THE BURDEN OF PROOF IN ELECTION PETITION: NEED FOR REFORMS?

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INTRODUCTION

It is my pleasure and I feel highly honoured to be invited by the Nigerian Bar Association Section on Legal Practice Committee on Democratic Process and Electoral Litigation to deliver this paper as one of the Speakers at this conference. I thank the Committee for the opportunity given to me to present the paper. In adjudicatory system, the concept of burden of proof is very vital and very fundamental. It refers to the obligation placed on a party who has a duty to establish the existence of facts he intends to explore in proving or defending his case. This is in consonance with the age long principle, the who asserts must prove'. The requirement of burden of proof is applicable in any given case whether commercial, torts, criminal or election petition. Burden of proof is one of the most important aspects of adjudication, especially for a party who is claiming a right before the court or tribunal. This is so because if the burden is not discharged as required by law, a party's case is bound to fail. One can also define burden of proof is the obligation placed on a party in a trial to produce the evidence that will prove the claims he has made against the other party. In a legal dispute, one party is initially presumed to be correct and gets the benefit of the doubt, while the other side bears the burden of proof. When a party bearing the burden of proof meets its obligation, the burden of proof may shift to the other side depending on the nature of the case before the court or tribunal.

Election petition is a perennial and highly agitated area of our evolving jurisprudence. Laws and practice directions are recurrently made in other to curtail the problems and shortcomings naturally associated with election petition because of its problematic nature. Conceivably, the most challenging aspect the election petition especially for the petitioner is how to discharge the burden of proof in other to succeed in the prosecution of a petition. This paper therefore aims at addressing the issue of burden of proof in election petition and to find out whether or not, there is need for reforms on the current state of the law and practice regulating burden of proof as it concerns election petition.

THEORY OF BURDEN OF PROOF

Simply put, burden means heavy load, heavy moral obligation as defined by the "New Webster's Dictionary". In legal context, it means the onus or responsibility upon a party to procure evidence and to prove same to the satisfaction of the court or tribunal. In a trial, the most important question upon which the outcome of a case is determined one way or the other is on whom lies the burden of proof. If the party on whom the burden of proof lies is unable to discharge the burden, he may eventually lose his case.

The theory of burden of proof in the law of evidence is as old as the law of evidence itself. It is a long age settled principle of law that he who asserts must prove. This was codified into our law as contained in the Evidence Act, particularlySections 131 to 144 of the Act which deal generally with the identifiable trail of the burden of proof in both civil and criminal proceedings. Most important of the sections are sections, 131, 132, 134, 135 and 138 of the Act which provide as follows:

> ***132. (i) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist.***
>
> ***(ii) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***
>
> ***132. The Burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***

134. The burden of proof shall be discharged in all civil proceedings on the balance of probabilities.

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

(2) The burden of proving that any person has been guilty of a crime or wrongful act is subject to section 1389 of this Act in the person who asserts it whether the commission of such act is or not directly in issue in the action.

(3) If the prosecution prove the commission of a crime beyond reasonable doubt is shifted on to the defendant.

138 (1) The burden of proving any fact necessary to be proved in order to

(a) Enable a person to adduce evidence of some facts; or

(b) Prevent the opposite party form adducing evidence of some fact lies on the person who wishes to adduce, or to prevent the adduction of such evidence prospectively.

(2) The existence or non-existence of facts relating to the admissibility of evidence under this section is to be determined by the court.

The above provisions represent the general rule as to the proof of existence of facts intended to be relied on by a party in the establishment of his claim before the court or tribunal. Except in some instances where facts are admitted by a party or where the existence of facts are presumed by law, a party claiming specifically, a positive existence of facts must as a matter of law, prove those facts before the court. For instance, where a petitioner's case is that election did not hold, and this allegation is denied by the candidate whose return is being challenged, the burden of adducing evidence to establish that election actually took place lies on the declared candidate. **In Agagu v. Mimiko (2009) 7 NWLR (pt. 1140) 342;** it was the candidate declared as the winner who asserted that election took place. The case for the petitioner was that election did not take place in

the disputed polling units, wards and local government areas. The Court of Appeal examined the question of on whom the burden of proof lies and held thus:

> ***"It was the first respondent's case that there was no election held. The appellant who incidentally was the first respondent to the petition responded that the election was conducted. The burden of introducing evidence otherwise known as evidential burden squarely rests on the party who substantially asserts the positive before evidence is adduced...the appellant, it seems to me, who asserts substantially that election was conducted has the evidential burden of proving that the election forms EC8B EC8C and EC8D which are respective results of wards, local government and state levels. There were no forms EC.8A, which are polling station results tendered in evidence. Hence there were no bases for consideration of forms EC.8B EC.8C and EC.8D. To meet the respondent's case it beholved the appellant to tender the results from polling stations or booths...the petitioner, who averred that election was not held, cannot be required to prove the holding of the election by producing results. It is the respondent/appellant who alleged that there was a free and fair election that is under the obligation to tender the result of the election in the nature of form EC8A in proof of their (sic) assertion that election was freely and fairly conducted and results duly collected and declared their failure to so means that they failed to prove that election was held therefore, impliedly admitted that there was no election".***

Generally speaking, there are 2 types of burden of proof depending on whether the matter before the court is criminal or civil in nature. In criminal matters, the burden of proof lies on the prosecution and does not shift, save for few exceptions; and the standard of proof is one beyond reasonable doubt. Any lingering doubt, no matter how slight, is usually resolved in favor of the accused. In civil matters, the burden of proof lies with the party that will fail if no evidence is adduced a, and proof is on the preponderance of evidence or on the balance of probabilities.

This notwithstanding, where in civil matters, the commission of crime is alleged, the party claiming is required to prove his case beyond reasonable doubt. This is also the requirement even in election petition. That was the principle espoused in the case of ***Nwobodo vs. Onoh (1984) All NLR.*** This issue is very pertinent in election petitions, where in most cases; the petitioner loses the election and he alleges that his opponent 'stole the election through voter fraud, voter suppression, super-imposing election figures or some other electoral malfeasance. Basically, election rigging no matter the nomenclature is criminal. That being the case, when the petitioner claims that such criminal activities are involved, which swing the election in favor of his opponent, the law requires the petitioner to prove his case beyond reasonable doubt and not on the balance of probabilities.

Section 131 of the Evidence Act, 2011 quoted above, creates a duty on a party to prove disputed assertion and it is discernable from the law that the burden of proof placed on the party, refers to the duty of producing evidence in proof of facts sought to be relied on in the establishment of his case. In civil cases and election petition, the ultimate burden of establishing a case is as disclosed on the pleadings. The party who bears the general burden of proof is the party who would lose the case if, after the end of the case, no evidence is led. That party is the petitioner in election petition. This was the purport of the Court of Appeal decision in the case of **Awuse vs. Odili (2005) All FWLR (pt 261) 248;** where the matter was put thus

> ***"The law is trite that the consideration of the respondents' case did not arise until and unless the petitioner had made out a case. In other words, a duty lied on the petitioner who alleged, to succeed on the strength of hisnown case and not the weakness of the defence".***

The implication of the above decision is that, when election result is declared, there is a presumption that the result is correct. Though the presumption is rebuttable, but the burden is on the petitioner to rebut the presumption. In other words, the burden is on the

person who denies the correctness of the result to establish that the result is not correct or represents the wish of the electorates.

RELATIONSHIP BETWEEN BURDEN OF PROOF AND STANDARD OF PROOF

As earlier discussed, burden of proof refers to the duty imposed on a party in a cause or matter to establish his case to the satisfaction of the court or tribunal. Since it is not legally enough to place a burden of proof on a party without prescribing the level or degree of the burden placed on him so as to measure whether or not he has been able to discharge the burden, standard of proof comes in to regulate what is sufficient to discharge the burden or to regulate the level and degree of the burden of proof. Therefore, standard of proof is the degree or level of proof demanded in a specific case such as beyond reasonable doubt or by preponderance of evidence as the case may be. It is very convenient therefore; to say that standard of proof dictates the level or nature of burden proof required of a party in order to successfully discharge the burden placed on him.

This is necessarily so because standard means a criterion for measuring acceptability, quality or accuracy. Therefore, the standard of proof prescribes the quality of burden of proof to entitle a claimant or petitioner to the judgment of the court or tribunal. In other words, standard of proof is the degree or level of proof that defines the burden of proof such as beyond reasonable doubt in criminal mattersor where allegations of crimes are made in a civil suit or on the balance of probabilities in civil matters, simplicite.

BURDEN OF PROOF IN ELECTION PETITION

It is axiomatic now that election petitions are sui generis and any discussion about proof of an election petition must be viewed from that prism.

To properly appreciate the burden of proof in election petition, the various grounds upon which an election can be challenged must be examined. But before that, the point must be made from the outset that most of the grounds for which election can be challenged entail criminal activities. In this regard, the standard required to succeed in such election petition is one beyond reasonable doubt. This in essence places a very big task on the petitioner. From the experience gathered over the years in the prosecution of election

petitions, I have come to realize that it is more difficult for a petitioner to establish his case than it is for a respondent to defend the petition even if every allegation in the petition whether criminal or otherwise is determined on the balance of probability.
It must also be pointed out that the stringent task placed on the petitioner to prove every allegation of crime in his petition beyond reasonable doubt has resulted to the dismissal of many otherwise meritorious petitions.

In criminal matters, it is the state's duty to prove the case against the accused beyond reasonable doubt to be able to secure a conviction. The state has the resources to deploy in order to secure such conviction. The state readily has within its reach agents like police detectives, forensic experts, and handwriting and fingerprint experts as the case may be, to prove the case against the accused. This notwithstanding, the state in some cases falls short, and the criminals get away with crime even as monstrous as murder. Various corruption cases prosecuted by EFCC are some examples of instances where despite the unlimited resources available to the state, cases are still lost among other reasons because of the requirement for proof beyond reasonable doubt.
So if the state could not prove the guilt of the accused in many criminal trial despite its unlimited resources, why does the law expect a private individual in an election petition which is in most cases, typified with criminal allegations, to prove his case beyond reasonable doubt in order for the court to nullify an election that was rigged or manipulated or tainted with commission of crime?
It may be argued that most politicians are rich and could easily engage the services of high priced attorneys to prosecute their petitions, however, placing that heavy burden on the petitioner encourages rigging and gives the impression that it is okay to rig an election and get away with it since the aggrieved party cannot easily gather the quality of evidence needed to get the an election nullified due to the heavy burden of proof. This notwithstanding, the law is that every allegation of crime in election petition must be proved beyond reasonable doubt. At this point, we shall examine the various grounds for challenging an election for proper appreciation of burden of proof in election petition.

PROOF OF NON-QUALIFICATION

Going by the principle of law that he who asserts must prove, the petitioner who alleges that the respondent was not qualified to contestan election has the burden to prove such non-qualification. The point must be made that allegation of non- qualification presupposes that the respondent must have lied about his qualification by presenting a false or forged certificate of qualification. Therefore, the burden of proof is on the petitioner to prove such non-qualification beyond reasonable doubt.

In **Alliance for Democracy vs. Fayose (2004) All FWLR (pt. 222) 1719 at 1741;** the appellant challenged the return of the 1 respondents as the governor of Ekiti State on the ground among others that he was not qualified to contest the election at the material time on the ground that he forged an Head Certificate he presented to the National Electoral. The tribunal dismissed the petition and the petitioner proceeded to the Court of Appeal. Delivering the judgment, the court held thus:

> ***"It follows logically and reasonably, in my view, that if, as the appellant contended, the credentials or certificates, whatever name or names thereon, and uttered to INEC, belong to any person or persons other than to the 1" respondent, put in other words that the 1" respondent forged the name or names of the true owner of the certificates or credentials in those documents submitted to INEC for his clearance as qualification to contest the election, hen in my view, it behoves of the appellant to prove the forgery",***

As I observed earlier, when the allegation burdens on the presentation of forged credentials, the petitioner is in a serious dilemma on the standard of proof. Unfortunately even if the petitioner scales the standard of proof and established that the respondent indeed presented forged certificate, there is no record of any case or any assurance that the culprit will be presented by the relevant authority at the end of it all.

More worrisome is that fact that there has been no serious effort made to prosecute persons that committed electoral offences in all our past elections. As provoking as this concern of mine might appear, the law is that allegation of forged certificate must be proved beyond reasonable doubt. The case that succinctly illustrates the burden placed on

the petitioner in discharging allegation of presentation of forged certificate is the case of Nnachi vs. Ibom (2004) 16 NWLR (pt. 900) 614 where the Court of Appeal had this to say:

> ***"The 'star witness' whose testimony forms the basis of the issue under consideration was one Mr. EgboEjike. The witness is the Senior Assistant Registrar, Abia State University (formerly Imo State University). He was subpeoned 'to produce list of graduates of Economics Department of 1990'. The witness did produce some list and calendar, which the election tribunal received in evidence respectively as Exh. NB7 tendered along with its copies and marked 'NB7A' the calendar was marked Exhibit 'NB7B'. Under cross examination, the witness stated that not all the students of the Economics Department who passed the examination that year were in exhibit NB7A & NB7B. The witness did not have the supplementary list of those who graduated in 1990. A doubt has thus been created which in law, must be resolved in favour of the accused. (See Queen v Haske (1961) 2 SCNLR 90 at 93). In this case, the 1" respondent is the accused, being alleged to have presented a forged certificate. By that testimony, the star witness led the petitioner to the top of the mountain, gave him a glance of the glory and place of pride and the importance occupied by the National Assembly, a place the petitioner desires to be, and then left him marooned on the mountain top. The testimony of the witness is inconclusive and therefore of little or no evidential value to the case of the petitioner. No possibilities exist here let alone probabilities, contrary to the contention o the learned counsel to the appellant".***

PROOF OF SUBSTANTIAL NON-COMPLIANCE

Section 139 (1) Electoral Act, 2010 (as amended) provides thus:

> ***"139. (1) An election shall not be liable to be invalidated byreason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or Court that the election in accordance was with conducted substantially the principles of this Act and that the non-compliance did not affect substantially the result of the election".***

The origin of the principle in section 139 (1) of the Electoral 2010 (as amended) is traceable to the English law on election petition which forms part of our received law in Nigeria. In the English case of **Woodward v Sarsons** it was held:

> ***"If this proposition is closely examined, it will be found to be equivalent to this, that the non-observance of the rules or forms which is to render the election invalid, must be so great as to amount to conducting of the election in a manner contrary to the principle of an election by ballot and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters, in other words the result of the election".***

Theabove proposition was first applied in the case of **Sorunke v Odebunmi(1960) 5 FSC 175** and followed in the cases of **Swen** v. **Dzungwe (1966) 1 SCNLR 11, 119**and **Awolowo v Shagari (1966) 1 SCNLR 11.**

Where a petitioner alleges a particular non-compliance, he must as a matter of law satisfy the tribunal that such compliance is substantial enough to affect the overall result of the poll complained against. In **Iniam** v. **Akpabio (2008) 17 NWLR (pt. 1116) 225 at 301-302,** the Court of Appeal held:

> ***"No doubt the appellants copiously pleaded malpractices and instances of alleged non-compliance with the Electoral Act, but no evidence was led at the tribunal to show their effects on the outcome of the election. I agree with the learned counsel for the 35th respondent that it is not enough to merely catalogue instances of malpractices and breaches of Electoral Act without adding up or tallying the number of votes involved or affected and the impact of***

these on the overall result of the election against the appellant interest. See Buhari v. Obasanjo (supra); Biyu v. Ibrahim (supra) Wulgo v. Buk (1999) 3 NWL.R (PT. 596) 539 Kalgo v. Kalgo (1999) 6 NWLR (Pt. 608) 639 and Haruna v. Modibbo (supra). The obvious reason for tying such malpractices to votes affected thereby is because irregularities affecting minority of votes would not upset the election of candidate with majority of lawful votes. See Adeola v. Owoade (1999) 9 NWLR (Pt. 617) 30. Appellants have failed to show the effect of the alleged malpractices on the outcome of the final result of the election, despite their copious pleadings and extensive cross-examination of RW2. There was no evidence on the number of units and votes covered by these exhibits and how they were affected by the alleged malpractices. How many votes would the 1" respondent lose and how many would the appellants gain from the declared results, if irregularities had not occurred? These posers are important in view of the appellants' allegation in paragraph 9(d) of their petition that the 1" election and his return is invalid".

Where petitioner is challenging an election on the ground of acts of non- compliance and he is praying the election or court for a nullification of the entire election, he must in addition to establishing the non-compliance complained of, further prove that when the votes affected by the acts of non-compliance are nullified the electorate have not been allowed to elect their representative or governor or president as the case may be. In Buhari v. Obasanjo (2005) 13 NWLR (pl. 941) 1, 308-309, the Supreme Court held:

"In the instant case, the 1" appellant was just one of the numerous candidates that contested for the office of President of Nigeria at the election. The 2nd appellant was also one many political parties that fielded candidates for the same office. The l'appellant, according to the result declared at the end of the election, scored just about half of the votes credited to the 1" respondent. But the 1" appellant did not challenge the scores neither credited to the I" respondent nor prayed the court below to declare him winner and to the end, leading credible evidence to show that he scored more votes than the 1"

respondent at the election. But he prayed the court below to set aside the entire elections on the grounds, inter alia, that certain breaches of the provisions of the Act were committed without showing how the alleged breaches affected the entire outcome of the election, including the results credited to the other contestants, and himself. The court below was therefore right in rejecting the request and the interpretation given to the provisions of the Act is, in my view, quite appropriate.

It is not enough for a petitioner to plead substantial non-compliance he must lead evidence to show how the non-compliance complained of would affect the result of the election as it was held in the case of **CPC v. INEC (2011) 18 NWLR (pt. 1279 493 at 571,** where the Supreme Court held thus:

"This court has consistently held that for petition to succeed on non-compliance with the provision of the Electoral Act the petitioner must prov not only that there was non-compliance with the provisions of the Act but that the non-compliance substantially affected the result of the election. In other words, the petitioner has two burdens to prove-

(1) That the non-compliance took place; and

(2) That the non-compliance substantially affected the result of the election.

See: Buhari v. INEC (2008) 19 NWLR (P1.1120) 246 1 435; Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1 at 80; Akinfosile v. Ijose SCNLR; Awolowo v. Shgari (1979) 6-9 SC 51".

The court below found that the appellant failed to prove substantial non-compliance. The appellant tried to push the burden of proof of its declaratory reliefs at the door steps of the 1" respondent INEC. Such a step is not in tune with the low. Since the appellant failed to prove substantial non-compliance. It could not depict, in clear terms, that non-compliance substantially affected the result of the election. In short, the vital issue in contention was not surmounted

by the appellant. The issue must, at the tail end, be resolved against it and in favour of the respondents....

It must be pointed out that going by the provisions of the Act as provided by section 139 and the above decided authorities, some latitude of non-compliance is anticipated. Therefore, if in the opinion of the tribunal, the non-compliance does not destroy the fundamental tenets ingrained in the Act, then such irregularities could conveniently be overlooked. This in my view is to prevent an election from being invalidated on mere failure to comply with minor provisions of the Electoral Act which have no effect or substantially affect the outcome of the election.

Proof of Falsification of Election Result and Inflation of Votes

In order toprove a ground of falsification of votes, it is imperative that the petitioner must have two sets of results, one considered genuine or authentic and the other considered falsified. The two would then be compared to determine the falsity. Allegation of inflation with non-existent votes has been held to be another way of alleging falsification of a result and to prove falsification of result, there should be in existence at least two results, one of which could be stigmatized as false and the other one as genuine. See the cases of:

Proof of Allegation of Bribery

A clear and unequivocal proof is required before a petitioner can establish a case of bribery. Suspicion, however strong, is not sufficient, and the mere fact that somebody else committed the crime and bribed other persons to vote for a particular candidate is not enough or conclusive. It has to be shown that either the candidate, who is alleged to have bribed the voters, committed the offence by himself or through his acknowledged agent or that he authorized what was done or that he subsequently, ratified it. A candidate in an election cannot be held responsible for what other people did in the form of unsolicited aid of which he or his acknowledged agents were ignorant. Mere canvassing for candidate in whose success one is interested is not sufficient to ascribe to the candidate any unlawful act of the canvasser of which the candidate and his agent are ignorant. See:

Proof of Allegations of Thuggery and Violence

It is the party who alleges that voting did not take place in a particular polling station as a result of disorderly conduct or act of thuggery on the day of election that has the burden of proof. In **Ajadi** v **Ajibola (2004) 16 NWLR (pt. 898) 91,** it was held by the court that where there was a complaint about violence or thuggery in an election petition, a nexus must be established between the perpetrators and the respondent by credible evidence. It must be shown that the act adversely affected the conduct of the election. In **Audu v INEC (No. 2) (2010) 13 NWLR (pt. 1212), 456,** the Court of Appeal held:

> ***"There is no doubt that thuggery and violent disruption of election are criminal acts which must be proved beyond reasonable doubts. This court in Ogu v Ekweremadu (2006) 1 NWLR (Pt. 961) page 255 at 282 per Adekeye, J.C.A (as he then was) held that thuggery and violent disruption of election are criminal acts, and there must be established a nexus between the perpetrators and the Ist respondent by credible evidence. It must be shown that the act adversely affected the result of the election. Also, in Nnachi v Ibom (supra) this court per Fabiyi, J.C.A (as he then was) stated:***
>
> ***Thuggery and violent disruption of election are criminal acts. It must be shown that the person causing actrs of thuggery was n agent of the Respondent".***

PROOF OF VALID NOMINATION AND UNLAWFUL EXCLUSION

A person who was duly nominated by his political party and whose name was submitted to INEC and published pursuant to the Electoral Act does not cease to be candidate for the purpose of filling an election petition simply because he had been disqualified. He is entitled to defend the right which had inured to him as a candidate before the disqualification. A person who secured the nomination of his party and whose name was submitted to the INEC and accepted s a nominated candidate is entitled to petition if he is precluded from partaking in or excluded from the election. In this regard, such a person has the burden to prove:

(a) That he was validly nominated by his party,

(b) That the election was conducted and concluded;

(c) That a winner was declared and;

(d) That his name was not included in the list of the contestants.

The petitioner must not only state the above requirements in his petition, he must specifically prove them at the trial. In ***PPA v INEC (2010) 12 NWLR (pt. 1207) 70;*** the Court of Appeal held:

> ***"A candidate at election is an individual who was validly nominated by its (sic) party. The mere proposal of the name of candidate by a political party as in the instance appeal, without more, does no amount to valid nomination. In Idris v. ANPP (supra), this court held that a petitioner seeking to prove that he was unlawfully excluded despite being validly nominated by his political party must first prove that:***

(i) That he was validly nominated by his political party;

(ii) That an election was conducted;

(iii) That a winner was declared;

(iv) ***That his name was not included in the list of contestants".***

PROOF OF ALLEGATION OF OVER-VOTING

A party alleging over-voting in an election in some particular polling units has the burden to tender in evidence the statement of results in the appropriate forms which should show the number of registered voters, the number of accredited voters and the number of actual voters to enable the election tribunal or court decide whether there was over-voting or not. In **Kalgo** v. **Kalgo (1999) 6 NWLR (pt. 608) 639;** the petition in this matter was based on allegation of multiple voting which was alleged to have resulted in over-voting in the favour of the respondent

At the trial, no one gave evidence that any malpractice was perpetrated. The petitioner gave evidence that 1,267 illegal votes were added to the votes of the respondent in a ward but did not tell the tribunal how he arrived at that figure. Some other evidence of figure given in respect of some voting centers was at variance with the pleading. The tribunal gave judgment against the petitioner. On appeal, the Court of Appeal affirmed the decision of the tribunal and held thus:

"On the issue of irregularity amounting to non-compliance with the provisions of Decree No. 3 of 1999, the lower tribunal did observe that the petitioner did not tender the statement of results in the appropriate forms which would have shown the number of registered voters, the number of accredited voters and the number of actual voters to enable the tribunal decide whether there was over-voting or not. I must add here that there is no running away from the basic rule that onus of proof was certainly on the appellant who was alleging non-compliance which would have entitled the tribunal to coned the 'illegal' votes accredited to the 1" respondent".

Again in **Haruna** v. **Modibbo (2004) 16 NWLR (pt. 900) 487,** the Court of Appeal held that the most basic and conclusive proof of an allegation of over-voting was the voters' register, which was the basis on which it could be ascertained whether or not over-voting indeed took place. Any testimony of the shortage of or excess votes can only be ascertained when it is compared with the solid facts in the voters register.

PROOF OF ALLEGATIONS OF CORRUPT PRACTICES

Allegation corrupt practices are mainly criminal in nature. Therefore, they must be proved beyond reasonable doubt as a matter of law. To discharge this burden, a petitioner must lead concrete evidence showing that:

(a) The respondent personally committed the corrupt acts or aided, abetted, counseled or procured the commission of the alleged acts of corrupt practices;

(b) The alleged acts were committed through an agent, that the agent was expressly authorized to act in that capacity or granted authority and:

(c) The corrupt practices substantially affected the outcome of the election and how it affected it.

The petitioner who alleges corrupt practices on the part of a respondent with reference to an election must prove not only the actusreus but also the mensrea on the part of the respondent. In **Gbadmosi v. Azeez (1998) 9 NWLR (pt. 566) 471,** one of the grounds

upon which the petition was based was the allegation of corrupt practices. The Court of Appeal held:

> ***On issue (1) relating to whether the petitioner has been able to prove allegation of corrupt practices as was alleged in his petition, I have considered the arguments of the parties on this issue vis-à-vis the records and the prevailing law. The poser here is whether it can be said that the petitioner has discharged the burden of proving the corrupt practices alleged against the respondent. It is mandatory for the petitioner to discharge this onus as specified in section 67 of Decree No. 7 of 1997 which defines corrupt practices to men personation, treating, undue influence, bribery and aiding, abetting, counseling or procuring the commission of the offences specified above. Thus, guilt can only be attributed to a candidate who commits any of the offences or gets person to commit the offence with his knowledge or consent or knowledge of a person who is acting under his general or special authority of the candidate with reference to the election. In other words, the petitioner must prove not only actusreus but also the mensrea on the part of the respondent. It can be observed from the circumstances of this case that the petitioner hereby merely alleged general electoral malpractices without proving the mental element on the part of the respondents. This negation of proof of the mental element has made it impossible for the petitioner to discharge the onus placed on him in respect of the electoral malpractice alleged in his petition".***

Also in **Nwole v. Iwuagwu (2005) 16 NWLR (pt. 952) 543,** the Court of Appeal held:

> ***"I am at one with the trial tribunal that to determine whether the allegation of corrupt practices or electoral malpractices has been proved, the requirements of the law are as follows:-***
>
> 1. ***That the respondent who was declared personally committed the corrupt practices.***
> 2. ***That where the alleged act was committed through an agent, the said agent must have been authorized by the respondent.***

3. ***The corrupt practices affected the conduct and outcome of the election and how it affects it.***
4. ***The petitioner must go further to prove that but for the malpractices, he would have won the election.***

The general rule is that the onus is on the appellant to prove that there were such malpractices and non-compliance which prevented him from winning the election. In Kudu v. Aliyu (1992) 2 NWLR (PT. 231) p. 615 at 620 Akanbi, JCA (as he then was) put it beyond argument that a petitioner in an election petition, who alleges in his petition, particular non-compliance, must satisfy the court that the non-compliance is substantial and affect substantially the result of the election".

PROOF OF ALLEGATIONS OF LATE ARRIVAL OR NON-ARRIVAL OF VOTING MATERIALS, NON-ACCREDITATION AND NON-CONDUCT OF ELECTION

Without wasting time, some judicial authorities shall be referred to in demonstrating how these heads of allegation are proved in election petitions. On how to prove late arrival or non-arrival of voting materials, the Court of Appeal in **INEC v Anthony (2011) 7 NWLR (pt. 1245) 1,** held thus:

"The burden of proof is not discharged by a Petitioner by simply telling the court that materials arrived late and voting took place barely an hour or that result sheet were not distributed along with other essential electoral materials, the petitioner has to go further to prove the time of the arrival of the electoral materials and the materials that arrive and such evidence must come from person/persons who are designated officers or by polling agents present. In the present case, none of such designated officers or polling agents who were present when the materials arrived at the polling stations gave evidence.

In the same vein, the Court of Appeal when dealing with the burden imposed on the petitioner on how to prove non-accreditation in the case ***Ayodeji V Ajibola (2013) All FWLR (pt. 660) 1327,*** held thus:

> ***"I tend to agree with the Respondent that the decided authority in the case of KWALI v. DOBI decided only in 2010 is still subsisting and binding on a party as the applicable law governing the proof of non-compliance as at now, whereof it is only the original voters register that can be used to establish an allegation of non-accreditation as alleged by the Appellant and not section 97 of the Evidence Act. Appellant had a duty to subpoena the 3rd Respondent to produce the said documents at the trial. There is evidence of application for subpoena to the 3rd Respondent, but nothing is disclosed further, whether Appellant abandoned the application as they have not stated why they did not finally call the official of the 3d Respondent to give evidence on their behalf.***

On how to prove non-conduct of election, the Court of Appeal in the case of ***INEC v. Anthony (supra),*** held that:

> ***"The Petitioner's ground for challenging the election at the tribunal is that no election was conducted at all the constituency and he is expected to produce evidence to the effect. The tribunal definitely went off far from the mark, when it relied on its mere perception that this witnesses appeared to be "witnesses of truth" play in the election? Where is the evidence that no election took place as alleged? It is settled that a Petitioner relying on this ground must prove so by calling at least a registered voter form each of polling booths in each of the wards in the constituency. See CHIME v. ONYIA (2009) 2 NWLR (Pt. 1124) I. In the absence of any such evidence, the impression made on the tribunal by the witnesses, must remain in the mind of the tribunal; it is irrelevant, and cannot be used to fill up the blank spaces or empty holes in the Petitioner's case.***

PROOF OF OVER-VOTING

To aptly prove over voting, the burden is on the party who alleges same not only to plead the incidences of over voting, but must as a matter of law tender register of voters, ballot boxes containing ballot papers and statements of results from the affected polling stations. In the case of ***Audu v. INEC (No. 2) (supra),*** the Court of Appeal held:

> ***"In order to prove over-voting the tendering of register of voters, ballot boxes containing ballot papers and statement of result from the affected polling stations sine qua non in cases of this nature. See the following cases KALGO v. KALGO (1999) 6 NWLR (pt. 608) page 639 at 646; HARUNA v. MODIBBO (supra).***

In the same manner, in the case of ***CPC v. INEC (2012) 2-3, SC,*** the Supreme Court held that:

> ***"Over the matter of ticking or marking, the Appellants seem to take shelter in their quest to establish either over-voting or irregularities or malpractices upon which can be based at (sic) mollification or the election victory of the I" Respondent and declaration as winner for the Appellants. However, in setting out on the adventure, the Appellants went on the journey without necessary implements that would have enable them establish over-voting or malpractices as envisaged by the Electoral Act. Rather, being empty handed had gone in to the minor details of ticking or marking on the right side or the left side, a situation akin to blowing of hot air which has no value. What one expected is for the Appellants to show that registered voters in a polling unit or units were more than allowed or that accredited voters were less than cast their votes,***

all of which are easy to establish where a party was not distracted by minor issues unless such irregularities did not take place. It is to stated loud and clear that the polling unit forms the foundation of an election and so what took place there is what is needed for a party seeking to establish malpractice to put across and not this flighty session of ticking on the right and left, an administrative process of the electoral official. See CHUKWU v. OMEAKU (2009) ALL FWLR (pt. 490).

SEVERANCE OF PLEADING AND BURDEN OF PROOF IN ELECTION PETITION

Many a times in election petition, it is common to see the mixture of civil and allegations of commission of electoral offences such as falsification of election results, ballot boxes snatching, multiple thumb-printing of ballot papers, the return of fictitious scores where no election held, and so on. Where such situation occurs, there are 2 possible options left for the petitioner. The first one is to gather enough evidence in proving criminal and civil allegations contained in the petition. The second possible option for the petitioner is to abandon the criminal allegation in the petition and focus on the civil aspect of same, so as to lessen his burden, especially when the petitioner fills that he cannot prove the allegations of crime pleaded in the petition beyond reasonable doubt. The point must be made that this option is only possible if the petition has not been couched in way that both criminal and civil allegation are so interwoven as to make it impossible to severe them. Where the petitioner is unable to prove allegations of electoral offences and the civil allegations are so interwoven with the criminal allegations as to make the former inseparable from the later, the petition is said to be bad except if the petitioner can prove the criminal allegation beyond reasonable doubt.

Where an election petition contains allegations of commission of crimes and civil allegations and it becomes impossible to prove the allegation of commission of crimes ***beyond reasonable doubt,*** it then becomes important to determine whether the paragraphs of the petition which contain allegations of crimes can be severed from the civil allegations contained in the petition. It is also important to determine

whether after the severance, the substance of the paragraphs containing civil allegations can sustain the petition so as to require of the petitioner the proof of the surviving paragraphs on the ***balance of probability*** or on the ***preponderance of evidence.*** This is what is called the ***doctrine of severance of pleadings Bello, JSC (as he then was),*** explained the application of this doctrine in ***Nwobodo v. Onoh*** (supra), and held:

> ***"However, where a Plaintiff makes an allegation of a crime in his pleadings but nevertheless can succeed in his claim without proving the crime it cannot then be said that the alleged crime was a fact in issue or directly in issue NWAKWERE v. ADEWUNMI (1967) NLWR 45 at 48. Denning, LJ, stted the rule aptly in ARAB BANK V. ROSS (1955) QBD 216 at 229 in these terms:***
>
> > ***"Under the rules of pleadings, as I have always understood them, a pleader who has pleaded more than he strictly need have done, can always disregard the unnecessary or surplus averments and rely simply on the more limited ones".***
>
> ***The scope of section 137(1) of the Evidence Act may be summarized: where in an election petition the petitioner makes an allegation of a crime against a Respondent and he makes the commission of the crime as the basis of his petition, the sub-section imposes strict burden on the petitioner to prove the crime beyond reasonable doubt. If the petitioner fails to discharge the burden, his petition fails. However, the provisions of section 137(1) are subject to the principle of severance of pleadings which may be stated thus: if in any civil proceedings the averments alleging a crime are severable and if after such severance there still remain in the pleadings of the Plaintiff or the petitioner can succeed in his claim or petition, then the burden of proof upon the Plaintiff or petitioner is to prove his case within the balance of probability. I may emphasis that the application of section 137 (1) of the Evidence Act to a civil proceeding depends on the contents of the pleadings in a particular case. Each case should be decided on its pleadings. With these considerations in mind, when I applied the principle of severance to the petition and disregarded all the averments alleging crimes against the Respondent, I found what remained of the petition could not be sustained having regard to totality of the evidence adduced by the parties. The allegations of crimes were contained in paragraphs 4, 5, and 7 (i) which covered six pages of the petition.***

In my view, the three paragraphs were made to be centre of gravity to which the other paragraphs in the petition were attracted.

Section 137 (1) of the old Evidence Act that was referred to in ***Nwobodo v. Onoh (supra)*** is ***imparimateriato*** the current section

"135 (1) Evidence Act 2011 which provides thus: "135 (1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt".

In ***Omoboriowa v. Ajasin (1984) 1 SCNLR, 108***, after the election to the office of the Governor of Ondo State took place, ***Chief Akin Omoboriowo*** was declared elected having purportedly scored the majority of lawful votes and having purportedly satisfied the constitutional requirements as to territorial spread. ***Chief Michael Adekunle Ajasin*** who was declared as the looser challenged the result by a petition which he filed in Ondo State High Court. The ground of the petition was among others based on serious criminal allegations against ***Chief Akin Omoboriowo.*** The Allegations charged him with falsification of figures; inflation of votes and the reduction of votes won by the petitioner. However, the petitioner abandoned the allegation of crime as there was no evidence adduced on the issue. In proof of the ground for the petition, the petitioner called several witnesses and produced documentary evidence all along the line from the receipt of the results from the presiding officers. He established how the figures for each constituency had been obtained and collated and there was a continuous chain of events leading to the total figures. Various certificates of return issued and signed by FEDECO officials were tendered in evidence. The trial court found that the petitioner proved his case. ***Chief Omoboriowo& Ors*** appealed to the Federal Court of Appeal which confirmed the decision of the trial court by a majority decision of 3to2. On further appeal to the Supreme Court, one of the issues dealt with was the appropriate standard of proof required in the circumstances of the case. In assessing this, the Supreme Court held thus:

"Again, as in my reason for judgment in NWOBODO v. ONOH (supra), I considered fully the scope of section 137 (1) of the Evidence Act and its

application to the pleadings of a particular case as qualified by the principle of severance of pleadings as demonstrated in NWANKWERE v. ADEWUMI (1967) NLWR 45 at 48 and ARAB BANK v. ROSS (1952) QBD 216 at 229. In the case in hand, at the close of his case during the hearing of the petition, the petitioner abandoned the allegations of crimes. It follows therefore that in so far as the petition was founded on those allegations. It must be dismissed. However, if the averments alleging crimes against the 2nd Respondent were excised from the petition there still remained in the body of the petition sufficient averments without putting directly in issue the commission of a crime by a party to sustain the petition..... From the foregoing, the trial court was entitled to deal with the petition as a claim in a civil action in accordance with the provision of section 129 (1) of the Electoral Act and to apply the standard of proof within the balance of probability in its determination of the petition. The Federal Court of Appeal rightly, in my view endorsed the stance of the trial court.

The doctrine of severance of pleading applies only where there is a clear and distinctive compartmentalization or separation of criminal allegations from those that are civil in nature. In other words, the doctrine is not applicable where criminal allegations and civil allegations pleaded are interwoven and intertwined. In ***Gundir v Nyako (2014) 2 NWLR (pt. 1391) 211,*** the Supreme Court made this point very clear when it held thus:

"The dilemma in which the Appellants have found themselves is very critical and unwinding. In other words, the appellants by their appeal are fighting tooth and nail that the principle of the doctrine of severance ought to have applied to their petition they are also contending that having failed to prove the criminal allegations they could still anchor on the civil alternative claim. It is obvious that he Appellants are not resting their appeal on criminal allegations, which they have found to be very hard nut to crack. The truth is also obvious and staring in the Appellants faces that they have completely shut out themselves from relying on civil allegations. The confirmation is on the record wherein both the lower court and also the tribunal had found on the intertwined nature

on the Appellants' petitions and concluded that they are criminal in nature. The Appellants in the circumstance have found themselves at a crossroad since they are neither here nor there. While the criminal aspect is no longer open to them, they are not also availed the civil alternative having long shut out".

It must finally be pointed out that application for severance of pleading has to be formally made in the course of hearing of a petition. It is one of the applications under the current practice that should be made during the pre-hearing sessions. It will be too late if application for severance of pleading is delayed till the address stage. In ***Gundiri v. Nyako (supra),*** the Supreme Court made out this point when it held thus***:***

"....The final address of counsel is not the stage for an application for the indulgence of such magnitude sought by a party for the trial court to effect the severance that is needed. A more formal, well defined application is called for".

CONCLUSION

Burden of proof in election petition and the standard required for the heads of ground for challenging an election have been examined. So also was examined the relationship between burden of proof and standard of proof. In the course of the paper, the doctrine of severance of pleadings in relation to the burden of proof in election petition was also addressed. What is left to be considered now is whether after the examination of the current state of our laws, rules of practice and procedure applicable to the burden of proof in election petition, is to explore if there is any need for reform or to improve on same.

Generally speaking, all human activities including provision of laws and rules to regulate our conducts are liable to one reform or the other from time to time because there is no perfect manmade law anywhere. It is on this basis that I intend to make some suggestions in the form of reformation to our current state of law in relation to burden of proof in election petition:

1. **THE PRINCIPLE OF DUMPING OF DOCUMENT BE ABOLISHED**

   In our law, parties who seek reliance on certain documents must not only plead and tender the documents. They must as a matter of law and practice tie the

documents specifically to the part of their claim in respect of which they intend to use the documents, otherwisethey would be guilty of dumping the documents on the court or tribunal. The resultant effect of this will be very fatal to their cases as the documents will lack evidential value. This is the principle of law adopted by the Court of Appeal in the case of Dame Pauline Tallen vs. David Jonah Jang (2011) LPELP-9231 (CA); where the court held thus:

> "The law is clear as pronounced in the cases cited earlier in this judgment that a party relying on bundle of documents in proof of his case must specifically relate such documents to that part of his case in respect of which the bundle of documents were tendered. This responsibility does not fall on the court as it would be aiding and conducting a case on behalf of a party who has failed to discharge the onus placed on him".

Many election petitions otherwise well conducted have suffered failure on the ground of this principle of law. It is therefore my view that if the party relying on the documents has been able to bring the Certified True Copies of the documents before the tribunal, the documents should be accorded the requisite evidential value. After all, the law is trite that court cannot close its eyes to the documents pleaded and brought before it. What is more it is an accepted part of our law that documents speak for themselves.

2. THE BURDEN THAT ELECTION WAS PROPERLY CONDUCTED SHOULD BE PLACED ON INEC

It is the law that when the petitioner alleges that an election was not properly conducted, he must prove how and in what way the election was not properly conducted. This burden many a times, might be tasking a petitioner who have limited resources in terms of expertise and capability which are always and more readily available to the state. It is therefore my view that the burden that an election was properly conducted should be placed on the body that conducted the election. After all, the body has within its reach all the materials used for the

conduct of the election and is easier for the body to establish, the level of credibility of the conduct of the election.

3. **THE DISTINCTION BETWEEN POSITIVE AND NEGATIVE ALLEGATION BE ABOLISHED**

The law as to the proof of fact is that he who asserts the positive as against the negative has the obligation to prove the positive assertion. For instance, where a petitioner's case is that election did not hold, and this allegation is denied by the candidate whose return is being challenged, the burden of adducing evidence to establish that election actually took place lies on the declared candidate. That was the decision in ***Agagu v. Mimiko (supra)*** where it was held by the court that the candidate who was declared as the winner who asserted that election took place must prove that as against the petitioner whose case was that election did not take place in the disputed polling units, wards and local government areas. This distinction in my humble view should be abolished.

4. **The requirement for proof beyond reasonable doubt in allegation of crime be revisited**

As observed earlier, the candidate whose return is being challenged is not in a criminal trial; and even if the petitioner is able to prove the allegation of crime beyond reasonable doubt, he would not be sent to jail. So, what is the essence of proof beyond reasonable doubt? I wish to pause at this point to make a little illustration to demonstrate my point. The case that rightly comes to mind at this juncture is the case of O.J. Simpson who was accused of the multiple murders of his ex-wife, Nicole Brown Simpson, and her boyfriend, Ronald Goldman. He hired a first class defense attorney, Johnny Cochran, for his defence. The state was unable to prove his guilty beyond reasonable doubt and he was discharged and acquitted. However, the deceased family instituted a wrongful death action in a civil court. It was the same set of facts and evidence that failed to secure conviction in criminal trial that was used by the deceased family to secure liability against O. J. Simson in the wrongful death action. The plaintiff's onus of proof

was on the balance of probabilities. The plaintiff would not have been able to prove it beyond reasonable doubt had the law required him to do so. Though the civil court found Mr. Simsonliable in the action for wrongful deaths; it could only order him to pay damages for the wrongful deaths.

This is the faith of many otherwise good election petitions in our country. His Lordship, ***Obaseki JSC***(as he then was) in his dissenting opinion in the case of ***NwobodoVs C. C. Onoh (supra),*** put it succinctly thus:

> ***"The commission of a crime by a party to this proceeding is not directly in issue and the petitioner is not required in law to discharge the burden of proving the crime of offence of falsification against any party to the proceeding. The standard of proof required of the petitioner on these proceedings to succeed is that of balance of probabilities, this being a civil matter."***

It is against this backdrop that I suggest that the law in this regard be revisited and modified in a way that will give room for easier prosecution of petitions especially on the part of the petitioner. If election petition is too rigid and difficult to prove, its essence will be lost and the perpetrators of election fraud will triumph in their fraud. Thanks