is the party declared the winner is required to comply with the mandatory provisions of paragraph 12 of the First Schedule to the Electoral Act, No. 2 of 2006. It requires the respondent to set out clearly in his reply particulars of the votes which he intends to object to demonstrating how to prove at the hearing that the petitioner is not entitled to be returned. Sub-paragraph (2) of paragraph 12 of the First Schedule to the Electoral Act, No. 2 of 2006, which is pertinent, reads as follows:-

"(2) Where the respondent in an election petition complaining of an undue return and claiming the seat or office for a petitioner intends to prove that the claim is incorrect or false, *the respondent in his reply shall set out the facts and figures clearly and distinctly disproving the claim of the petitioner.*" (Italic mine)

The provision demands much more than the reply merely denying joining of issues with the petitioner and even averring to additional facts. This is just a basic requirement in civil proceedings, which has been provided for in paragraph 12(2) of the First Schedule of the Act.

Paragraph 15 which requires much more than is demanded under paragraph 12(2) provides as follows:-

"15. When a petitioner claims the seat alleging that he had the highest number of valid votes cast at the election, the party defending the election or returned at the election shall set out clearly in his reply *particulars of votes, if any, which he objects to and the reasons for his objection against such votes, showing how he intends to prove at the hearing that the petitioner is not entitled to succeed*" (Italics mine)

Thus, the respondent is required to specifically put down-

- (i) The particulars of the votes he objects to;
- (ii) The reason or reasons for his objection against such votes; and

Show how he intends to establish at the trial that the petitioner was not entitled to succeed or to be returned. The consequence of neglect or failure of the respondent to comply with the provisions of paragraph 15 of the First Schedule to the Electoral Act is that the result tendered by the petitioner is deemed not challenged or controverted. See *Hassan v. Tumu* (1999) 10 NWLR (Pt. 624) 700, 710 and 712. I have carefully examined the respondent Respondent's reply, which is in Vol. VI at pages 2541 - 2620 of the printed record of

proceeding and cannot locate any averment satisfying the conditions set out in paragraph 15 of the First Schedule I- to the Electoral Act, No. 2 of 2006. The refusal, neglect or failure of the appellant to satisfy the provisions of the said paragraph has the effect that the result tendered by the petitioners/first respondent herein, is unchallenged and uncontroverted. The tribunal did not Decide the matter on facts which were not pleaded nor set up a case other than the one the first respondent/petitioner set out to make. (Rather it is the appellant that failed to meet the first respondent's lease. Issue 5 is also resolved against the appellant.

I am now to determine the appellant's issue 6 and it is important to reproduce the issue once more in the judgment in the interest of clarity. It reads as follows-

"Whether the trial tribunal was right in its interpretation and application of sections 46, 50 and 19 of the Electoral Act 2006."

Learned senior counsel for the appellant introduced argument on this issue as follows-

"The trial tribunal in the course of its judgment dealt with sections 19, 46 and 50 of Electoral Act, 2006. In addressing this issue, it is important to reproduce the said section of the Electoral Act, 2006."

Learned senior counsel then proceeded to reproduce the three sections except that respectfully he reproduced section 64 instead of the section 46 he set out to read. Section 46 deals with appointment of polling agents by political parties while section 64 deals with counting of votes and preparation of forms by presiding officers. I, therefore, propose to confine the determination of this issue strictly to the provisions of sections 19, 46 and 50 of the Electoral Act. I do not intend to consider any material extraneous to the provisions of these sections. I will not permit myself to be dribbled or dragged into consideration of issue or issues arising from the provision of any other enactments including the provisions of sections of the Electoral Act apart from those identified in this issue.

After the reproduction of the provisions of the Electoral Act as observed earlier in this judgment, learned senior counsel contended that a court of law in exercising its interpretative jurisdiction must stop where the statute stops on the authority of the Supreme Court in *Balonwu v. Ikpeazu* (2005) 13 NWLR (Pt. 942) 479 and in *Buhari v. Yusuf* (2003) 14 NWLR (Pt. 841) 446 at 533-536. Learned senior counsel further contended that the tribunal clearly misconceived the meaning and intendment of the said sections of the Electoral Act, 2006 and thereby fell into a grave error with all the attendant absurdity and miscarriage of justice thereby occasioned to the appellant. He read the portion of the judgment he is complaining against and argued that it was clear from the quoted part of the judgment that the tribunal clearly misdirected itself in relying on sections 50(1) and 19 of the Electoral Act, 2006 to fault or reject the oral evidence of RW34. It was then submitted that there is nothing whatsoever in the said sections of the Electoral Act vesting the tribunal with the power to reject the oral evidence of RW 34 whose evidence remains credible and un-impeached under cross-examination by the learned counsel for the petitioner.

Learned counsel further contended that the law is settled that once a piece of evidence adduced by a party before a court of law or tribunal is credible, as in the instant case, the court or tribunal is duty bound to accept and rely upon such evidence and ascribe probative value thereto contrary to the position of the trial tribunal on the instant case.

Pray, who decides whether a piece of evidence is credible or incredible? Is it the court or the parties? Learned senior counsel's submission to the effect that once a piece of evidence adduced by a party before a court or tribunal is credible, as in the instant case, the court or tribunal is duty bound to accept and act on it, is with respect, rather presumptuous. The tribunal in the instant appeal has found the evidence unreliable and, therefore, incredible. The only alternative open to a litigant is to appeal against the finding and not to be asserting the contrary. Having not appealed against the finding, it subsists until set aside. It is not within the province of a counsel to assert the opposite and predicate his argument on it.

Be that as it may, the portion of the judgment of the tribunal on which learned senior counsel for the appellant predicated his grouse, reads as follows-

"Furthermore, since the voters' register upon which RW 34 is relying to show that he voted has lost credibility and by his own evidence he has lost his voter's card there is no basis for this tribunal to accept his evidence that voting took place and he and others voted at unit 004 of Arogbo II ward 009. We rely on section 50(1) and 19 of the Electoral Act to show that the voting witness said he did was unlawful because he did not comply with the statutory requirements of these sections."

Section 19 of the Electoral Act provides as follows: "19(1) Whenever a voter's card is lost destroyed, defaced, torn or otherwise damaged, the voter shall, at least thirty (30) days before polling day, apply in person to the Electoral Officer or any other officer duly authorized, for that purpose by the Resident Electoral' Commissioner, stating the circumstances of the loss, destruction, defacement or damage.

- (5) If the Electoral Officer or any other officer is satisfied as to the circumstances of the loss, destruction, defacement or damage of the voter's card, he shall issue to the voter another copy of the voter's original voter's card with the word "DUPLICATE" clearly marked or printed on it, showing the date of issue.
- (6) No person shall issue a duplicate voter's card to any voter on polling day or within thirty (30) days before polling day.
- (7) Any person who contravenes subsection (3) of this section commits an offence and is liable on conviction to a fine not exceeding N200.000 or imprisonment not exceeding two years or both."

Section 50(1) of the Electoral Act, 2006 is recited immediately hereunder:-

"50(1) Every person intending to vote shall present himself to a presiding officer at the polling unit in the constituency in which his name is registered *with his voter's card.*" (Italics mine).

Clearly, on a careful reading of the finding of the tribunal, recited above, which the appellant is quarrelling with, the tribunal did not reject the evidence of RW 34 on the strength of sections 19, 50(1) of the Electoral Act. I agree with learned counsel for the appellant that they are no authority for rejection of evidence or testimony of witness. All the tribunal did was to apply the provisions of the two, sections to the effect that if RW34 who is required, like any other voter, to approach the presiding officer with a voter's card under, section 50(1) and without prior application seeking and obtaining duplicate voter's card under section 19 of the Act, the voting he had claimed to have done must be unlawful. The finding is unassailable. A person who claims to have voted without a voter's or duplicate of, voter's card cannot be said to have voted lawfully. Ordinarily, no person shall be served with voting paper if he failed to produce a voter's card and his name appeared on the voter's register. It must, be remembered that the electoral officer for

the Local Government had reported that the relevant voters' register had been carted away by hoodlums.

The complaint of the appellant goes to the review and evaluation of evidence and not interpretation of those sections. Learned senior counsel quoted the passage from page 7105 of the record out of context. In fact, he reproduced the conclusion arrived at by the tribunal without setting out the reasoning that led to it. The scenario leading to the tribunal's conclusion being assailed strenuously commenced at page 7103 of the record. It will be interesting to reproduce same. It reads as follows:-

"RW34 identified his picture and details on exhibit 1258(0-08) the voters' register for his unit. RW 34 confirmed that on exhibit 78(15) which was voters' register for his unit his details were not ticked at all. RW 34 stated further that the card he used to vote was marked during accreditation and that he did not know and did not want to see the evidence that INEC produced to show that register of voters for his unit was not available. Exhibits 1258(18)(1)-08) and 78 (1) - (18) are certified copies of one and the same voters' register for Unit 004 open space of Arogbo II Ward 007 of Ese-Odo Local Government Area. Exhibit 78(0-08) was certified on 24th August, 2007 while *Exhibit 1258(1) (18) was certified on 3rd September, 2007 by INEC. It is astonishing that while on exhibit 78(15) the picture and particulars of RW34 represented as number 243 and all other registered voters were not ticked, in exhibit 1258(15) the same particulars of RW34 and all the other registered voters on the same page were ticked to show that they voted.*

Ordinarily, each of the two documents should enjoy the presumption of regularity and genuineness attached to every CTC of a document. This, however, is not an ordinary situation because the same document is telling lies about itself in two different circumstances: one saying RW34 voted and the other saying otherwise. *We therefore arrive at the inevitable conclusion that the voters' registers represented in exhibits 78 and 1258 have so abused the whole purpose of the presumption of regularity' and genuineness that they cannot enjoy such presumption. Furthermore, we cannot pick and choose which of the two voters' registers to believe in the circumstances. See section 114(1) of Evidence Act.*

We have also looked at CTC of request for New Ballot Boxes from Electoral Officer for Ese-Odo Local Government Area to the resident Electoral Commissioner in Akure, exhibit 1106(5), dated 18th April, 2007 wherein it was reported that the registers for units 1 -12 of Arogbo II were missing. This includes one for Unit 004 of Arogbo II. We note that exhibit 1106 (5), was made before the two voters' registers were certified. In other words the two CTC of the voters' register for Unit 004 of Arogbo II Ward 007, exhibits 78(1)-(18) and 1258(1)-(18) are not credible." (Italics mine) The tribunal rejected the voters register on the grounds that:-

- (a) INEC had written that the voters' register for the unit where he claimed to have voted was missing: see Exhibit 1106.
- (b) There were two parallel voters' registers. Exhibit 1258(0-08) and 78(1) -08) running concurrently and both are certified true copies of the same voters' register.
- (c) (i) Exhibit 1258(1) - (18) was certified on 3rd September, 2007 by INEC while

(ii) Exhibit 78(0-08) was certified on 24th August, 2007.

- (d) Prior to the certifications, it was reported in a letter dated 18th April, 2007 exhibit 1106 that the voters register for units 1 - 12 of Arogbo II was missing.
- (e) On exhibit 78(15) which is for RW 34's unit the picture and particulars of RW 34 represented as number 243 and all other registered voters were not ticked whereas the same particulars of RW 34 and all the other registered voters were ticked in exhibit 1258(15)."

What is deducible from this analysis is that the election was" conducted at two locations, one on Exhibit 1258(1) - (18) while the other at another location on exhibit 78(1) - (18) which did not hold. It did not hold because of the carting away of voting materials including ballot boxes as shown by exhibit 1089 and 1106 (5). The exhibits were written by the Electoral officer for Ese-Odo Local Government to the Ondo State Resident Electoral Commissioner stating that election could not be held in Arogbo II because some hoodlums carted away ballot boxes and other electoral materials. Exhibit 1106 (5) dated 18th April, 2007 is also a letter written by the third - fourteenth respondents indicating that 13 ballot boxes for Arogbo I and voters' registers for Arogbo II Units 1 - 12 , which incidentally included unit 004 of Arogbo II ward, had also been carted away by some hoodlums. Can any reasonable tribunal ascribe probative value to evidence of a voter who claimed to have voted in a ward where ballot boxes and Electoral materials including ballot papers had been stolen? The tribunal was, therefore, entitled to disbelieve evidence of RW34 that he voted lawfully and accepted the petitioner's version supported by the third respondent and his officers that there was no election at the designated voting centre.

The votes purportedly cast in exhibit 1258(1)-(18) was properly declared unlawful. No worthy and efficient electoral body conducts election on two parallel voters' registers. Surely the result of such exercise cannot be credible and acceptable. The tribunal was, therefore, right in its application of the relevant provisions of the Electoral Act, No. 2 of 2006. Issue 6 is therefore, resolved against the appellant.

On the appellant's issue 7 learned counsel for the appellant read a portion of the judgment of the tribunal and argued that what was embedded in the finding and at the root of the further decision of the trial tribunal to declare the petitioner elected as the Governor of Ondo State is that all the lawful votes cast for the appellant had been taken into account. Learned counsel argued that the conclusion is Inescapable and logical and must be fool proof in the sense that it does not admit of any error if the judgment of the tribunal must stand. Learned counsel for the appellant, against this background, drew the Attention of the court to the finding of the tribunal with regard to Apoi II Ward 02, Apoi III Ward 03 of Ese-Odo Local Government where the election results of all polling units were nullified. The issue raised herein touches upon substantiality of the compliance. Before proceeding further with the consideration of the portion of the final order of the tribunal on which the learned senior counsel founded his submission, it is necessary to reproduce same. It reads inter alia –

We hold that the 1st respondent was not duly elected and returned by the highest number of lawful votes cast at the Ondo State Governorship election held on 14th April 2007."

I agree with the submission of the learned senior counsel for the appellant that if there is an error in the calculation of the lawful votes cast at the Ondo State Governorship election of 14th April, 2007 by the trial tribunal then the consequential declaration of the petitioner as the elected Governor of the state cannot stand.

I agree with his further argument still in the appellant's brief that if it is shown that the trial tribunal's arithmetic is legally or factually incorrect, as it was proposed to be shown, then the judgment of the tribunal would be liable to a reversal by this court.

In Apoi II Ward 002, it was common ground that there were 13 polling units. The tribunal found that there were discrepancies that affected 11 units, viz units 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 and on account of this, the tribunal proceeded to nullify the entire ward's results, including those of units 12 and 13 "where despite its toothcomb method" it could not find any fault or discrepancy.

The complaint in Apoi III Ward 003 was that the tribunal nullified the results of units 1, 3 and 17 on an error margin of 2 votes, 1 vote each respectively. The full story had not been told. In this ward, the tribunal had earlier found that the results for ten of the 17 units had been found to be tainted with illegality.

On the facts, the tribunal found that majority of the units' results in Apoi III ward 003 and Apoi II ward 002 were unlawful. These are evidence of substantial non-compliance, which entitles the tribunal to nullify the result for the whole ward notwithstanding degree of error. In that circumstance, the tribunal would right cancel results for the whole ward or constituency irrespective, whether the results of some units, wards or local government were beyond reproach or the level of error in some units, wards or governments was marginal. The case of *Yusuf v. Obasanjo* (2005) 10 NWLR (Pt.956) 96, 178 - 181 considered and determined effect of substantiality of non-compliance. The case of *Ojukwum v. Onwudiwe* (1984) 1 SCNLR 247 cited and followed in *Yusuf v. Obasanjo* (supra) is a Supreme Court decision. At page 305 of the report, Uwais, J.S.C. (as he then was) stated as follows-

"In all therefore, the learned trial Judge found that election which took place at 52 out of the 138 polling booths was discredited. By inference, it follows that the election in the remaining 86 polling booths was flawless. Thus the discredited polling booths were no half as many as those validly used. Nevertheless, the, learned trial Judge disallowed the votes in all the 138 polling booths. I think this is a serious misdirection.

In that case, the trial court declared invalid the result of the, election when only 52 out of 138 polling booths were faulty. The Supreme Court reversed the decision. It is implicit in this Judgment that where more than half of the polling booths or unit results are discredited the tribunal would be entitled to declare invalid the whole election. The appellant's complaint in this issue is unmeritorious since more than half of the votes cast in each of Apoi II ward 002M and Apoi III Ward 003 had been found to be unlawful votes. Issue 7 is also resolved against the appellant.

On the appellant's issue 8, it was submitted in the appellants brief that the petitioner/first respondent herein produced and dumped on the tribunal a plethora of documents ranging from ballot papers voters' registers, unused ballot papers, voters' cards, election result Forms EC8B and EC 8C. These were subsequently admitted by the tribunal despite objections from the appellant which documents were admitted and marked exhibits 1 to 1283. The appellant further contended in his brief that no oral evidence was led in-chief whatsoever by the petitioner or any of his witnesses on any of the exhibits, nor did any of his witnesses attempt to tie these documents; to aspects of the case. Curiously in its Judgment, the tribunal on its

own *suo motu* sorted out and arranged, in the recess of its chambers, polling unit by polling unit ballot papers which had been tendered from the Bar and dumped upon the tribunal and on which no modicum of oral evidence-in-chief had been led by the petitioner. It also contended that the tribunal further proceeded relying on these exhibits dumped upon it by the petitioner, and on which no evidence was led, to produce charts in the recess of its chambers.

Clearly, if the learned senior counsel for the appellant objected the admissibility of these exhibits at the point of tendering them, he would most certainly have referred me to the page of the record of proceedings where the appellant objected to the admissibility of these documents. It is, however, not correct to insinuate that the exhibits dumped on the tribunal by the petitioner/first respondent. Learned senior counsel for the appellant had suggested earlier in this brief that the documents were admitted with the concurrence of both parties with the understanding that they would subsequently object to or cross-examine on them.

Concerning the submission or allegation that ballot papers were dumped on the tribunal and were not put in evidence on the basis of Rolling unit by polling unit by the learned senior counsel for the petitioner and that it was the tribunal that undertook the responsibility of sorting out the ballot papers into units is not supported by the record of proceedings.

The first respondent herein caused to be issued subpoena to the "Independent National Electoral Commission, custodian of voting materials by virtue of section 73 of the Electoral Act, to produce and tender in evidence ballot papers used in the election for all the disputed areas. The subpoena also requested that the voting papers be tendered on their respective ballot boxes. The subpoena was admitted and marked exhibits 1074(1) -(7). See pages 3708 to 3714 of the record of proceedings in (Vol. VIII). Subsequently, the voting papers were tendered and admitted in evidence through the INEC the third to fourteenth respondents herein. Consequent upon further directions as to how to proceed in respect of the contents of the bags containing the ballot papers, the tribunal directed in its ruling of 15th March, 2008 as follows:-

"1. That the physical counting shall be done by 2 persons to be brought by each of the petitioner and 1st respondent who will do the counting in alternative days.

2. That the ballot papers in each bag, as the bags presented to the tribunal, shall be counted singly by the persons mentioned above and their numbers records by the tribunal's secretary or her representative shall be present while the counting is being done.

3. That the counting exercise shall not preclude the tribunal from continuing with the proceedings in the petition. The counting exercise shall commence today and end on or before 1st April, 2008. These orders are without prejudice to the rights of the parties to apply the registry of tribunal to inspect or use the exhibit the custody of the tribunal."

The exhibits were produced and tendered on the record by sixth petitioner's witness, one Toyin Abegunde, the representative of INEC and the fourth respondent, Resident Electoral Commissioner, On State, contrary to the contention of the learned counsel for appellant that it was learned counsel for the first respondent that he tendered the documents. See the proceedings of 29th November 2007,

The contention of the learned senior counsel for the appellant that no modicum of oral evidence in chief was produced on documents is erroneous. The provisions of the Election Tribunal and Court Practice Directions dispensed of oral evidence-in-chief. The witnesses are to enshrine their evidence-in-chief in depositions which will be adopted at the trial by the deponents who will then cross-examined and be re-examined. See Paragraph 4(1) and (3) of the Practice Directions which provides as follows-

"4(1) Subject to any statutory provisions or any provisions, 5 of these paragraphs relating to evidence any fact required to be proved at the hearing of a petition shall be proved by written deposition and oral examinations of witnesses ...

(3) There shall be no oral examination of a witness during his examination-in-chief except to lead the witness to adopt his written deposition and tender in evidence all disputed documents or other exhibits referred to in the deposition."

It is clear from the foregoing provisions of the Election Tribunal and Court Practice Direction, that facts are receivable in evidence by witness' statements and *viva voce* examination of the witnesses.

After leading a witness to adopt his statement, he can then be cross-examined and re-examined *viva voce*. Pursuant to the inspection carried out by the first respondent, Ogundeji Irogu, forty-seventh petitioner's witness deposed to two witness statements on 18th February, 2008 giving copious and full account of the contents of the bags containing ballot papers which evidence was not controverted, challenged or impugned. The forty-seventh petitioner's witness in his testimony covered all the contents of the bags containing used and unused ballot papers tendered as exhibits 1076 _ 1085. He tied or related these exhibits to the respective polling units, wards and local governments. He also demonstrated the defect-in each of the ballot papers contained in exhibits 1076 - 1085 in compliance with the order of the tribunal.

The submission of the appellant that he had no opportunity to "cross-examine" any witness on the ballot papers cannot be correct. The forty-seventh petitioner's witness who testified on the ballot papers was tendered or offered for cross-examination after adopting his two statements but the appellant declined to seize the opportunity. The appellant elected not to cross-examine forty-seventh petitioner's witness who identified and testified on his findings on the ballot papers after his inspection. His testimony remained unchallenged, uncontroverted and unimpugned. The trial court was therefore entitled to act on it. See *Amadi v. Nwosu* (1992) 5 NWLR (Pt. 241) 273, 284 where Supreme Court per Nnaemaka-Agu, J.S.C. held as follows:

"It is a settled principle of law that where an adversary or a witness called by him testified on a material fact in controversy in a case, the other party should if he does not accept the witness's testimony as true, cross-examine him on the fact, or at least show that he does not accept the evidence as true. Where as in this case he fails to do either, a court can take silence as an acceptance, that the party does not dispute the facts.

See also *Ajao v. Alao* (1986) 5 NWLR (Pt. 45) 802; *Leadway Assurance Co. Ltd. v. Zeco Nigeria Ltd.* (2004) 11 NWLR (Pt. 884) 316,329.

The tribunal was, therefore, right to have acted on the exhibits and ballot papers relating to the election in the manner it did because the petitioner took steps to ensure that the voting papers were tied by credible evidence to every unit, ward and Local Government from which they

derived. The postulation of the appellant that the electoral materials were merely dumped on the tribunal respectfully is, on the record, unfounded. The documents were produced in evidence from proper custody through sixth petitioner's witness, an official of the third respondent. Although the ballot papers were required to be stored in ballot boxes, if the third and fourth respondents, INEC and the Resident Electoral Commissioner, decided to breach the law and store them in bags, the respondents to the petition cannot complain. They should lie on their bed as they made it. An innocent citizen should (not be made to pay for their transgressions.

The last grouse the appellant ventilated under this issue relates to the charts. The appellant has by his brief unfairly castigated the tribunal for the statistical analysis it did in the judgment. The impression being created is that the tables and charts in the judgment were strange and uncalled for and without prompting from the parties. It is an attempt to show that the parties did not provide the basis for the method adopted by the tribunal in its judgment. It is significant to note, contrary to the picture painted by the appellant, right from the inception of the petition down to evidence adduced through written addresses of the learned counsel for the parties, charts were freely and extensively employed in the presentation before the tribunal. In the petition presented by the first respondent, charts or tables formed a substantial part of it. Charts also formed a large part of the appellant's reply to the petition. The reply contained 22 charts. In addition to these charts embedded in the reply, there were 39 annexure numbered 1 - 39 attached to the petition. At the close of pleadings, the appellant's reply earned 61 charts for the tribunal to contend with. PW45, 46, 47, 49, 50 and 51 demonstrated in open court facts and figures contained in tables and charts in the course of their testimony. In fact their respective witnesses' statements extensively elaborated with charts and tables. The appellant made use of 80 charts in his own address. It is, therefore, reasonably deducible that the tribunal, in resolving all the issues raised by the parties in their respective charts and tables while evaluating the evidence, should also adopt the same method. The submission of the learned senior counsel for the appellant in the appellant's brief is misconceived in the circumstance of this case. The appellant and first respondent made charts the corner stone of erecting or advancing their case.

At that stage, the tribunal was evaluating evidence of the case made by the parties through their pleadings, evidence adduced and addresses of counsel. Since the parties were offered opportunity to address on the charts before the matter was reserved for judgment, I am respectfully of the firm view that they were not entitled to further right of address unless and except it is desired to reduce the proceedings to a circus show. In *Ngige v. Obi* (supra) where the parties did not provoke the use of charts and, therefore, had no opportunity for addressing the tribunal on charts when that tribunal decided that use of chart was desirable to illuminate its judgment and made use of chart, this court affirmed the decision by rejecting the appellant's argument that it had no chance of addressing that tribunal on the chart, appendix 4 used in the judgment. It follows that, even if the parties had not depicted their petition, reply and addresses with charts and the tribunal had in its judgment decided to clarify issue or issues in its judgment, parties would not be entitled to a right to comment or address on the charts. Consequently, this issue also has no merit and, therefore, fails.

On the appellant's issue 9,1 propose to set down the formulation. It reads as follows:

"Was the trial tribunal justified in omitting lawful results in the final computation of the result of the election when the said results were not nullified by the tribunal. While introducing the issue in the appellant's brief, it was stated as **follows:-**

"This issue borders on whether or not the Governorship/Legislative Houses Election Tribunal was justified in omitting the result of units 8,18 and 24 Oniparaga Ward 9 of Odigbo Local Government Area in the final computation of the result of the election for the Ward and state when the tribunal did not nullify the election results nor found any fault with the results of the units."

It, therefore, follows from the statement quoted above that the issue, which otherwise covers the whole constituency, is constricted to units 8, 18 and 24 of Oniparaga Ward 9. The tribunal's consideration of the Oniparaga Ward 9 is at pages 261 - 264 of its judgment which is reproduced at pages 7074 - 7077 of the record of proceedings. I reproduce the relevant portion of the judgment immediately hereunder-

UNIT	VOTERS REGISTERS' EXHIBITS	NUMBER REGISTERED VOTERS IN THE REGISTER	UNUSED VOTE CARDS IN EXHIBIT REGISTER	FORM EC8A EXHIBIT NUMBER	VOTES CASTS IN FORM EC8A	EXHIBIT NUMBER OF USED BALLOT PAPERS	NUMBER OF USED BALLOT PAPERS COUNTED	FORM EC8D EXHIBIT NO	
001	876(1) – (81)	1423		1253	200	1084(11)	374	907(1)(2)	
002	877(1) – (17)	273		1138(1)	1344	" (11)	1387	"	
003	878(1) – (17)	254				" (4)	246	"	
004	879(1) – (20)	326				" (4)	299	"	
005	880(1) – (20)	228				" (4)	194	"	
006	881(1) – (7)	104				" (4)	99	"	
007	882(1) – (26)	206							
008						1084 (4)	399	"	
009	883(1) – (28)	871		1138(2)	800	" (11)	801	"	
010	884(1) – (23)	406	17	1138(3)	400	" (11)	397	"	
011			51						
012	885(1) – (20)	291				1084(4)	381	"	
013	886(1) – (44)	336	79						
014	887(1)-(22)	440	52	1138(5)	400	1084(11)	399	"	400
015	888(1)-(10)	148							
016	889(1)-(13)	207	51	1138(6)	200	1084(4)	198	907(1)-(2)	200
017	890(1)-(29)	500	55			1084(4)	515	"	500
018	891(1)-(18)	298	33			1084(2)	220	"	346
019	892(1)-(22)	375	19						
020	893(1)-(16)	262							
021	894(1)-(33)	559	58	1138(7)	546	1084(2)	550	"	
022	895(1)-(30)	508	31	1138(8)	506	1084(2)	500	"	
023	896(1)-(28)	508	52	1138(9)	500	1084(2)	495	"	546
024	897(1)-(22)	349				1084(11)	199	"	506
025	898(1)-(31)	541	49	1138(10)	500	1084(2)	498	"	500
026	899(1)-(22)	355	12	1138(11)	350	1084(4)	350	"	202
027	900(1)-(29)	502		1138(12)	500	1084(2)	195	"	500
028	901(1)-(20)	327		1138(13)	191	1084(11)	293	"	191
029	902(1)-(13)	137				1084(11)	63	"	63
030	903(1)-(28)	437	63	1138(14)	200	1084(4)	200	"	200

The last ward to consider in this local Government Area is Oniparaga Ward 9. It has 31 units. The total number of unused voters' cards in exhibit 1098 (38) is a far cry compared with the total number of registered voters as can be gleaned from the voters' registers from Exhibits 876(1) – (81) to 904 (1) in the above chart. Forms EC8A in exhibits 1253, 1138 (1) – (3) and 1138 (5) – (15) for the units were tendered. Votes cast in them for units 9,10, 14, 16, 21, 22, 23, 25,

26, 30 and 311 tallied with the votes cast and recoded in exhibits 907 (1) – (2) (i.e. Form EC8B) for those units.

In Exhibit 1084 series for used ballot papers counted, none was counted for each of Units 7, 11, 13, 15, 19 and 20. Forms EC8A were not tendered for the 6 units and no entries were made for them In Form EC8B [Exhibit 907 (1) - (2)]. It follows that election was not conducted in remaining 25 units out of which votes cast and recorded for 13 of the units i.e. units 9, 10, 14, 16, 21, 22,23, 25, 26, 26, 28, 30 and 31 in Forms EC8A tallied with the entries in Form C8B for those units. In the circumstance it will not be right to hold or conclude that there was no credible election in the entire ward, however we have observed that though the number of registered voters recorded in Form EC8A and Form EC8B for each of Units,28,30 and 31 tallied, they are at variance with the actual registered voters in the voters' registers for the 3 units. That being the case, we a-hereby nullify the results for the 3 units i.e. units 28, 30 and 31. What remains for us to do is to compute the result from the 10 remaining units for Labour Party and PDP and the outcome is as follows:

UNITS	VOTES BY LABOUR PARTY	VOTES BY POP
9	9	776
10	38	316
14	4	383
16	4	186
21	†	543
22	31	469
23	70	400
25	43	414
26	1	308
27	42	341
TOTAL	238	4136

It appears to me from the study of the chart at page 7074 that there had been *lapsus calami*, an omission in the case of units 8 and 24 where Form EC 8A were not produced. The result for these two units should have been nullified for want of production of Form EC 8A being the reason for the six units expressly nullified in this ward. But there is evidence of production of Form EC8A for 400 votes in respect of unit 8. There was however, a minor discrepancy between Form EC8A on one part and the number of used ballot papers and Form EC8B or the other hand. But the results for units 8, 18 and 24

Were not formally cancelled by the tribunal. Clearly there is an error in the judgment and I agree with the learned counsel for the appellant that this court is endowed with the power of the trial court to give any determination, which the trial court ought, to have arrived at. See section 15 of the Court of Appeal Act and Order 4 rule 1 of-1 the Court of Appeal Rules, 2007. See also *Agbabiaka & Ors. V Okojie* (2004) 15 NWLR (Pt. 897) 503, 539 and *Obim v. Achuk* (2005) 6 NWLR (Pt. 922) 594 at 623.

However, it seems to me that no sufficient material has been put at our disposal to enable us invoke our power under the Act. The account of votes cast in the three units is as follows - unit 8,171; unit 18,400 and unit 24 the number of votes cast was not stated. Even in the two units where returns were stated in the table drawn by the tribunal at page 7075, the votes were not apportioned between the political parties that contested the election to the office of the Governor, particularly the scores of each of the appellant's

and first, respondent's political parties. We are, for this reason, unable to apportion the votes between the contestants. In the circumstance of j this case, the error is insignificant or immaterial in the sense that first respondent herein is credited with 198,269 votes as against appellant's 128,669 so even if 1 credit the votes cast in units 8 and 18 to the appellant, the first respondent would still hang on to his lead. The error is, therefore, not substantial.

The alternative submission of the learned senior counsel for appellant is that an appellate court is under a duty to reverse the decision of a trial court arrived upon a wrong premise or otherwise perverse. Learned counsel further contended that such interference would be justified where the decision of the trial court is incorrect, unlawful or unjust. He relied on the case of *Shell Petroleum Development Co of Nigeria Plc v. Stephen Dino & Ors* (2008) 2 NWLR (Pt. 1019) 4.38 at 265 - 266.

It will amount to greater injustice with greatest respect to the learned senior counsel for the appellant to deny the respondent the fruit of his labour merely because of paltry number of votes which are in all less than 1000. In any case, it is not every misdirection or error in a judgment that will justify reversal of the judgment unless the error has resulted or caused a miscarriage of justice in the sense that if the misdirection lapse had not occurred the decision of the court would have been different. See *Ibrahim v. Judicial Service Committee* (1998) 14 NWLR (Pt. 584) 1.46-49; *Atoyebi v. Governor of Oyo State* (1994) 5 SCNJ 62, 84; (1994) 5 NWLR (Pt. 344) 290 and *Sylvester E Ukaegbu & Ors. v. Diiru O. Ugoji* (1999) 6 NWLR (Pt. 196) 127, 145. This issue is resolved against the appellant. Learned senior counsel for the appellant contended severally under the appellant's issue 10 that the finding of the tribunal that burden of proving existence of Form EC8A where Forms EC8B, EC8C and EC8D had been produced was fatal to the appellant's case was perverse when the respondent pleaded that he was going to rely on the forms in his petition. Respectfully the submission of the learned senior counsel is unmindful of the issue joined. It was the first respondent's case that there was no election held. The appellant who incidentally was the first respondent to the petition responded that the election was conducted. The burden of introducing evidence otherwise known as evidential burden squarely rests on the party who substantially asserts the positive before evidence is adduced. Thereafter the burden of proof rests on the party who will fail if no further evidence is produced. Where this is done, the burden of proof will shift on the other party to introduce evidence, which if accepted will then defeat the claim of the petitioner. The principle is enunciated in section 137 of the Evidence Act, Cap. E14 of the Laws of Federation of Nigeria, 2004. It provides as follows:-

"(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."

In *Olu Akinfosile v. Ijose* (1960) 5 FSC 192 at 199; (1960) NWLR 160, the petitioner in an election petition submitted that once he had shown the non-compliance with the regulations he needed to show that such non-compliance did not affect the result of the election. It was held that the petitioner who alleges in his petition a particular non-compliance and avers in his prayer that the non-compliance was substantial must so satisfy the court otherwise he will fail or lose. See also *Onobruhere v. Esegine* (1986) 2 SC 385 396;

(1986) 1 NWLR (Pt. 19) 799; *Ojomo v. Ejeh* (1987) 4 N (Pt. 64) 216, 229; *Bakare v. A.C.B. Lid.* (1986) 3 NWLR (Pt. 26) 457.

The appellant, it seems to me, who asserts substantially that election was conducted has the evidential burden of proving that the election was held. He did not. The first respondent produced Forms EC8B, EC8C and EC8D, which are respective results of wards, local governments and State levels. There were no Forms EC8A, which are the polling station results, tendered in evidence. Hence then were no bases for consideration of Forms EC8B, EC8C and EC8D. To meet the Respondents' case, it beheld the appellant to tender the results from the polling stations or booths. It is settled that the polling booths results, as set down in Form EC8A, is the primary evidence of the votes cast in an election. It is the foundation or base on which the pyramid of an election process is built. See *Awuse v. Odili* (2005) 16 NWLR (Pt. 952) 416, 488; *Sabiya v. Tukur* (1983) 11 SC 109; *undNwobodo v. Onoh* (1984) 1 SCNLR 1 (1984) SC I. The appellant or Independent National Electoral Commission iii whose custody the voting materials are placed ought to have stepped out to tender Form EC8A to show that the election was actually* conducted. Failure to tender the results of the polling booths the way for the inference the tribunal drew that if truly there were an election as claimed by the respondents to the petition, particularly the third to fourteenth respondents, the primary evidence, that is polling station results ought to have been tendered. The finding of the tribunal that, in the absence of the primary evidence. Form EC8A,1 the results contained in the various Forms EC8B. EC8C and EC8D could not be authentic, and is. therefore, not perverse.

The petitioner, who averred that election was not held, cannot^ be required to prove the holding of the election by producing its-results. It is the respondent/appellant who alleged that there was a free and fair election that is under the obligation to tender the result of the election in the nature of Form EC8A in proof of their assertion that election was freely and fairly conducted and results duly collated and declared. Their failure to do so means that they failed to prove that elections were held and. therefore impliedly admitted that there was no election.

There is no obligation on the first respondent to tender Form EC8A notwithstanding that the pleaded same in his petition otherwise he will be proving a case contrary to his pleadings. He has no duty abandon his case and proceed to assist the appellant to prove his case. The provision of the Evidence Act set out above is very clear and unequivocal and unambiguous on the question of burden or onus of proof: It is not static. It shifts. It is on the party who will lose or fail if no further evidence is called. It is not regulated by any rule of procedure or practice. The appellant was not prejudiced nor was there any miscarriage of justice by the first respondent not producing evidence the document he averred he was going to rely upon. In .unlikely event of a further appeal, I propose to observe that the appellant was a respondent to the pennon.

At the time the first respondent in the instant appeal, who was the petitioner before the tribunal, closed his case the appellant had not opened his case not to talk of closing it. He therefore, was in a position to assess the case and decide whether to tender the relevant Form EC8A. He did not Consider it fit to do so or look a gamble. He should abide by the consequences of his own decision voluntarily made, even though it turned out to be fatal to his case. It is no answer that he did not plead the document since the first respondent herein had pleaded them in the petition. It is settled law that party can rely on averment contained in his opponent's pleading. In *Lawrence Onvckaonwu & Ors. v. Ekwubiri & Ors.*(1966)1 All NLR 3235, there was an issue pleaded by the defendants but not pleaded by the plaintiffs. When plaintiffs' third witness wanted to lead evidence on it he was stopped by objection from adducing evidence on it. On appeal, the judgment was set aside and retrial ordered. The effect of the failure of the first respondent herein to have led evidence in support of his pleadings which is denied by the adverse party's pleading, is that such averment is deemed abandoned notwithstanding evidence supporting it being produced by the adverse party. *Yiisufv. Oyetitilc* (1984) 1 SC 205. Issue 10 is also resolved against the appellant.

It is proposed in dealing with the appellant's issue 11, to reproduce the issue as framed in the appellant's brief of argument. It reads:- Whether the conclusion of the lower tribunal as to what lawful votes scored by the parties was, is valid and justifiable having regard to the failure of the tribunal to determine the number of votes affected by the alleged malpractices and improprieties raised by the petitioner."

In arguing this issue, learned counsel for the appellant contended in the appellant's brief of argument that the issue seeks to consider! propriety of the conclusion of the lower tribunal on its perceived analysis and computation of lawful votes cast. Learned senior counsel then re the finding of the tribunal on pages 601 - 602 of its judgment copied c at pages 7414 - 7415 of the record. Learned counsel further contended that "one cannot but ask. where did the lower tribunal do the analysis and computation of lawful votes in each of Akoko North West, Akoko North East, Akure North, He Oluji/Oke-Igbo, Odigbo, Ose, Ese Odo Ilaje, Irele and Okitipupa Local Governments?" Learned counsel still in the appellant's brief, asserted that there was nowhere on the printed record where analysis and computation of lawful votes cast were conducted. Learned senior counsel then submitted that that being the case the reasoning and conclusion of the lower tribunal that it analysed and computed (he lawful votes cast is most perverse and must be set aside, this is because the conclusion has no support either on the pleadings or evidence led. He cited the case of *Oju Local Government v. INEC (2007) 14 NWLR (Pt. 1054) 242, 272*

The submission of the learned senior counsel in the appellant's brief is dexterous but not candid. The portion of the judgment s complained about is reproduced immediately hereunder: "From the above analysis and computation, the lawful votes cast in each of Akoko North East, Akure North, Ile-Oluji/Oke-Igbo, Odigbo. Ose, Ese-Odo Ilaje, Irele and Okitipupa Local Government Areas are as follows:-

1. Akoko-North West Local Government Area -28,982
2. Akoko-North East Local Government Area - 15958
3. Akure North Local Government Area - 11,985
4. Ile-Oluji/Oke-Igbo Local Government Area - 20,327
5. Odigbo Local Government Area - 27,760
6. Ose Local Government Area - 25.395
7. Ese-Odo Local Government Area - 3866
8. Ilaje Local Government Area – Nil 9
9. Irele Local Government Area - Nil
10. Okitipupa Local Government Area - 24737 out of the votes cast as stated above, the two parties Labour Part v and PDF scored as follows.

We have already said that the parties did not dispute the elections and their resultant scores in respect of Akoko South-East, Akoko South-West, Akure South, Idanre, Ondo East, Ondo West and Owo Local Government Areas. We will now set down the votes recorded in exhibit 3 (Form EC8D) for each of the 7 Local Government Areas not in dispute along with those for the above-named Local Government Area as analysed and computed by us in addition to then-percentage scores in the following chart..."

The judgment of the tribunal spans 606 pages. It contains summary, review and address of counsel as well as objection, which were taken care of in pages 1 - 193. Thereafter, (he tribunal under its issue three titled - "whether the petitioner has proved his case as required by law to entitle him to the relief(s) sought" - took and considered the petitioners complaint. In this regard the tribunal introduced the consideration of the issue as follows-

"We have noticed that the parties are not disputing the election and results in respect of Akoko South-East, Akoko South West. Owo. Akure South Idanre, Ondo West Local Government Areas. Their disputes centre on certain wards in Akoko North-East. Akoko North-West. Ose, Akure North, Ile Oluji/Oke-Igbo and Odigbo Local Government Areas as well as the whole of Ese-Odo, Ilaje, Irele and Ikitipupa Local Government Areas. These are the wards and the Local Government Areas we are going to consider with a view to determining whether or not the petitioner has proved his case as pleaded in his petition and as required by law to entitle him to the reliefs sought."

The tribunal respectfully properly directed itself. The tribunal then commenced this exercise considering Local Governments in which only ward results were questioned. The relevant Local Governments are Akoko North-East, Akoko North-West. Ose. Akure North. Ile-Oluji/Oke-Igbo and Odigbo. It took the offending wards in turn and dealt with them. In Akoko North-East Local Government, the tribunal examined the evidence relating to ten of the thirteen wards that make up this Local Government. The finding of the tribunal in respect of each ward is illustrated by a chart which shows where available votes cast on Form EC8A as against votes cast of Form EC8B. The tribunal invariably invalidated votes cast on Form EC8B in the absence of Form EC8A, which is accepted as primary evidence of the votes cast at the election. After invalidation, the tribunal then stated the votes obtained by the parties in Ikado 1 ward 03 the tribunal concluded as follows at page 7018 of the record: "By our calculation from the exhibits (Result sheets)-5 the valid votes scored by Labour Party - 444 and PDP - 1329." See also similar distribution or apportionment of votes in Oorun 1 ward 012 at page 7019:

"By our calculation from the exhibits (result sheet) the J valid votes scored by labour party and PDP in respect- "5 of these units are Labour Party 759 and PDP 2498." In Oyinmo Ward 013, the Labour Party was credited with 19 votes and PDP 2498 at page 7020. This exercise went on throughout the State, unit by unit; ward by ward and Local Government by Local Government. It is, therefore, respectfully most uncharitable and preposterous to submit that the tribunal did not do any analysis or computation. The basis for this decision can be found in the: charts and the findings drawn for each disputed unit, ward or Local Government as well as the findings of the tribunal thereof.

The submission of the learned senior counsel in respect of pleadings or want of pleadings of Local Government is misconceived. The petition was against the result of the election which is properly before the tribunal. Where the petitioner successfully impugned a unit ward or local government result the same is deducted from the scores of candidates in respect of that particular Local Government. It is when the quality of these additions and subtractions affect the result of the election as to warrant the victory of the petitioner that we talk of substantial non-compliance; otherwise if it is found that there is substantial compliance, the result is upheld. Where the non-compliance affects the result of the election then it is said that the non compliance is substantial. See *Yusuf v. Obasanjo & Others* (2005) 10 NWLR (Pt. 956) 96, 178-181.

The issue of competence or otherwise of the petition predicated on the failure to satisfy the provisions of paragraph 4(1) First -Schedule does not belong to this issue. Raising it at this stage is belated. The question of competence of the petition had been trashed out in the appellant's issue 1. The appellant has no right to raise the Issue which he failed to canvass at the tribunal for the first time on appeal. I am also not aware that leave had been sought and obtained to raise fresh issue on appeal. In any case, the question of competence of the petition ought to have been raised before taking any further step in the petition. See paragraph 49 of the First Schedule to the Electoral Act, 2006. This point had been exhaustively dealt with under issue 1. I have nothing more to add other than say that this issue is also resolved against the appellant.

The next issue for consideration and determination in this appeal is the appellant's issue 12 which reads as follows:-

"Whether the tribunal was right in declaring the petitioner/1st respondent winner of 14th April, 2007 Governorship election in Ondo State?" I am respectfully of the view that there is substance in the submission of the learned senior counsel for the appellant that there were discrepancies in the results of three wards of Akoko North-East Local Government affirmed by the tribunal. The three wards in which results were upheld are Ikado 1 Ward 03 (8 out of the 13 units); Oorun 1 Ward 012 (all the 9 units) and Oyinmo Ward 013 (3 of the 9 units). The results upheld as indicated at pages 7015, 7019 and 7020 of the printed record are as follows-

WARD	PDP	LP
Ikudo Ward 03	1,329	444
Oorun 11 Ward 012	2,498	759
Oyinmo Ward 013	2,498	19

The correct addition of the scores of the parties, are as follows-

PDP 6,325
 LP 1,222

But the tribunal, at page 7021 of the record, summed up the same figures and arrived at the following-

PDP - 5882
 LP - 1224

The sum arrived at by the tribunal is clearly wrong. This is a clear instance of arithmetical error which could easily be adjusted. But a new dimension was introduced into the matter by the summary of results covering all the 18 Local Governments of the State at page 7416 of the record. The summary of results included the percentages of votes scored by each party. In the summary, the results in respect of Akoko North-East Local Government are as follows:

PDP - 3439 21.5%
 LP - 4461 27.9%

There is no basis for this result from the printed record particularly at pages 7008 - 7021 where in Akoko North-East Local Government was considered. Conveniently, these set of results can be knocked off the summary sheets. At this stage, the results entered into the summary sheet for Akoko North-East (PDP - 3439, LP ~ 4461) at page 7416 will be deleted and substituted with the correct result of the summation of affirmed results for Ikado Ward 03, Oorun II Ward 012 and Oyinmo Ward 013 which is PDP 6325 and LP 1222. On the summary of results Labour Party has 198, 269 votes and PDP scored 128, 667.

The subtraction from the score of each party is as follows-

LP	PDP
198,269	128,667
4,461	3,439
193,808	125,230

<u>+ 1.222</u>	<u>6.325</u>
195.030	131,555

The scores of the parties after the corrections or adjustments are

Labour Party	-	195.030
PDP	-	131.555

From the exercise carried out, the contention of the learned senior counsel for the appellant that it was the use of the figures, PDP 3,439 and LP 4,461 is the only result that put Labour Party ahead of PDP is erroneous. It is clear that with or without that result the Labour Party was still ahead of the PDP. It is equally not correct that it solely gave LP 25%. Whether or not LP scored 25% of the votes cast in Akoko North-East Local Government Area cannot affect the outcome of the result since the 1^M respondent scored 25% of the votes cast in 12 out of the 18 Local Governments constituting Ondo State in addition to getting the highest number of valid votes cast at the election.

Finally, the appellant contended that where the tribunal found that the election was vitiated by serious and substantial irregularities and malpractices none of the candidates at the election can benefit from such an election which is deemed void, hence no one can be returned on the basis of such an election. Learned counsel for the appellant referred to section 147(1) of the Electoral Act, 2006; *Onwindinjo v. Joseph Dimobi & Ors.* (2006) 1 NWLR (Pt. 961) 318 at 335; *Buhari v. Yusuf*(2003) 14 NWLR (Pt. 941) 446 at 526 and *Ango v. Achida* (1999) 3 NWLR (Pt. 594) 246. Learned senior counsel for the appellant finally submitted that as the tribunal had found at page 7418 of the record that the irregularities and the malpractices have seriously affected the outcome of the election, hence the proper order to make is to nullify the election.

I am respectfully unable to accept the submission of the learned senior counsel because the tribunal never found that the election was initiated by serious and substantial irregularities. What it found was that the outcome, which is the election of the appellant, had been affected by serious and substantial irregularities and malpractices. This view is consistent with the conclusion the tribunal finally arrived at in its judgment, which is reproduced immediately hereunder-

"On the totality of the evidence before us and based on all what we have said so far, we are satisfied that all the electoral irregularities and malpractices earlier highlighted have seriously and substantially affected the outcome of the election. The petitioner has therefore proved his case and is entitled to the favourable judgment of the tribunal. We hold that the 1st respondent was not duly elected and returned by the highest number of lawful votes cast at the Ondo State Governorship election held on 14th April, 2007. We order that the purported election of the 1st respondent as the Governor at the Ondo State Governorship election of 14/4/2007 be and is hereby nullified"

Neither in the statutory provision nor the decided cases referred to us is it provided that an election characterized by serious irregularities and substantial malpractices is deemed void hence no one can be declared or returned on the basis of such an election. Indeed the same section supports the conclusion the tribunal arrived thereat. Section 147(1) and (2) of the Electoral Act, No. 2 of 2006 provides thus:-147(1) Subject to subsection (2) of this section, if the tribunal or the court, as the case may be determines that a candidate who was returned as elected was not validly elected on any ground, the tribunal or the court shall nullify the election.

- (2) *If the tribunal or the court determines that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the tribunal or the court, as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the election and satisfied the requirement of the constitution and this Act.* " (Italic mine)

The decided case read in the appellant's brief is that of *Onwudinjo v. Dimobi* (supra) at page 335 where Galadima. JCA, opined that:

"A successful /i/vnr; that the election was marred by irregularities can only result in nullification of the election and not return of the petitioner." (Italic mine)

It has raised the ubiquitous question of jurisdiction: this time in the form of lack of prayer. Learned senior counsel for the appellant has not directed me to an}- relief on which the determination of this issue can be predicated. It seems to me that the question is answered at page 604 - 606 of the judgment of the tribunal. It reads as follows.

"The reliefs sought by the petitioner from the tribunal are contained in paragraph 38(i) - (x) of his petitioner. In paragraph 14.0 on page 365 of the petitioners written address, he now seeks the relief in paragraph 38(i) - (v) thereof and they are simply the determination by the tribunal that the /^s' respondent was not duly elected or returned by majority of lawful votes that the 1st respondent's election be voided, that election in four named Local Government Areas be nullified and that he be declared as duly elected and returned as the Governor of Ondo State."

There is, therefore, no relief seeking that the election be nullified and a fresh one conducted. In the absence of such a relief seeking the voidance of the election of the Governorship election held in Ondo State on 14th April 2007, this court is not competent to accede to the request. Having resolved all the twelve issues against the appellant, the 207 grounds of appeals from which they were formulated fail and are dismissed. The only appeal outstanding for consideration is that of the second respondent/appellant who can really claim to be an aggrieved party. The other appellants are nominal panics who have no stake as to the outcome of the appeal. It is none of their business to decide the person whom the electorates elect and consequently declared by the court to be the winner and person returned. The primary functions of these purported appellants are to ensure that there is fairness and security at the election. Public policy demands that the two institutions do not descend into the arena, and theirs is to tend the rope in the interest of peace and stability in the land, thus, they should learn to remain neutral and strive to attain the aura of neutrality bestowed on them by the constitution of the Federal Republic of Nigeria. I commend to these appellants the attitude of the Nigerian Army and the Nigerian Navy, who were equally joined as respondents, but did not enter the fray to further complicate proceedings that were already complicated.

Nine issues for determination were formulated in appeal No. CA/B/EPT/342B/08 filed by the Peoples Democratic Party. However, all the nine issues were covered in the issues formulated in appeal No. CA/B/342A/08 and have been disposed of. The issues canvassed by the other appellants in their respective appeals have also been considered and disposed of in the same Appeal No. CA/ B/EPT/342A/08. In the final analysis, it is clear that all the appeals lack merit. They are accordingly dismissed. The judgment of the tribunal delivered on the 25th day of July, 2008 is hereby affirmed. It is therefore ordered as follows:-

- (1) That the election of the appellant. Dr. Olusegun Agugu, as the Governor of Ondo State at the Governorship election of 14th April. 2007 be and is hereby nullified.
- (2) That the first respondent. Rahman Olusegun Mimiko having satisfied the requirement of section 179(2)(a) and (b) of the Federal Republic of Nigeria 1999 and by virtue of section

147(2) of the Electoral Act. No. 2 of 2006 be and is hereby declared as the Governor of Ondo State of Nigeria.

There shall be no order as to costs, each party to bear his or we own costs.

SALAMI J.C.A.: I agree

AKAAHS, J.C.A.: I agree

AUGIE, J.C.A.: I agree

NDUKWE-ANYANWU, J.C.A.: I agree

Appeal dismissed