

1. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)
2. THE RESIDENT ELECTORAL COMMISSIONER (REC EDO STATE)
3. THE ELECTORAL OFFICER, AKOKOEDO L.G.A.
4. THE ELECTORAL OFFICER, EGOR L.G.A.
5. THE ELECTORAL OFFICER, ESAN CENTRAL L.G.A.
6. THE ELECTORAL OFFICER, ESAN NORTH EAST L.G.A.
7. THE ELECTORAL OFFICER, ESAN SOUTH EAST L.G.A.
8. THE ELECTORAL OFFICER, ESAN WEST L.G.A.
9. THE ELECTORAL OFFICER, ETSAKO CENTRAL L.G.A.
10. THE ELECTORAL OFFICER, ETSAKO EAST L.G.A.
11. THE ELECTORAL OFFICER, ETSAKO WEST L.G.A.
12. THE ELECTORAL OFFICER, IGUEBEN L.G.A.
13. THE ELECTORAL OFFICER, IKPOBA-OKHA L.G.A.
14. THE ELECTORAL OFFICER, OREDO L.G.A.
15. THE ELECTORAL OFFICER, ORHIONMWON L.G.A.
16. THE ELECTORAL OFFICER, OVIA NORTH EAST L.G.A.
17. THE ELECTORAL OFFICER, OVIA SOUTH EAST L.G.A.
18. THE ELECTORAL OFFICER, OWAN EAST L.G.A.
19. THE ELECTORAL OFFICER, OWAN WEST L.G.A.
20. THE ELECTORAL OFFICER, UHUNMWODE L.G.A.

V.

1. COMRADE ADAMS ALIYU OSHIOMHOLE
2. ACTION CONGRESS (AC)
3. SENATOR (PROF.) O. OSUNBOR
4. PEOPLES DEMOCRATIC PARTY (PDP)

CA/B/179B/2007

1. SENATOR (PROF) OSERHEIMEN OSUNBOR
2. PEOPLES DEMOCRATIC PARTY (PDP)

V.

1. COMRADE ADAMS ALIYU OSHIOMHOLE
2. ACTION CONGRESS (AC)
3. INEC & 19 ORS

CA/B/EPT/91/08

PROF.

SENATOR OSERHEIMEN OSUNBOR

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CA/B/EPT/92/08

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23. SENATOR (PROF) O. OSUNBOR

CA/B/EPT/93/08

INEC & 19ORS.

V

1. COMRADE ADAMS ALIYU OSHIOMHOLE
2. ACTION CONGRESS (AC)
3. SENATOR (PROF.) O. OSUNBOR
4. PEOPLES DEMOCRATIC PARTY (PDP)

COURT OF APPEAL (BENIN DIVISION)

CA/B/179 A/2007

CA/B/179B/2007

CA/B/EPT/91/08

CA/B/EPT/92/08

CA/B/EPT/93/08

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

ISAAYO SALAMI, J.C.A.

JOHNAFOLABI FABIYI, J.C.A.

AMINA AD AMU AUGIE, J.C.A.

OZONDUKWE-ANYANWU, J.C.A.

TUESDAY, 11TH NOVEMBER,

2008

APPEAL - Finding of trial court - Where not appealed - Effect - Bindingness and conclusiveness of.

COURT - Proof of case - Material placed before the court - Duty on court to rely solely thereon.

COURT - Technicalities - Attitude of court thereto.

DOCUMENT - Documentary evidence - Function of vis-a-vis oral evidence - Which is more reliable.

DOCUMENT - Documentary evidence - Where document received in evidence - Effect - Duty on court to evaluate.

ELECTION - Conduct of election - Non-compliance with Electoral Act - What amounts to - How determined.

ELECTION - Election - What it denotes - Conduct of - Body responsible therefor - Role of.

ELECTION PETITION - Conduct of election - Non-compliance with Electoral Act - What amounts to - How determined.

ELECTION PETITION - Independent National Electoral Commission - Proper role of - Need to maintain impartiality

ELECTION PETITION - Non-compliance with Electoral Act Allegation of- Burden of proof of - How discharged.

EVIDENCE - Admission - Meaning of - Right of a party to rely on opponent's admission.

EVIDENCE - Documentary evidence - Where document received in evidence - Effect - Duty on court to evaluate.

EVIDENCE - Proof - Documentary evidence - Oral evidence Relationship between - Which is more reliable.

EVIDENCE - Proof- Non-compliance with Electoral Act – Allegation of- Burden of proof of - How discharged.

EVIDENCE - Proof- Onus of proof in civil cases - Nature of- Where lies - How discharged.

EVIDENCE - Proof - Testimony of a witness - Whether court can accept part and reject oilier parts.

EVIDENCE - Proof of case - Material placed before the court - Duty on court to rely solely thereon.

EVIDENCE - Subpoena - Where issued - Effect - Need to obey - Failure to comply therewith - Effect of.

JUDGMENT AND ORDER - Finding of trial court - Where not appealed - Effect - Bindingness and conclusiveness of.

NOTABLE PRONOUNCEMENT - On proper role of Independent National Electoral Commission.

PRACTICE AND PROCEDURE - Finding of trial court - Where not appealed - Effect - Bindingness and conclusiveness of.

PRACTICE AND PROCEDURE - Interlocutory application -Consideration of- Duty on court not to determine substantive issue at stage thereof.

PRACTICE AND PROCEDURE - Subpoena - Where issued - Effect f-Need to obey - Failure to comply therewith - Effect of.

PRACTICE AND PROCEDURE - Technicalities - Attitude of court thereto.

WORDS AND PHRASES - Admission - Meaning of.

Issues:

A. CA/B/179A/2007&CA/B/179B/2007

1. Whether the petition was signed as required by law (INEC's issue 1 in 179A/07, Osunbor/PDP's issue 3 in 179B/07, Oshiomhole/AC's issues 1& 2 in 179A/07 & issue 3 in 179B/07).
2. Whether the Tribunal was right to hold that the scores of the candidates at the election were reflected on the petition (INEC's issue 5, Osunbor/PDP's issue 4, Oshiomhole/AC's issue 4 in 179A/07 & issue 4 in 179B/07).
3. Whether having struck out the 23rd - 214th respondents on the ground that they are non-juristic persons, the tribunal was right to hold that the averments relating to them in the petition could not also be struck out (INEC's issue 6, Osunbor/PDP's issue 2, Oshiomhole/ AC's issue 5 in 179A/07 & issue 2 in 179B/07).
4. Whether the Tribunal pre-judged the substantive Petition at the interlocutory stage of the proceedings (INEC's issue 3, Osunbor/PDP's issue 7, Oshiomhole/AC's issue 5 in 179A/07 & issue 6 in 179B/07)

B. CA/B/EPT/91/08; CA/B/EPT/92/08; CA/B/EPT/93/08

1. Whether in the circumstances of this case, the Tribunal was right to use the evidence of Olawale Kayode, the Head of Operations of INEC in Edo State, who testified as PW47. arriving at its decision.
2. Whether the Tribunal applied the right standard of proof in arriving at its decision.
3. Whether the Tribunal was right to rely on Charts 'A' to 'O' drawn up by the petitioners in coming to its conclusion.

4. Whether or not the Tribunal declared the petitioner as winner of the election on the basis of 4 Local Governments only.

Facts:

Gubernatorial elections were conducted all over the country on the 14th day of April, 2007. In Edo State, the Peoples Democratic Party (PDP) and Action Congress (AC) fielded Senator Prof. Oserheimen Osunbor and Comrade Adams Aliyu Oshiomhole as their respective candidates, and the Independent National Electoral Commission (INEC) returned PDP's candidate, Senator Prof. Oserheimen Osunbor as the winner of the election.

Dissatisfied with the results declared by INEC, Comrade Adams Oshiomhole and AC filed a petition of 69 paragraphs at the National Assembly, Governorship and Legislative Houses Election Petition Tribunal, Edo State, wherein they prayed the Tribunal for the following reliefs

-
- “(a) It be determined that the Governorship Election of 14th April 2007 conducted by the 1st (INEC) & 2nd (REC Edo State) respondents was marred by corrupt practices, fraud and outright rigging.
 - (b) It be determined that the 3rd respondent herein (Senator Prof. O. Osunbor) was not duly elected and did not score the lawful majority votes cast at the 14th April, 2007 Gubernatorial Elections in Edo State and ought not to have been returned by the 1st & 2nd respondents.
 - (c) It be determined that the total number of lawful votes cast at the 14th April, 2007 Governorship Election in Edo State were for the petitioners and the 1st Petitioner ought to have been returned by the 1st & 2nd respondents.
 - (d) It be determined that the votes allegedly scored or credited to the 3rd & 4th respondents in Esan West, Esan Central, Esan North East, Esan South East, and Igueben, Uhunmwede, Ovia North East, Etsako West, Owan East, Owan West Local Government Areas of Edo State are invalid on ground of corrupt practices, fraud, ballot snatching, ballot stuffing and outright rigging.
 - (e) It be determined that the Governorship Election of 14th April 2007 in Edo State suffered from non-compliance with the Electoral Act, 2006.
 - (f) An ORDER declaring the 1st Petitioner as the winner of the Governorship Election of 14th April, 2007 in Edo State having scored the highest number of lawful votes of the total votes cast in the said election.
 - (g) An ORDER compelling the 1st & 2nd respondents to present to the 1st petitioner, certificate of return as the validly elected Governor of Edo State in the Gubernatorial Election held on the 14th of April 2007. ALTERNATIVELY
 - (h) An ORDER nullifying the entire Governorship election conducted in Edo State on the 14th of April, 2007 on the Grounds of corrupt practices or non compliance with the Electoral Act 2006.”

The grounds upon which the petition was brought are as follows:-

- a. That the gubernatorial election conducted by the 1st & 2nd respondents in Edo State on the 14th of April, 2007 was invalid by reasons of corrupt practices;
- b. That the 3rd respondent (Senator Prof. O. Osunbor) was not duly elected by majority of lawful votes cast at the April 14, 2007 Gubernatorial Election; and

- c. The Gubernatorial Election conducted by the 1st & 2nd respondents in Edo State on the 14th of April 2007 was characterized by non-compliance with the provisions of the Electoral Act, 2006."

Upon being served with the petition, the two sets of respondents, INEC and its officers, Senator Prof. O. Osunbor and PDP filed separate notices of preliminary objection to the petition. INEC and its officers challenged the competence of the petition on eight grounds, which are as follows -

1. The petition is incompetent, inchoate, irregular, a nullity, invalid, incurably defective for non-compliance with the relevant mandatory provisions of the Electoral Act 2006 and the First Schedule to the same Electoral Act 2006.
2. Its contents are contrary to judicial decisions regarding the facts and/or the requirements that need to be pleaded in an Election Petition.
3. It failed to state the scores of all the candidates that took part in the election.
4. It is incompetent having failed to state the actual final scores of all the candidates and parties that took part in the conduct of the said election.
5. It was purportedly signed or endorsed by one Mr Odubela who is not named as solicitor at the foot of the petition contrary to the mandatory provisions of paragraph 4(3) (b) of the 1st Schedule to the Electoral Act, 2006.
6. The 23rd - 24th respondents are not juristic personalities and a fortiori are unknown to law.
7. The Hon. Tribunal does not have the power or jurisdiction to adjudicate or pronounce on pre-election matters.
8. The Petitioners' pleadings centered primarily on pre-election matters or issues which are not justiciable in election proceedings.

On their part, Prof. Senator O. Osunbor and PDP challenged the jurisdiction of the Tribunal to hear the petition on 25 grounds particulars, including:-

1. The 23rd - 24th respondents be struck out and all the averments/pleadings relating to them as they are an amalgamation and/or community of persons and therefore unknown to law and in violation of section 144(2) of the Electoral Act.
2. The petition was not signed as required under the relevant provisions of the Electoral Act, 2006.
3. Necessary parties though not statutory respondents ought to be made respondents to answer for the allegations against them in the conduct of the election of 14/4/2007 but were not so joined, and that -
4. The scores of the candidates that participated in the election are not stated in the petition as required under the provisions of the Electoral Act."

The two applications were consolidated and heard together. In its ruling delivered on the 4th of July, 2007, save for striking out the 23rd - 24th respondents because they were non-juristic persons and striking out paragraphs 41 and 61 of the petition, which deal with pre-election matters, the tribunal over-ruled all the other objections raised by the respondents. Dissatisfied, INEC and its officer appealed to the Court of Appeal with a notice of appeal containing nine grounds of appeal. Prof. Senator O. Osunbor and PDP also appealed with a notice of appeal containing 15 grounds of appeal, and the appeals are CA/179A/2007 & CA/179B/2007 respectively.

pre-hearing sessions commenced after the objections were overruled, and in its report on the sessions, the Tribunal set out the following five issues agreed on by the parties as arising for determination in the petition –

1. Whether or not the 3rd respondent was duly elected by majority of lawful votes cast at the Governorship election held in Edo State on 14th April, 2007 and whether the 1st and 2nd respondents were right to have declared and returned him as the winner of that election.
2. Whether or not the election of the 3rd respondent as Governor of Edo State can be or was invalidated by reasons of corrupt practices and substantial non-compliance with the Electoral Act, 2006.
3. Whether or not the petitioners have proved beyond reasonable doubt the criminal allegations of fraud and falsification of results contained in their petition in accordance with section 138(1) of the Evidence Act.
4. Whether or not the 1st petitioner has proved that he scored the highest number of valid and lawful votes cast at the Governorship election held in Edo State on 14th April, 2007 and satisfied the requirements of the Constitution and the Electoral Act, 2006 is entitled to be declared as the elected Governor.
5. Whether the tribunal can nullify the Governorship election held in Edo State on 14th April, 2007 on grounds of corrupt practices and non-compliance with Electoral Act."

At the hearing of the substantive petition. Comrade Adams Oshiomhole and AC called 61 witnesses; INEC and its officers called 3 witnesses; and Senator (Prof.) O. Osunbor called 32 witnesses. The documentary evidence admitted by the Tribunal were marked as exhibits 1 -117. At the close of trial, final written addresses were filed and adopted on the 18th of February, 2008. The Tribunal thereafter delivered its Judgment on the 20th of March, 2008, wherein it held that "the petition succeeds" and ordered as follows –

- "(1) The 1st and 2nd petitioners polled the highest number of valid votes cast at the Governorship Election in State on 14th April, 2007.
- (2) The 1st petitioner Comrade Adams Aliyu Oshiomhole is hereby declared as the elected Governor of Edo State of Nigeria being the candidate who has scored the highest number of valid votes cast and has satisfied the requirements of the Constitution of Nigeria 1999 and the Electoral Act, 2006.
- (3) It is ordered that the certificate of return issued to Senator (Prof.) Oserheimen Osunbor as elected Governor of Edo.State is hereby withdrawn and nullified.
- (4) The 2nd respondent is hereby ordered to issue the 1st petitioner Comrade Adams Aliyu Oshiomhole a Certificate of Return as the elected Governor of Edo State."

Dissatisfied, Prof. Osunbor, the PDP and INEC filed separate appeals at the Court of Appeal, the final court in Governorship election petitions.

In considering the appeal, the Court of Appeal considered and construed the provisions of sections 67(1) & (2), 144(2), 147(1) & (2) of the Electoral Act, 2006; and Section 179(2) of the 1999 Constitution that is;-

"67(1) Subject to subsection (2) of this section, a ballot paper, which does not bear the official mark, shall not be counted.

(2) If the returning officer is satisfied that a. ballot paper which does not bear the official mark was from a book of ballot papers which was furnished to the Presiding Officer of the polling station in which the vote was cast for use at the election in

question, he shall, notwithstanding the absence of the official mark, count that ballot paper."

"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, a presiding officer, a returning officer or any other person who took part in the conduct of an 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 election 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 requirements of the Constitution and this Act."

"179(2) A candidate for an election to the office of Governor of a State shall be deemed to have been duly elected where, there being two or more candidates:-

- (a) He has the highest number of votes cast at the election, and
- (b) He has not less than one-quarter of all the votes cast in each of at least two-thirds of all the Local Government Areas in the State."

Held (Unanimously dismissing all the interlocutory' and the main appeals):

1. *On what election denotes and the role of Independent National Electoral Commission –The Independent National Electoral Commission (INEC) is the official body responsible for the conduct of elections, and the concept of election denotes the process of accreditation, voting, collation recording on all relevant INEC forms and declaration of results. In other words, INEC is a competent authority to conduct an election and issue results. In the circumstance, it is in the best position to tender the exhibits and testify on it in COUM [I.N.E.C.V. Ray (2004) 14 NWLR (Pt. 892) 92 referred to.] (P. 662, paras. D-E)*

Per ABDULLAHI, P.C.A. at pages 662-664, paras D-A:

"In this case, PW47 is the Head of Operation of INEC in Edo State. INEC is the official responsible for the conduct of elections, and the concept of election denotes the process of accreditation, voting, collation, recording on all relevant INEC Forms and declaration of results. In other words, INEC is the competent authority to conduct an election and issue results - see INEC v. Ray (2004) 14 NWLR (Pt. 892) 92. The petitioners needed the documents used at the elections to prove their case, and since the documents had to come from proper custody, an official from INEC had to produce them before the tribunal. PW47 was delegated to do just that. However, when he tendered the bags admitted in evidence as exhibits 88 - 99, he said he did not know how many ballot papers were inside the bags. The tribunal therefore ordered that the

ballot papers be counted to verify exactly how many ballot papers were there in the exhibits 88 - 99 before it. The appellants argued that what the tribunal ordered was a recount, which can only be carried out by INEC. They hinged their arguments on section 65 of the Electoral Act, which provides that a candidate or a Polling Agent may, where present at a polling station when counting of votes is completed by the presiding officer, demand to have the votes recounted.

This argument cannot hold water. What the Tribunal ordered was a count of the ballot papers in exhibits 88-99, which was in evidence before it, and not a "recount" in the sense of the word used in section 65 of the said Act. In the circumstances of this case, there is nothing wrong with that order. PW47 counted the ballot papers, and recorded the outcome in a document he prepared and signed, which was admitted in evidence as exhibit 105. Exhibit 105 was therefore a natural follow-up to the counting order made. The problem arose when the number of ballot papers in exhibit 105 did not tally with the number in exhibit 70, the result declared by INEC. Obviously, if they had tallied as it should, this issue would not have arisen. It must be remembered that Senator (Prof.) O. Osunbor and PDP had averred as follows in paragraph 59 of their joint reply to the petition -

"With reference to paragraph 69 of the petition, the respondents aver that if there were any invalid votes (which is denied) at the election, they would not be substantial enough to invalidate the election of the respondents and *if those votes are deducted from the total votes scored by all the candidates, the 3rd and 4th respondents would still have majority of the votes cast at the election and satisfy to other requirements for election ...*". (Italics is mine)

Having envisaged a deduction of invalid votes, Senator (Prof.) O. Osunbor cannot complain that the tribunal ordered the ballot papers to be counted.

PDP, on its part, submitted that any possibility of a shortfall in the ballot papers due to the omission of INEC or its officials or any doubts in the chain or handling of the ballot papers should be resolved in its favour. But that submission works both ways; the petitioners' case is that INEC did not conduct a free fair election, and that Senator (Prof.) O. Osunbor, who was declared the winner, did not score the lawful majority votes cast at the elections, and ought not have been returned as the winner by INEC. INEC was subpoenaed to appear before the tribunal to testify and produce the relevant documents relating to the elections. It had declared one result in exhibit 70, but when the ballot papers it brought before the tribunal was actually counted, the number did not tally with the figures in exhibit 70.

Was the tribunal expected to turn a blind eye to the evidence before it? Certainly not; exhibit 105 prepared and signed by PW47 was now before it and the law is well settled that once a document is received in evidence, and is so marked, it becomes evidence before the tribunal, and the tribunal has the duty to evaluate the probative value of every documentary evidence tendered before it. See *Awuse v. Odili* (2005) 16 NWLR (Pt. 952) 416. Thus, the Tribunal was right to use the said exhibits as it saw fit."

2. *On what amounts to non-compliance with Electoral Act and determination of -*
Non-compliance with the Electoral Act is defined as the conduct of an election contrary to the Act or the rules and regulations made thereunder. The paramount question in determining whether there was non-compliance is whether or not in

view of the court's findings, the Constituency was allowed to elect its representative. [Swem v. Dzungwe (1966) 1 SCNLR 111 referred to.] (P. 675. paras. E-H)

3. *On Burden on petitioner alleging non-compliance with Electoral Act and how discharged*
The standard of proof required of a petitioner who alleges that there has been non-compliance with the Electoral Act is on the preponderance of accepted evidence. This is because an election petition, being specie of a civil suit, is only required to be proved on balance of probabilities. All that the petitioner needs to establish is that his story is more likely to be true than the respondent's. [Swem v. Dzungwe (1966) 1 SCNLR 111 referred to.] (Pp. 670-671. paras. G-B)
4. *On Duty on court to act only on materials placed before it-*
A court must act on the materials placed before it. In this case, the appellants did not place any material before the Electoral Tribunal to enable it determines who signed the petition. (P. 636, paras. A-C)
5. *On Power of court to accept part of witness's testimony and reject other parts –*
A court or tribunal can accept part of a witness's evidence and reject other parts. In this case, the Election Tribunal was right to have accepted some parts of the evidence given by PW 47, the INEC Head of Operations for Edo State, who was called by the petitioners to testify and reject some other parts. [Awuse v. Odili (2005) 16 NWLR (Pt. 952) 416; Ebre v. State (2001) 12 NWLR (Pt. 728) 617 referred to.] (Pp. 661-662, paras. E-A)
6. *On Meaning of admission and right of a party to rely on opponent's admission –*
An admission is an express or implied concession by a person of the truth of an alleged act it is presumed that no man would declare anything against himself except it was true. A party is entitled to rely on his opponent's admission as an admission against interest to defeat his opponent's claim. [Eigbe v. N. U. T. (2008) 5 NWLR (Pt.1081) 604; Ipinlaiye II v. Olukotun (1996) 6 NWLR (Pt. 453) 148; Onisaodu v. Elewaju (2006) 13 NWLR (PL 998) 517 referred to.] (P. 663, paras. A-D)
7. *On Effect of subpoena and failure to obey same –*
Where a person is subpoenaed to appear before a court or tribunal, it is a very serious matter and not one to be treated with levity. Thus, where a person is subpoenaed to produce a document, he must produce the document as commanded in the subpoena, or suffer the penalty. (P. 664, paras. C-D)
8. *On Effect where document received in evidence and duty on court to evaluate same –*
Once a document is received in evidence, and is so marked, it becomes an evidence before the court or tribunal and it has the duty to evaluate the probative value of every evidence tendered before it. [Awuse v. Odili (2005) 16 NWLR (Pt 952) 416 referred to.] (pp. 663-664, paras. H-A)
9. *On Which is more reliable between documentary and oral evidence –*
The most reliable, if not the best evidence, is documentary evidence and it is more reliable than oral evidence. In this case, the Election Tribunal was right to have placed a greater value on the documentary evidence produced by PW47, the INEC Head of Operations in Edo State, than on his oral testimony. [Akinbisade v. State (2006) 17 NWLR (Pt 1007) 184; Aiki v. Mown (2006) 9 NWLR (Pt. 984) 47 referred to.] (P. 665, paras. E-H)
10. *On Relationship between documentary and oral evidence –*

Where documentary evidence supports oral testimony, such oral testimony becomes more credible as documentary evidence serves as a hanger from which to assess oral testimony. In this case, the petitioners tendered documents to show that the results of the elections in Etsoko Central and Akoko Edo Local Governments were cancelled. INEC, through PW47, merely asserted that the results were not cancelled and left it at that. The petitioners brought more to the tribunal than the respondents. [Ndayako v. Mohammed (2006) 17 NWLR (Pt.1009) 655; Kimdey v. Mil. Gov., Gongola State (1988) 2 NWLR (Pt. 77) 445 referred to.] (P. 671, paras. C-F)

11. *On Onus of proof in civil cases –*
In a civil trial, the onus of proof shifts from one party to the other depending on the nature of the case and evidence adduced by either party. In effect, where a party has offered enough evidence and the other party would be the one to lose if no evidence is adduced in rebuttal, the onus of proof would shift to that other party. (P. 671, paras. B-
12. *On Present attitude of court to technicalities –*
The days of justice by technicality are over under Nigerian jurisprudence. (Pp. 636-637, paras. H-B)
13. *On Duty on court not to determine substantive issue at interlocutory stage –*
A court or tribunal has a duty not to determine substantive issues at the stage of considering an interlocutory application. [Hasliim v. Minister, F.C.T. (2002) 15 NWLR (Pt. 789) 159; Ogunsola v. Usman (2002) 14 NWLR (Pt.788) 636; Akapo v. Hakeem-Habeeb (1992) 6 NWLR (Pt.247) 266; North-South Petroleum (Nig.) Ltd. v. F.G.N. (2002) 17 NWLR (Pt. 797) 639; Madubuike v. Madubuike (2001) 9 NWLR (Pt.719) 698 referred to.] (P. 645, paras. F-H)
14. *On Bindingness of finding not appealed against –*
The findings of a trial court that has not been appealed against remains binding and conclusive, (P. 685, para. C)
15. **NOTABLE PRONOUNCEMENT:**
On Function and proper role of the Independent National Electoral Commission -

Per ABDULLAHI, P.C.A. at pages 664-665, paras H-E:

"INEC, as I said earlier, has the exclusive power to conduct elections and declare the results; it does not share that power with anyone. It conducts the elections and its mandate is to see that the elections are free and fair. To that end INEC is expected to and must be seen as an impartial umpire. 'Impartial' means 'not supporting one person or group more than another; neutral; unbiased' - see Oxford Advanced Learners Dictionary, 6th Ed. INEC and its officials appear to have derailed from their role in this case. Yes, they are necessary, parties and must therefore be joined as respondents to the petition, but that does not mean that they should go as far as they did in this petition to indulge in filing objections to the petition and filing appeals against the ruling and the judgment of the tribunal. The negative effect of this situation is that the move to tender the late discovered bags of ballot papers in evidence while PW47 was being cross-examined by learned senior counsel for INEC appeared suspicious. Would they have made the same application if the figures in exhibit 105 had tallied with the figures they declared in exhibit 70? Why was the bag containing the said ballot papers not found before exhibit 105 was made? As the tribunal said - 'A whole

bag of ballot papers cannot now suddenly surface from the blues' - and in my view, the bags were rightly rejected. Ironically, INEC and its officers submitted in their brief that the fact that the tribunal relied on documents only and discarded the oral testimony of PW47 did not portray it as an 'impartial arbiter in the circumstances', but that is an unwarranted attack on the tribunal."

Nigerian Cases Referred to in the Judgment:

Aiki v. Idowu (2006) 9 NWLR (Pt. 984) 47
Akapo v. Hakeem-Habeeb (1992) 6 NWLR (Pt.247) 266
Akinbisade v. State (2006) 17 NWLR (Pt. 1007) 184
Amaechi v. INEC (2008) 5 NWLR (Pt.1080) 227
Awuse v. Odili (2005) 16 NWLR (Pt. 952) 416
Ebre v. State (2001) 12 NWLR (Pt. 728) 617
Eigbe v. N.U.T. (2008) 5 NWLR (Pt.1081) 604
Haruna v. Modibbo (2004) 16 NWLR (Pt. 900) 487
Hashim v. Minister, F.C.T. (2002) 15 NWLR (Pt. 789) 159
Ibrahim v. Sheriff (2004) 14 NWLR (Pt. 892) 43
I.N.E.C. v. Ray (2004) 14 NWLR (Pt.892) 92
Ipinlaiye v. olokotun (1996) 6 NWLR (Pt. 453) 148
Iwu v. Nwugo (2004) 9 NWLR (Pt, 877) 54
Jang v. Dariye (2003) 15 NWLR (Pt.845) 436
Kimdey v. Mil. Gov., Gongola State (1988) 2 NWLR (Pt. 77) 445
Madubuiké v. Madubuiké (2001) 9 NWLR (Pt.719) 698
Ndayako v. Mohammed (2006) 17 NWLR (Pt.1009) 655
Ngige v. Obi (2006) 14 NWLR (Pt. 999) 1
North-South Petroleum (Nig.) Ltd. v. F.G.N. (2002) 17 NWLR (Pt, 797) 639
Ogunsola v. Usman (2002) 14 NWLR (Pt.788) 636
Onisaodu v. Elewuju (2006) 13 NWLR (Pt. 998) 517
Swein v. Dzungwe (1966) 1 SCNL 111
Yusufv. Obasanjo (2005) 18 NWLR (Pt. 956) 96

Nigerian Statutes Referred to in the Judgment:

Constitution of Federal Republic of Nigeria, 1999. S.179(2)(a)(b)
Electoral Act, 2002, S. 133(3)
Electoral Act, 2006 Ss. 54(1), 64(1), 65, 66, 67(1) (2), 70, 73,
144(2), 145(1) (b) and 147, 1st Schedule, paras. 49(1), 4(3) (b)
Evidence Act. Ss. III, 112, 116 and 138

Nigerian Rules of Court Referred to in the Judgment:

Federal High Court (Civil Procedure) Rules, 2000, O. 38 r.21

Appeal:

This was an appeal against the judgment of the Nations Assembly Governorship and Legislative Houses Election Petition Tribunal, Edo State which upheld the appellant's election and declared the respondent the elected Governor of Edo State. The Court of Appeal, in a unanimous decision, dismissed the appeal,

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: Umar Faruk Abdullahi, P.C.A. (Presided and Read the Leading Judgment); Isa Ayo Salami, J.C.A.; John Afolabi Fabiyi, J.C.A.; Amina Adamu Augie, J.C.A.; Uzo Ndukwe- Anyanwu, J.C.A.

Date of Judgment: Tuesday, 11th November, 2008

AppealsNos. CA/B/179A/2007

CA/B/179B/2007

CA/B/EPT/91/08

CA/B/EPT/92/08

CA/B/EPT/93/08

Tribunal:

Name of the Tribunal: National Assembly, Governorship and Legislative Houses Election Petition Tribunal, Edo State

Date of Judgment: Thursday, 20th March, 2008

Counsel:

Senator (Prof.) O. Osunhor

L.O. Fagbemi (SAN) (with him, Chief L. Akpofure (SAN), Dr. Alex Izmyon (SAN); D.D. Dodo (SAN), M.B. Adoke (SAN), S.O. Agwinede, Esq., PA. Ogbebor, Esq. Lowo Obisesan, Esq., Ahmed Akanbi, Esq.; Lateef Adedigba, Esq., Segun Adebayo Esq., K. Olariwaju, Esq., Bello Abu, Esq., Audu Auga, Esq., sandison Iyenagbe, Esq., Nnonyechi Alex (Miss), D.O. inegbeboh, Esq., and O.L. Ogbebor, Esq.

Peoples Democratic Party:

Chief Akin Olujimi (SAN) (with him, Yusuf AH (SAN),; E.C. Ukala. (SAN), J.O. Aghimein (SAN), Ighodalo Imadabelo (SAN), Akinsola Olujinmi, Esq., Yaqub Dauda, Esq., N. Adegboye, Esq., Kenneth Obayi, Esq., I.G., Edewi, Esq., A.O. Osayamwanbor, Esq., Ama Onyibe (Miss), P.E. Ebuehi, Esq., C.I. Abosele, Esq., and C.E. Agbonwanegbe, Esq.

INEC and 19 Ors.

Kanu Agabi (SAN) (with him A.O. Adelodun (SAN), Roland Otaru (SAN), Muritala Adio, Esq., Chris Oshiogege, Esq., O.O. Obono-Obla, Esq., Darracott Osawe, Esq., and Chidi Nwoke, Esq.

Comrade Adams Oshiomhole

Chief Wole Olanipekun (SAN) (with him, Chief Adeniyi Akintola (SAN), Prof. Yemi Osinbajo (SAN), Nnamonso Ekanem, Esq., Dr. Tunji Abayomi, Esq., Osayabo Osarenren, Esq., Dapo Akinosun, Esq., Olufemi Omoniyi, Esq., Mojeed Bello-Osagie, Esq., Biodun Amole, Esq., Kabiru Akingbolu, Esq., Gabriel Uduafi, Esq., Gentleman Amegor, Esq., Prince Hassan Kadiri, Esq., S.P. Imolode, Esq., A.I. Osarenkhe, Esq., and Hilary I.O. Oshomah

Action Congress

Rickey Tarfa (SAN) (with him, Emeka Ngige (SAN), Adetunji Oyeyipo (SAN), Nganjiwa Hyeladira, Esq., Wole Iyamu, Esq., Osariodion Ogie, Esq., Efosa Urhoghide, Esq., George Igbokwe, Esq., Olusegun John Odubela, Esq., Bamidele Aturu, Esq., Gregory Aruna, Esq. Adaeze Ezegbu (Miss), Abdul Oroh, Esq., Prince Hassan Kadiri, Esq., Isaac Asaka, Esq., A. Usman, Esq., Sir Adams Aliu, Esq., Alh. Yusuf Garba, Esq., A.I. Osarenkhe, Esq., R.I.D. Okezie, Esq. and I. Aghayere, Esq.

(5) It was purportedly signed or endorsed by one Mr. Odubela who is not named as

solicitor at the foot of the petition contrary to the mandatory provisions of paragraph 4(3)(b) of the 1st Schedule to the Electoral Act, 2006.

- (6) The 23rd - 214th respondents are not juristic personalities and *a fortiori* are unknown to law. The Hon. Tribunal does not have the *vires* or power to adjudicate or pronounce on pre-election matters.
- (7) The petitioners' pleadings centered primarily on pre-election matters or issues which are not justiciable in election proceedings,

On their part, Prof. Senator O. Osunbor and PDP challenged the jurisdiction of the tribunal to hear the petition on 25 grounds particulars, including -

1. The 23rd - 214th respondents be struck out and all the averments/pleadings relating to them as they are an amalgamation and/or community of persons and therefore unknown to law and in violation of section 144(2) of the Electoral Act.
2. The petition was not signed as required under the relevant provisions of the Electoral Act, 2006.
3. Necessary parties though not statutory respondents ought to be made respondents to answer for the allegations against them in the conduct of the election of 14/4/2007 but were not so joined, and that -
4. The scores of the candidates that participated in the election are not stated in the petition as required under the provisions of the Electoral Act.

The two applications were consolidated, and heard together. In its ruling delivered on the 4th of July, 2007, save for striking out the 23rd - 214th respondents because they were non juristic persons and striking out paragraphs 41 and 61 of the petition, which deal with pre-election matters, the tribunal over-ruled all the other objections raised by the respondents. Dissatisfied, INEC and its 1 officers appealed to this Court with a notice of appeal containing nine grounds of appeal. Prof. Senator O. Osunbor and PDP appealed with a notice of appeal containing 15 grounds of appeal, and the appeals are CA/179A/2007 & CA/179B/2007 respectively. CA/179A/2007, six issues for determination were formulated in the appellants' brief settled by Roland Otaru. SAN, and in CA/179B/2007 nine issues were formulated in the appellants' brief presented by Dr. Alex A. Izinyon, SAN; Ighodalo Imadegbelo, SAN; Iredia Osifo Esq.; F^{ei}d Orbih, Esq.; S. O. Agwinede, Esq.; S. O. Odiase Esq. H.O.W. Idahagbon, Esq., C. N. Enoma, Esq.; Osaze Ojo, Esq. Osaro Osemwingie, Esq.

Comrade Adams Oshiomhole and AC are the 1st and 2nd respondent in both interlocutory appeals, and in their briefs prepared Abdullahi Ibrahim, CON, SAN; Prof. Itse Sagay, SAN; Olisa Agbakoba, SAN; Rickey Tarfa, SAN; Adeniyi Akmtola, SAN; and Adetunji Oyeyipo, SAN five issues for determination were formulated for them in CA/179A/2007, and seven issues were insulated as arising for determination in CA/179B/2007.

Basically, all the issues canvassed can be subsumed into four core issues -

1. Whether the petition was signed as required by law (INEC's issue 1 in 179A/07, Osunbor/PDP's issue 3 in 179B/07, Oshiomhole/AC's issues 1 & 2 in 179A/07 & issue 3 in 179B/07).
2. Whether the tribunal was right to hold that the scores of the candidates at the election were reflected on the petition (INEC's issue 5, Osunbor/PDP's issue 1, Oshiomhole/AC's issue 4 in 179A/07 & issue 4 in 179B/07)
3. Whether having struck out the 23rd - 214th respondents on the ground that they are non-juristic persons, the Tribunal was right to hold that the averments relating to them in the petition could not also be struck out (INEC's issue 6, Osunbor/PDP's issue 2, Oshiomhole/ AC's issue 5 in 179A/07 & issue 2 in 179B/07)
4. Whether the tribunal pre-judged the substantive petition at the interlocutory stage of the proceedings ((INEC's issue 3, Osunbor/PDP's issue 7, Oshiomhole/AC's issue 5 in 179A/07 & issue 6 in 179B/07)

On the issue of signature, the two sets of appellants urged the Tribunal to strike out the petition because it should have been signed by the petitioners themselves or one of the six senior counsel listed at the foot of the petition and not by a counsel whose name was not listed at the foot of the petition.

In over-ruling the objection on signature, the tribunal held follows -

"We have read the affidavits in support - and we find that none of the deponents claims to know the signature of any of the six Senior Advocates whose names are listed at the foot of the petition. There is no deposition that the deponents had ever seen any of them writer his signature or that they are familiar with the signature of any of them. There is nothing to convince us that the signature on the petition is not that of one of the six senior counsel, It is he who asserts that must prove. *It is possible that the signature on the petition is that of one of the senior counsel listed at the foot of the petition and it may belong to a junior counsel from any of the Chambers of the Senior Advocates. We are satisfied-that there is a signature on the petition, but whose signature is it? In Ibrahim vs Sheriff (2004) 14 NWLR (Pt. 832); 43* where only one out of three petitioners signed the

petition, the Court of Appeal held it was proper. It further held that the only situation where a petition can be struck out for non-compliance with paragraph 4(3)(b) of the First Schedule to the Act is where neither of the petitioners nor their counsel signed the petition".

The Tribunal further held that "even if the petition was™ signed by any of the six senior counsel but *by* a junior counsel in any of their chambers, with authority of the Senior Advocate, there has been compliance with paragraph 4(3)(b) of the First Schedule" It is this conclusion that the appellants are challenging in this Court INEC and its officers argued that the "Tribunal presumed facts not based or supported by any legal evidence or the Law of Evidence and made an unsolicited defence for the petitioners. It was also submitted that Tribunal acted on speculation; that it was not in dispute that none of the petitioners signed the petition; that it was palpably

wrong of the Tribunal to hold that a junior in the chambers of the six Senior Advocates must have been authorized to sign the petition without evidence to show this; that non-compliance with the mandatory provisions of paragraph 4(3)(b) of the First Schedule was not a mere technicality but a fundamental vice, which renders the petition incompetent; that the provision of paragraph 49 (1) of the First Schedule to the Electoral Act cannot cure the misdeed created by the petitioners in contravention of paragraph 4(3)(b) of the same schedule to the Act; and that the decision in *Ibrahim v. Sheriff* cannot be used, to give credence to the non-compliance with paragraph 4(3)(b) of the First Schedule to the said Act. Senator Prof. Osunbor PDP argued in the same vein, and added that -

"The decision of the Tribunal - is not predicated on any of the materials placed before it. It proceeded with respect on a long voyage of investigation on its own, conjuring facts in the process and arriving at a decision based on the facts conjured by it. The days of Christopher Columbus or Richard Landers are gone and the Tribunal cannot afford that luxury and voyage of discovery but since the Tribunal had embarked on that voyage and thank goodness that it has not suffer(sic) the fate of Christopher Columbus and Richard Landers. It is only appropriate for this Court to intervene and stop that voyage. We submit with respect that the Tribunal was performing the function of an investigator. We submit strongly that it is trite law that Courts must predicate their decisions on the materials placed before it and not on extraneous facts".

It was also argued that the Electoral Act does not stipulate the signing of a petition by proxy and it is the petitioner or his solicitor who must sign it. Comrade Adams Oshiomhole and AC however countered that the question of who actually signed the petition is a question of fact and not law, thus it is incumbent on the appellants to prove that none of the solicitors listed at the foot of the petition signed the petition; that the fact supplied in the affidavits are so unreliable that no tribunal can rely on them to sustain the assertion that they, made; that there is no dispute that the petition was signed; and that the tribunal did not "rebate or reprobate but merely considered the submission of the list set of appellants where it was stated -

"The signature of "Odubele" is not named as one of the solicitors. It is immaterial if such name exists as a junior, once he is not named thereto, it shows the petition was not signed by the solicitor, as it is not in dispute that the petitioner did not sign."

This issue is easily resolved; the appellants are not saying that the petition was not signed, they are only contending that the signature on it looks like that of one "Odubela" or "Odubele" whom not listed as a solicitor. True enough, a court must act on the material placed before it but where is the material before the Tribunal enable it determine who signed the petition? There was none the Tribunal did not find any and this court cannot either. To the contrary the Tribunal stated that it "had a critical look at the original copy of the Election Petition" and found it difficult "to read the signature as "Odubela" or "Odubele" because from the scribbling which is barely legible, it is difficult to read the name as either Odubela or Odubele, What is more, it is clear that the tribunal over-ruled the objection because it was satisfied that the petition was signed and for no other reason. It held -

"We are not unaware of such cases as *Williams v. Tribunal (supra) and Nwancho vs Elem* (2004) All FWLR (Pt. 225) 93 where the Court of Appeal held that an unsigned petition is a dud document under paragraph 4(3)(b) and therefore struck out the petition. In the instant case, we are satisfied that the petition was signed. In case we are wrong however and in view of the decision in *Dalhatu vs Dikko (supi)* we shall tread the path of caution and hold that even if the petition was not signed by any of the six senior counsel but by a junior counsel in any of their Chambers, with authority of the Senior Advocate, there has been compliance with paragraph 4(3)(b) of the First Schedule"

The tribunal is right; the situation in this case is not on all fours with that in *Williams v. Tinubu* and *Nwancho v. Elem* cited by the appellants. The petition in this case was actually signed while the petitions in those cases were not signed. In treading the path of caution and adding the comment about a junior counsel signing the petition, the tribunal appeared to have stirred up more controversy than is necessary, but the bottom line is that it over-ruled the appellants' objection because the petition was actually signed and not because a junior counsel was authorized by a senior counsel-sign same. Even if that is not enough, the Tribunal further held:-

"It will in our view, amount to doing justice by technicality if this petition were struck out or dismissed] because it was not signed by one of the Senior Advocates, whose names are listed at the foot of the^ petition. The days of justice by technicality which is as bad as injustice are over. Justice by technicality has long died in Nigeria for good and has since been buried. The trend these days is to strive to do substantial justice on the merit of each case"

The tutorial is right: the day of justice by technical are definitely over. The petition in this case was signed and to dismiss the petition over. The petition on the ground that there is no evidence that any of the six seniors counsel listed at the foot of the petition signed it is to fall the trap of the undue technicality. This issue therefore fails and is resolved against the two set of appellants. The other issue raised by the appellant is that the scores, and it is hinged on the avernt in paragraph 12 of the petition, wherein it was stated -

"Your humble petitioners aver that the following scores were said recorded for candidates/parties that took part in the said Gubernatorial Elections –

A	AC candidate – 1 st respondent	197,472
B	PDP – 3 rd respondent	329,740
C	AD	858
D	ADC	349
E	ANPP	8,253
F	APGA	208
G	BNPP	137
H	DPP	623
I	FRESH	187
J	NCP	302

K	PPA	179
L	PPP	748
M	DPA	5.”

The appellant’s complaint at the tribunal was that the petitioners did not state the scores of the candidates who participated at the Governorship Election in Edo State contrary to paragraph 4(1)(c) of the first schedule. However ,the tribunal overruled and held as follows –

“We have no doubt that the parties know, from their pleadings, who the AC and PDP candidate were in the governor ship election- There is no misgiving that the 1st petitioner was the AC sponsored governorship candidate in the same way as the third respondent was the candidate sponsored by the 4th respondent(PDP) for the governorship candidate was 1st respondent and scored 197,427 votes, can in our view, be cured or corrected either by an application to amend or by evidence at the hearing. In our view and from the state of the pleadings in this petition, the respondents cannot claim to have been misled by the avoidable error in paragraph 12 of the petition, which we believe was due to the inadvertence of the counsel who drafted the petition. The mistake of counsel should not be visited on the petitioners. We are satisfied from paragraphs 12 and 15(1) of the petition that the scores of candidates who participated in the governorship election in Edo State are pleaded as indicated and tabulated in paragraph 1 2 A - M. There is therefore substantial compliance with paragraph 4(1) (c) of the First Schedule.”

The argument of INEC and its officers is that the petitioners ought to have stated all the scores of the candidates and not the scores of the parties, thus the Tribunal was wrong to hold that they actually stated the scores; and that the reference to the AC candidate as "1st espondent" and PDF as the "3rd respondent" in paragraph12 of the petition is not a mere misnomer but a total contravention of the provisions of the Electoral Act. Senator Prof. O. Osunbor and PDF argued along the same lines, and further submitted that Comrade Adams Oshiomhole and AC - "are groping and do not know then their case, and that it is a trial and error method, which this honorable court cannot allow". Comrade Adams Oshiomhole and AC countered that a look at the petition shows that the appellants' contention is without basis because in its paragraph 11, 12 and 15(1) they stated the scores of all the candidates/parties that participated in the said election. This issue clearly lacks merit; apart from what are clearly mistakes in paragraph 12 of the petition, the appellants appear to have lost sight of the fact that it is the Electoral Act of 2006 that is in operation not that of 2002.

The distinction between a party and its candidate is certainly not as clear cut as it was under the Electoral Act, 2002. and this was highlighted by the Supreme Court in *Amaechi v. INEC* (2008) NWLR (Pt 1080) 227, where in construing section 221 of the 1999 Constitution, it held as follows -

"Without a political party a candidate cannot contest, The primary method of contest for elective offices is therefore between parties. If as provided in section 221 (of the 1999 Constitution) it is only a party that canvasses for votes. It follows that it is the party that wins election, A good or bad candidate may enhance or diminish the

prospect of his party, in winning but at the end of the day, it is the party that wins or loses an election."

Obviously, it would fly against the prevailing trend for this court to accede to the appellants' contention that the petition should be struck out because the petitioners stated the scores of the parties and not its candidates. Moreover, stating that the 1st petitioner is the 1st respondent and that PDP is the 3rd respondent in paragraph 12 of the petition is not a fundamental error, and the Tribunal was right to hold as it did. There is no question that the scores of candidates who contested the election were pleaded and tabulated in paragraph 12A-M of the petition. This issue therefore fails.

The third issue identified for resolution, is whether the tribunal was right to hold that the averments relating to the 23rd - 214th respondents, who were struck out for being non-juristic persons, could not also be struck out because they are presumed to be agents of INEC and caught up by the *proviso* to section 144(2) of the Electoral Act, 2006, which stipulates that -

"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, a presiding officer, a returning officer or any other person who took part in the conduct of an election, such officer or person should 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*" (*Italics mine*)

The Tribunal struck out the 23rd - 214th respondents, who were an amalgamation of presiding officers from different polling stations, against whom different allegations about the conduct of the election were made. But in refusing to strike out the averments relating to them, it held that;

"By the *proviso* to section 144(2) of the Electoral Act 2006, the non-joinder of the presiding officers of all the polling stations will not and cannot operate to, avoid the petition. This is because they are presumed in law and in fact to have been joined or are deemed joined as respondents once INEC itself is made a party in the petition. The presumption of their joinder is irrefutable (*sic*), once they are shown to be agents of INEC which itself has been sued. The *proviso* to section 144(2) of the Electoral Act, 2006 cured the mischief in section 133 (3) of the Electoral Act, 2002. It was the absence of this proviso in the Electoral Act, 2002 that caused the striking out or outright dismissal of several meritorious petitions after the 2003 general elections. Paragraphs 16, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 33, 34, 36, 45, 53, 60 and 67 of the petition contain allegation corrupt practices which are not restricted to the 23rd - 214th respondents alone. The petitioners' complaints in these paragraphs are allegations against some of the subsisting respondents like the 1st, 2nd, 33rd, 4th 22nd respondents jointly or severally. The averment in those paragraphs of the petition certainly set out the legal rights of the petitioners to contest an election and the obligations of some of the respondents, especially INEC to conduct a free, fair and credible election the averments further set out facts which constitutes infractions of the petitioners' legal rights or failure of the respondents to fulfill their obligation in the conduct of the

election in such a way that if there is no proper traverse or defence the petitioners will succeed in the reliefs or remedies which they are seeking. In such a situation, we cannot strike out those paragraphs of the petition. The application to strike out those paragraphs of the petition fails and is refused."

The contention of INEC and its officers in CA/179A/07 is that, all the averments affecting the 23rd - 214th respondents ought to have been discountenanced by the tribunal, particularly as the paragraphs centered on what purportedly happened before the said election of 14th April, 2007. This court was urged to hold that section 144(2) of the Electoral Act, 2006 cannot validate the sustainability of the said paragraphs of the petition. Senator (Prof.) Osunbor and PDP also argued that the proviso to section 144(2) of the said Act is inapplicable to the peculiar facts of this case. They further submitted that -

"... A thing that is not a juristic person cannot be an agent. An agent must have legal capacity to be able to . act for another. The submission of the appellants at the Tribunal below was that by amalgamation, the 23rd -214th respondents are non-juristic persons and consequently their names and all averments relating to them should be struck out. We submit that having upheld the aforesaid submission of the appellants, it was wrong for the Tribunal below to hold on to the proviso in section 144(2) to avoid striking out averments relating to the 23rd - 214th respondents who had been struck out"

Comrade Oshiomhole and AC however argued in reply that the reasoning and conclusion of the Tribunal cannot be faulted; that in one breath the appellants are saying that the electoral officers are necessary parties and in another breath they say that they are (non-juristic persons; and that what the Tribunal did was to analyze the pleadings in the petition and apply the relevant law to see whether the paragraphs can stand or not. Again, I agree; this issue clearly lacks merit. To start with, *the proviso* to section 144(2) of the Electoral Act, 2006 is clear and unequivocal that electoral officers, presiding officers and returning officers are agents of INEC and as long as INEC is a party to the petition, the fact that they were not joined as --parties themselves will not operate to void the petition, which as the Tribunal observed, was what obtained under the Electoral Act 2002. 'in this case, the petitioners had joined all the presiding officers in each ward in each of 16 local government areas as respondents as if all the Presiding Officers in each such ward were one respondent. •The two sets of appellants objected to such amalgamation, and the

Tribunal held that -

"The lumping together of several presiding officers from unspecified and unidentified polling booths in a number of wards in the different local governments makes the 23rd - 214th respondents non juristic persons. Section 144(2) of the Electoral Act, 2006 provides for the joinder of "a presiding officer" who took part in the conduct of an election and whose conduct the petitioner complains of. There is no provision in the Electoral Act, 2006 which permits the amalgamation of presiding office or the grouping of a team of presiding officers as respondents in an election petition. See Chief Ugwu Nwafor Ujam v. Chief Ken Nnamani (2005) All FWLR (Pt.252) 1580 where it was held by the Court of Appeal that it is imprecise, nebulous and at large to sue a team of respondents as presiding officers. In each of the 23rd - 214th respondents between 10 and 30 presiding officers from unspecified polling booths were lumped together as respondents. This, in our view, is improper

In effect, the presiding officers who were declared non-juristic persons were struck out as respondents because they were lumped together, but the fact that they were so struck out did not impinge on their status as presiding officers, and the fact that they are not parties to the petition will not void the petition because as presiding officers they are agents of INEC.

In other words, the 23rd - 214th respondents did not cease to be agents of INEC in their individual capacities and since INEC party to the petition, they come within the contemplation of proviso to section 144(2) of the Electoral Act, 2006, which says that their non-joinder as parties to the petition "will not on its own open to void the petition if INEC is a party". The averments against them in the said paragraphs of the petition subsist, and since the averment also concern other respondents who were not struck out as parties the Tribunal was therefore right to hold as it did and refuse to strike out the averments in the said paragraphs of the petition. This issue therefore fails and is resolved against the two sets of appellants.

Senator (Prof) O. Osunbor and PDF also complained that the 76th respondent is a non-juristic person and ought to have been struck out. The petitioners had sued the 76th respondent as East West LGA instead of Esan West LG A, and in ruling that it was a misnomer, the Tribunal held -

"East West Local Government sued as the 76th respondent is said by the petitioner's counsel to be a. typographical error, instead of Esan West. This is certainly a misnomer which can be cured by the leave of the Tribunal at any stage of the proceedings even by an oral application to amend the name of the local government. We agree with learned senior counsel for the petitioner that East West Local Government a typographical error as there is no allegations of any wrong doing against East-West Local Government in the petition. However in paragraphs 15 (1) and 16 (xii), 18,33 and 69 of the petition. allegations are made against Esan West Local Government Presiding officers"

Senator (Prof) O. Osunbor and PDP however contend that the reason advanced by the tribunal is not tenable in law; that the decision is predicated on assumption and speculation unsupported with hard facts; and that there was no application for amendment, rather the petitioners' counsel informed the tribunal in a cavalier Banner that the 76th respondent came into being as a result of error, and the Tribunal surprisingly accepted the explanation and held as it did Comrade Adams Oshiomhole and AC responded that the tribunal carefully perused the petition before it and came to the only reasonable conclusion that it could.

The Tribunal is right; listing the 76th respondent as East West LGA instead of Esan West LGA is merely a typographical error, and it is an error that can easily be amended, even on an oral application, lies, there is no East West Local Government in Edo State but there is an Esan West Local Government, and there is no question that the 76th respondent listed in the petition is Esan West Local Government. Besides, the appellants have not shown in what way they have been prejudiced or suffered any miscarriage of justice from the error. This issue clearly lacks merit and therefore fails.

The last issue for determination in the interlocutory appeals is \whether the Tribunal prejudged the substantive petition at the interlocutory stage of the proceedings. It is the contention of INEC and its officers that the core issues which the parties submitted for adjudication were decided by the Tribunal in its ruling of 4th May, 2007 on the preliminary objections. This court was referred to extracts from the tribunal's ruling, as follows -

"Allegations that members of a particular political party were used as principal and adhoc staff of INEC either as electoral officers, supervisors, presiding officers, pollclerks, returning officers and collation officers in an election or that a particular party used thugs to snatch ballot papers, ballot boxes and other electoral materials to secure unlawful votes, all amount to corrupt practices. These allegations are sufficient to invalidate. an election, if and only if, they can be proved by credible evidence. Allegations that the 3rd and 4th respondent by their agents used offensive weapons during „ election, shut (*sic*) into the air with guns and remove election materials or that ballot papers were they were thump (*sic*) printed and stuffed into ballot boxes in order to secure unlawful votes all amount to corrupt practices *and must have happened during the time the election, was being conducted*. These are complaints in the conduct of the election and the Tribunal is competent to hear, look into them and determine their veracity genuineness or authority." (*Italics theirs*) "Paragraph 16, 17, 18, 19, 29, 30, 60, 63, and 64 *all elaborate* the series of corrupt practices alleged to have. been perpetrated by the 3rd and 4th respondents at specific locations during the election: They should therefore remain.

Paragraphs 17-57 of the petition are neither vague nor speculative. They concern *specific allegations corrupt practices which the respondents were said to have perpetrated in Edo Central Constituency comprising five local Governments namely. Esan South - East, Esan North - East, Esan Central, Esan West and Igueben where voting did not take place but where ballot stuffing into ballot boxes was said to be the order of the day*" (*Italics theirs*)

"Again paragraphs 62, 63, 64, 65 and 66 of the petition! did not violate section 144 (2) of the Electoral Act, 2006 because the complaints and allegations in those paragraphs of the petition were not that Martins Okofulaju, Chief Tony Anenih and Elder Odion Ogbesia participated in the conduct of the election held on 14th April, 2007 but that their action in recruiting members of the 4th respondents (PDP) as presiding officers and pool clerks was a violating (*sic*) of the Electoral Act, 2006 and *amounted to corrupt practices*". (*Italics theirs*)

It was further submitted that there is no gainsaying the fact that the above pronouncements by the Tribunal went too far into the substantive petition. On their own part, Senator (Prof) O. Osunbor and PDP complained that the Tribunal adopted the decision of ADENIJI JCA in *Dr. Chinedu Iwu v. Nwugo* (2004) 9 NWLR (Pt. 1-54 at 70) that a petition would not be struck out when there is overwhelming allegation contained therein, and submitted that by subscribing to the word "overwhelming" the tribunal had made up its mind on what to do before hearing the preliminary objection. Comrade Adams Oshiomhole and AC however argued that the contention of INEC and its officers is without basis; that except the English language had changed its meaning, there is nothing in the above quoted statements suggesting or indicating that the Tribunal determined any matter or issue that should or would arise for determination at the trial; that the tribunal did not make any findings but merely interpreted the paragraphs of the petition, which the appellant raised for its consideration; that any allegation that a court or tribunal had prejudged a matter is a serious matter because it is on that bothers on fair hearing i.e. likelihood of bias; and that what the appellants did is to quote certain portions of the ruling and give them a slanted

interpretation or quote them out of context, which is most unfair to the learned judges of the tribunal. As to the argument proffered by Senator (Prof.) Osunbor and PDP, they submitted that the appellants appear to have deliberately quoted the use of the word overwhelming" out of context; and that the reference to *Chinedu Iwu v. Nwugo (supra)* was not even the reason for the Tribunals' decision.

I agree; the appellants appear to be making a mountain out of a molehill. Yes, the Tribunal or any Court whatsoever has a duty not to determine substantive issues at the stage of considering an interlocutory application - see *Hashim v. Minister F.C.T.* (2002) 15 NWLR (Pt. 789) \Ogunsola v. Usman (2002) 14 NWLR (Pt.788) 636; *Akapo v. Hakeem-Habeeb* (1992) 6 NWLR (Pt.247) 266; *North-South Petroleum Nig. Ltd. v. F.G.N.* (2002) 17 NWLR (Pt. 797) 639, See also *Madubuiké v. Madubuiké* (2001) 9 NWLR (Pt.719) 698 at 707 para, G where this Court per Fabiyi, JCA observed -

"As a general rule, it must be stated succinctly that live issues in the case must be left for the substantive trial of the suit. If live issues are tried at the interlocutory stage, there will be nothing left for the trial at the substantive hearing of the suit."

But in this case, no pronouncements were made by the tribunal on any live issues at that stage when it was considering the appellants' objections. The record shows that it was when resolving the issue non-joinder of necessary parties as respondents that the Tribunal slated as follows -

"Learned senior counsel for the 3rd and 4th respondent referred to paragraphs 16(xiii), 17, 62, 63, 64, 65 \$ 66 and of the petition and urged us to strike them out as they all contain allegation of wrongdoing against people who are named for having participated in the conduct of the election but who were not made respondents in them the petition to answer the allegations against the Section 145 of the Electoral Act, 2006 states the group on which an election may be questioned to include "that the election was invalid by reason of corrupt practice or non-compliance with the provisions of the Electoral Act 2006. See section 145 subsection (l)(b). Allegations that members of a particular political party were used as principal and adhoc staff of INEC either as electoral officers, supervisors, presiding officers, poll clerks returning officers and collation officers in an election or that a particular party used thugs to snatch balk papers, ballot boxes and other electoral materials t secure unlawful votes, all amount to corrupt practice *These allegations are sufficient to invalidate an election if and only if they can be proved b\ credible evidence^* Allegations that the 3rd and 4th respondents b\ their, agents used offensive weapons during the election, shut (*sic*) into the air with guns and removed election materials or that ballot papers where they were thump (*sic*) printed and stuffed into ballot boxes in order to secure unlawful votes all amount to corrupt practices and must have happened during the time the election was being conducted. *These are complaints in the conduct of the election and the Tribunal is competent to hear, look into them and determine their veracity, genuineness or authority: (Italics mine)*

The tribunal continued as follows -

"The cases of *Jang v. Dariye* (2004) FWLR (Pt.194) 214; (2003) 15 NWLR (Pt.845) 436 and *Yusuf v. Obasanjo* (2005) 18 NWLR (Pt.956) 96 are inapplicable. In our view,

only paragraphs 43 and 61 of the petition relate to matters which happened before the election. The Tribunal cannot pry into matters that had occurred before the election. Paragraphs 43 and 61 are therefore struck out. Paragraph 16, 17, 18, 19, 29, 30, 60, 63, and 64 *all elaborate the series of corrupt practices alleged to have been perpetrated by the 3rd and 4th respondents at specific locations during the election: They should therefore remain, paragraphs 17- 57 of the petition are neither vague nor speculative. They concern specific allegation of corrupt practices which the respondents were said to have perpetrated in Edo Central Constituency comprising five local governments namely, Esan South - East, Esan North - East, Esan Central, Esan West and Igueben where voting did not take place but where ballot stuffing into ballot boxes was said to be the order of the day. " (Italics mine)*

Clearly, the portion of the ruling complained against were not quoted out of context but were misconstrued to mean the direct opposite of things. The choice of words used by the tribunal –“allegation”, “if and only if they can be proved by credible evidence”, “alleged to have been perpetrated” “said to be” etc., clearly show, that it did not determine the substantive petition or touch on any live issues at that early stage of the proceedings. The tribunal merely analyzed some paragraphs of the petition to see whether they should be Struck out or not. There were no pronouncements, and no findings were made by the tribunal on the merit or otherwise of the allegations contained therein. All it said were that some of the paragraphs allege corrupt practices, which should be looked into at the trial and it struck out those that it could not look into, nothing more and nothing i. The other set of appellants' grouse about the tribunal's use of word "overwhelming" is hinged on the Tribunal's conclusion in its ruling-

"We commend learned senior counsel for a very scholastic dissection of the petition almost paragraph by paragraph and word for word all in an attempt to have this petition struck out or dismissed at all costs and in its early stage, The vogue these days is to strive to do substantial justice even handedly to parties according to the merits of their case and not justice by technicality. We are sure that if the learned senior counsel had directed his mind at this, he certainly would not have dissipated so much energy and or spent so much time on these preliminary objections, all in an attempt to kill this petition at its embryonic stage. *Having said this, we feel it will be apt to remind counsel about what Adeniji, JCA, once said about the right of petitioner to be heard in an election petition. Hear him, in Chinedu Iwu v. Oregon Nwugo (2004) 9 NWLR 877) 54 at 71 paras. A-B; 70, para. D.*

'The Nigerian judicial system would not permit a plaintiff to be driven from the Judgment seat without any Court having considered his right to be heard excepting in cases where the cause of action was obviously and almost incontestably bad *In the instant case, there is no way of verifying the truth of the overwhelming allegations contained in the (petitioners) appellants' petition except by way of a full trial, whereby the veracity of the petition of the petitioner is tested through the rigours of cross-examination.*'

We entirely agree with the above observation and adopt it as ours."

I have to agree with the 1st and 2nd respondents that it is most unfair and in absolute bad taste for learned senior counsel to lift one word "overwhelming" out of the tribunal's conclusion to canvass the issue raised. The Tribunal's reference to Adeniji, JCA's observation in *Dr. Chinedu Iwu v.*

Nwugo (supra) had nothing whatsoever to do with the petition itself. The tribunal merely expressed its view that the preliminary objections were unnecessary and it could not have struck out the petition without a full trial, which is the point Adeniji, JCA was making in *Iwu v. Nwugo (supra)*. Counsel must remember that they are first and foremost Ministers in the Temple of Justice and owe a duty to the Court to assist it in doing justice. To lift a word out of context and create an impression of the Tribunal that is not true is most unfortunate and it is not what is expected from counsel. Be that as it may, the issue clearly lacks merit and it therefore fails as well.

The end result of the foregoing is that all the issues raised by the two sets of appellants in the interlocutory appeals are resolved against them. The interlocutory Appeals Nos. CA/179A/07 & CA/ 179B/07 therefore fail. They lack merit and are hereby dismissed.

Pre-hearing sessions commenced after the objections were overruled, and in its report on the sessions, the Tribunal set out the five issues agreed on by the parties as arising for determination in the petition -

1. Whether or not the 3rd respondent was duly elected by majority of lawful votes cast at the Governorship election held in Edo state on 14th April, 2007 and whether the 1st and 2nd respondents were right to have declared and returned him as the winner of that election.
2. Whether or not the election of the 3rd respondent as Governor of Edo State can be or was invalidated by reasons of corrupt practices and substantial non-compliance with the Electoral Act, 2006.
3. Whether or not the petitioners have proved beyond reasonable doubt the criminal allegations of fraud and falsification of results contained in their petition in accordance with section 138 (1) of the Evidence Act.
4. Whether or not the 1st petitioner has proved that he scored the highest number of valid and lawful votes cast at the Governorship election held in Edo State on 14th April, 2007 and satisfied the requirements of the Constitution and the Electoral Act, 2006 is entitled, to be declared as the elected Governor.
5. Whether the tribunal can nullify the Governorship election held in Edo State on 14th April, 2007 on grounds of corrupt practices and non-compliance with Electoral Act.

At the hearing of the substantive petition, Comrade Adams Oshiomhole and AC called 61 witnesses; INEC and its officers called witnesses; and Senator (Prof) O. Osunbor called 32 witnesses, the documentary evidence admitted by the Tribunal were marked as exhibit 1 -117. At the close of trial, final written addresses were filed and adopted on the 18th of February 2008. The Tribunal here after delivered its Judgment on the 20th of March 2008, wherein that "the petition succeeds" and ordered as follows –

1. The 1st and 2nd petitioners polled the highest number of valid votes cast at the Governorship Election in Edo State on 14th April, 2007.
2. The 1st petitioner Comrade Adams Aliyu Oshiomhole is hereby declared as the elected Governor of Edo State of Nigeria being the candidate who has score highest number of valid votes cast and has satisfied the requirements of the Constitution of Nigeria, 1999

and the Electoral Act, 2006.

3. It is ordered that the certificate of return issued to Senator (Prof) Oserheimen Osunbor as elected Governor of Edo State is hereby withdrawn and nullified. The 2nd respondent is hereby ordered to issue the petitioner Comrade Adams Aliyu Oshiomhole certificate of return as the elected Governor of Edo state.

Dissatisfied with the Judgment, Senator (Prof.) O. Osunbor filed a notice of appeal with 12 grounds of appeal, which was replaced with a notice of appeal containing 80 grounds of appeal. He later filed an application, which was granted on the 25th of September 2008, to amend same by adding two additional grounds of appeal. Senator (Prof) O, Osunbor therefore has 82 grounds of appeal in his Appeal No. CA/B/EPT/91/2008. Eleven issues for determination were formulated from the 82 grounds of appeal in the appellant's brief prepared by L. O. Fagbemi, SAN; Chief E. L. Akpofure, SAN; Dr. Alex A. Izinyon, SAN; D. D. Dodo, SAN; M. B. Adoke, SAN; S. O. Agwinede, Esq.; and P. A. Ogbor, Esq., including issue 1-

"Whether the tribunal was right in its conclusion that the various allegations of thuggery, malpractices and violence were established, when necessary parties against whom such allegations were made, were not made parties to the proceedings?"

Comrade Adams Oshiomhole objected to the said Issue in his amended 1st respondent's brief settled by Chief Wole Olanipekun SAN; Chief Adeniyi Akintola, SAN; Prof. Yemi Osinbajo, SAN, A.J. Owonikoko, Esq.; Biodun Amole, Esq.; and Gabriel Uduafi Esq., wherein it was argued that grounds 4, 6, 14, 15, 17, 19, 23 & 50 of the grounds of appeal on which the issue is based are incompetent on the ground that they are caught by the doctrine of issue estoppel, and constitute an abuse of the court process as the same complaint in the interlocutory appeals cannot be made the basis for complaint in the substantive appeal. AC also proffered the same arguments in its objection to the same issue 1 in its 2nd respondent's amended brief prepared by Abdullahi Ibrahim, SAN; Professor Itse Sagay SAN; Rickey Taifa, SAN; Emeka Ngige, SAN; Adetunji Oyeyipo, SAN; Wole Iyamu, Esq.; Osariodion Ogie, Esq.; Efosa Urhoghide, Esq.; Igbokwe George, Esq.; J. O. Odubela, Esq.; Rotimi Oguneso, Esq.; Bamidele Aturu, Esq.; Aruna Gregory, Esq.; Adaeze Ezegbu (Miss); Chisa Anyanwu (Mrs) and Ben Awurum, Esq., I agree, the issue of whether the petition is competent or not and whether officials of INEC should have been joined or not has been dealt with in the interlocutory appeals earlier dismissed, and cannot therefore be the subject of the substantive appeal. The objection to issue 1 is therefore upheld and grounds 4, 6, 14, 15, 17, 19, 23 and 50 of senator (Prof.) Osunbor's grounds of appeal and the issue 1 formulated therefrom are struck out. All the same, ten issues for determination were formulated in Comrade Adams Oshiomhole's amended 1st respondent's brief, and AC also formulated its own ten issues in its 2nd respondent's amended brief.

But that is not all, PDP also appealed against the Tribunal's decision with a notice of appeal - containing 43 grounds of appeal in its Appeal No. CA/B/EPT/92/2008, ten issues for determination were formulated in the appellant's brief prepared by Chief Akin Olujinmi, SAN; Yusuf Ali, SAN; E. C. Ukalla, SAN; J. O. Agbiimien, SAN and Ighodalo Imadegbelo, SAN. Again, Comrade Adam Oshiomhole formulated ten issues for determination in his 1st respondent's brief settled by the same counsel as in CA/B/EPT/ 2008. AC formulated nine issues in its 2nd respondent's brief settled by the same counsel as in CA/B/EPT/91/2008. INEC and its officers were not left out, they also appealed against the judgment with a notice of appeal containing 21 grounds of appeal, and in

their Appeal No. CA/B/EPT/93/2008, thirteen issues for determination were formulated in the appellant's brief settled by Kanu G. Agabi, SAN, Adebayo Adelodun, SAN and Roland Otoru, SAN. Comrade Adam Oshiomhole formulated nine issues in his 1st respondent's brief prepared by the same counsel as in the other appeals. AC formulated fourteen issues in its 2nd respondent's brief prepared by the same counsel. After scrutinizing the complaints in the various grounds of appeal filed by the appellants in each of the appeals, the issue formulated there-from and the arguments proffered thereon by the parties, it is my view that the issues that call for determination in the appeals boil down to the following -

1. Whether in the circumstances of this case, the Tribunal was right to use the evidence of Olawale Kayode, the Head of Operations of INEC in Edo State, who testified as PW47, in arriving at its decision.
2. Whether the Tribunal applied the right standard of proof in arriving at its decision.
3. Whether the Tribunal was right to rely on Charts A to drawn up by the petitioners in coming to its conclusion
4. Whether or not the Tribunal declared the 1st petitioners as winner of the election on the basis of 4 local Governments only.

As to the first issue, PW47 is a key witness in this case, thus oral testimony *vis-a-vis* the documentary evidence tendered through him and the conclusion of the Tribunal therefrom requires looking at in some detail, PW47, Olawale Kayode, is the Head of Operations of INEC in Edo State, and he testified that he was delegated by the Resident Electoral Commissioner (REC) to appear before the Tribunal. A number of documents were admitted in evidence through him, including bags containing ballot papers used in Uhunmwonde LGA, Esan West LGA, Etsako West LGA, Ovia South-West LGA, Owan East LGA, Igueben LGA, Esan Central LGA, Ovia North-East LGA, Esan North East LGA, Orhionmwon LGA, Esan South-East LGA and Owan West LGA, which were marked as exhibits 88 to 99 respectively. Each time the said exhibits 88 to 99 were tendered through PW47, he told the Tribunal that he did not know the number of ballot papers in the bags. Chief Akintola SAN then made the following application to the Tribunal -

"I humbly apply that the number of ballot papers in each Local Government be counted by this witnessing. the presence of Court Officials and the representative of counsel for the petitioners and the respondents.

Mr, Otoru, SAN objected on the ground that "document tendered and admitted in Court cannot be examined or re-examined extra judicially and outside the court". Dr. Izinyon SAN added that "any exercise to bring about the number of ballot papers will be contrary to the evidence earlier given by this witness", and that "documents are admitted in evidence and are read or taken to be read". Chief Akintola SAN replied that the "application to court the documents is to read them", citing Order 38 rule 21 of the Federal High Court (Civil Procedure) Rules 2000, The Tribunal agreed and held -

" It is true that this witness said in his evidence in chief that he did not know the number of ballot papers in the ballot boxes and bags. This probably was because he has not counted them. Now that the ballot papers in boxes and bags have been tendered and admitted in evidence, they become documents in the

custody of the Tribunal. The Tribunal can, in our humble view, order that the ballot papers be counted. This we shall readily do and without any hesitation. We overrule the objections of learned senior counsel for the respondents and order that the ballot papers be counted local government by local government until it is completed. The counting shall be done by the witness PW47 who is still testifying. He is to be assisted by the Assistant Secretary of the Tribunal, Mallam Lawal Mohammed Adamu and such counting shall be in the present (sic); of representatives of counsel to the parties who must themselves be counsel not politician. " (Italics mine)

After the ballot papers were counted, PW47 reported to the Tribunal that-

"The ballot papers have now been counted and I have written the figures down on a sheet of paper. This is the result of the re-counting. Admitted in evidence without objection as exhibit 105. The number of votes used and unused for Esan Central LGA is 15,378. In exhibit 70 (Form EC8D) the number of votes recorded for Central LGA is 30,154. After I had counted the ballot papers admitted for Esan Central LGA (exhibit 94), I discovered another bag containing ballot papers inside in Esan Central LGA at INEC main store (strong room) in Benin on 25th November, 2007. That bag has been brought to the Tribunal, It contains the ballot papers used in the Governorship election. The number of ballot papers used and unused for Owan West LGA according to exhibit 105 is 18,974. In exhibit 70 the number of ballot papers for Owan West is 19,991. For Esan North-East LGA the number of used and unused ballot papers as per exhibit 105 is 29,501. In exhibit 70 the number of ballot papers used and unused for Esan North-East is 33,412. The number of ballot papers used and unused for Igueben LGA in the Governorship Election as per exhibit 105 is 19,394 and in exhibit 70 the figure is 77,703. For Esan South East LGA the number of used and unused papers as per exhibit 105 is 37,614 and in exhibit 70 the figure is 36,230. For Esan West LGA the number of used and unused ballot papers counted as per exhibit 105 is 46,069 and in exhibit 70 INEC recorded 35,509. For Ovia South- West LGA the number of used and unused ballot papers counted as per exhibit 105 is 31,447 and in exhibit 70 the Figure is 21,601. For Etsako West LGA the number of used and unused ballot papers counted as per exhibit 105 is 58,884 and in exhibit 70 INEC recorded 48,336. Orihiomwon LGA the number of used and unused ballot papers counted as per exhibit 105 is 39,721 and in exhibit 70 INEC recorded 55,869. In Ovia North East LGA the number of used and unused ballot papers counted as per exhibit 70 (sic) INEC recorded 23,518. I also discovered a bag of already scanned ballot papers in respect of this Local Government at the INEC Office on 25th November 2007, that bag is also now at the Tribunal. For Owan East LGA the number of used and unused ballot papers I counted as per exhibit 105 is 27,539 and in exhibit 70 INEC recorded 27,598. I produced exhibit 105 and signed it. I was present during the counting. " (Italics mine)

On the 4th of December, 2007, PW47 further testified as follows

"The ballot papers used in the governorship election in 12 local governments of Edo State have now been sorted out. For Uhumwode LGA (exhibit 88), there are 12,889 unstamped and unsigned ballot papers. There were 239 ballot papers stamped and

signed at the front instead of at the back of the ballot papers. For Etsako West LGA (exhibit 90), there are 3,681 unstamped and unsigned ballot papers. 1121 ballot papers were stamp (sic) and signed in the front. For Ovia South west (exhibit 91), 8906 ballot papers were unsigned and unstamped and 710 ballot papers were stamped and signed in front instead of the back. For Esan Central (exhibit 94) 354 ballot papers were unstamped and unsigned. For Igueben LGA (exhibit 93), 3318 ballot papers were unsigned and unstamped and 631 ballot papers were stamped and signed in the front instead of at the back of the ballot papers. For Owan West LGA (exhibit 99) 1096 ballot papers were unstamped and unsigned and 294 were signed and stamped at the front instead of the back of the ballot papers. For Esan South East (exhibit 98), 1026 ballot papers were unstamped and unsigned for Orhiomwon LGA (exhibit 97) 17,048 ballot papers were unstamped and unsigned and 144 ballot papers were stamped and signed in their front instead of their back. For Owan East LGA (exhibit 92) 2093 ballot papers were unstamped and unsigned while 125 ballot papers were signed and stamped in their front instead of their back. For Esan West LGA (exhibit 89), 6220 ballot papers were unstamped and unsigned while 9 ballot papers were stamped and signed in their front. For Ovia North East LGA (exhibit 95) 4604 ballot papers were unstamped and unsigned. For Esan North East LGA (exhibit 96) 4097 ballot papers were unstamped and unsigned. The total number of unstamped and unsigned ballot papers is 65,332. The number of ballot papers signed and stamped in front is 3,273."(Italics mine)

While cross-examining PW47, Mr Oturu SAN applied to tender the bag containing used ballot papers for the governorship election in Esan Central LGA, which PW47 said he later discovered after testifying at the Tribunal, Chief Akintola SAN objected to the Documents being admitted and after hearing arguments for and against the application, the Tribunal held that -

"The document sought to be tendered are according to this witness ballot papers used in the conduct of the Governorship election in Esan Central Local Government of Edo State in the 14th April 2007 election. The documents were found in the strong room of INEC office in Benin after the witness had tendered exhibit 94 on 22nd November, 2007. At the time of tendering exhibit 94 on 22nd November, 2007 PW47 said in relation to Esan Central.

'There is only one bag of ballot Papers I do not the number of ballot papers contained in the bag These are all the ballot papers used in Esan central Local Government for the Governorship election'

Having said this, one is at loss as to how this same witness will now discover another tag of ballot papers for the same Local government in the INEC strong room

We agree that since ballot papers were pleaded by the petitioners who also gave notice to produce the 1st respondent, ballot papers would ordinarily have been admissible in evidence. However, in view of the *unambiguous and categorical evidence* of PW47 *quoted* above, a whole bag of ballot papers cannot *now* suddenly *surface from the blues*. *We uphold the obligation (sic) of Chief Adeniyi Akintola SAN and reject the bag of ballot papers in evidence.* " ^

The same application was made to tender later discovered scanned ballot papers for Ovia North-East LGA, and in upholding the objection on the same ground as above, the Tribunal added that PW47 "was not a participant at the scanning exercise by forensic and handwriting experts".

The highlight of the PW47's evidence under cross-examination include -

1. That part of his duties as the Head of Operations of INEC in Edo State is to monitor the conduct of the election, including the collation of "reports from the various local government on the conduct of the election" and to "retrieve result from various local government" in respect of the election.
2. That he visited a number of local government areas on the day of the election and observed that the election was peaceful.
3. That it was not true that violence, thuggery, illegal/mass thumb printing of ballot papers, ballot stuffing and other electoral malpractices took place
4. That the result of the election in Etsako Central LGA and Akoko Edo LGA were not cancelled as claimed by the petitioners.
5. That the election was conducted in substantial compliance with the provisions of Electoral Act.
6. The Senator (Prof.) O. Osunbor was duly returned as the winner of the election having scored a majority of the lawful votes cast at the election,
7. That there was no Local Government Area where the total number of votes cast exceeded the number of registered voters.
8. That Senator (Prof.) O. Osunbor had majority of lawful votes cast in the Governorship election in Edo State. After reviewing the evidence before it and that of PW17, the

Tribunal held;-

"We think as a witness PW47 did not live up to his billing. His importance as a witness to assist in advancing the case of the two sets of respondents was grossly overestimated. He tendered documents sequel to the subpoena served on him ranging from exhibit 51 Form EC25B to exhibit 106 which included forms, voters registers, ballot papers and records of counting and sorting of the ballot papers. These are documentary evidence which of course are distinct from oral evidence. Distinct in that they stand on their own. It is now settled especially in election petitions that documentary evidence is the best form of evidence PW47 also gave oral evidence and was cross-examined. We think that when it comes to the oral evidence of PW47 he has to battle for credibility with those whose evidence he said to contradict, we have knowingly set out the major part of his answers in cross-examination by senior counsel for the two sets of respondents because of the great store which they laid on them. But all that evidence are

glaringly hearsay evidence. He dwelt on the reports he got. These are not admissible evidence. We therefore discountenance all the reports, which were said to have been given to PW47 by persons who were not called to testify. We also find it mind boggling that the PW47 as Head of Operations in the INEC Headquarters, Benin-City on 14th April, 2007 the date for Governorship and House of Assembly elections had the time to leave his office at 11 am to make the visits to Edo Central Constituencies as he stated and remained there till 3pm when polls were supposed to close. This is more pronounced when he started his evidence enumerating the report he received from local government areas in the same Edo central. Did he receive those reports and still found it necessary to visit there? We are of the firm view that we are entitled believe only the evidence of PW47, which are so, credible and direct. We are entitled to sift his evidence and take what is good and reject what is hearsay incredible, unsound and vague as bad. We do not think that the oral evidence of PW47 in any way diminish the evidence of the witnesses for the petitioners. We think that PW47 apart from the documentary evidence, which he tendered, gave some good oral evidence. We accept his documentary evidence and his good oral evidence only which we shall refer to at the appropriate time. At the moment we think exhibit 105 could be put into use. We hold that exhibit 105 is a reliable document. It was produced by PW47 from the ballot papers used in the governorship election on 14th April, 2007. PW47 testified that the ballot papers were the only one used in the Governorship election in Edo State on 14th April, 2007 and that they were brought by him to the Tribunal and tendered local government areas by local government areas. See section 66 and 73 of the Electoral. Act 2006. PW47 testified that he did not knew the number of the ballot papers as they were admitted local" government by local government. It was on the basis; that the Tribunal on application ordered the ballot papers to be counted and not recounted.

The appellants in all three appeals objected strongly to the way and manner the Tribunal used PW47's evidence in arriving at its conclusion. Senator (Prof.) Osunbor's position is stated in a nutshell at p. 5 of his brief-

"In an attempt to prove the various allegation of irregularities raised, petitioners of their own volition, subpoenaed PW47 to come to the Tribunal not just to tender document but also to give evidence to support the case of the petitioners. Such was the confidence of the petitioners that they swore PW47 who gave evidence on behalf of the petitioners. PW47, Olawale Kayode was an official of the 1st respondent to the petition. However, for the purpose of this proceeding, he was a witness of the petitioners. The witness, that is PW47, gave damaging pieces of evidence against the interest of the petitioners who called him. His evidence essentially relates to the fact that election was peaceful and no incidence of thuggery or stuffing of ballot papers took place. Petitioners never sought to treat this witness as a hostile witness. Rather than treating the evidence of PW47 as admission against interest of the petitioners who called him, the lower Tribunal decided to segment the evidence of the witness into 2, thereby believing that portion that is favourable to the petitioners and disbelieving the portion unfavourable to them. It would seem that the Tribunal failed to appreciate the fact that whatever admission made by PW47 is binding on the petitioners".

PDP also argued along the same lines, submitting that a party who invites his opponent as a witness does so at his own peril, that the admission against interest by PW47 must be given its full

weight, notwithstanding the failure of the Tribunal to do so; and that it is not the business of the court to choose one witness in preference to the Softer on the issue of credibility. PDP further argued that the counting of the ballot papers ordered by the Tribunal was to know how many there are, and for no other purpose, and that it was surprising when p the Tribunal proceeded to use exhibit 105 as if it was an official result issued in the election; and that the Tribunal was wrong in the use it made of exhibits 70 and 105 to arrive at its conclusion.

INEC and its officers, on their part, pointed out that PW47 gave for evidence for the petitioners based on the *subpoena duces tecum adtestificandum*, which was served on the Edo State REC (exhibit 46); that it was the REC who mandated PW47 vide a letter dated 30/ 10/2007 (exhibit 45) to tender documents and give evidence on his behalf; and that it was in that capacity as the Head of Operations of INEC in Edo State backed by exhibit 45 that PW47 came to give evidence for the petitioners and tender some documents during the trial of the petition. They also argued that PW47 was never treated as a hostile witness and further contended that - "In spite of the overwhelming evidence of PW47 available to him by virtue of his office and acquired through personal knowledge, which supported the of the appellants, the Tribunal wrongly treated some of his evidence as hearsay and sifted those favourably the petitioners.

It was further submitted that documents do not exist *in vacuo* and "relying on the documents alone and discarding the oral evidence of PW47, which supports the case of the appellants, did not portray the Tribunal as an impartial arbiter in the circumstance"; and that the failure of the Tribunal –

"To give credence to the evidence of PW47, which supports the case of the appellants, occasioned miscarriage of justice on the appellants. This is because if the Tribunal had given very serious consideration toll the evidence of PW47, which destroyed the petitioners' case, the petition would have been dismissed".

In response, Comrade Adams Oshiomhole reiterated the reiterate the fact that PW47 was subpoenaed to produce the documents used by INEC in the election, and that he clearly told the Tribunal the ballot papers and ballot boxes he produced were all that were used in the election.

It was further submitted -

This witness 'therefore left no one in doubt that whatever it was he brought at that time were all materials which INEC had. Instructively, the Tribunal without hesitation, admitted all in evidence. At that stage, both Tribunal and the parties were made to accept that their contest would be based on what was already before the Court. On the basis of the foregoing, the learned senior counsel to the petitioners applied that the ballot papers be counted in order to ascertain the number as PW47 had told the Tribunal that he does not know the number of the ballot papers he tendered. Thus the counting was done and all the parties involved¹ accepted the result of the recount as conclusive of what the Tribunal had in the 12 disputed local governments".

It was further submitted that the mere contradiction in the evidence of a witness, without more, is not sufficient to wipe out the entire testimony, since the court can rely on other pieces of evidence before it to choose which part of the testimony of a witness is contradictory or unacceptable.

On its part, AC submitted that the evidence of an INEC Official Election petition, who is subpoenaed by a petitioner, cannot be admission to prove against interest, by the petitioner; and that a person

cannot 'his own admission to prove his case, thus a subpoenaed of INEC that is sued in the present petition cannot admit evidence on behalf of the petitioners.

It was further submitted as follows -

"PW47 was subpoenaed under *subpoena duces tecum ad testificandum*. The purport of that subpoena is to achieve two things rolled into one –

- i. To tender documents, and
- ii. To testify *viva voce*

If as we have contended, PW47 acquitted himself under the leg of tendering documents, but was only able to assist with hearsay and vague evidence under his call on *testificandum*; the Tribunal cannot just throw the baby away with the bath water. The documents on their own have evidential value unaffected by the hearsay evidence. We submit therefore that the Tribunal made proper use of the documents tendered by PW47 in coming to their decision".

I have to agree with the respondents on this issue. First of all, it is not the law, as they rightly submitted, that the Tribunal cannot accept part of the evidence of PW47 and reject the other part see *Awuse v. Odili* (2005) 16 NWLR (Pt. 952) 416 and *Ebre & Ors v. The State* (2001) 12 NWLR (Pt. 728) 617 at 642-643, paras, where the Supreme Court per Achike, JSC held:

"It has been urged on behalf of the appellants that it was not open to the trial court to choose and pick with regard to the testimony of PW2, rather that it ought to have rejected PW2's evidence in its entirety. I do not think that it was necessary for the trial Judge to go to that length. After all, *it was only one aspect of PW2's testimony that the trial Judge, on evaluation, found some doubt to accept PW2 's testimony. It was therefore open to him to disbelieve that portion of the witness' testimony without that fact prejudicing the, rest of PW2 's that evidence that was neither challenged nor called in doubt. In my view, it was open to the trial Judge to believe and act on the rest of the unaffected evidence "*

Clearly, the appellants' submission on this score is not the law; a court or Tribunal can accept part of a witness's evidence and other parts.

The appellants insisted that PW47 is a witness for the petitioners and his evidence is an admission against their interest, but is that really the case? An admission is an express or implied concession by a person of the truth of an alleged act; is presumed that no man would declare anything against himself unless it was true - see *Eigbe v. N.U.T* (2008) 5 NWLR (Pt.1081) 604. A party is entitled to rely on his opponent's admission as an admission against interest to defeat his opponent's claim - see *Ipinlaiye II v. Olukotun* (1996) 6 NV (Pt. 453) 148 SC and *Onisaodu v. Elewaju* (2006) 13 NWLR 998) 517 SC, wherein it was held that -

"When evidence of a witness supports the case of opponent against whom he purports to give evidence, opponent can take advantage of that evidence to strengthen his case, if it is consistent with, and corroborates his case...

In this case, PW47 is the Head of Operations of INEC in Edo State. INEC is the official body responsible for the conduct of elections, and the concept of election denotes the process of accreditation, voting, collation, recording on all relevant INEC Forms and declaration of results. In other words, INEC is the competent authority to conduct an election and issue results - see *INEC v. Ray* (2004) 14 NWLR (Pt. 892) 92. The petitioners needed the documents used at the elections to prove their case, and since the documents had to come from proper custody, an official from INEC had to produce them before the Tribunal. PW47 was delegated to

do just that. However, when he tendered the bags admitted in evidence as exhibits 88 - 99, he said he did not know how many ballot papers were inside the bags. The Tribunal therefore ordered that the ballot papers be counted to verify exactly how many ballot papers were there in the exhibits 88 - 99 before it. The appellants argued that what the Tribunal ordered was a recount, which can only be carried out by INEC. They hinged their arguments on section 65 of the Electoral Act, which provides that a candidate or a polling agent may, where present at a polling station when counting of votes is completed by the presiding officer, demand to have the votes recounted. This argument cannot hold water. What the Tribunal ordered; was a count of the ballot papers in exhibits 88-99, which was in evidence before it, and not a "recount" in the sense of the word used in 65 of the said Act. In the circumstances of this case, there is wrong with that order. PW47 counted the ballot papers, and recorded the outcome in the document he prepared and signed, which was admitted in evidence as exhibit 105. Exhibit 105 was therefore a natural follow-up to the counting order made. The problem arose when the number of ballot papers in exhibit 105 did not tally with the number in exhibit 70, the result declared by INEC. Obviously, if they had tallied as it should, this issue would not have arisen. It must be remembered that Senator (Prof.) O. Osunbor and PDP had averred as follows in paragraph 59 of their joint reply to petition -

"With reference to paragraph 69 of the petition, the respondents aver that if there were any invalid votes (which is denied) at the election, they would not be substantial enough to invalidate the election of the respondents and if *those votes are deducted from the total votes scored by all the candidates, the 3rd and 4th respondents would still have majority of the votes cast at the election and satisfy to other requirements for election ...* " (*Italics is mine*)

Having envisaged a deduction of invalid votes. Senator (Prof.) Osunbor cannot complain that the Tribunal ordered the ballot papers to be counted.

PDP, on its part, submitted that any possibility of a shortfall in the ballot papers due to the omission of INEC or its officials or any doubt in the chain or handling of the ballot papers should be resolved in its favour. But that submission works both ways; the petitioners' case is that INEC did not conduct a free and fair election, and that Senator (Prof.) O. Osunbor, who was declared the winner, did not score the lawful majority votes cast at the elections, and ought not have been returned as the winner by INEC. INEC was subpoenaed to appear before the Tribunal to testify and produce the relevant documents relating to the elections. It had declared one result in exhibit 70 but when the ballot papers it brought before the Tribunal -was actually counted, the number did not tally with the figures in exhibit 70,

Was the Tribunal expected to turn a blind eye to the evidence before it? Certainly not; exhibit 105 prepared and signed by PW47 was now before it, and the law is well settled that once a document is received in evidence, and is so marked, it becomes an evidence before the Tribunal, and the Tribunal has the duty to evaluate the probative value of every documentary evidence tendered before *Awuse v. Odili* (2005) 16 NWLR (Pt. 952) 416. Thus, the Tribunal was right to use the said exhibits as it saw fit.

The appellants also argued that the Tribunal was wrong to have rejected the bags of ballot papers that were later discovered in INEC's Strong Room. Again, I will say that in the circumstances, the Tribunal was right to do so. INEC was subpoenaed to produce the document used in the elections, and, as its counsel argued before the Tribunal when he

objected to the subpoena being admitted in evidence, disobedience to a subpoena is a quasi criminal offence punishable with 3 months imprisonment". Being subpoenaed to appear before a Tribunal is therefore a very serious matter, and one that can be treated with levity. Thus, the person must produce the documents as commanded in the subpoena, or suffer the penalty. PW47 brought exhibits 88-99 to the Tribunal. On the 22nd of November 2007, when exhibit 94 was being tendered, he said

"There, is only one bag of ballot papers I do not the number of ballot papers contained in the bag. are all the ballot papers used in Esan Central Government for the Governorship Election.

He also said same when he was tendering exhibit 95 for North-East LGA, but when he was making his report as per exhibit 105, PW47 said-

The number of votes used and unused for Esan Central LGA is 15,378. In exhibit 70 the number of votes recorded for Esan Central LGA is 30, 154. After I had counted the ballot papers admitted for Esan Central LGA (exhibit 94), I discovered another bag containing ballot papers inside Esan Central LGA at INEC main store (Strong room) in Benin on 25th November, 2007. In Ovia North East LGA the number of used and unused ballot papers counted as per exhibit 70, INEC recorded 23,579 (the figure in exhibit 705 is 20,851) also discovered a bag of already scanned ballot papers in respect of his Local Government at the INEC office on 25th November 2007". (Italics mine)

INEC, as I said earlier, has the exclusive power to conduct elections and declare the results; it does not share that power with anyone. It conducts the elections and its mandate is to see that the elections are free and fair. To that end, INEC is expected to and must be seen as an impartial umpire. "Impartial" means not supporting one person or group more than another; neutral; unbiased" see Oxford Advanced Learners Dictionary, 6th Ed. INEC and its officials appear to have derailed from their role in this case. Yes, they are necessary parties and must therefore be joined as respondents to the petition, but that does not mean that they should go as far as they did in this petition to indulge in filing objections to the petition and filing appeals against the ruling and the judgment of the Tribunal. The negative effect of this situation is that the move to tender the late discovered bags of "ballot papers in evidence while PW47 was cross-examined by learned senior counsel for INEC appeared suspicious. Would they have made the same application if the figures in exhibit 105 had tallied with the figures they declared in exhibit Why was the bag containing the said ballot papers not found before exhibit 105 was made? As the Tribunal said - "A whole bag of ballot papers cannot now suddenly surface from the blues" - and in my view, the bags were rightly rejected. Ironically, INEC and its officers submitted in their brief that the fact that the Tribunal relied on documents only and discarded the oral testimony of PW47 did portray it as an "impartial arbiter in the circumstances", but that is an unwarranted attack on the Tribunal. The Tribunal is right to place a greater value on documentary evidence than on oral testimony. The position of the law is that the most reliable, if not the best evidence is documentary evidence. It is certainly more reliable moral evidence. See *Akinbisade v. The Slate* (2006) 17 NWLR (pt. 1007) 184 SC and *Aiki v. Idowu* (2006) 9 NWLR (Pt. 984) 47 at where Alagoa, JCA observed -

"Documents when tendered and admitted in court are like words Littered and do speak for themselves. They are even more reliable and authentic than words from the vocal cord of man because they are neither transient nor subject to distortion and misinterpretation but remain permanent and indelible through the ages. The documents bear eloquent testimony to what transpired ...".

The balance between documentary and oral evidence comes to the fore when we consider the issue of whether the elections in two local governments were cancelled or not. This issue is hinged on exhibits 70, 71, 71 A, 108, 108A and 110, and the oral testimony of PW47 that -

"I have seen exhibit 74 page 36, "Note" it is not true that the result of the election in the Governorships tussle was cancelled in Etsako Central Local Government. Exhibits 58, 58A and 58B, it is also not true that the election result in Akoko Edo in the Governorship election was cancelled. Exhibits 52, 52A and 52B were not cancelled. In *exhibit 70 the result of the Governorship election in Akoko Edo and Etsako Central were included in the overall result.*"

Exhibit 70, dated 18th April 2007, includes results from Akoko-Edo and Etsako Central LGAs, In exhibit 71, dated 16th April 2007, Comrade Adams Oshiomhole is credited with 197,472 votes Senator (Prof.) O. Osunbor is credited with 329,740 votes; no results from the two local governments. Exhibit 71A, is dated 18th April 2007, and it has results from the two Local Government Areas. PW60, one Josan Joseph Tonpshakka, Librarian II with National Library of Nigeria Edo State Branch was subpoenaed to appear. He tendered the Observer Newspaper of 17th April 2007 (exhibit 108), with a Notice of "Final Result" dated 15th April 2007, purportedly published, 'by INEC and signed by one Mohammed Abubakar Ahmadu, REC-Edo State at page 3 (specifically admitted as exhibits 108A). Results for Etsako Central and Akoko Edo were omitted in exhibit 108A both were asterisked with a star, explained at the foot of the notice to mean that the results in the two local government areas were cancelled. PW61, one Johnson Egwakhide Oghurna, who had made a video tape for another petition, was also subpoenaed and he tendered exhibit 110, the video tape showing that the Edo State REC cancelled the elections in Etsako Central and Akoko Edo Local Governments for reasons he gave about violence which went beyond the tolerable level. In its Judgment on this issue, the Tribunal held as follows -

"PW47 testified that exhibit 70 Form EC8D comes before exhibit 7.1 and 71 A. That is, exhibit 70 was the final result. It was from exhibit 70 that the 2nd respondent returned the 3rd respondent as winner on exhibit 71 and 71 A. The main attack of the petitioners on exhibit 70 is that it contained the result of Etsako Central LGA and Akoko Edo LGA. It is contended that the result of the 2 (two) local government areas were cancelled by the 2nd respondent after the election of 14th April, 2007. Two sets of respondents have urged us to discountenance exhibit 110 on ground of not being produced from proper custody, not being reliable document and that PW61 who tendered same was an interested person, having a case in the Tribunal and being a member of the petitioners' political party. We hold that exhibit 110 is relevant to this petition and the issues of how the video tape was produced before the tribunal is of little consequence. Exhibit 110 being relevant puts everything else to rest. We hold that exhibit 110 showed that the election in Etsako Central and Akoko Edo Local Governments were cancelled by the 2nd respondent. We hold that exhibit 108A is a reliable document. The fact

that it was published as a notice in exhibit 108 was not derogatory at all. We hold that exhibit 108A could stand on its own as proof that results in Etsako Central and Akoko Edo Local Governments were cancelled. Exhibit 108A also corroborates exhibit 110. We have looked at exhibit 70, exhibit 71, exhibit 71A, exhibit 110, and exhibit 108A and have come to the inescapable conclusion that results in Etsako Central and Akoko Edo were cancelled. Exhibit 110 obviously came out soon after the election on 14th April, 2007. Exhibit 108A was signed. Exhibit 71 was signed on 16th April, 2007 by the 2nd respondent. It was the return of 3rd respondent as winner of the election. It credited the 1st petitioner with 197, 472 votes and the 3rd respondent with 329, 740 votes. We think that ought to be the rational sequence but the two sets of respondents say no. The respondents claim that exhibit 70 was the final result and first in time and that it included the result of Etsako Central and Akoko Edo Local Governments. That makes the figure credited to 1st petitioner to be 201,116 votes and figures credited to 3rd respondent to be 391,262. Exhibit 70 was said to have given rise to exhibit 71A which bear the same figures as exhibit 70, meaning that votes of the two disputed local government were added to it. We find an inherent flaw in exhibit 70 and 71 A. Both documents were made on 18th of April 2007. That will be 4 days after the election of April, 2007 2 days after the return on exhibit 71, 3 days after the notice on exhibit 108A and 1 day after the publication of exhibit 108A. there is no explanation from the 1st, 2nd, 5th, - 22nd, respondents on why exhibits 70 and 71A were made on 18th April, 2007. We take judicial notice that results in an election are arranged in an election are arranged in an ascending order. That is results start from the units and peaks at the consistency level. See the results in exhibit 70 Form EC8D. It is then that result in Form EC8D will appear on Form EC8E. We have perused the results in Etsako Central and Akoko Edo tendered as exhibits 58, 58A and 58B and exhibits 52, 52A and 52B respectively. The result in the units wards and local government levels of Etsako central and akoko Edo were made on 14th April, 2007 and were also not entered on exhibit 108A, which was made on 15th April, 2007 and were also not entered on exhibit 71 which was made on the 16th April, 2007. Those results did not exist at the time that exhibit 108A and exhibit 71 were made.

We discountenance exhibits 52, 52A and 52B as well as exhibits 58, 58A and 58B respectively. The next ludicrous stretch is that it took 4 days for those results made on 18th April 2007, PW47 gave evidence about how one Barrister Alex Irotumde signed as agent for PDP in all the wards and Constituency levels of Etsako Central Local Government. He said the anomaly came about because there was a security situation, which gave and (*sic*) rise to a security report. PW47 did not explain this security report. Rather he said because of that collation could not be done in the various 10 (ten) wards of Etsako Central but was brought to one place in Fugar to collate the 10 (ten) wards. It could not be very far from the reason, which the 2nd respondent gave on exhibit 110 when he announced the cancellation of the results in the two local government areas. Further a look at exhibit 52A. Form EC8B for Akoko Edo local government Area show that none of the agents of the political parties who participated in the election signed the result sheets. On exhibit 52B. Form EC8C, only one Barrister Samson Ekhafafe signed under column for party agent but he failed to include the name of his political party. That anomaly could also be attributed to PW47's security report. *We hereby discountenance the election results for Etsako Central and Akoko Local Government Areas, which were included in exhibit*

and 71 A. We also discountenance the evidence of PW47 that the elections in Etsako Central and Akoko Edo Local Government Areas were not cancelled. We hold that exhibits 70 and 71A are incurably bad by containing the results from Etsako Central and Akoko Edo Local Government Areas. "We hold that the fact, which is held to tightly by the two sets of respondents, that 3rd respondent was declared and returned winner as Governor of Edo State by 2nd respondent following elections on 14th April, 2007 and based on exhibits 70 and 71 A, cannot stand and is bound to jail. See U.A.C v. Macfoy. We are firm in our view that the only valid documents upon which the 2nd respondent would have declared the 3rd respondent winner and returned him as Governor of Edo State, is exhibit 71."

The appellants' contention is that the exhibits relied on by the Tribunal in arriving at its conclusion that the elections in the two local governments were cancelled are inadmissible in evidence, and should be expunged. They argued that the Tribunal was wrong to rely on exhibits 108 and 108A as newspaper reports are not inadmissible as evidence of the fact? therein. As to exhibit 110, Senator (Prof.) O. Osunbor submitted that for it to be admissible it must be pleaded and must satisfy the provisions of section 91 of the Evidence Act. which enjoins the Court to ensure that the maker of a document is called as a witness: that exhibit 110 tendered through PW who was not sworn, and without the maker giving evidence is nothing but Documentary Hearsay: and that a court must consider the genuineness of the tape unless there is further independent and reliable corroboration.

PDP argued along the same lines, and further submitted that there was no nexus between exhibit 110 and the alleged cancellation of results; that there was nothing indicative in the tape that had anything to do with the election: that nobody identified it shown in the video; and that -

"The Tribunal ought to have been wary in these days electronic magic and manipulation, in accepting and relying on the exhibit, hook, line and sinker".

On its part, INEC submitted that the Tribunal had a duty warn itself of the inherent dangers of relying on exhibit 110, since it had no maker and was undated etc.; that the Tribunal placed undeserved reliance on exhibit 110, and its conclusion that the exhibit "*obviously came about soon after the election*" is not support the records, and is a clear case of the Tribunal making a ease party, rather than acting on the evidence before it. which is procedure most deprecated and advisedly shunned".

Comrade Adams Oshiomhole submitted that on the preponderance of evidence, it was clear that the results were cancelled, and the Tribunal can accept the part of the evidence weighs more on the scale of justice. Explaining that exhibit 11Q was already part of the proceedings before the Tribunal in another petition, it was submitted that a court is entitled to take judicial notices proceedings and records as well as their contents, so there was no basis for the contention that the maker was not called.

AC submitted that exhibits 108 and 108A are public documental and are admissible in law by virtue of sections 111 and 112 of the Evidence Act; that the issue of how exhibit 110 was obtained irrelevant in law, as a document remains admissible no matter its custody it is procured from; that it is immaterial that exhibit 110 was tendered by PW61 who did not file any witness deposition as he was subpoenaed to testify; that there is no law that requires a certain number of witnesses to be called by a claimant; and section 116 of the Evidence Act

allows the court to presume the genuineness of every document in an official gazette or a newspaper.

This issue is easily resolved and it will be resolved on the narrow compass of preponderance of evidence. It is settled that the standard of proof required of a petitioner who alleges that there has been non-compliance with the Electoral Act is the preponderance of evidence - see *Swem v. Dzungwe* (1966) NMLR 297; (1966) SCNLR 111. This is because an election petition being a species of a civil suit is only required to be proved on balance of probabilities. All the petitioner needs to establish is that his story is more likely to be true than the respondent's. In the words of Dr. Akinola Aguda in this book, *Law and Practice relating to Evidence in Nigeria* -

"It is enough for a party to a case who has the onus of establishing a particular fact to say that his own evidence is just as good as that of his opponent. For what the law says that he must do to discharge the onus of proof on him is to prove by evidence which convinces the Court or Tribunal of the probability of his case rather than that of his opponent on the point in issue."

It is also accepted that the *onus* of proof in a civil trial shifts from one party to the other, depending on the nature of the case and evidence adduced by either party. In effect, where a party has offered his evidence and the other party would be the one to lose if no case is adduced in rebuttal, the onus of proof would shift to that party. There is also the settled law that where documentary evidence supports oral testimony, such oral testimony becomes more credible as documentary evidence serves as a hanger from which to assess oral testimony. See *Ndayako v. Mohammed* (2005) 17 NWLR (Pt. 1009) 655; *Kimdey v. Mil Gongola State* (1988) 2 NWLR (Pt. 77) 445. In the case, the petitioners tendered documents to show that the results of the elections in Etsako Central and Akoko Edo Local Governments were cancelled. INEC through PW 47 merely asserted that the results were not cancelled and left it at that. No doubt, the petitioners brought more to the table than the respondents, and even if exhibits 108, 108A and 110, there are exhibits 70, 71 and 71A before the Tribunal. For emphasis, I will repeat what the Tribunal held -

"Exhibit 70 was said to have given rise to exhibit 71 A which bear the same figures as exhibit 70. We find an inherent flaw in exhibits 70 and 71A. Both documents were made on 18th April 2007. That will be 4 days after the election of 14th April 2007. 2 days after the return on exhibit 71, 3 days after the notice on exhibit 108A and 1 day after the publication of exhibit 108. There is no explanation from the 15th - 22nd respondents on why exhibit 70 and 71 A were made on 18th April 2007. We take judicial notice that results in an election are arranged in an ascending order. That is results start from the units and peak at the constituency level. So the results in exhibits 70 start from Form EC8B to Form EC8C before it reaches EC8D. It is then that results in Form EC8D will appear Form EC8E. We have perused the results in Etsako Central and Akoko Edo. The result in the units, wards and local government levels of Etsako Central and Akoko Edo made on 14th April, 2007. But those results were not entered into exhibit 108A, which was made on 15th April 2007 and were also not entered on exhibit 71 which was made on the 16th April, 2007. Those results did not exist at the time that exhibit 108A and exhibit 71 were made.

As the Tribunal rightly pointed out, there is no evidence before it from INEC or its officials explaining the sequence of dates of results in the exhibits. In other words, the onus of proof shifted to the appellants to explain how, for instance, the same Form EC8E issued by INEC for the same election were prepared on different dates, with one carrying results from the two local governments the petitioners claimed the results were cancelled, and the other carrying results without any from the two local governments. The principle of

preponderance of evidence operates where one of the parties puts more on the scale of justice that will make it tilt in his favour. What comes out clearly in this case is that the petitioners' case was strengthened by documents tendered by INEC, and since the respondents did not put anything on the other side of the scale, the Tribunal had no option than to accept the evidence proffered before it by the petitioners. The irony is that the Edo State REC. the 2nd respondent, who is alleged to have cancelled the result and who delegated PW47 to tender the documents, was content to sit by and do nothing to set records straight. The Tribunal's reasoning and conclusion cannot be faulted and it is upheld.

The last issue connected to the evidence of PW47 is whether the Tribunal was right to cancel votes on the grounds of multiple registrations, multiple accreditations and multiple voting, in his evidence. PYV47 pointed out that -

"Item 15 reads Augustus Aikhoma aged 67, gender male and a photograph his occupation is "Oilier". Item 16 is also Augustus A. Aikhonio, male, 17 years old, Occupation "oilier" photograph. Both of them accredited to him voted age 1/10 of voters Register 101 ward Units 4 of Esan Central LGA in Item 34 reads Augustus Aikhomo, 77 years a Retired Admiral of No. 7 Benin Auchi Road. Idumebo, Irrua, finger print. In Item 39 the name is Augustus A. Aikhomu, 67 years old, retired Admiral of 7 Benin Auchi Road, Idumebo Irrua, Finger print Both names were accredited having been voted. ... item 55 in exhibit 78A is the name of Lawren O. Elabor, Male, 49 years old "Other" and photograph was accredited to vote. Item 56 reads Lawren Olabor, Male, 49 years old "other" and photograph. He was also accredited." (Italics mine) There is also RW22, Osemede Osehime, a legal practitioner,

Who replied-

"In exhibit 78, the names are Monday Aghai for (No. 15) and the same for (No. 16) Monday Aghai aged 32 years and others for occupation. *The two names were ticked in exhibit 78.* The name in No. 25 and 28 read Lucky Aigbe aged 18 and student. The photographs are not the same (The photographs are the same). The names in 146 and 147 both read Olabisi Balogun aged 22 and student. *Both names were accredited.* The names in numbers 221 and 222 are Odion Ehiremen aged 19 the student. Both names were accredited." The Tribunal held as follows on the issue of multiple voting -"We think that the issue of multiple voting is covered by the Act. See section 54(1) of Electoral Act, 2006. A person cannot vote except and until accredited. Accreditations of voters and of the late stage of voting represent extreme or outer beacons or outposts in the effort to prevent electoral malpractices. The petitioners tendered voters registers for 8 local government areas. These were all PW47, who was on subpoena to produce could tender. The petitioner's led evidence on multiple registration/accreditation. RW22 in cross-examination by senior counsel for petitioners identified on exhibit 78, voters register for Esan Central the following: The two sets of respondents could not have missed the evidence on the issue given PW47 one of which made headlines as follows: Augustus Aigbomu age 67 occupation. Retired Admiral, address 7 Benin-City -Auchi Road, Ibunabo Irrua photograph (and thumbprints in another one) appears two times on Electronic voters register and two times on manual register and all four register names were accredited as

having voted. They admitted as exhibits 73 A and 78B. Also 78C was-Lawrence O. Elabor, male, age 49, occupation o photographs appear two times and was accredited times. Exhibit 78D was for Doky L. Imahanhio gender male, age 18, occupation student, photograph appears two times and accredited two times. We hold that multiple accreditation will in-exorable lead multiple voting which will in turn vitiate the results' the units where they occurred. We hereby set out invalid votes arising from multiple registrations multiple voting. *The votes for PDF and AC in the 8 wards above are hereby cancelled.*

Senator (Prof.) O. Osunbor's submission on this issue that there was no basis for the Tribunal to cancel the votes; that the question of multiple registration and multiple accreditation were not raised the pleadings, and the Tribunal acted without jurisdiction concluding that the votes were invalid, and what the Tribunal ought to have done was to void the votes of voters whose names appear more than once on the voters register or who were accredited more than once. Furthermore, that the Tribunal was in serious error void the entire results of the units as that approach means that the voters who were not involved had their votes nullified.

PDF, on its part, argued that the Tribunal's findings are perverse in that the petitioners pleaded non-accreditation in paragraphs 19 and 39 of the petition and registration of voters not multiple registration of voters in paragraph 15 (a) of the petition; and that multiple registrations by a voter is a criminal offence, which must be proved beyond reasonable doubt.

INEC and its officers also argued that there is nowhere it was demonstrated to the Tribunal that cancelled votes were scored as a result of multiple registration and multiple voting, and the questions of multiple registration and multiple accreditation were not pleaded by the petitioners rather they pleaded that they will call forensic experts to show multiple votes but at the end of the day, they refused to call the expert witness(es).

In reply. Comrade Adams Oshiomhole submitted that their case was established and proved by documentary evidence produced by INEC which were admitted by consent, and that even without any of oral evidence to corroborate the hard core facts in all the documents admitted in evidence, the Tribunal would still have been justified to base its judgment on the documents, without more, the success in their case was -

"Not hinged on documentary evidence alone. It was strongly backed up also by the oral evidence from all the witnesses who were unanimous in attesting to the various forms of irregularities carried out in favour of the appellant."

AC, on its part, submitted that multiple registrations and multiple accreditations constitute irregularities, which are conveniently provided for under the head of non-compliance with Electoral Act, 2006 and which were pleaded under paragraph of the petition, so it is not correct to argue that there were no pleadings. This Court was referred to paragraph 45 of the petition, allegation of over-voting, and paragraph 22 of the petition, which it submitted, covered all the other allegations.

Now, one of the grounds upon which the petition is based is as stated in paragraph 69C of the petition, and that is that the election as "characterized by non-compliance with the provisions of the electoral Act" Non-compliance with the Electoral Act is defined as the conduct of an election contrary to the Act or the rules and Regulations made thereunder. The paramount

question is whether or not in view of the court's findings, the Constituency was allowed to elect its representative - see *Swem v. Dzungwe (supra)* where the Supreme Court per Coker, JSC observed -

"Non-compliance may result not only from the degree of, but also from the nature of a complaint and the question in every case is whether or not in view of the findings the constituency as such was allowed to elect its representative. At stations No. 28(1 Chor) and No. 11 (Igbudu B) the non-compliance found consisted of plural voting and swapping of ballot boxes with unauthorized and illegal votes - -" (*Italics mine*)

"Plural" and "multiple" mean the same thing - "repeated more than once" - see Webster's Comprehensive Dictionary, Encyclopedic Ed. In this case, the petitioners averred as follows in paragraph 22 of the Petition that - "There were gross corrupt practices ranging outright rigging, multiple voting, thuggery, violence, falsification of results and outright stealing of election materials". (*Italics mine*)

The allegation of multiple voting was clearly pleaded petition, and the voters register prepared by INEC and present the Tribunal by PW47, showed multiple registrations and null accreditations recorded therein. Without question, the allegation non-compliance with the Electoral Act was not only proved, definitely proved beyond reasonable doubt.

INEC prepared the voters registers, and it was PW47 who is the Head of Operations of INEC in Edo State that demonstrate the Tribunal that there were instances of multiple registrations multiple accreditations. Surely, they were not an end in themselves but were in place for a reason, and the only possible reason prepare grounds for the multiple voting that will inexorably following multiple registrations and multiple accreditations. The Tribunal therefore right to conclude as it did, and I uphold same.

At the end of the day, contrary to the appellants' contention that PW47 gave damaging evidence against the petitioners who called him, and should have been treated as a hostile witness, PW47 turned out to be the best witness the petitioners called. His evidence strengthened their case, and went a long way to prove their assertion in paragraph 69B that - "the 3rd respondent was not duly elected majority of lawful votes cast" at the April 14, 2007 election, the ground on which the petition was determined.

The judgment speaks for itself, and is reproduced here in some detail -

"We are firm in the view that the valid document upon which the 2nd respondent would have declared the 3rd respondent winner and returned him as Governor is exhibit 71. We recognize only exhibit 71 and for the-avoidance of doubt we repeat the final scores of each of the parties based on exhibit 71 which are 1st and 2nd petitioners 197,472 votes, and 3rd and 4th respondents 329,740 votes. We may now proceed to determine between the 3rd respondent and 1st petitioner who scored the highest number of valid and lawful votes cast. The petitioners are disputing the results of the election in 12 Local Governments namely..Uhumwode, Ovia North East, Ovia South West, Esan Central, Esan West, Esan North East, Esan South East, Igueben, Owan East, Owan West, Orhionmwon and Etsako West. The petitioners are not contesting the validity of the votes cast in 4 (four) local Government Areas namely, Oredo, Egor, Ikpoba-Okha and Etsako East; The result for 1st and 2nd petitioners and 3rd and 4th respondents in the Local Government Areas not in dispute are Oredo, AC 4,711, PDF 9,613; Egor, AC 14,959 PDF 189, Ikpoba-Oka,

AC 8,305, PDP 2,282 and Etsako East AC 19,787 PDP 10, 603. The result in 2 (two) Local Government Areas namely, Etsako Central and Akoko Edo have been adjudged cancelled. The 18 (eighteen) Local Government Areas in Edo State on Election Day have now been accounted for. The petitioner have present (*sic*) a chart to Tribunal said to contain a tabulation of the invalid and unlawful votes cast and urges the Tribunal to act on the chart number A - O. We have pursued the Charts A-O. The complaints of the petitioners about invalid and unlawful votes in them fall into 3 (three) categories as follows -"We are aware that all the documents represented on chart A-N (1) were exhibits before the Tribunal tendered by PW47. The documents relating to ballot papers not stamped and signed at the back is exhibit 106 tendered by PW47. *We hold that all the ballot papers shown on exhibit 106 which are not stamped and signed at the back are invalid. The total number of the invalid ballot papers in exhibit 106-are 65, 144, 51, 534 for 3rd and 4th respondent and 13,610 for 1st and 2nd petitioners. We agree that these votes are invalid votes and would be deducted from the votes of both the 1st and 2nd petitioners and 3rd and 4th respondents on exhibit 71.* The petitioners' led evidence in open Tribunal on multiple registration/accreditation. We hereby set out the in valid votes arising from multiple registrations and multiple voting in the affected Local Government Areas as follows. In Esan South East, voters register in exhibit 86 and from 40 units in 8 wards yielded 12202 votes for PDP and 1801 for AC, in Esan Central using exhibit yielded from 58 units in 9 wards 20219 votes PDF and 2232 votes for AC. In Esan West using exhibit from 24 units in 7 wards, yielded 15409 votes PDF and 166 votes for AC. In Esan South East exhibit 80 from 41 units in 8 wards yielded 17390 for PDP and 1184 votes for AC. In Ovia South with exhibit 82 yielded from 5 units in 2 wards 19)1 votes for PDP and 219 votes for AC. In Owan East exhibits 83 yielded from 9 units in 5 wards 3324 vote for PDP and 927 for AC. In Owan West using exhibit 84 yielded from 114 units in 5 wards 2360 votes of PDP and 631 votes for AC and Uhumwode using exhibit 85 yielded from 29 units in 8 wards 16940 votes for PDP and 1429 votes for AC. The votes for PDP and AC enumerated in the 8 wards above are hereby cancelled. The third segment deal with malpractices said] to have appeared on the face of the unit results, which are Forms EC8A. The Forms EC8A and other' documents were in custody of 1st, 2nd, 5th - 22nd respondents and were tendered by PW47, We had painstakingly studied the charts and we agree with the petitioners about the malpractices, which appear on the face of the Forms EC8A. These malpractices of over voting, mutilation of result sheets, alteration of figures without-initialing and outright cancellations corroborate the oral evidence of petitioners' witness about widespread thuggery and manipulation of process. We agree that the malpractices should be proved unit by unit but they are no barriers of Berlin walls between units on Election Day. Disturbances in one unit have a spilt over effect. We hold that votes scored through those malpractices are invalid and for ease of reference we set them out in the affected Local government Areas as follows:

In Esan North East using the Form EC8A exhibits 55 from 17 units in 9 wards yielded 5488 votes for PDP and 887 votes for AC. In Esan Central using exhibits 54 from 2 units in 2 wards yielded 767 votes for PDP and 67 votes for AC. In Esan West using exhibit 57 yielded from 28 units in 8 wards 16508 votes for PDP and 699 for AC. In Esan South East using exhibit 56 yielded from 11 units in 5 wards 4379 for PDP and 558 votes for AC. In Etsako West using exhibits 60 yielded from 1-unit 1 - ward 4602 votes for PDP and 70S votes for AC. In Igueben using exhibits 61 yielded 11 units in 5 wards 3612 for PDP and 1044 for AC. In Ovia North East using exhibits 65 yielded from 10 units in 6 wards 2446 votes for PDP and 309 votes for AC, In

Ovia South West using exhibit 66 yielded front 18 units in 9 wards 5608 votes for PDP and 937 votes for AC. In Orhionmwon using exhibit 68 yielded from 14 units in 6 wards 5983 votes for PDP and 996 votes for AC.

In Owan East using exhibit 67 yielded from 25 units in 9 wards 4737 votes for PDP and 2011 votes for AC. In Owan West using exhibit 68 yielded from 32 units in 10 wards 3670 votes for PDP and 1186 for AC and from Orhionmwonde using exhibit 69 from 8 units in 7 wards yielded 1577 votes for PDP and 191 votes for AC. The votes for PDP and AC enumerated in the 12 wards above are hereby cancelled. The total is PDP 149,189 invalid votes. AC 17285 invalid votes. We proceed to add invalid votes which were stamped and signed at the back which was PDP 51,534 and AC 13,610 and we arrive at a grand total of PDP 200,723 invalid votes and AC 30,895 invalid votes which are hereby cancelled. We deduct 200,723 invalid and cancelled votes from the 197,472 awarded the AC on exhibit 71 and we have 166,577. We hold therefore that for the election for the office of Governor of Edo State of Nigeria held on 14th April, 2007 the 3rd and 4th respondent scored 129,017 valid votes while the 1st and 2nd petitioners scored 166,577 valid votes. We therefore declare that the 1st and 2nd petitioners scored the highest number of valid votes in that election."

The appellants objected to the Tribunal's reliance on charts Senator (Prof.) O. Osunbor argued that the Tribunal was wrong it rely on the chart "as a basis to consider the sundry allegations of multiple voting, multiple registrations, non-signing and sampling of ballot papers and result sheets, as well as alterations and cancellation of figures"; and citing *Haruna v. Modibbo* (2004) NWLR (Pt. 900) 487, that the use of charts infringes on the right fair hearing as the person against whom it will be used will not be in a position to contest the contents, and by virtue of the Practice Direction 2007, every document to be relied on must be frontloaded so it will be a miscarriage of justice to allow documents not pleaded or frontloaded to be introduced by the chart.

PDP also submitted that the charts were not pleaded nor were the figures in the charts integrated in the petitioners' pleadings, and argued -

"Confusion is inevitable whenever pronouncements are made not on the basis of facts on the record. The Tribunal's Judgment on the charts A - O is bedeviled by this fundamental vice of the Tribunal introducing material evidence or filling the gaps for the petitioners such that the verdict on the charts cannot stand".

INEC and its officers argued in the same vein that it was wrong of the tribunal to place reliance on the charts; that they were not pleaded or frontloaded or listed as documents to be relied upon at the trial; and that 'the appellants were denied a fair hearing as they were taken by surprise as a result of the resort to the charts by the petitioners at address stage.' However, Comrade Adams Oshiomhole's explanation is as follows -

"Upon delivery of final written addresses, petitioners counsel set out in details the irregularities that were established at the trial and demonstrated through the witnesses by relying on all the statutory and electoral forms which were duly admitted in evidence. This was done local government by local government, the summary of which was reduced into charts numbered A - O." He also submitted that the appellants had the opportunity and it responded to the charts during final addresses; that they also had opportunity and did

cross-examine the witnesses on the facts and figures contained in the charts and could not rebut the core facts in charts; and that courts -

"No longer tolerate or welcome the flimsy and unbridled attempt for a litigant to scream and cry breach of fair hearing when indeed such a litigant was given ample opportunity to present his case but failed to utilize the opportunity afforded him by the Court."

Furthermore, that the facts and circumstances in *Haruna v. (supra)* are completely in sharp contrast to those in this because -

- i. The witnesses in *Haruna v. Modibbo* who testified in respect of Forms ECS A and which formed the basis of the charts in the said case were not LNEC officials. In this case, all the electoral forms tendered and from which the Tegulanties were collated were done through PW47.
- ii. In *Haruna v. Modibbo*, the disparity or irregularities were not demonstrated in open court and shown how they affected the overall result. Contran wise in this case, through PW47 and RW22. the petitioners demonstrated vividly and in open court the nature of the irregularities, the votes attracted by the irregularities, the benefits of the unlawful votes to the appellant.
- iii. In *Haruna v. Modibbo*, the charts were drawn up by the Court in its judgment. But in this case, the charts were drawn up by the petitioners who presented same to the Court and all the parties for their responses and reactions. In *Haruna v. Modibbo*. the parties were not given the opportunity to address the .Court on the facts contained in the charts. In the case at hand, all the parties were given the opportunity and indeed in their respective written addresses responded to the point.
- iv. As against the case of *Haruna v. Modibbo* the appellants in this case did concede before the Tribunal that the figures in the charts were derived from the exhibits tendered in the case.

Referring this Court to its decision in *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1 al 161, it was submitted that it is permissible in law for the Tribunal itself to draw up the charts, since they represent an open demonstration of what was contested in the Court through documentary evidence.

AC argued that since the procedure of counsel relying or is to highlight evidence led at the trial is not objectionable on ground of law, it is wrong of the appellants to call in aid the case of *Haruna v. Modibbo* to fault the procedure adopted; that no miscarriage justice was made out by the procedure, and it would have made more sense for the appellants to show that facts, which were not evidence, were smuggled into the charts through the address relied upon by the Tribunal in the Judgment, but this has not established or even suggested by the appellants.

I have to agree with the respondents. I have gone through said charts and I find that there are no new or extraneous evidence therein. The argument that the charts were the basis for cancelling votes and that there was no evidence before the Tribunal to justify it, is far from the truth. PW47, the Head of Operations of INEC Edo State, who was delegated by the Edo State REC to respond to the subpoena issued on INEC to tender the electoral materials

used at the elections, ended up demonstrating to the Tribunal how a number of irregularities generated a lot of invalid votes. Take the issue of unstamped and unsigned ballot papers; after counting the ballot papers he brought to the Tribunal, PW47 told the Tribunal that -

"The total number of unstamped and unsigned ballot papers is 65,332."

He was shown exhibit 74 (Manual for Electoral Officials), and admitted -

"... Failure to stamp and sign a ballot paper renders it invalid."

In its Judgment, the Tribunal held as follows on this issue –

"Section 67(1) and (2) of the Electoral Act states ... (and) have been judicially interpreted to mean that ballot papers which are not stamped and signed at the back by the presiding officer are invalid. We think that the provision at exhibit 74 puts the issue to rest. It stipulates that ballot papers for each of the elections should be prepared by stamping and signing the back of each ballot paper. It states further that failure to stamp and sign a ballot paper at the back rendered the ballot invalid. ... The provision in section 67(2) could only be activated by the returning officer. PW47 was not the returning officer at any election on 14th April, 2007 and could not give any evidence either in chief or on cross-examination on the *matter*. It fell on the 1st set of respondents to call evidence to achieve section 67(2) (*supra*) but they failed to do so. What is more even where returning officers gave evidence on the effects of Section 67(2) *supra*, the Tribunal under these proceedings have to (*sic*) power to review same."

Now, in addition to PW47's "admission against interest" that the Manual for Electoral Officials, 2007, prepared by INEC (exhibit 74) provides that unsigned and unstamped ballot papers are invalid, the Tribunal also relied on section 67 of the Electoral Act that provides for "rejection of ballot papers without official mark". By virtue of its subsection (1) and (2), a ballot paper which does not bear the official mark shall not be counted. However, if the returning officer is satisfied that a ballot paper that does not bear the official mark was from a book of ballot papers furnished to the presiding officer of the polling station in which the vote was cast, he shall notwithstanding the absence of the official mark count that ballot. In this case, PW47 was not the presiding officer at the polling stations where the votes declared invalid were cast, and could not therefore give evidence as to whether the unsigned and unstamped ballot papers were from "a book of ballot papers furnished to the presiding officer at the polling station". What is even more damaging, none of the respondents including INEC and its officers, called evidence to achieve section 67(2) of the Electoral Act. This was the decision of the Tribunal and the basis on which it held that -

"...All the ballot papers show, on exhibit 106 which are not stamped and signed at the back are invalid. The total number of the invalid ballot papers in exhibit 106 are 65, 144, 51, 534 for 3rd and 4th respondent and 13,610 for 1st and 2nd petitioners. *We agree that these votes are invalid votes and would be deducted from the votes of both the 1st and 2nd petitioners and 3rd and 4th respondents.*"

This is just an example of how the Tribunal arrived at its decision to deduct invalid votes from the valid votes cast at the election. Its decision was clearly not based on the charts prepared by the petitioners counsel. Counsel assisted the Tribunal and parties by the settings out figures in chart, and there is nothing new in this. It has been done before and

accepted. In *Ngige v. Obi* (supra) where the appellants also alleged “breach of fair hearing”, it was the Tribunal that drew up a chart like this one, when it was writing its judgments and attached it as an appendix to the judgment.

This court however held as follows in that case, *Ngige b. Obi* (supra) –

“The chart was made from the exhibits. There was extensive cross-examination in open court, in respect of all the exhibits. Learned counsel for all the parties also address the Tribunal in respect of the parties also addressed the Tribunal in respect of all the exhibit. It is my considered opinion that appendix 4 was a product of public demonstration and testing in open court by witnesses and their cross-examination. It was an evaluation of what was contested, demonstrated and investigated in the Chambers of the Tribunal. The Tribunal was extensively addressed on each and every exhibit tendered. The chart is the weight attached to the said exhibits and scores contained therein arising from the evidence proffered and demonstrated in open court at the Tribunal. The Tribunal was right to have done the arithmetical calculation in appendix 4. The arguments that the appellant was denied the opportunity to comment or react to appendix 4 is misconceived because appendix 4 constitutes part of the judgment of the Tribunal. The Tribunal was in possession of all the results in the Forms EC8A (i) it admitted. Where the Tribunal is in possession of all the results it is duty bound to collate the results where there is proof that there is inflation with non-existent votes and/or wrong computation.”

In this case, which is nearly on all fours with the case of *Ngige v. Obi*, save for the fact that it is the petitioners' counsel that drew up the charts and not the Tribunal, the kernel of the principles applied remain the same. I agree with Comrade Adams Oshiomhole and AC that the decision in *Ngige v. Obi* is more applicable to this case than that of *Haruna v. Modibbo* and it is the conclusion the Tribunal reached before it relied on the charts. In my view, the Tribunal was right to rely on the charts, which contained figures brought out from electoral materials prepared in INEC and tendered as exhibits PW47, the Head of Operations of INEC in Edo State. The over-riding consideration is that the exhibits were prepared by INEC, and tendered by an INEC official, who demonstrated to the Tribunal on uncertain terms the irregularities therein and how they led to invalid votes. INEC did not present any evidence or call any witnesses explain away how these irregularities came about, and they had accepted as facts. What is more, the appellants have not challenged the actual computations done by the Tribunal in respect of the invalid votes led to its decision. The position of the law is the findings of a trial court that has not been appealed against remains binding and conclusive; and it is so in this case.

The point that must be made and brought out clearly is that nowhere in the body of its Judgment did the Tribunal nullify the Elections in any of the Local Government Areas of Edo State. What was to be deducted were invalid votes and the exhibits used to demonstrate the irregularities that led to invalid votes were electoral materials prepared and tendered through PW47. What can be more damaging than that! These were documents prepared and presented by the very body, the impartial umpire, that was supposed to conduct a free and fair election. What more proof would the petitioners need to satisfy the requirement of proof beyond reasonable doubt, when INEC, through PW47, succeeded in proving their case for them beyond reasonable doubt? I have made no reference whatsoever to the oral testimony of other witnesses who testified before the Tribunal. This is deliberate and aimed at showing that the documentary evidence prepared and tendered by INEC was sufficient in itself to prove the

petitioners' case. The petition was determined solely on the ground that the petitioners scored the highest number of valid votes cast at the election. There is nowhere in its Judgment that the Tribunal found that the election was invalid in any way. It merely applied the provisions of section 147(2) of the Electoral Act, 2006. The said 'section 147 reads as follows -

- (1) Subject to subsection (2) of this section, 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 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 the valid votes cast at the election, the Election Tribunal court as the case may be shall declare as elected candidate who scored the highest number of valid cast at the election ...

In this case, the Tribunal held after deducting invalid votes it was the petitioners that scored the highest number of valid votes and that is its *raison d'etre* for deciding in favour of the petitioners and nothing else.

This brings us to the next issue in this appeal, and that is whether or not the petitioners were declared winners on the basis of 4 local governments only. Section 179(2) of the 1999 Constitution provides as follows -

"A candidate for an election to the office of Governor of a State shall be deemed to have been duly elected where, there being two or more candidates -

- (a) *He has the highest number of votes cast at the election, and*
- (b) *He has not less than one-quarter of all the cast in each of at least two-thirds of all the local governments areas in the State."*

In submitting that the Tribunal did not comply with the above provision, Senator (Prof.) O. Osunbor posed the question - a nullifying the results in the various local governments, is therein votes/result still existing? And in answering the question, submitted that since the Tribunal did not make any finding that; vote or result is still outstanding in the 12 Local Government; — it means that the entire results were cancelled, and citing the case *Haruna v. Modibbo* (supra) it was further argued that -

"If indeed the Tribunal was right in nullifying the result of the election in 12 Local Governments, the only option available to the Tribunal was to declare the entire election void. It is to be noted that the Tribunal has earlier held that INEC cancelled the results in Etsako Central and Akoko Edo Local Governments. It is submitted that arising from the above is the inescapable conclusion that election results in 14 Local Governments in Edo State were cancelled. We are now left with Local Governments. It is submitted that the 1st respondent cannot be lawfully returned as the Governor of a State on the basis of results from four Local Governments as such exercise would not have met the constitutional requirement of section 179(2) of the 1999 Constitution."

INEC and its officers also argued that the Tribunal "woefully failed to show how the 1st and 2nd petitioners scored at least one of all the votes cast in at least 12 Local Government Areas of the 8 Local Governments"; that the decision or findings of the was based on speculation which has no place in judicial proceedings; and that the total number of votes accepted by

the Tribunal and upon which the 1st petitioner was declared Governor 30 State did not represent majority of lawful votes cast. Comrade Adams Oshiomhole submitted that it is evident from appellants' grounds of appeal that they have erroneously assumed that the Tribunal annulled the election in 12 Local Governments

This court was referred to the conclusion of the Tribunal as follows -

"We have compared the votes scored by the 1st and 2nd petitioners with the total of the valid votes scored in each of the 16 Local Government Area except Etsako Central and Akoko Edo and it is clear that 1st and 2nd petitioners scored at least one quarter of all the votes cast in at least 12 local Government Areas of the 18 Local Government Areas in Edo State. We hereby declare the 1st and 2nd Petitioners as Winner of election into the office of Governor of Edo State on 14th April, 2007 having satisfied the provisions of section 179 2(a) and (b) of the Constitution and sections 70 and 147(2) of Electoral Act, 2006."

He further submitted that the appellants have unfairly made a liberate attempt at misinterpreting not just the contents of the petition, but also the very purpose and tenor of the Tribunal's judgment. It was argued that -

"By and large, the grounds of appeal, the issues raised in the appellants' brief and the submissions of counsel are poles apart from the Judgment of the lower Tribunal. It is the position of the law that an appeal is a continuation of hearing and that grounds of appeal must be anchored on the judgment of the lower court. In making his presentation at an appellate court, an appellant is not allowed to distort the findings and conclusion of the lower court, more particularly by reading into them what they do not contain or intend".

On its part, AC argued along the same line that the Tribunal annulled any elections.

The above submission is well taken, and it represents the true position of what the Tribunal found after a painstaking review of all the materials placed before it. It is manifest from the Tribunal's finding, which is unchallenged that the petitioners scored twenty five percent of the lawful votes case in ten out of the twelve contested five per cent of the lawful votes cast in ten out of the twelve contested local governments, as well as in the four uncontested local governments, the petitioners therefore satisfied the requirements of section 179(2)(a) and (b) of the 1999 Constitution by scoring the highest number of valid votes case at the election" and scoring not less than one-quarter of all the votes cast in each of the least two-thirds of the eighteen local governments of Edo State. From the foregoing, it is clear that the three main appeal lacks merit. They are accordingly dismissed. The judgment of the Tribunal delivered on the 20th of March, 2008 is hereby, affirmed as well as all the consequential Orders made herein which are as follows -

1. Comrade Adams Aliyu Oshiomhole is hereby Declared as the elected Governor of Edo State of Nigeria being the candidate who has scored the highest number' valid votes cast and has satisfied the requirements the Constitution of the Federal Republic of Nigeria 1999 and the Electoral Act, 2006.
2. The Certificate of Return issued to Senator (Prof.) Oserheimen Osunbor as elected Governor of Edo State is withdrawn and nullified.
3. The Independent National Electoral Commission (is hereby ordered to issue Comrade Adams Oshiomhole a Certificate of Return as the elected Governor of Edo State of Nigeria forthwith.

4. Each party will bear its own costs.

SALAMI, J.C.A.: I agree

FABIY, J.C.A.: I agree

AUGIE, J.C.: I agree

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