1. SENATOR NURUDEEN ADEMOLA ADELEKE

2. PEOPLES DEMOCRATIC ARTY (PDP)

V.

1. **ADEGBOYEGA ISIAKA OYETOLA**

3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

4. ALL PROGRESSIVES CONGRESS (APC

SUPREME COURT OF NIGERIA

SC/553/2019

IBRAHIM TANKO MUHAMMAD, Ag. C.J.N. (*Presided*)
OLABODE RHODES-VIVOUR, J.S.C. (*Read the Leading Judgment*)
KUMAI BAYANG AKA'AHS, J.S.C.
KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, J.S.C.
AMIRU SANUSI, J.S.C.
PAULADAMU GALUMJE, J.S.C.
UWANI MUSA ABBA AJI, J.S.C.

FRIDAY, 5TH JULY 2019

ACTION- Case of party - Duty on party to be consistent in stating and proving his case

APPEAL - Court of Appeal- Whether can sit on appeal on null and void judgment

APPEAL - Issue for determination - Formulation of- Formulation of from omnibus ground of appeal - Principles guiding.

APPEAL - Judgment of lower court- Where not on appeal before Supreme Court - Attitude of Supreme Court thereto.

APPEAL - Notice of appeal - Amendments of- Principles guiding.

APPEAL - A Notice of appeal- Nature of- Defective notice of appeal -Effect of.

APPEAL - Notice of appeal -Requirements and essence of.

APPEAL - Preliminary objection to an appeal - Purpose of - Where Successful - Effect of.

APPEAL - Preliminary objection to an appeal Respondent who wishes to rely upon - Duty thereon.

APPEAL - Technicalities - Attitude of Supreme Court thereto.

APPEAL - Null and void judgment - Whether Court of Appeal can sit on appeal thereon.

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CONSTITUTIONAL LAW - Governor of a State When deemed elected-Section 1792) (a) and (b) of the Constitution.

CONSTITUTIONAL LAW - Governorship Election Tribunal Composition of - Need for members to be consistent in sitting or participation throughout the proceedings Defect in composition of- Effect Section 285(3) and paragraph 2(1), 6th Schedule of the l1999 Constitution (as amended).

CONSTITUTIONAL LAW - Constitutional provisions Guidelines contained in the Manual for election issued by INEC- Whether can override the provisions of the Constitution and Electoral Act, 2010.

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COURT-Election Tribunal - Composition of- Quorum of.

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COURT - Governorship Election Tribunal – Composition of - Need for members to be consistent in sitting or participation throughout the proceedings Defect in composition of - Section 285(3) and paragraph 2(1) of the 6th Schedule of the 1999 Constitution (as amended).

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COURT - Judgment of court - Judgment delivered by a panel - Where one of them did not hear the argument or absent at the hearing - Effect.

COURT - Judgment of lower court - Where not on appeal before Supreme Court - Attitude of Supreme Court thereto.

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COURT- Record of proceedings of court - Bindingness of on court and parties - Impugning of – Procedure therefor

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JUDGMENT AND ORDER - Judgment of lower court - Where not on appeal before Supreme Court - Attitude of Supreme Court thereto.

JUDGMENT AND ORDER- Judgment of trial court - Where there are variations on bench of trial Court that heard a case and delivered judgment- Consequences of- Effect on validity of judgment.

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PRACTICE AND PROCEDURE - Appeal - Notice of appeal Nature of - Defective notice of appeal - Effect of.

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PRACTICE AND PROCEDURE - Judgment of trial court- there are variations on bench of trial court that heard a case and delivered judgment -Consequences of- Effect on validity of judgment

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PRACTICE AND PROCEDURE Preliminary objection to an appeal - Purpose of Where successful - Effect of.

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PRACTICE AND PROCEDURE - Reliefs - Declaratory reliefs Parties seeking - Need to succeed on the strength of their own Case.

PRACTICE AND PROCEDURE - Reliefs - Reliefs not asked for - Whether court can grant.

PRACTICE AND PROCEDURE Technicalities Attitude o Supreme Court thereto.

STATUTE - Guidelines contained in the Manual for election issued by INEC - Whether can override the provisions of the Constitution and Electoral Act, 2010.

WORDS AND PHRASES – Election - Declaration and return - Distinction between.

Issue:

Whether the Court of Appeal was wrong when it held the majority judgment of the trial tribunal was a nullity as Obiorah, J. who delivered the leading judgement was absent on 6 February 2019 when evidence of RW 12 and 13 were taken.

Facts:

On 22 September 2018 the appellant, the candidate of the People's Democratic Party (PDP), the 1st respondent, the candidate of the 3rd respondent, the All Progressives Congress (APC), and over forty candidates of other political parties contested the Gubernatorial Election for Governor of Osun State. The 2nd respondent (INEC), the regulatory body charged with the conduct of elections in Nigeria, conducted the election.

At the end of election on 22 September 2018, the 2nd respondent declared the election inconclusive and proceeded to schedule a rerun election in seven polling units. This was necessary because, according to the 2d respondent, there occurred in these seven polling units hijacking of election materials, violence, malfunction of card readers, disruption of voting by thugs, and

absconding presiding officer. The 2nd respondent conducted the rerun election on 27 September 2018. At the end of the exercise the 1st respondent was declared the winner with 255,505 votes while the 1sappellant came in a close second with 255,023 votes.

Dissatisfied with the results declared by the 2nd respondent, the appellants filed a petition on 16 October 2018, praying, inter alia, that he be declared the duly elected governor of Osun State at the election held on 22nd September 2018. In the trial court, the 2nd respondent was the 1st respondent, while the 1st respondent was the 2nd respondent. The 3rd respondent was also the 3rd respondent. After the petition was served on the 2nd respondent, the 2nd respondent filed a reply denying all the averments in the petition and urged the tribunal to uphold the election of the 1st respondent as the Governor of Osun State as declared by the 2nd respondent.

The 1st respondent also filed a reply wherein he claimed to have been duly returned, elected as the Governor of Osun State. He also filed and argued a preliminary objection to the competence of majority of the reliefs sought by the appellants. The 3rd respondent too filed a notice of preliminary objection along with his reply to the petition.

The appellants filed replies to all the replies. The petition came before the Osun State Governorship Election Tribunal. The panel of Judges that sat to hear the petition were Sirajo, J., Chairman; Obiorah, J. member1 and Gbolagunte, J., member 2.

In a considered judgment delivered on 22 March 2019, Obiorah, J. and Gbolagunte, J. found merit in the petition, while Sirajo, J. dissented. Dissatisfied with the majority judgment of the tribunal, the 1st and 3rd respondents appealed to the Court of Appeal. In a judgment delivered on 9 May 2019 by a majority of 4 to 1, the Court of Appeal upset the majority judgment of the tribunal. Mbaba, J.C.A. dissented. The Court of Appeal, in the majority decision held that the judgment delivered by Obiorah, J. who did not sit with the other Judgeron the Governorship Election tribunal to hear the proceedings of 6 February 2019 was a nullity, because his absence at one of its sittings certainly affected the competence of the tribunal.

The appellants were dissatisfied with the majority judgment of the Court of Appeal and appealed to the Supreme Court.

Section 285 (3) and Paragraph 2 (1) of the Sixth Schedule to the Constitution provide:

Section 285 (3) of the Constitution states:

"The composition of the National Assembly Election Tribunals, Governorship and Legislative Houses Election Tribunals shall be as set out in the Sixth Schedule to this Constitution."

Paragraph 2 (1) provides:

"A Governorship and Legislative Houses Election Tribunal shall consist of a Chairman and four other members."

Held *(Dismissing the appeal by a majority decision of 5 to 2, Aka'ahs and Galumje, JJ.S.C. dissenting):*

1. *On When a court is competent-*

The issue of jurisdiction is an all important one, which must be declared before a court can proceed to adjudicate on a matter. A court is competent when-

(a) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another;

(b) The subject matter of the case is within its jurisdiction, and there 1s no feature in the case which prevents the court from exercising its jurisdiction;

(c) The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

A tribunal is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another. Any detect in competence is fatal, for the proceedings are a nullity, however well conducted and decided. The defect is extrinsic to the adjudication. *[Madukolu v Nkemdilim (1962) 2 SCNLR 341; Angadi v PDP (2018) 15 NWLR (Pt. 1641) 1 referred to.] (Pp. 512-513, paras. H-A, 525, paras. C-G).*

2. *On Composition of Governorship Election Tribunal and need for members to be consistent in sitting or participation throughout the proceedings –*

Governorship Election Tribunal is a creation of the Constitution of the Federal Republic of Nigeria 1999 as amended. By the provisions of section 285 (3) and Paragraph 2(1) of the Sixth Schedule to the Constitution, Governorship Election Tribunal shall consist of a chairman and two other members. The constitutional provisions presuppose that a tribunal for governorship election must comprise chairman and two members, no more no less, throughout the conduct of its proceedings. Any defect in the composition of a court is a nullity no matter no thorough or properly it was conducted. Also, the sitting or participation by members in the proceedings must always be maintained and consistent throughout the proceedings right from the beginning through to the end of the proceedings. Where for whatever reason, one of the judges is absent or indisposed, the proceedings must be adjourned. In the instant case, although Obiorah, J. was consistent in the conduct of the proceedings of the tribunal on virtually all the days, the record of appeal glaringly showed that he was absent or did not participate in the proceedings held on 6th February 2019 when RW12 and RW13 testified, during which vital exhibits were tendered and admitted in evidence. This therefore confirmed that he did not see the exhibits before they were admitted on that day or listened to the rigorous cross- examination of the two vital witnesses. His absence on 6/2/2019 therefore marred the entire exercise/assignment of the tribunal, in that the entire exercise had been rendered otiose as the entire judgment he wrote and delivered had become a nullity, or null and void and of no effect whatsoever. Obiorah, J.'s judgment wherein he commented on the testimonies of RW12 and RW13 and the exhibits tendered on that day must have been based on the realm of conjecture which is unacceptable in law. The absence of Obiorah, J. on 6th February 2019 made the tribunal incompetent to render the judgment. The majority Judgment of the tribunal was therefore a nullity. *Madukoluv. Nkemdilim (1962) 2 SCNLR 341; Nyesom Wike v. Peterside (2016) 7 NWLR (Pt.1512) 452; Kalejaiye v. LPDC (2019) 8 NWLR; (Pt. 1674) 365; Woluchem v. Gudi (1981) 5 SC 291 referred to.] Pp. 521-522, paras. H-C; 522-523, paras. G-B).*

3. On Constitution of Governorship Election Tribunal –

By virtue of section 285(3) and paragraph 2(1) of the Sixth Schedule to the 1999 Constitution (as amended), the Governorship Election Petition Tribunal shall consist of a Chairman and two other members. In the proceedings of 6/2/2019, wherein RW12 and RW13 gave evidence on oath, were cross-examined and several vital documents tendered, Obiorah, J., was not among the "Chairman and the two other members." Thus, the tribunal not properly constituted as regards numbers and qualifications of the members of the tribunal which automatically affected the jurisdiction of the tribunal to hear and determine the election petition, especially where evidence was taken. What made it worse was that a judgment or decision came out of it by a member who did not partake in the vital proceedings of 6/2/2019 wherein evidence and cross examination of vital witnesses took place. *(Pp. 502, para. A: 525-526, paras. F-A).*

4. On Effect of a null judgment and defect in the composition of an Election Tribunal-

A judgment that is a nullity has no legal validity and can confer no right nor impose any obligation on anybody. Any defect in the composition of an Election Tribunal is fatal, for the proceedings are a nullity no matter how well they were handled and decided. The defect is extrinsic to the proceedings. In the instant appeal, the judgment delivered on 22/3/2019 was a nullity. *[MPPP v. INEC (2015) 18 NWLR (Pt. 1491) 251 referred to.] (P 526, paras. A-C).*

5. On Consequences of variations on the bench of a trial court-

A trial must be conducted by the judge himself or if a panel heard the ease all members of the panel must sit every day the case is heard. The members of the panel would write a considered judgment based on the evidence they received and recorded. A complaint that one of the judges on the panel was absent on a day witnesses testified and the same judge resumed sitting and proceeded to write and deliver judgment is a serious matter. It is a mistrial, a fundamental defect in proceedings. The complaint would always be that the judge who

delivered judgment had not seen and heard the witnesses. He could not appraise the evidence and decide on the facts properly, neither can he say anything on the demeanour of the witnesses he never saw. The complainant would be at liberty to say and quite rightly t00 that his right to fair hearing was breached. A variation on the bench makes a judgment of the trial court a nullity. An examination of the record of appeal in the instant appeal revealed that well over ninety witnesses gave evidence, and at the end of each day's proceedings the three judges, which included Obiorah, J. signed. It was only the proceedings of 6 February 2019 that was not signed by Obiorah, J. that was the day when the testimony of RW12 and RW 13 was taken. They were cross-examined and vital documents admitted in evidence. Both counsel agreed in the Court of Appeal that Obiorah, J. did not sit on 6 February 2019 and so could not have signed proceedings for that day. Failure of Obiorah, J. to sit on 6 February 2019 rendered the proceedings of that day worthless and the entire judgment a nullity. The correct order to make in the circumstances was to declare the judgment of the trial tribunal a nullity as a result of one of the panelists not sitting on a day proceedings were held. *[Tawiah III v Ewudzi 3 WACA 52; Onwiva v Kwaseko 3 WACA 230; Egobiamien v FMGN (2002) 17 NWLR (Pt. 797) 488; Shanu v Afribank (Nig) Plc (2002) 17 NWLR (Pt. 795) 185; Olatunbosun v Naiser Council (1988) 3 NWLR (Pt. 80) 25; Kalejaiye v LPDC (2019) 8 NWLR (Pt. 1674) 365; Sokoto State Gov. Kamdex (2007) 7 NWLR (Pt. 1034) 466; Myesom Peterside (2016) 7 NWLR (Pt. 1512) 452 referred to.] (Pp 505-506. paras. G-l)*

6. On Consequences of variations on the bench of trial court-

Where members of the court who wrote the judgment were not present throughout the hearing the entire proceedings and any judgment founded thereon are a nullity. Where variation of composition of the court occurs at the trial where witnesses testified, it was inappropriate for judges who did not hear some of the witnesses testify and did not observe their behavior /demean during testimonies, to participate in the delivery of the judgment. Any defect

in the competence of a court is fatal, no matter how well the case is conducted and decided, as the defect is extrinsic to the adjudication. Delivery of judgment by a Judge, who did not participate in all the stages of the trial, amounts to a violation of a party's fundamental right to fair hearing. So it was in the instant case. Therefore, the majority judgment of the trial Tribunal was a nullity. No doubt a lot of industry went into prosecuting and defending the petition before the Tribunal and in the preparation of the judgment. *[Ubwa v Tiv Area Traditional Council (2004) 11 NWLR (Pt. 884) 427; Sokoto State Govt. Kamdex (Nig.) Lid. (2007) 7 NWLR (Pt. 1034) 466; Nyesom v Peterside (2016) 7 NWLR (Pt. 1512) 452; Awolola v. Governor, Ekiti State (2019) 6 NWLR (Pt. 1668) 247; Kalejaiye Legal Practitioners Disciplinary Committee (2018) 8 NWLR (Pt. 1674) 365. The case of Woluchem v. Gudi (2004) 3 WRN 20; Madhukolu v. Nkemdilim (1962) 2 SCNLR 341; Leedo Presidential Motel Lid. v B.O.N. Ltd (1998) 10 NWLR (Pt. 570) 353; Skenconsult v. Ukey (1981) SC 6 referred to.] (Pp. 511, paras. B-C; 512, paras. A-C; 512-513, paras. H-B)*

7. On Proper order where a judge absents himself from court proceedings –

In a situation where a judge absents himself from the proceedings of a panel, he cannot come back to sit as if he never absented himself. The proper order in such a situation is for the case to start de novo. In the instant case, the learned counsel for the appellants ought to have advised his clients that failure of Obiorah, J. to sit on February 2019 and then return to court and deliver the majority judgment was a prepare and d fundamental error that remained irredeemable for all time. *(P 5 00, paras. E-G).*

8. On Effect of judgment delivered by a panel where one of them did not hear the argument n0r was he present at the hearing –

A judgment delivered by a panel, where one of them did not hear the argument nor was he present at the hearing is a nullity. [Sokoto State Govt. of Nigeria v. Kamdex (Nig.) Lid. (2007) 7 NWLR (Pt. 1034) 466; Nyesom v Peterside (2016) 7 NWLR (Pt. 1512) 452 referred to.] (P. 524, paras. C-D)

9. On Application of rules and canons of natural justice -

By the rules and canons of natural justice, what qualifies and empowers a judge to judge and decide fairly and judiciously on a matter, wherein two contending parties are involved, is the fact that he has been able to hear both sides to know where the pendulum of justice tilts and preponderates. The law does not judge or condemn a man before hearing him. This has remained the eternal word of God and the law of natural justice. Fair hearing must be accorded those who must come under the decision and judgment of any Judge or umpire through an unbiased and full understanding of the facts and issues involved, and not through partial and uncompleted hearing or proceedings. In the instant case, it was on record that the proceedings of the tribunal on 6/2/2019 wherein RW12 and RW13 gave evidence on oath, were cross-examined and several vital documents tendered, was not empanelled by Obiorah, J. Coincidentally, he turned out to write and deliver the majority and leading judgment of 22/3/2019. *(Pp. 523-524, paras. H-C)*

10. On Duty on party to be consistent n stating and proving his case -

A party should be consistent in stating his case and consistent in proving it. He will not be allowed to take one stance in the pleading then turn summersault during trial. Justice is much more than a game of hide and seek. It is an attempt, our human imperfections notwithstanding, to discover the truth. An appeal is a rehearing of the case. Parties must maintain the same stance on facts right up to the Supreme Court. Though counsel at times present the semblance of the truth, the judge is expected to pursue the truth. A party must be consistent with the case he sets up and not shift ground in another court as it suits his fancy. That was precisely what the appellants were doing, and that is legally wrong. The appellants could not say in the Court of Appeal that the non-participation of Obiorah, J. in the proceedings of 6 February 2019 was neither an issue of lack of jurisdiction nor a matter of nullity of the

proceedings, and then in the Supreme Court say that the record of appeal was in conflict, but failed to say what the conflict was. (P. 503, paras. C-F)

11. On Importance of cross examination –

Cross-examination of a Witness is very vital on a proceeding as that affords the judge a sufficient opportunity to watch and assess how credible and reliable that witness being so cross-examined is, by watching his behavior and demeanour in court when responding to questions he is asked or question that is put to him. That can only be done in the presence of the judge. *(P 521, paras. D-B)*

12. On Whether Court of Appeal can sit on appeal on null and void judgment - **The Court of Appeal cannot sit on appeal on a judgment which is a nullity and void. In the instant case, in view of the importance and seriousness of the attack on the majority judgment of the tribunal in which the Court of Appeal also largely based its judgment now being appealed against, the Supreme Court deemed it worthwhile and expedient to consider the first issue which related to jurisdiction. This is because, if the allegation or attack on the majority judgment of the tribunal was found to be correct, or was substantiated, then the attack on it would obviously render the said judgment a nullity.** *(P.519, paras. D-F).*

13. On Bindingness of record of proceedings on court and the parties –

It is not only the court but also the parties that are bound by the record of proceedings as transmitted to the Supreme Court. In the absence of any formal challenge to its authenticity, the court will consider it as it is. *(P. 508, para*. H)

Per KEKERE-EKUN, J.S.C. at pages 509-510, paras. E-C:

> **"The record is a certified true copy of the proceedings before the tribunal. As stated earlier, there has not been any attempt to impugn the record. It is glaring that Member I, P.C. Obiorah, J. did not sign the proceedings for that day. By signing the proceedings for each day,**

each member confirms that it is the correct account of what transpired on the day. The heading of the day's proceedings is usually done by the registrars of court. It is an administrative function. The sitting Judges both have no role to play. Their signature at the conclusion of the day's proceedings is what authenticates the record for that day.

Our attention has been drawn to several other pages of the record, where it is clear that at the end of each day's proceedings, all the members of the tribunal appended their signatures. Indeed, in the format adopted the Chairman appears in the Centre while Members I and II appear below the Chairman on the left and right of the page respectively. For the proceedings of 6/2/19, the name of the Chairman and Member II are placed vertically, one above the other, indicating that Member I was not present and therefore did not sign. The appellants have not, at any stage, asserted that P.C. Obiorah, J. was present on 6/2/2019. Their contention is that the inclusion of his name in the heading of the day's proceedings is conclusive proof that he sat on that day. I find myself unable to agree. It is my considered view that the inclusion of Obiorah, J's name on the heading of the court's proceeding cannot be so construed. It is his signature at the conclusion of the proceedings that constitutes the proof that he actually sat on that day and took part in the proceedings. The consistency of the signatures of all members of the tribunal at the end of each day's proceeding throughout the record suggests that if Obiorah, J. sat on 6/2/2019 he would have signed the proceedings."

14 *On Procedure for impugning record of proceedings of a court -*

Where the court's record is impugned, there is a procedure that must be followed. It is by the filing of an affidavit setting out the facts or part of the proceedings omitted or wrongly stated in the record. The affidavit would then be served on the Judge or registry of the court concerned for their reaction. A challenge to the record presupposes that the party complaining is asserting

that the record is faulty or incorrect. He must therefore first formally impeach the record. In the instant case, the 1st respondent did not seek to impeach the record. He was not contending that the record of 6th February 2019 was not a true reflection of the day's proceedings. Rather, the contention was that what the record revealed was that P.C. Obiorah, J. did not participate in the day's proceeding and that was why he did not append his signature thereto. Indeed, if anything, it was the appellants who were contending that the record was incorrect by asserting that the heading of the day's proceedings was conclusive proof of Obiorah, J's participation on that day and that the non-signing of the day's proceedings did not prove that he was absent. *[Gonzee (Nig) Ltd. v. Nigerian Educational Research and Development Council (2005) 13 NWLR (Pt. 943) 634; Ojengbede v. Esan (2001) 18 NWLR (Pt. 746) 771; Ogli Oko Memorial Farms Ltd. v. Nigerian Agricultural & Co-operative Bank Ltd. (2008) 12 NWLR (Pt. 1098) 412 referred to.] (P. 508, paras. C-H).*

15. On Bindingness of record of appeal and duty on party not satisfied with record of appeal to file supplementary record of appeal -

Record of appeal is the only document that gives an indication of what took place in court. The court is enjoined to take notice of its contents and resolve issues arising therefrom. When a party is not satisfied with the record of appeal, he should file a supplementary record of appeal. In the instant appeal the parties were satisfied with the record of appeal. (P. 502, paras. D-E)

Per RHODES-VIVOUR, J.S.C. at pages 502-503, paras. F-C:

> **"As quite rightly pointed out by learned counsel for the 1st respondent, Chief Wole Olanipekun SAN, learned counsel for the appellant Dr. O. Ikpeazu, SAN also held the view that Obiorah, J did not sit on 6th February 2019. In dismissing the non-participation of Obiorah J. in the proceedings of 6 February 2019 learned counsel said (in the Court of Appeal) non-participation of Obiorah, J. in the proceedings of 6th February, 2019 thereby rendering the proceedings a nullity is mistaken postulation because the fact that all members of the tribunal or that the**

Chairman of a tribunal did not sit in on all the proceedings of the tribunal is neither an issue of lack of jurisdiction nor a matter of nullity of the proceedings."

At no time did Dr. 0, Ikpeazu SAN dispute the correctness of the proceedings of 6 February 2019, that Obiorah, J did not sit on 6th February 2019.

I must observe that in every proceeding before the tribunal Obiorah, J signed at the end of proceedings for the day except on 6 February, 2019 when he did not sign the proceedings. I must further observe that in his processes in the Court of Appeal he maintained that Obiorah J. did not sit on 6th February, 2019. It is in the Supreme Court that Dr. O. Ikpeazu, SAN appears to be changing his stance, apparently saying that there are conflicts in the record of appeal and it is the duty of learned counsel for the 1st respondent to file an affidavit to correct the conflict in the record of appeal."

19. *On Principles guiding amendments of notice of appeal –*

Amendments that would change the texture of a notice of appeal will not be permitted. Such amendments are fundamental. *(P 499, paras. B-C)*

20. *On Principles guiding Formulation of issue for determination from omnibus ground of appeal -*

Issue for determination cannot be formulated solely from an omnibus ground to challenge specific findings of the court. In the instant case, issue was distilled from the omnibus ground 31 and several other grounds, to wit: grounds 19, 20, 21, 22, 24, 25, 26, 27, 28, etc. These grounds challenge specific findings of the Court of Appeal. Issue 10 was therefore competent, since it was formulated from several grounds of appeal aside from the omnibus ground of appeal. Accordingly, the preliminary objection was overruled. *[Akinlagun v Oshoboja (2006) 12 NWLR (Pt. 993) 60; Aderibigbe v. Abidoye (2009) 10 NWLR (Pt. 1150) 592 referred to.] (P. 499, 461 paras. D-F).*

21. On Purpose of preliminary objection to an appeal and effect where successful -

The object of preliminary objection is to challenge the competence of an appeal or the hearing thereof. If successful, it terminates the appeal in limine. That is why when such notice of preliminary objection is raised, it must be heard and determined one way or the other before the determination of the appeal or otherwise. *[Garba v Mohammed (2016) 16 NWLR (Pt. 1537) 114; Ogidi v. Egba (1999) 10 NWLR (Pt. 621) 42; General Electric Company v. Akande (2012) 16 NWLR (Pt. 1327) 593; SPDC v Amadi (2011) 14 NWLR (Pt. 1266) 157 referred to.] (P. 538, paras. F-H)*

22. On Nature of notice of appeal and effect of a defective notice of appeal –

The notice of appeal is the process that initiates the hearing of an appeal. So a defective notice of appeal touches on the jurisdiction of the court to hear the appeal. If the notice of appeal is defective, it must be struck out for being incompetent. For if a notice of appeal is defective there would be no appeal to be heard as the court would have no jurisdiction to hear such an appeal. In the instant case, the offending part of the notice of appeal was at the end where learned counsel representing the appellants' described themselves as "1st and 2nd respondents' counsel" instead of "1st and 2nd appellants' counsel", On the next page the respondents and their counsel were however correctly stated. The error was a clerical error, an accidental slip, a blunder that could be corrected. Thus, where ever the appellants' counsel described themselves as "1st and 2nd respondents' counsel" in their processes was corrected to read "1st and 2nd appellants' counsel". *[Kano Textile Printers Ltd Galeode & Hoff (Nig.) Ltd. (2005) 13NWLR (P 943) 680 referred to.] (Pp. 498-499, paras. H-C).*

23. On Requirements and essence of notice of appeal-

What is actually required to sustain a notice of appeal is to set out the grounds of appeal, the reliefs that are sought from the appellate court and the signature of the appellant or that of his counsel. The insertion of counsel for appellant is just a surplussage. Even if it is not inserted, the notice of appeal will not be

rendered void. The essence of notice of appeal is to give adequate notice to the appellant's adversary about the nature of the complaint that he will be confronted with in court. Where such notice is understood by the adverse party, it is competent. *[Aderoummu v Olowu (2000) 4 NWLR (Pt. 652) 253; Ibrahim v. Osunde (2003) 2 NWLR (Pt. 804) 2; Ogbebor v Danjuma (2003) 15 NWLR (Pt. 843) 403 referred to.] (P 540, paras. C-E)*

24. On Whether courts will visit sins of counsel on litigant or penalize litigant for mistake of court registry -

Courts would not visit the blunders, mistake and inadvertence of counsel on the litigant or penalize a litigant for the mistake of the registry. The sins of counsel will not be visited on a party. In the instant case, the insertion, "1st and 2nd respondents counsel" was made in the notice of appeal, after the list of counsel, by learned counsel for the appellants. But to hold that the notice of appeal filed by the appellants was incompetent on the ground that learned counsel for the appellants had described themselves as 1st and 2nd respondents counsel would be driving reliance on technicality too far. *[Mains Ventures Ltd. v. Petroplast Ind. Ltd. (2000) 4 NWLR (Pt. 651) 151; Enyibros Foods Processing Co. Ltd. v NDIC (2007) 9 NWLR (Pt. 1039) 216; Okpala Okpu (2003) 5 NWLR (Pt. 812) 183; Oyegun v Nzeribe (2010) 7 NWLR (Pt. 1194) 577 referred to.] (P 539, paras. C-G)*

25. On Attitude of Supreme Court to technicalities -

The Supreme Court has enjoined courts not courts not to be unduly tied down by technicalities, particularly where no miscarriage of justice would be occasioned. Justice can only be done in substance and not by impeding it with mere technical procedural irregularities that occasion no miscarriage of justice. The 1st respondent by his preliminary objection sought to achieve a result through technicalities. The fact that the learned counsel for the appellants described themselves as counsel for the respondents must not be allowed to defeat the cause of justice in the instant appeal. For human beings

are mere mortals susceptible to human error. Where such errors are harmless, they are pardonable. [Consortium M. C v. NEPA (1992) 6 NWLR (Pt. 246) 132; *Falobi v Falobi* (1976) 1 NMLR 169; *Bello v. A.-G., Oyo State* (1986) 6 NWLR (Pt. 45) 828; *Okonjo v. Odje* (1985) 10 SC 267 referred to.] (P 540, paras. E-H)

26. On Whether court can grant reliefs not asked for-

A court is not a Father Christmas or charitable organization that will dish out reliefs that have (Unreported) - Suit No. SC.197/2019 delivered on 8th day of April 2019, the appellants did not seek any reliefs at all from the Supreme Court. That was the basis of the decision in that case, which is different from the instant case. *[Abe v INEC (Unreported) - Suit No. SC.197/2019 delivered on 8th day of April not been asked for. In the case of Abe v INEC 2019 distinguished; A.-G., Fed. v. A. I. C Ltd. (2000) 10 NWLR (Pt. 675) 293 referred to.] (P 541, paras. A-B)*

27. On Principles guiding dismissal of an action in limine –

Dismissal of an action *in limine* **is the most punitive relief that a court can grant a defendant against the plaintiff. Because of its punitive nature, courts of law are reluctant or loath in granting it. In other words, courts of law cannot grant the relief for the mere asking on the part of the defendant. There must be legal basis for the request and a corresponding legal basis for granting it. In the instant appeal, the preliminary Objection not being sustainable, was accordingly overruled.** [*Inakoju v Adeleke* (2007) **4 NWLR (Pt. 1025) 427 referred to**.] (P. 541, paras. B-E)

DISSENTING OPINIONS OF AKA'AHS AND GALUMJE, JJ.S.C

1. *On Supremacy of the Constitution and treatment of provisions of any law inconsistent with the provisions of the Constitution -*

By Section 1(1) of the Constitution of the Federal Republic of Nigeria 1999, the Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. Also by

Section 1(3) of the same Constitution, if any other law is inconsistent with the provisions of the Constitution the Constitution shall prevail, and that other law shall to the extent of the inconsistency be void. In the instant case, the 1st appellant having fulfilled the requirement of the Constitution by scoring the highest number of votes cast at the election of 22nd September 2018, and having achieved not less than one quarter of the votes cast at the election in each of at least two thirds of all the local government areas in Osun State, no other law in the land whatever called should have been employed to declare the election inconclusive and order for any election. The Constitution is the grundnorm, which we as people of Nigeria have enacted for ourselves. Its observance in breach portrays us as unserious people. *(Pp. 555-556, paras. G-C)*

2. *On When candidate for election to the office of Governor of a State shall be deemed to have been duly elected –*

By virtue of section 179 (2) (a) and (b) of the Constitution, 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 a majority of the votes cast at the election; and

(b) he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the local government areas in the State.

In the instant case, the declaration by INEC, the 2nd respondent that the election held on 22nd September 2018 was inconclusive and the order for a rerun on 27th September 2018 were null and void since the 1st appellant still emerged the winner of the election, with the highest number of votes cast at the election and met with the Constitutional requirement of securing one-quarter of the votes cast in at least two-thirds of the Local Government Areas constituting Osun State on 22 September 2018 as stipulated in section 179 (2) (a) and (b) of the Constitution. (P. 555, paras. C-G)

3. *On Quorum of an election tribunal -*

The quorum of an election tribunal as provided for under section 285(4) of the Constitution is the Chairman and one other member. In the instant case, the chairman of the tribunal was a High Court Judge with considerable experience in election petitions. The chairman should have known that variation of the panel for a single day in which vital witnesses were taken, was fatal to the proceedings of the day. For whatever reason, he allowed proceedings to go on. Clearly this was not what the parties asked for and they did not contribute in any way to the lapse. The petitioners' desire was to have their petition determined, where the error is committed by the court and it is shown that neither the parties, nor their counsel are involved, it is unfair that they will be held accountable. At this level, it is the judiciary that is on trial and not the litigants. In the instant case, there was no evidence of bench variation, as nobody had been mentioned as the person who sat in place of Obiorah, J. [*Sokoto State Government v. Kamdex* (2007) 7 NWLR (Pt. 1034) 466; *Ubwa v. Tiv Area Traditional Council* (2004) 11 NWLR (Pt. 844) 427; *Shuaibu v. Nigeria Arab Bank* (1998) 5 NWLR (Pt. 551) 582; *Kalejaiye v. LPDC* (2019) 8 NWLR (Pt. 1674) 365; *Tawiah 111 v. Kwasi Awudzi 3 WACA 52; Akosuah Onwiwa v Kwaseko 3 WACA 230*; *Danoah v. Taiil* 12 WACA 167 referred to and distinguished. (Pp. 546-547, paras. H-D)

4. *On Effect where party who wrote or took part in delivery of judgment did not hear the case or took part in the hearing* -

Where and when it is established that the party who wrote or took part in the delivery of judgment did not hear the case or took part in the hearing, this would vitiate the whole trial and would lead to the declaration nullifying the whole proceedings. In the instant case, however, the allegation that Obiorah, J. did not sit with the panel on 6 February 2019 was at best, a well-articulated speculation by learned counsel for appellant, as per his address founded on the inference that Obiorah, J. did not sign the proceedings of 6/2/2019. It was the issue of non-signing of the records, even though the member was reflected as having participated in the proceedings. *[Ubwav Tiv Area Traditional Council*

(2004) 11 NWLR (Pt. 844) 427; Shuaibuv Nigeria Arab Bank Ltd. (1998) 5 NWLR (Pt. 551) 582; Sokoto State Government v. Kamdex Nig Lid. (2007) 7 NWLR (Pt. 1034) 456; Awolola v. Governor Ekiti State (2019) 6 NWLR (Pt. 1668) 247; Kalejaiye v. LPDC (2019) 8 NWLR (Pt. 1674) 365 referred to.] (Pp. 531-532, paras. E-A)

PER GALUMJE, J.S.C. at pages 543-544, paras. C-A:

"The assertion that the appellants admitted at the lower court that Obiroah J. did not participate in the proceedings of 6th February, 2019 is not correct. The brief of argument filed on behalf of the 1st and 2nd appellants who were 1st and 2nd respondents. Respondents at the lower court is at pages 4056 - 4095 of volume 6 of the records of this appeal. At page 4059 - 4060 learned counsel for the appellants stated as follows:-

"It is contended with utmost respect, that that postulation is not correct. The fact that all the member of the tribunal or that a chairman of a tribunal did not sit in all the proceedings of the tribunal is neither an issue of lack of jurisdiction nor matter of nullity of the proceedings. I shall address that point subsequently, but suffice it to say at this stage that the record of the tribunal at page 3693 will disclose the names of three (3) Judges of the tribunal on 6h February, 2019, although only two (2) of them signed this proceedings of that day. That is all the record disclose, and nothing more." (Italics mine for emphasis). This is clearly not an admission that Obiorah J. did not participate in the proceedings of 6 February, 2018. Learned counsel's argument on the issue of nullity of judgment was not an admission of absence of Obiorah J. Learned senior counsel rather made it clear that the record showed that the day's proceedings were conducted before three (3) Judges, and one did not sign the days proceedings. His argument on nullity of judgment was just a research finding, which he believed that even if the learned Justice Obiorah J. was absent, it will not nullify the judgment.

This is by any stretch of imagination not an admission of absence of Obiorah J."

5. *On Whether judge expected to sign certified true copy of his judgment and proper thing to do where party contends judgment was not signed-*

A Judge is not expected to sign a certified true copy of his judgment. In fact, the practice is not for a certified true copy of a document to be signed the same way as the original. It is not to be signed at all. It is the certification by the appropriate officer that makes the document authentic. If a party seriously contends that a judgment of a judge was not signed, the proper thing to do to establish that fact is to exhibit the original copy of the judgment, not a certified true copy. In the instant case, the record of appeal before the Court of Appeal was a certified copy which had no signature of any of the members of the tribunal. The contention that Obiorah, J. did not participate in the sitting of the 6th February 2019, because he did not append his signature could only be established if the original record of the proceedings of that day was produced. Honourable Justice Obiorah did not need to sign the certified copy of the proceedings which had been authenticated by the Registrar's certification. *[Ahmed v C.B.N. (2013) 11 NWLR (Pt. 1365) 352 referred to.] (Pp. 530-531, paras. G-C)*

6. *On Whether judge expected to Sign Certified true copy of his judgment -*

A Judge is not expected t0 Sign a certified true copy of his judgment. In fact, the practice is not for a certified true copy of a document to be signed the same way as the original. It is not to be signed at all. In the instant case, if learned senior counsel for the appellant in the Court of Appeal seriously contended that Obiorah, J. did not sit on 6 February 2019, what he ought to have done was to swear to an affidavit annexing the original record of the sitting of the 6 February 2019 which would have brought out the fact that Obiorah, J. did not in fact sit on 6 February 2019. Thus, the arguments of learned senior counsel and the majority decision of the Court of Appeal nullifying the majority decision of the tribunal on the basis of Obiora, J. being absent and not sitting

on 6 February 2019 were based on conjecture. [Ahmed v C.B.N. (2013) 11 NWLR (Pt. 1365) 352 referred to.] (P. 531, paras. C-E)

7. *On Application of presumption of regularity -*

In the instant case, where Obiorah J. signed all previous proceedings, there is presumption of regularity by virtue of section 168(1) of the Evidence Act, that he signed the proceedings of 6th September 2018. *(P 547, paras. F-G)*

8. *On Whom lies burden of proof in civil cases –*

By virtue of section 136(1) of the Evidence Act 2011, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person, but the burden may in the course of a case be shifted from one side to the other. In this case, the 1st respondent had the burden to prove that Obiorah, J. did not sit to participate in the day's proceedings. That could have been done by impeaching that part of the record that says Obiorah J. sat and participated in the proceedings of 6th September 2018. Since that was not done, the record was binding on both the Court of Appeal and the Supreme Court. To hold that Obiorah, J. was absent from the sitting of the tribunal would amount to speculation, as such finding will not be supported by any evidence. (P 546, paras. C-G)

9. *On Procedure for impugning record of proceedings of court -*

The procedure laid down for impugning the record of proceedings of a court or tribunal is for the party challenging the same to swear to an affidavit setting out the fact that was omitted or wrongly stated in the record. Such affidavit is to be served on the Judge and/or registry of the court or tribunal concerned, as well as on counsel on the other side. In the instant case, it was the 1st respondent who raised at the Court of Appeal for the first time that Obiorah, J. was absent from the proceedings of the tribunal on the 6th February 2019, despite the fact that the record shows that the proceedings were conducted

before the three members of the panel. The 1st respondent had the burden to prove that Obiorah, J. did not sit to participate in the day's proceedings. That could have been done by impeaching that part of the record that says Obiorah, J. sat and participated in the proceedings of 6th September 2018. This was not done. *[Amedu v FR.N. (2009) LPELR - 8212; Gonzee Nig Ltd v. NERDC (2005) 13 NWLR (Pt. 943) 634; UBA Plc v. Ujor (2001) 10 NWLR (Pt. 722) 89 referred to.] (P. 546, paras. A-E)*

10. *On Procedure for impugning record of proceedings of Court-*

The procedure laid down for impugning the record of proceedings of a court or tribunal is for the party challenging the same to swear to an affidavit setting out the fact(s) that was/were omitted or wrongly stated in the record. Such affidavit is to be served on the Judge and/or Registry of the court or tribunal concerned, as well as the counsel on the other side. This was not done in the instant case and the onus was on the party who alleged that Obiorah, J. did not sit simply because he was shown as not having signed the certified record. (P. 546, paras. A-C; G)

Per AKA'AHS, J.S.C. at pages 529-530, paras. E-E:

> **"Dealing with Issue I, the majority judgment by Sankey J.C.A. has this to say about the records:-**
>
> **'It is an elementary principle of law that parties, as well as the Court, are bound by the Record of Court. Therefore, from a juxtaposition of pages 3693 of the record of proceedings with page 3698 thereof it is indisputable that the information therein is inconsistent and/or incompatible. For whereas on the heading of the day's proceedings of 6th February, 2019, the names of three Judges, to wit: Hon. Justice I. Sirajo - Chairman, Hon. Justice Peter C. Obiorah Member 1, and Hon. Justice Adegboye A Gbalagunte Member II, are set out thereat, at the end of the day's proceedings reflected at pages 3698 of the record, only two out of the three Judges listed in the heading at page 3698 to wit: the Chairman and Member II; signed the proceedings; while the signature**

of member is conspicuously absent. From the information that is apparent on the face of the record, even though it is indicated that the day's proceedings on 6th February, 2019 were to be taken and heard by the three Judges, at the end of the day, only two out of the three signed the proceedings. In the absence of any explanation, I agree with learned Senior Counsel for the appellant that the implication of only two of the three Judges signing the record at the end of the day's proceedings is that member II, Hon. Justice Peter Obiorah did not participate in the day's proceedings'.

I am unable to agree with this conclusion.

The record which was before the lower court was the record transmitted to it by the registry of the tribunal which certified as correct. The actual records of the tribunal was not before the lower court. The court should have either *sou motu* **summoned the registrar of the tribunal to produce the authentic records of the Judges to compare them with the certified copy or learned counsel for the appellant in the Court of appeal, would have challenged the record and this would have enabled the registrar of the tribunal and Justice Obiorah to clear the air on the apparent discrepancy."**

11. *On Bindingness of record of appeal on courts* -

Courts are bound by the record of appeal. In the instant case, the Court of Appeal was bound to accept that the proceedings of 6th February 2019 was conducted before a panel of three members, but one member did not append his signature at the end of the days proceedings. (P. 545, paras. D-E)

Per GALUMJE, J.S.C. at pages 544-545, paras. B-D:

"For a clear view of the proceedings of 6th February 2019, I wish to reproduce the opening paragraph of page 3693 of the record of this appeal, and the last proceeding of the day at page 3698 as follows:-

In the Osun State Governorship Election

Petition Tribunal

Holden at Abuja

On Wednesday the 6th Day of February, 2019

Before Their Lordships

Hon. Justice Muhammad I. Sirajo – Chairman

Hon. Justice Peter C. Obiorah - Member 1

Hon. Justice Adegboye A. Gbolagunte - Member 2

Petition No. EPT/OS/GOV/2018

Between:

1. Senator Ademola Nurudeen Adeleke

2. Peoples Democratic Party (PDP)

V.

1. **Independent National Electoral Commission (INEC)**

2. Adegboyega Isiaka Oyetola

3. All Progressives Congress (APC)

Tribunal - In view of the conclusion of evidence today by the 3rd respondent, the parties shall file their respective address within the statutory period provided by the Electoral Act. The addresses shall be adopted on 07/03/19.

Signed
Chairman
06/02/2019
Signed
Member 11
06/02/2019

On this day two witnesses were taken. One Ayoola Soji - 381 and Oladejo Kazeem, who testified as RW12 and RW13. During the testimony of RW12 two exhibits were tendered. Objection to these documents were reserved and the decision in which the documents were admitted was signed by the chairman alone.

Also at the end of the testimony of each witness, the chairman signed alone.

The chairman and member II are said to have signed the last paragraph of the days preceding which directed parties to file their respective addresses within the statutory period provided by the Electoral Act, which addresses were adjourned to 07/03/2019 for adoption.

From the proceedings reproduced above, there is nowhere, where the actual signature of the chairman and member II are endorsed. It is the registry that compiled the record that merely inscribed the word signed, followed by the designations of the chairman and members. It is very clear from the the proceedings of 6th February, 2019 was conducted before the three member panel"

12. *On Whom rests power to cancel an election -*

By virtue of Chapter 3, Paragraph 3.2 of the Manual for Election Officials 2018, the power to cancel election at the polling units rests with the presiding officers who will make report of the incidence the ward collation officer. This is so because this presiding officer 1s in charge of the election the polling unit and he is in the field and informed of the happenings at the polling units 1 the presiding officer's report that will be acted un and not even the report of the ward collation officers. In the instant case, there was no evidence that of the presiding officers in the seven polling unite prepared a report in which it cancelled election in those polling units. Cancellation of election in those polling units, especially when RW11 admitted under cross- examination that same was carried out in absence of polling agents was illegal. The cancellation of the election in the seven polling unite by the State Returning Officer was clearly illegal. Therefore since the rerun election of 27th September 2018 was predicated on the unlawful cancellation of the elections in the seven polling units, it was illegal as well. There is no way something will be put on nothing and same will stand. [*Doma v. INEC* (2012) 13 NWLR (Pt. 1317) 297; *Ikpeazu v. Otti* (2016) 8 NWLR (Pt. 1513) 38 referred to.] (Pp. 554, paras. B-E; 555, paras. C-D)

13. *On Whether a State Returning Officer has the power to cancel an election –*

The duties of a State Returning Officer are spelt out in Paragraph 3.11 steps1 16, pages 81 - 8. Of the Manual for Election Officials 2018, which is exhibit P615 in the instant case. A careful study of the provision of the relevant paragraphs of the Manual will clearly show that the activities of the State Returning Officer do not include power to cancel any result of election. His duty is to compare the total number of voters on form EC40 (G 3) with the margin of win of the two leading candidates, and where the margin of win is not in excess of the total number of registered voters of the polling units where election was cancelled or not held, decline to make a return until another election is conducted in the affected polling units. (Pp. 553-554, paras. H-B)

14. *On When candidate for election to the office of Governor of a State shall be deemed to have been duly elected -*

By virtue of section 179(2)(a) and (b) of the Constitution a candidate for 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 a majority of the votes cast at the election; and

(b) he has not less than one quarter of votes cast at the election in each of at least two thirds of all the local government areas in the State.

In the instant case, by the result that was announced by the 2 respondent after the election of 22nd September 2018, the scores which had not been disputed, the 1st appellant did satisfy the Constitutional requirement to be declared Governor - elect, as set out under section 179 (2) (a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999. (P 555, paras. D-G)

15. *On Whether party who did not participate in an election can question or challenge the election –*

A party who did not participate in an election has no right to question or challenge that election. He is a total stranger and cannot be heard. This preposition of law is settled by section 285(13) of the Constitution of the

Federal Republic of N 1999, as altered by the 4th alteration Act No. 21 of 2017. The petitioner files before the tribunal a petition in which he prays to be declared the winner of the election. That being so, he has a constitutional the election duty to participate in all the stages of the election. The authority of *Sylva v INEC (2016) 13 NWLR (Pt. 1316)* **85 which was cited by learned senior counsel for the 1st respondent is no longer the law on this point, as it has been overtaken by section 285(13) of the Constitution. By the appellants participation in the rerun election, they did not in any way waive their rights of complaint against the election of 22nd September 2018, rather their right was enhanced by virtue of their participation in the rerun election. A situation of whether head or tail you lose, should not be foisted on the appellants.** [Sylva INEC **(2012) 13 NWLR (Pt. 1316) 85** distinguished; *Eze v PDP* **(2018) (2019) 1 NWLR (Pt. 1652) 1**; *Shinkafi v Yari* **(2016) 7 NWLR (Pt. 1511) 340 referred to.]** (P 552, *paras*. A-F)

16. *On Need for parties seeking declaratory reliefs to succeed on the strength of their own case* -

Parties seeking declaratory reliefs must succeed on the strength of their own case. This the appellants did in the instant case, through the unchallenged evidence of PW74 and paragraph 21 (b) and 24 of the petition that gave strength to the evidence of PW74. At paragraph 16 of the reply to the petition, the 1st respondent admitted that it was the returning officer that cancelled the election in the seven polling units. (P. 553, paras. E-F)

17. *On Whether guidelines contained in the Manual for election issued by INEC can override the provisions of the Constitution and Electoral Act 2010* -

The Guidelines contained in the Manual for election issued by INEC must not override the clear provisions of the Constitution and the Electoral Act, 2010. (P. 532, para. F)

18. *On Duty of trial tribunal with respect to appraisal of oral evidence and ascription of probative value thereto -*

Appraisal of oral evidence and ascription of probative value to such evidence is the primary duty of a tribunal of trial and the essence is that it is that tribunal of trial that has the opportunity of hearing and assessing the evidence and demeanour of witnesses. Where assessment of evidence and ascription of probative value to such evidence is carried out by a tribunal of trial, an appellate court has no jurisdiction to interfere, in the absence of special and/or exceptional circumstances. In the instant case, Obiorah, J. as a member of the panel of the tribunal that heard witnesses, including RW12 and RW13, was very much competent to assess the testimonies of all the witnesses and ascribe probative value to such evidence. The assessment and ascription of probative value to the testimonies of RW12 and RW13 by Obiorah, J. did not occasion a miscarriage of justice to the respondents. [*Adeye v. Adesanya* **(2001) 6 NWLR (Pt. 708) 1;** *Eki v. Giwa* **(1977) 11 NSCC 96 referred to.]** (Pp. 548-549, paras. G-B)

19. *On Attitude of Supreme Court to judgment of lower court not on appeal before it -*

Where a judgment of a lower court is not on appeal before the Supreme Court, the court will maintain a stoic stance and keep its peace. In the instant case, since the judgment of the Federal High Court in Labour Party v. INEC & Ors. (Unreported) Suit No0. FHC/ABJ/CS/309/2011 was not on appeal before the Supreme Court, the court maintained a stoic stance and kept its peace. [*Jev. v. Iyortom* **(2014) 14 NWLR (Pt. 1428) 575 referred to.]** (P 551, *paras*. G-H)

20. *On Subsistence of a decision of court which has not been set aside –*

A decision of a superior court of record is subsisting where it has not been set aside. Even though the decision of the Federal High Court *in Labour Party v. INEC & Ors.* **(Unreported) suit No. FHCIABJI CS/309/2011, which struck down the provision of section 140(2) of the Electoral Act, though binding on the Supreme Court, it is a decision of a not superior court of record as it is**

subsisting since it h not been set aside. [*Jev v Iyortom* **(2014) 14 NWLR (Pt. 1428) 575 referred to.]** (P. 551, paras. F-G)

21. *On Grounds upon which an election petition may be predicated and distinction between election and declaration and return -*

By the provisions of section 138(1) of the Electoral Act, the grounds upon which an election petition shall be predicated are as follows:-

(a) that a person whose election is questioned was (at the time of the election) not qualified to contest the election;

(b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Act;

(c) that the respondent was not duly elected by majority of lawful votes cast at the election; or

(d) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

Grounds of petition are jurisdictional as they define the confines of the challenge to an election. Even though a petitioner is allowed to use his own language, the language used must convey the exact meaning and purport of section 138(1) (b) of the Electoral Act. Section 138(1) (b) of the Electoral Act provides for 'election,' while the appellant ground ii talks of' declaration and return'. They are clearly not the same. While election comprises of the process of accreditation and voting, 'declaration and return', is restricted to the announcement of the result only. In the instant case, the 2" ground of the petition was incompetent as it was not a complaint based on non- compliance as provided under section 138(1) (b) of the Electoral Act, 2010 (as amended). Also, the complaint at paragraph 15 (ii) of the petition was directed at the rerun election of 27th September 2018, as such all facts and evidence adduced in support of an allegation of non-compliance with the election of 22nd September 2018, which did not come within the ambit of ground 15(ii) of the petition were outside the contemplation of Ground 15(ii) upon which the petition was presented. The 2nd ground of the petition was incompetent and was liable to be struck out. However, the 1st ground of the petition conveyed

the meaning and purport of section 138(1) (c) of the Electoral Act. That ground alone could sustain the petition. [*Ojukwu v. Yar 'adua* **(2009) 12 NWLR (Pt. 1154)** 50; *Ngige v. Obi* **(2006) 14 NWLR (Pt. 999) 1**; *Biyu v. Ibrahim* **(2006) 8 NWLR (Pt. 981) 13 referred to.]** (Pp. 549, paras. D-F; 550, paras. A-D; 551, paras. A-B)

22. *On Whether it is business of court to comb through volumes of records in order to find processes that are listed for amendment* -

It is not the business of the court to comb through volumes of records in order to find processes that are listed for amendment. In the instant case, the notice of appeal which learned appellants' counsel wanted to amend and the amended notice were not attached to the application. Also not attached were the appellants' brief of argument and the reply brief listed in the appellant's prayers as the processes sought to be amended and the amended copies for the Supreme Court to deem as properly filed. To that extent, the appellants' motion filed on the 10th of June 2019 for amendment was incompetent and was accordingly struck out. *(P. 539, paras. A-C)*

23. *On Procedure for raising preliminary objection to an appeal*-

By virtue of Order 2 rule 9 of the Supreme Court Rules, a respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days' notice thereof before the hearing, setting out the grounds of objection and shall file such notice together with ten copies thereof with the registrar within the same time. If the respondent fails to comply with this rule the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such other order as it thinks fit. In the instant case, learned senior counsel for the 1st respondent was wrong when the notice of the preliminary objection was said to have been filed by an applicant. The notice of preliminary objection in the instant appeal was not in accordance with the rules of the Supreme Court, which provides for raising of preliminary objection by respondent. *(Pp. 539-540, paras. G-C)*

Nigerian Cases Referred to in the Judgment:

A.-G. Fed v. A.C. Ltd. (2000) 10 NWLR (Pt. 675) 293

Abe v. INEC unreported appeal No. SC.197/2019 delivered on 8th day of April, 2019

Adegbayi v. APC (2015) 12 NWLR (Pt. 1442) 1

Adeigbe v. Kusimo (1965) NMLR 284

Aderibigbe v. Abidoye (2009) 10 NWLR (Pt. 1150) 592

Aderoummu v. Olowu (2000) 4 NWLR (Pt. 652) 253

Adeye. v. Adesanya (2001) 6 NWLR (Pt. 708) 1

Ahmed v. C.B.N. (2013) 11 NWLR (Pt. 1365) 352

Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248

Akinlagun v. Oshoboja (2006) 12 NWLR (Pt. 993) 60

Alawiye v Ogunsanya (2013) 5 NWLR (Pt. 1348) 607

Angadi v. PDP (2018) 15 NWLR (Pt. 1641) 1

Awolola v. Gov, Ekiti State (2019) 6 NWLR (Pt. 1668) 247

Bello v. A.-G., Oyo State (1986) 6 NWLR (Pt. 45) 828

Biyu v. lbrahim (2006) 8 NWLR (Pt. 981) 10

Consortium M. C v. NEPA (1992) 6 NWLR (Pt. 246) 132

Doma v. INEC (2012) 13 NWLR (Pt. 1317) 297

EFP Co. Ltd. v. NDIC (2007) 9 NWLR (Pt. 1039) 216

Bgobiamian v. FMB.N. (2002) 17 NWLR (Pt. 797) 488

Eki v. Ciwa (1977) 11 NSCC 96

Eze v. PDP (2019) 1 NWLR (Pt. 1652) 1

Falobi v. Falobi (1976) 1 NMLR 169

FMH v. C.S.A. Ltd. (2009) 9 NWLR (PL. 1145) 193

First Bank (Nig.) Plc v. TSA Ind. Ltd. (2010) 15 NWLR (Pt. 1216) 247

Garba v. Mohammed (2016) 16 NWLR (Pt. 1537) 114

General Electric Company v. Akande (2012) 16 NWLR (Pt 1327) 593

Gonzee (Nig.) Ltd v. NERDC (2005) 13 NWLR (Pt. 943) 634

Ibrahim v. Osunde (2003) 2 NWLR (Pt. 804) 2

Ikpeazu v. Otti (2016) 8 NWLR (Pt. 1513) 38

Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1025) 427

Jev v. lyortom (2014) 14 NWLR (Pt. 1428) 475

Kalejaiye v. LPDC (2019) 8 NWLR (Pt. 1674) 365

Kano Textile Printers Ltd. v. Gale ode & Hoff (Nig) Ltd. (2005) 13 NWLR (Pt. 943) 680

Labour Party v. INEC (2009) 6 NWLR (Pt. 1137) 351

Labour Party v. INEC (2015) 18 NWLR (Pt. 1491) 251

Labour Party v. INEC unreported FHC/AB.J/CS/309/2011

Leedo Presidential Motel Ltd. v. B.O.N. Ltd. (1998) 10 NWLR (Pt. 570) 353

Madukolu v. Nkemdilim (1962) 2 SCNLR 341

Mains Ventures Ltd v. Petroplast Ind. Ltd (2000) 4 NWLR (Pt. 651) 151

Musa v. State (2017) 4 NWLR (Pt.1555) 87

N.J.C. v. Dakwang (2019) 7 NWLR (Pt. 1672) 532

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

Nyesom v. Peterside (2016) 7 NWLR (Pt. 1512) 452

O.O.M.F Ltd. v. N.A.C.B. Ltd. (2008) 12 NWLR (Pt. 1098) 412

Odunze v. Nwozu (2007) 13 NWLR (Pt. 1050) 1

Ogbebor v Danjuma (2003) 15 NWLR (Pt. 843) 403

Ogidi v. Egba (1999) 10 NWLR (Pt. 621) 42

Ojengbede v. Esan (2001) 18 NWLR (Pt. 746) 771

Ojo v. Adejobi (1978)3 SC 65

Ojukwu v. Yar 'adua (2009) 12 NWLR (Pt. 1154) 50

Okonjo v. Odje (1985) 10 SC 267

Okpala v. Okpu (2003) 5 NWLR (Pt. 812) 183

Olatunbosun v. NISER Council (1988) NWLR (PL. 80) 25

Oyegun v. Nzeribe (2010) 7 NWLR (Pt. 1194) 577

Shamu v. Afribank (Nig.) Plc (2002) 17 NWLR (Pt. 795) 185

Shinkafi v. Yari (2016) 7 NWLR (Pt. 1511) 340

Shuaibu v. Nig Arab Bank Ltd. (1998) 5 NWLR (Pt. 551) 582

Skenconsult v. Ukey (1981) 1 SC 6

Sokoto State Govt. Kamdex Nig Ltd. (2007) 7 NWLR (Pt. 1034) 466

Sommer v. FHA (1992) 1 NWLR (Pt. 219) 548

SPDC v. Amadi (2011) 14 NWLR (Pt. 1266) 157

Sylva v. INEC (2012) 13 NWLR (Pt. 1316) 85

Tsalibawa v. Habiba (1991) 2 NWLR (Pt.174) 461

Ubwa v. Tiv Area Traditional Council (2004) 11 NWLR (Pt. 844) 427

Wada v. Bello (2016) 17 NWLR (PL. 1542) 374

Woluchem v. Gudi (1981) 5 SC 291

Foreign Cases Referred to in the Judgment:

Danoah v. Taiil 12 WACA 167

Otwiwa v. Kwaseko 3 WACA 230

Tawaiah III v. Ewudzi 3 WACA 52

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, 1999 (as amended), Ss. 179(2)(a)(b), 285(3)(4), paragraph 2(1) of the Sixth Schedule, S. 1(3)

Electoral Act, 2000 (as amended), Ss. 69, 70 135(1), 138(1) (b), 140 and 168(1)

Nigerian Rules of Court Referred to in the Judgment:

Supreme Court Rules, O. 2r.9

Book Referred to in the Judgment:

Guidelines and regulation in the conduct of the Osun State

Governorship Election, 2018

Appeal:

This was an appeal against the judgment of the Court of Appeal delivered on the 9th of May, 2019 wherein a majority of 4 - 1 Justices of the Court of Appeal set aside the majority of 2 to 1 decision of the Governorship Election Tribunal (simply hereinafter referred to as the "Tribunal"). The Supreme Court, in a majority decision of 5 to 2, dismissed the appeal for being incompetent.

History of the Case:

Supreme Court:

Names of Justices that sat on the appeal: Ibrahim Tankop Muhammad, Ag. C.J.N. (Presided); Olabode Rhodes-Vivour, J.S.C. (Read the Leading Judgment); Kumai Bayang Aka'ahs, J.S.C. (Dissented) Kudirat Motonmori Olatokunbo Kekere-Ekun, J.S.C.; Amiru Sanusi, J.S.C.; Paul Adamu Galumje, J.S.C. (Dissented); Uwani Musa Abba Aji, J.S.C.

Appeal No.: SC.553/2019

Date of Judgment: Friday, 5th July 2019

Names of Counsel: Dr. Onyechi Ikpeazu, SAN, Chief N. O. O. Oke, SAN, Dr. Paul Ananaba, SAN, Emeka Okpoko, SAN (with them, Niyi Owolade, Esq.) - for the *Appellants*

Chief Wole Olanipekun, SAN, J. O. Baiyehea, SAN, Abiodun Owonikoko, SAN; D. Akinlaja, SAN and Bode Olanipekun, SAN - for the 1st Respondent

Yusuf Ali, SAN, K. K. Eleja, SAN Prof. Waham Egbewole, SAN (with him, Bashir Isa, Esq. and Adesina Agbede, Esq.) - for the 3rd Respondent

Dr. Abiodun Layonu, SAN and Chief Yomi Aliyu, SAN (with them, Kolapo Alimi, Esq., Olumide Olujimi, Esq., and Akinsola Olujimi, Esq.) -for the 3rd Respondent

Court of Appeal:

Division of the Court of Appeal from which the appeal was brought: Abuja

Names of Justices that sat on the appeal: Jummai Hannatu Sankey, J.C.A. (Presided); Abubakar Datti Yahaya, J.C.A.; Ita George Mbaba, J.C.A. (*Dissented*); Isaiah Olufemi Akeju, J.C.A. (*Read the Leading judgment*);

Bitrus Gyarzama Sanga, J.C.A.;

Appeal No.:CA/A/EPT/295/2019

Date of Judgment: Thursday, 9th May 2019

Names of Counsel: Dr. Onyechi Ikpeazu, SAN (with him, Chief N.O. O. Oke, SAN; Dr. Paul C. Annaba, SAN; Emeka Okpko, SAN; Kehinde Ogunwummiju, SAN; Niyi Owolade, Esq.; Sunday Abednego, Esq.; I.N.I. Iheanacho, Esq.; Edmund Z. Biriomoni, Esq., Wole Jimi. Bada, Esq.; Eze George Alala, Esq.; Stanislaus Mbaezue Esq.; Igbeaku Evulukwu, Esq.; Tochukwu Nweke, Esq Prince Adebiyi

Adetosoye, Esq., Tunde Adejumo, Esq.; Itodo George Esq.; Umoru Jibrin, Esq. and Deborah Andnaba, Esq.) - for the *Cross-Appellants*

Yusuf Ali, SAN (*with him,* K. K. Eleja, SAN, Prof. Wahab Egbewole, SAN, Bashir Isa Esq.; Adesina Agbede, Esq.;

Alex Akoja, Esq.) - 1st *Cross-Respondent*

Chief Wole Olanipekun, SAN (*with him,* John Olusola Baiyeshea, SAN; Abiodun Owonikoko, SAN; Dayo Akinlaja, SAN, Bode Olanipekun, SAN; Abiodun Olaide; Dr. Ajibola Basiru; Abdulrasak Adeoya; Dr. M.T Adekilekun; Taiwo Awokunle; M.K. Fidelis; Aso Amata Othuke; M.O. Adebowole; Olugbenga Fayemiwo; Simisola Okenla; Ayo Olatubora; Oghenetejiri Gbemre and Olajide Salami -for the *2nd Cross-Respondent*

Chief Akin Olujinmi CON, SAN (with him, Dr. Abiodun Layoun, SAN; Chief Yomi Aliyu, SAN; A.A. Abimbola Esq.; A.W. Salimon, Esq.; Olayinka Okedara, Esq Kolapo Alimi, Esq, Olumide Olujinmi, Esq: Oloyede Oyediran, Esq. and Ayodele Akisanya, Esq.) - *for the 3rd Cross-Respondent*

Election Tribunal:

Name of the Tribunal: Osun State Governorship Election Petition Tribunal, Abuja

Name of Members: P.C. Obiora, J.; A.A. Gbolagunde, J.;

M.I. Sirajo, J.

Suit No.: EPT/OS/Gov/1/2018

Date of Judgment: Friday, 22nd March 2019

Counsel:

Dr. Onyechi Ikpeazu, SAN, Chief N. O. O. Oke, SAN, Dr. Paul Ananaba, SAN, Emeka Okpoko, SAN (with them, Niyi Owolade, Esq.) - *for the Appellants*

Chief Wole Olanipekun, SAN, J. O. Baiyehea, SAN, Abiodun Owonikoko, SAN; D. Akinlaja, SAN and Bode Olanipekun, SAN- *for the 1st Respondent*

Yusuf Ali, SAN, K. K. Eleja, SAN Prof. Waham Egbewole, SAN (with him, Bashir Isa, Esq. and Adesina Agbede, Esq.)- *for the 3rd Respondent*

Dr. Abiodun Layonu, SAN and Chief Yomi Aliyu, SAN (with them, Kolapo Alimi, Esq., Olumide Olujimi, Esq., and Akinsola Olujimi, Esq.) - *for the 3rd Respondent*

RHODES-VIVOUR, J.S.C. (Delivering the Leading Judgment):

On 22nd September, 2018 the appellant, the candidate of the People's Democratic Party PDP, the 1st respondent the candidate of the 3rd respondent the All Progressives Congress APC and over forty candidates of other political parties contested the Gubernatorial Election for Governor of Osun State. The 2nd respondent, i.e. the Independent National Electoral Commission, INEC, the regulatory body charged with the conduct of elections in Nigeria conducted the elections.

At the end of elections on 22nd September, 2018, the 2nd respondent declared the election inconclusive and proceeded to schedule a rerun election in seven polling units. This was necessary, because according to the 2nd respondent, there occurred in those seven polling units hijacking of election materials, violence malfunction of card readers, disruption of voting by thugs, and absconding presiding officer.

The 2nd respondent conducted the rerun election on 27th September, 2018. At the end of the exercise the 1st respondent was declared the winner with 255,505 votes while the 1st appellant came in a close second with 255,023 votes. The votes of the other candidates are not relevant in this appeal.

After the results on 27th September, 2018 were declared by INEC the 1st respondent was sworn in as the Governor of Osun State.

Dissatisfied with the results declared by the 2nd respondent, the Appellants filed a petition on 16th October, 2018. The main grounds of the petition are:

1. That the 2nd respondent was not duly elected by the majority of lawful votes cast at the Governorship Election in Osun State held on 22nd September, 2018 and the rerun election held on 27th September, 2018.

2. That the declaration and return of the 2nd respondent as the elected Governor of Osun State is invalid by reason of substantive non-compliance with the provisions of the Electoral Act 2010 (as amended), during the Governorship Rerun Election in Osun State of 27th September 2018.
3. That the declaration and return of the 2nd respondent as Governor elect of Osun State is invalid by reason corrupt practice, during the Governorship rerun election in Osun State of 27th September, 2018.

The petitioners, i.e. the appellants prayed for the following reliefs:

(i) That it may be determined and thus declared that the 2nd respondent, Adegboyega Isiaka Oyetola was not duly elected and/or returned by a majority of lawful votes Cast in the Osun State Governorship Election held on 22nd September and the rerun election of 27th September 2018 and therefore his declaration and return as the Governor elect of Osun State is null, void and of no effect whatsoever.

(ii) That it may be determined and thus declared that the petitioner having fulfilled the requirements of section 179 (2) (a) and (b) of the Constitution as amended in respect of the Osun State Governorship Election held on 22nd September, 2018 is the winner by 353 votes margin in the said election having scored a total vote of 254,698 while the 2nd respondent scored 254,345 votes

(iii) That it may be determined and thus declared that the 1st petitioner having satisfied the provisions of the Constitution as amended, and the Electoral Act, 2010, as amended, in respect of the election of 22nd September 2018, the act of the 1t respondent, in ordering a rerun election of 27th September, 2018 is invalid, void and of no effect whatsoever howsoever.

(iv) That it may be determined and thus declared that the rerun election held on 27th September, 2018 is invalid by reason of corrupt practices substantial non-compliance and offences against the provisions of the Electoral Act 2010 (as amended).

(v) That it may be determined and thus declared that the rerun election of 27th September, 2018 and the return of the 1st respondent are voided by acts which us clearly violate and are in breach of the provisions of the Electoral Act 2010 (as

amended), including but not limited to rigging and manipulation of election results unprecedented act of violence, unlawful allocation of votes, thuggery and coercion of voters committed at the towns, villages, other communities, wards and polling units aforementioned in Osun State as well as unlawful interference in the electoral process by the respondents.

(vi) That it may be determined and thus declared that the result of the rerun Governorship Election of Osun State held on Thursday 27th September, 2018 as declared and announced by the 1st respondent be nullified and to be of no effect whatsoever.

(vii) An order of this honourable tribunal nullifying the certificate of rerun issued to the 2nd respondent by the 1st respondent.

(viii) A declaration that paragraph 44 (n) of the 1st respondent's approved guidelines and regulations for the conduct of the Osun State Governorship election 2018 is void because it (a) is in conflict with the Electoral Act, 2010, as amended and the Constitution of Nigeria (as amended) and/or (b) has the effect of expanding or amending the Electoral Act, 2010 as amended and the Constitution of Nigeria (as amended).

(ix) An order striking down and nullifying, paragraph 44(n) of the 1st respondent's approved guidelines and regulations for the conduct of the Osun State Governorship Election 2018 because it (a) is in conflict with the cumulative positions of sections 69 and 70 of the Electoral Act, 2010 as amended and section 179 of the Constitution of Nigeria (as amended) and/or (b) has the effect of expanding or amending the cumulative provisions of section 69 and 70 of the Electoral Act, 2010, as amended, and the Constitution of Nigeria (as amended) and/or (c) confers additional powers on the 1st respondent which were neither conferred nor envisaged by the cumulative provisions of sections 69 and 70 of the Electoral Act, 2010, as amended, and section 179 of the Constitution (as amended).

(x) A declaration that the respondents manipulated, altered, amended the card reader accreditation data/ accreditation on forms EC8A at Osogbo, Olorunda, Ola Oluwa, Boripe, Ilesha East, Atakomosa East, Ife Central, Ife North, Ife South, Iwo, Egbedore, Ayedire, Ayedaade and Ejogbo Local Government Areas of Osun State.

(xi) A declaration that by virtue of the Constitution (as amended) and the Electoral Act 2010 (as amended) both 1st respondent's press release and pronouncement (through the Returning Officer) on 23rd September, 2018 that the election conducted for the office of Governor of Osun State on 22nd September, 2018 was inconclusive was null, void, ultra vires unlawful and of no effect whatsoever, however.

(xii) A declaration that the 1st respondent's decision to order for and conduct a rerun election for the office of the Governor of Osun State conducted in the following seven polling units - polling units 012, Adereti Ward 7 and polling units 010 in Osi Ward 8 of Ife South Local Government, polling unit 2 in Oyere II Alapata village Ward 10 in Ife North Local Government, polling units 017 in ward 5 in Osogbo Local Government, Polling Units 1 and 4 in Ward 8 Polling Unit 3 in ward 9 in Orolu Local Government on 27th September, 2018 was null, void, *ultra vires*, unlawful and of no effect whatsoever howsoever.

(xiii) An order nullifying the result of the rerun election into the office of the Governor of Osun State conducted on 27th September, 2018 for being null, void, unlawful, *ultra vires* and of no effect whatsoever, howsoever.

(xiv) An order nullifying and or cancelling votes in all polling units where the petitioners have established over voting and non-accreditation during the Osun State Governorship Election of 22nd September, 2018.

(xv) A declaration that neither the 2nd respondent nor 3rd respondent scored the majority of lawful votes cast at the election to the office of the Governor of Osun State held on 22nd September, 2018 upon cancellation by this tribunal of the unlawful votes allotted to the 2nd and 3rd respondents in all the polling units where there were over voting and non-accreditation.

(xvi) A declaration that your petitioners scored the majority of lawful votes cast at the election to the seat of the Governor of Osun State held on 22nd September, 2018 and petitioner Senator Ademola Nurudeen Adeleke is therefore entitled to be returned as the duly elected Governor of Osun State.

(xvii) An order returning your petitioners as the winners of the election to the office of Governor of Osun State held on 22nd September, 2018 and the 1st petitioner Senator Ademola Nurudeen Adeleke as the duly elected Governor of Osun State.

In the alternative:

(xviii) An order declaring your 1st petitioner as the winner of the election to the office of Governor of Osun State held on 22nd September, 2018 and the rerun election of 27th September, 2018 and that the 1st petitioner Senator Ademola Nurudeen Adeleke is the duly elected Governor of Osun State based on the scores of the valid votes of the parties after deduction of the votes affected by total votes exceeding accreditation and votes affected by non-recording accreditation as follows:

	APC	PDP
Scores of parties as declared on Form EC8D.	255,505	255,023
Less votes affected by total votes exceeding Accreditation	8,694	5,119
Less votes affected by non-recording of Accreditation	5,476	3,270
Scores of parties after deduction.	241,335	246,634

The difference showing the margin of winning is 5,299 in favour of PDP.

(xix) An order directing the 1st respondent to issue your petitioner Senator Ademola Nurudeen Adeleke with the certificate of rerun forthwith.

(xx) Cost of the petition.

In the trial court, the 2nd respondent was the 1st respondent, while the 1st respondent was the 2nd respondent. The 3rd respondent was the 3rd respondent in the trial court.

After the petition with the usual attachments were served on the 1st respondent, 1st respondent filed a reply denying all the averments in the petition and urged the tribunal to uphold the election of the 2nd respondent as the Governor of Osun State as declared by the 1st respondent.

The 2nd respondent also filed a reply wherein he claimed to have been duly returned, elected as the Governor of Osun State. He also filed and argued a preliminary objection to the competence of majority of the reliefs sought by the petitioners.

The 3rd respondent also filed a notice of preliminary objection along with his reply to the petition.

The petitioners filed replies to all the replies.

The petition came before the Osun State Governorship Election Tribunal. The panel of Judges that sat to hear the petition were Sirajo, J. Chairman, Obiorah, J., member 1 and Gbolagunte J member 2. Preliminaries before trial concluded, the 1st witness was taken on 18th December 2018. After eighty witnesses were taken, the petitioners (in this appeal the appellants) closed their case on 18th January 2019.

No witness testified for the 1t respondent, but several documents were tendered from the bar by the 1st respondents learned counsel Mr. Agbede, the 1st respondent closed its case on 24th January 2019. Learned counsel for the 2nd respondent opened the defence of the 2nd respondent on 30th January, 2019.

After eleven witnesses were called, learned counsel for 2nd respondent closed the 2nd respondents defence on 5th February, 2019. Learned counsel for the 3rd respondent opened the 3rd respondents defence on 6th February, 2019. Respondent witness 12 and 13 were taken and the 3rd respondent closed its defence on 6th February, 2019.

In a considered judgment delivered on 22 March 2019, Obiorah, J. and Gbolagunte J. found merit in the petition. Sirajo, J. dissented.

The concluding part of the majority judgment reads:

> In conclusion, based on our resolutions of all the issues for determination and our findings we hereby declare that there is merit in this petition. We accordingly make the following final orders:
>
> 1. The 2nd respondent, Adegboyega Isiaka Oyetola, was not duly elected and/or returned by a majority of lawful votes cast in the Osun State Governorship Election held on Saturday 22nd September, 2018 and the re-run election of Thursday 27th September, 2018 and therefore his declaration and return as the Governor elect of Osun State is null, void and of no effect whatsoever.
> 2. The petitioners scored the majority of lawful votes cast at the election to the office of the Governor of Osun State and the 1st petitioner, Senator Ademola Nurudeen Adeleke, having fulfilled the requirements of section 179(2)(a) and (b) of the Constitution, (as amended) is hereby declared the winner of the said election and returned as the duly elected Governor of Osun State.

3. The 1st respondent's decision to order for and conduct a rerun election for the office of the Governor of Osun State in the following seven polling units Polling Unit 012, Adereti Ward 7 and Polling Unit 010 in Osi Ward 8 of Ife South Local Government, Polling Unit 2 in Oyere Alapata Village Ward 10 in Ife North Local Government polling unit 017 in Ward 5 in Osogbo Local Government, polling units 1 and 4 in Ward 8 polling units 3 in Ward 9 in Orolu Local Government on 27th September, 2018 is null, void and of no effect whatsoever and consequently the result of the rerun election is hereby nullified.
4. The certificate of return issued by the 1st respondent to the 2nd respondent, Adegboyega Isiaka Oyetola is hereby nullified.
5. The 1st respondent, Independent National Electoral Commission, is hereby ordered to issue Senator Ademola Nurudeen Adeleke a Certificate of Return as the duly elected Governor of Osun State of Nigeria forthwith.
6. Cost of N200,000.00 (Two hundred thousand naira only) is awarded to the petitioners against the 2nd and 3rd respondents.

Dissatisfied with the judgment of the tribunal the 1st and 3rd respondents filed an appeal.

The appeal was heard by the Court of Appeal (Abuja Division) and the following Justices of the Court of Appeal heard the appeal, Sankey, JCA, Yahaya, J.C.A, Mbaba J.C.A, Akeju, JCA and Sanga, JCA. In a judgment delivered on 9th May 2019 by a majority of 4 to 1, Sankey, JCA, Yahaya, JCA, Akeju, JCA, Sanga, JCA upset the majority judgment of the tribunal. Mbaba, J.C.A. dissented. The Court of Appeal had this to say:

> "……the judgment delivered by Obiorah, J. who did not sit with the other Judges on the Governorship Election Tribunal to hear the proceedings on 6th February, 2019 was a nullity because his absence at one of its sittings certainly affected the competence of the tribunal. It is impossible to procure or salvage a majority opinion in a judgment, which is a nullity. I accordingly so hold and resolve this issue in favour of the appellant." Consequently, from all I have said so far, the appeal succeeds on this ground. It is allowed. Accordingly, I declare the proceedings and judgment of the tribunal delivered on 22 March, 2019, a nullity, I

> hereby enter an order setting aside the entire proceedings of the tribunal, including its judgment and final orders".

The Court of Appeal, then proceeded to address the other outstanding issues and concluded as follows:

> "In the result having resolved issues 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 in favour of the appellant, the appeal succeeds. Accordingly, I allow the appeal and set aside the judgment of the Osun State Governorship Election Tribunal in petition no: EPT/05/GOV/01/2018 delivered on 22 March, 2018."

This appeal is against that judgment. In accordance with the Supreme Court Rules briefs were filed and exchanged.

Learned counsel for the appellant Dr. O. Ikpeazu SAN filed the appellants' brief on 24th May, 2019 and a reply to 1st respondents' brief on 30th May, 2019.

Learned counsel for the 1st respondent Chief Wole Olanipekun, SAN filed the 1st respondent brief on 28 May 2019.

Learned counsel for the 2nd respondent Mr. Y. Ali SAN, and learned counsel for the 3rd respondent Dr. A. Layonu SAN did not file briefs.

Learned counsel for the appellant formulated ten issues for determination:

1. Whether based on the facts before the court the learned Justices of the Court of Appeal were wrong when they held that the majority judgment of the tribunal was a nullity as Obiorah, J. who delivered the lead judgment was absent on 6th February, 2019 when evidence of and 13 were taken.
2. Whether the learned Justices of the Court of Appeal were wrong when they held that the 1st respondent's issue one (1) at the Court of Appeal encompassed both grounds 1 and 2 of his grounds of appeal and thus dwelt on the effect of the evidence of RW12 and RW13 on the majority judgment of the tribunal.
3. Whether learned Justices of the Court of Appeal were wrong when they held that the petition did not present ground of complaint based on non- compliance against the election of 22nd September, 2018.
4. Whether the learned Justices of the Court of Appeal were wrong when they held that having invalidated the election in seventeen (17) polling units, the appropriate

order the tribunal could have made having regard to section 140 (1) and (2) of the Electoral Act 2010 was for fresh election.

5. Whether the learned Justices of the Court of Appeal were wrong when they held that in the circumstances of the case the appellants waived their right to complain about non-compliance at the election, which took place on 22nd September, 2018.
6. Whether the learned Justices of the Court of Appeal were wrong when they held that grounds in paragraph 15 (ii) and (ii) were incompetent and violate section 138 of the Electoral Act 2010.
7. Whether the learned Justices of the Court of Appeal were wrong when they held that the reliefs granted by the tribunal amounted to double compensation.
8. Whether the learned Justices of the Court of Appeal were wrong when they held that the reliefs claimed by the appellants were directed at the election of 22nd September, 2018 and were not grantable as they were founded on an inconclusive election.
9. Whether the learned Justices of the Court of Appeal were wrong when they held that the reliefs being declaratory, the appellants had the burden of establishing that election duly held in seven (7) Polling Units before they can reach the conclusion that the Returning Officer had no legal right to cancel the result of the seven (7) polling units but failed to discharge that burden.
10. Whether the learned Justices of the Court of Appeal were wrong when they held that the appellant failed to prove that the failure by the INEC staff to make entries CW with respect to the eight (8) columns in Form EC8A in the impugned Forms EC8A was not substantial non- compliance which affected the result of the election.

On the other side of the fence seven issues were formulated by learned counsel for the 1st respondent:

1. Considering the fact that the majority judgment of to the trial tribunal was written and/or delivered by Honourable Justice P.C. Obiorah, J. who did not participate in all the proceedings of the trial tribunal particularly the proceedings of 6 February 2019 when RW12 and RW13 gave evidence (and were extensively cross-examined), whether the lower court was not right by setting aside the said judgment.

2. Whether the lower court was right by holding that the grounds and reliefs sought in the petition do not confer jurisdiction on the trial tribunal.
3. Was the lower court not right, relying on binding decisions of the Supreme Court, when it came to the conclusion that the appellants had waived any right they had against the rerun election of 27th September, 2018.
4. Considering the fact that ground 2 (paragraph 15 (ii) of the appellants' petition at the trial tribunal) was restricted to allegations of non-compliance with the provisions of the Electoral Act against the rerun election of 27th September 2018, whether the lower court was not in order by setting aside the decision of the trial tribunal regarding allegations of non-compliance against the election of 22nd September, 2018.
5. Was the lower court not right to have set aside the majority decision of the trial tribunal which invalidated the 27th September, 2018 rerun election.
6. Having regard to the fact that the trial tribunal specifically found that the petitioners failed to prove allegations of over voting and voiding of valid votes, among others, whether the lower court was not justified to have set aside the decision of the trial tribunal which subsequently nullified elections in 17 polling units.
7. Considering the position of the law, including binding decisions of both the lower court and Supreme Court whether the lower court was not perfectly in order with respect to its decision on the Certified True Copies and the pink copies of Forms EC8A tendered by the appellants.

I shall consider the issues formulated by learned counsel for the appellants.

At the hearing of the appeal on 17th June 2018, learned counsel for all the parties agreed that appeal nos. SC.554/2019: *Sen. Nurudeen Ademola Adeleke & anor v. APC & Ors*. and SC.555/2019 *Sen. Nurudeen Ademola Adeleke & anor v. INEC* & ors. shall abide the decision in the instant appeal, SC. 553/2019, having all arisen from the same judgment of the Court of Appeal.

Learned counsel for the1st respondent, Chief Wole Olanipekun, SAN informed the court that he filed a preliminary objection accompanied by a written address on 6th June 2019. A reply on points of law was filed on 13th June 2019. He adopted his brief and urged the court to strike out the appeal.

Opposing the preliminary objection learned counsel for appellant filed a written address in opposition to the preliminary objection on 10th June 2019. He also filed a motion on notice also on 10th June 2019 to correct an error. The motion was supported by an affidavit and written address. He urged the court to grant the motion and dismiss the preliminary objection.

On the main appeal learned counsel for the appellants' Dr. O. Ikpeazu SAN adopted 'the appellants' brief filed on 24th May 2019 and reply to 1st respondents brief filed on 30th May 2019 and urged the court to set aside the decision of the Court of Appeal and restore the verdict of the tribunal. Learned counsel for the 1st respondent Chief Wole Olanipekun, SAN adopted the 1st respondent's brief filed on 28th May 2019 and urged the court to dismiss the appeal.

A preliminary objection must at all times be heard first before the hearing of an appeal. Indeed by Order 2 rule 9 of the Supreme Court Rules, preliminary objection relates to the competence of the entire appeal.

A preliminary objection should only be filed where, if it succeeds the hearing of the appeal comes to an end. Where on the other hand, the need arises to challenge grounds of appeal or any other process, and if it succeeds the appeal would still be heard, then a motion on notice supported by affidavit should be filed. See Uwazurikev A.-G. of the Federation (2007) 2 SCNJ p. 309, (2007) 8 NWLR (Pt. 1035) 1; Union Bank of Nig. Plc v. O. Sogunro & Ors (2006) 7 SCNJ p.396, (2006) 16 NWLR (Pt. 1006) 504; SPDP of Nig. Ltd. v. A. M. Amadi & 4 ors (2011) SSC (Pt.1) p.4, (2011) 14 NWLR (Pt. 1266) 157.

In this case, learned counsel for the 1st respondent was right to file a preliminary objection. If it succeeds the appeal would no longer be heard. If it fails, the appeal would be heard. A preliminary objection is always decisive.

By this preliminary objection filed on 6 June, 2019, learned counsel for the 1st respondent Chief Wole Olanipekun SAN seeks the striking out and/ or dismissal of the appeal in *limine*, or in the alternative, the striking out of issue 10 of the appellants' brief of argument filed on 24 May, 2019.

The grounds for the notice of preliminary objection are:

(a) A notice of appeal is the originating process, which confers jurisdiction on an appellate court.

(b) Parties who brought this appeal have described themselves as 1st and 2nd respondents in the notice of appeal filed on 15th May, 2019.

(c) It is the duty of a respondent to defend the judgment, of the lower court and not to attack same.

(d) Further to (b) and (c) supra, the notice of appeal is incompetent and thus liable to be struck out and/or dismissed.

(e) Upon the striking out and/or dismissal of the notice of appeal, the entire appeal is by extension struck out and/or dismissed.

(f) Without prejudice to (a) to (c) supra an omnibus ground of appeal is not a ground of appeal from which issues of law can be distilled or argued.

(g) Ground (xxxi) of the notice of appeal is an omnibus ground of appeal from which issues cannot be distilled.

(h) Senator Ademola Nurudeen Adeleke and Peoples Democratic Party (PDP) have distilled their issues 10 from the omnibus ground of appeal.

(i) The said issue 10 is liable to be struck out for being incompetent.

Learned counsel for the 1st respondent observed that Dr. O. Ikpeazu SAN learned counsel for the appellants' and other counsel appearing with him described themselves in the notice of appeal as 1st and 2nd respondents' counsel contending that parties are left in limbo and confusion as to their State and title in the appeal.

He further observed that against all rules of procedure issue 10 was formulated from the - omnibus ground of appeal thereby rendering the said issue incompetent.

Reliance was placed on First Bank of Nig. Plc v. TSA Industries Ltd. (2010) 15 NWLR (Pt.1216) p.247; *Odunze v. Nwosu* (2007) 5-6 SC p.40, (2007) 13 NWLR (Pt. 1050) 1.

He urged the court to strike out and/or dismiss the appeal in its entirety.

In the alternative be argued that issue 10 in the brief filed by the appellants' is grossly incompetent and liable to be struck out, observing that an issue cannot be formulated from an omnibus ground of appeal. Reliance was placed on *FMH v. Comet Shipping Agencies Ltd.* (2009) 9 NWLR (Pt. 1145) p. 193: *Akinlagun & Anor v. Oshoba* (2006) 12 NWLR (Pt.993) p.60.

He urged the court to resolve this issue in favour of the appellant.

In opposing the preliminary objection learned counsel for the appellants' Dr. Ikpeazu, SAN filed a motion on notice on 10th June 2019. It was brought under section 6(6) (b) of the Constitution.

Order 8 rule 12 of the Supreme Court Rules, section 22 of the Supreme Court Act and the inherent jurisdiction of the court. The appellants prayed:

1. For an Order correcting and or amending the description of counsel appearing underneath the signature columns in the appellants' notice of appeal, appellants' brief of argument and appellants reply brief to the brief of the 1st respondents by substituting the description, 1st and 2nd respondents' counsel with appellants counsel".
2. The motion was filed to correct the error. I must say straightaway that the sale prayer is vague.
3. It should have a deeming order, so that the motion would be properly before the court. The motion is refused and dismissed.

I now turn to consider the submissions of Dr. O. Ikpeazu, SAN. He observed that where all the parties have exchanged briefs and where the record of appeal bears a clear indication as to the parties and who their counsel have always been the wrong description of the designation of counsel is only a misnomer which cannot vitiate an otherwise valid appeal. He further observed that the wrong description of counsel is a mistake of counsel. He referred to *Alawiye v. Ogunsanya* (2013) 5 NWLR (Pt.1348) p. 570.

In the alternative learned counsel submitted that an omnibus ground of appeal cannot be used to challenge specific findings of the court. He argued that the appellant's issue 10 was not distilled from the omnibus ground alone. Reliance was placed on *Aderibigbe v. Abidoye* (2009) 10 NWLR (Pt.1150) p.592.

He urged the court to dismiss the preliminary objection.

There are two limbs to the preliminary objection. The first is that the appellant's counsel described themselves as 1st and 2nd respondents counsel in the notice of appeal, instead of 1st and 2nd appellants counsel while the second is that issue 10 is incompetent since it was distilled from an omnibus ground of appeal.

The notice of appeal is the process that initiates the hearing of an appeal. So a defective notice of appeal touches on the jurisdiction of the court to hear the appeal. If the notice of appeal is defective, it must be struck out for being incompetent.

For if a notice of appeal is defective there would be no appeal to be heard as the court would have no jurisdiction to hear such an appeal. See *Kano Textile Printers Ltd. v. Galeode & Hoff (Wig.) Ltd* (2005) 5 SCM p.91, (2005) 13 NWLR (Pt. 943) 680.

The offending part of the notice of appeal is at the end where learned counsel representing the appellants describe themselves as 1st and 2nd respondents counsel instead of 1st and 2nd appellants counsel. On the next page the respondents and their counsel are correctly stated.

Amendnments that would change the texture will not be permitted. Such amendment are fundamental.

In this appeal, I find the error to be a clerical error, an accidental slip, a blunder that can be corrected. Where ever the appellants counsel describe themselves as 1st and 2nd respondents counsel in their processes it shall now read "1st and 2nd appellants counsel."

On the second limb of the preliminary objection, it is well settled that an issue cannot be formulated solely from an omnibus ground to challenge specific findings of the court. See *Akinlagun & anor v. Oshoboja* (2006) 12 NWLR (Pt. 993) p.60. *Aderibigbe v. T. Abidoye* (2009) 10 NWLR (Pt. 1150) p.592.

Issue 10 was distilled from the omnibus ground (i.e. ground 31) and several other grounds, to wit: grounds 19, 20, 21, 22, 24, 25, 26, 27, 28 etc. These grounds challenge specific findings of the Court below.

Tam satisfied that issue 10 is competent, since it was fornmulated from several grounds of appeal aside from the omnibus ground of appeal. Accordingly, the preliminary objection is overruled.

Learned counsel for the appellants, Dr. O. Ikpeazu SAN, and learned counsel for the 1st respondent Chief - Wole Olanipekun SAN, both have a similar issue No. 1 on whether the majority judgment of the tribunal is a nullity, have carefully considered this issue and found it to be very important and crucial in that if it succeeds, the entire proceedings at the election tribunal will be declared a nullity and it will become unnecessary to consider any of the other issues.

Issue 1 as formulated by learned counsel for the appellants reads as follows:

1. Whether based on the facts before the court the learned Justices of the Court of Appeal were wrong when they held that the majority judgment of the tribunal was a nullity as Obiorah, J. who delivered the lead judgment was absent on 6th February, 2019 when evidence of RW12 and 13 were taken.
2. Learned counsel for the appellants observed that the proceedings of 6th February 2019 was conducted before three members of the tribunal. Reference was made to page 3693 of the record of appeal. He further observed that the complaint of the 1st respondent was that Obiorah, J. did not sit on 6th February 2019, contending that, that observation is inconsistent with the record of appeal. He observed that none of the parties raised that point during address. He argued that learned counsel for the 1st respondent ought to have served an affidavit on Obiorah, J. for clarification on whether he sat or not in view of the conflicting state of the record of appeal.

Reliance was placed on Musa v State (2017) 4 NWLR (PL.1555) p.187; Adegbuyi v. APC (2014) LPELR 24214 SC, (2015) 12 NWLR (Pt. 1442) 1.

He further submitted that failure by the Judge to sign proceedings would not amount to the entire proceedings being, nullified. He submitted that lack of consistency of sitting by the panel does not render the proceedings null and void. He relied on *Adeigbe v. Kusimo* (1965) NMLR p.284; *Madukolu v. Nkemdilim* (1962) 2 NSCC p.374, (1962) 2 SCNLR 341; *NJC v. Dakwang* (2019) LPELR 46927 SC, (2019) 7 NWLR (Pt. 1672) 532; *Shuaibu v. Nig Arab Bank Ltd*. (1998) 5 NWLR (Pt. 551) p.582.

He urged this court to resolve this issue in favour of the appellants.

Learned counsel for the 1st respondent observed that it has never been the contention of the appellants both at the lower court and this court, that Obiorah, J. sat and participated at the proceedings of 6th February, 2019. He observed that at the Court of Appeal learned counsel for the appellants submitted that Obiorah, J. did not participate in the proceedings of 6th, 2019, first in his notice of appeal, his brief and his oral submission on 24th April, 2019.

He observed that they now take a different stance before this court contending that this cannot be allowed. Reliance was placed on *Ajide v. Kelani* (1985) 3 NWLR (Pt. 12) p.248. He argued that the appellants have been approbating and reprobating on this issue.

He observed that on 6th February 2019 when Obiorah, J. did not sit RW 12 - Ayoola Soji and RW13 - Oladejo Kazeem, gave evidence on oath, were cross examined and several vital documents were tendered through both of them. He submitted that the absence of Obiorah, J. at the proceedings of 6th February 2019 is enough to vitiate the entire judgment. He submitted that it is wrong and unacceptable for a Judge who did not hear or participate in all the proceedings to deliver judgment. Reliance was placed on Eeobiamian v. FMBN (2002) 17 NWLR (Pt. 797) p.488. Shanu Afribank (Nig.) Plc (2002) 17 NWLR (Pt. 795) p.185. Nana Esell Tawaiah lll v Kwesi Ewudzi 3 WACA p.52.

On the heading of a document, learned counsel for the 1st respondent observed that the heading of a document is of no significance or importance, contending that what matters is the content of such document. Relying on *Ojo v. Adejobi* (1978) 3 SC p.65, he submitted that since Obiorah, J. did not sit on 6th February 2019 the unsigned proceedings is a worthless document.

Reliance was also made on Tsalibawav. Habiba (1991) 2 NWLR (Pt.174) p.461 Concluding he submitted that since Obiorah, J. did not sit on 6th February 2019 the 1st respondent (as appellant in the Court of Appeal) was not given fair hearing. Reliance was placed on *Olatunbosun v. NISER Council* (1988) 3 NWLR (Pt. 80) p.25. *Kalejaiye v. The Legal Practitioners Disciplinary Committee anor* (2019) LPELR -47035 (SC), (2019) 8 NWLR (Pt. 1674) 365.

He urged this court to resolve this issue against the appellants and dismiss the appeal in its entirety.

To resolve this issue answers to two questions must be given:

i. Did Obiorah, J. sit on 6th February 2019 when the evidence of RW12 and RW 13 was taken?
ii. If he did not sit, what is the effect?

Answering both questions above, the majority decision of the Court of Appeal had this to say:

> "…..the judgment delivered by Obiorah, J. who did not sit with the other Judges on the Governorship Election Tribunal to hear the proceedings on 6th February 2019, was a nullity because his absence at one of its sittings certainly affected the competence of the

tribunal. It is impossible to procure or salvage a majority opinion in a judgment which is a nullity."

Now, section 285 (3) and paragraph (2) of the Sixth Schedule to the Constitution provides that:

> 2(1) A Governorship Election Tribunal shall consist of a Chairman and two other members.

In *Madukolu v. Nkemdilim* (1962) 2 NSCC p.374, (1962) 2 SCNLR 341. This court made some observations on when a court is competent. The court said that a court is competent when -

> (a) It is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or another; and
> (b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and
> (c) the case comes before the court initiated by the due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

This court went on to say that any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided, the defect is extrinsic to the adjudication.

Did Obiorah, J. sit on 6th February 2019? The record of appeal is the only document that gives an indication of what took place in court. The court is enjoined to take notice of its contents and resolve issues as in this case as to whether Obiorah, J. sat or not. When a party is not satisfied with the record of appeal, he should file a supplementary record of appeal. In this appeal are the parties satisfied with the record of appeal.

As quite rightly pointed out by learned counsel for the 1st respondent, Chief Wole Olanipekun SAN, learned counsel for the appellant, Dr. O. Ikpeazu, SAN also held the view that Obiorah, J. did not sit on 6th February 2019.

In dismissing the non-participation of Obiorah, J. in the proceedings of 6th February 2019, learned counsel said (In the Court of Appeal)

> "……non-participation of Obiorah, J. in the proceedings of 6th February, 2019 thereby rendering the proceedings a nullity 1s mistaken postulation because the fact that all members of the tribunal or that the Chairman or a tribunal did not sit in on

> all the proceedings of the tribunal is neither an issue of lack of jurisdiction nor a matter of nullity of the proceedings."

At no time did Dr. O, Ikpeazu SAN dispute the correctness of the proceedings of 6th February 2019, that Obiorah, J. did not sit on 6th February 2019. I must observe that in every proceeding before the tribunal Obiorah, J. signed at the end of proceedings for the day except on 6th February, 2019 when he did not sign the proceedings. T must further observe that in his processes in the Court of Appeal, he maintained that Obiorah, J. did not sit on 6th February, 2019.

It is in the Supreme Court that Dr. O. Ikpeazu, SAN appears to be changing his stance, apparently saying that there are conflicts in the record of appeal and it is the duty of learned counsel for the 1st respondent to file an affidavit to correct the conflict in the record of appeal. Oputa J.S.C. did say that:

> "A party should be consistent in stating his case and consistent in proving it. He will not be allowed to take one stance in the pleading then turn summersault during trial. Justice is much more than a game of hide and seek. It is an attempt our human imperfections notwithstanding to discover the truth…"

An appeal is a rehearing of the case.

Parties must maintain the same stance on facts right up to the Supreme Court. Though counsel at times present the semblance of the truth, the Judge is expected to pursue the truth. The appellant cannot say in the Court of Appeal that the non-participation of Obiorah, J. in the proceedings of 6th February, 2019 is neither an issue of lack of jurisdiction nor a matter of nullity of the proceeding and then in the Supreme Court say that the record of appeal is in conflict, but fails to say what the conflict is.

A party must be consistent with the case he sets up and not shift ground in another court as it suits his fancy. That is precisely what the appellants are doing and that is legally wrong.

Finally, I must observe that the heading of the day's proceedings are written by the Registrar of court signifying the Judge(s) that would sit on the day. This may not necessarily be so. The signature's at the end of proceedings for the day indicates which Judge sat to hear the proceedings.

On 6th February, 2019 Obiorah's name appears on the top of the page for proceedings of the day, but at the end of the day's proceedings, Obiorah, J. did not sign and that was the only proceedings that he did not sign at the end of the day.

Right from the Court of Appeal, Dr. O. Ikpeazu SAN and Chief Wole Olanipekun, SAN agreed that Obiorah, J. did not sign. The record of appeal supports their stance. I am in the circumstances satisfied with the decision of the Court of Appeal that, on 6th February, 2019 Obiorah, J. did not sit and so did not sign the proceedings for the day.

Since it has been found to the satisfaction of this court that Obiorah, J. did not sit on 6th February 2019, what then is the effect on the judgment of the tribunal delivered on 22nd March 2019.

A careful consideration of decided cases on the point would be necessary, and the starting point would be to consider judgments of the West African Court of Appeal delivered over sixty years ago, and then recent decisions of the Supreme Court.

In the following cases.

Tawiah II v. Ewudzi 3 WACA p.52; *Akosuah Owiwa v. Adjoa Kwaseko* 3 WACA p.230

The West African Court of Appeal was of the view that where membership of a court i.e., trial court varied during hearing, the proceedings were a nullity.

In *Egobiamien v. FMBN* (2002) 17 NWLR (Pt. 797) p.488, Obi, J. had completed hearing of all evidence and adjourned for judgment when he left for Delta State. Edokpayi, J. to whom the case was re-assigned ought to have directed that the case should commence de novo. He proceeded to write a judgment on the evidence recorded by another Judge. The Supreme Court declared the judgment written by Edokpayi, J. a nullity.

In *Shanu v. Afribank (Nig) Plc* (2002) 17 NWLR (Pt. 795) p.185, Obi, J. heard evidence but did not complete the hearing. The case was sent to Edokpayi, J. on the creation of Delta State. He continued hearing the case instead of hearing the case de novo. He delivered judgment. On appeal, the Court of Appeal allowed the appeal and ordered that the case be heard de novo. The Supreme Court agreed with the Court of Appeal.

Adeigbe & anor v. Kusimo & Ors (1965) 4 NSCC p.188, relied on by learned counsel for the appellants does not help his case. In that case, the president of the native court sat with two

members. The president sat all the time, to hear all the evidence, but the members (assessors) were changed on more than two occasions. Judgment was delivered by the president. On appeal, it was argued that the proceedings were a nullity because of the variations on the bench. The Judge quashed the lower court's judgment. The defendants appealed to the Supreme Court. The Supreme Court allowed the appeal. The court observed that the absence of the two assessors during the hearing would make no difference to the soundness of the adjudication. The court went on to say that assessors as we have observed earlier in this judgment are mere advisers.

In this case, Obiorah, J. was not an assessor or an adviser to the Chairman. His absence during the hearing on 6th February, 2019 affects the soundness of the judgment since he never saw or heard the testimony of RW12 and RW13. *Olatunbosun v. NISER Council* (1988) 3 NWLR (Pt. 80) p.25; *K. Kalejaiye v. The Legal Practitioners Disciplinary Committee & anor* (2019) LPELR-47035 (SC), (2019) 8 NWLR (Pt. 1674) 365; *Sokoto State Govt. v. Kamdex* (2007) LPELR - 3093 (SC), (2007) 7 NWLR (Pt. 1034) 466; *Nyesom v. Peterside* (2016) LPELR - 40036 (SC), (2016)7 NWLR (Pt. 1512) 452 are also instructive on this point. Nweze J.S.C. in the Kalejaiye case did say:

> "…..I must observe the most irksome complaint in this issue in the irregularities in the composition of the Committee... Learned senior counsel for the appellant, Chief Wole Olanipekun SAN, derided this as a clear violation of the appellant's fundamental right.....I cannot agree more with this eloquent submission. True indeed his submission is in the good and hallowed company of other decisions of the Supreme Court.....in all, from all I have said so far. I have no hesitation than to declare the proceedings of the Committee and its final direction delivered on Thursday May 21, 2019 a nullity.

I must explain the disastrous consequences when variations on the bench of a trial court occurs. A trial must be conducted by the Judge himself or if a panel heard the case, all members of the panel must Sit every day the case is heard. The members of the panel would Write a considered judgment based on the evidence they received and recorded. A complaint that one of the Judges on the panel was absent on a day witnesses testified and the same Judge resumed Sitting and proceeded to write and deliver judgment is a serious matter. It is a mistrial, a fundamental defect in proceedings. The complaint would always be that the Judge who delivered judgment had not seen and heard the

witnesses. He could not appraise the evidence and decide on the facts properly; neither can he say anything on the demeanour of the witnesses he never saw. The complainant would be at liberty to say and quite rightly too that his right to fair hearing was breached. The Supreme Court has always set aside judgments of trial courts where the panels have been irregular and inconsistent.

A variation on the bench makes a judgment of the trial court a nullity. An examination of the record of appeal reveals that well over ninety witnesses gave evidence, and at the end of each days proceedings the three Judges, which included Obiorah, J. signed. It was only the proceedings of 6th February, 2019 that was not signed by Obiorah J, that was the day when the testimony of RW 12 and RW 13 was taken. They were cross-examined and vital documents admitted in evidence. Both counsel agreed in the Court of Appeal that Obiorah, J. did not sit on 6th February, 2019 and so could not have signed proceedings for that day. Failure of Obiorah, J. to sit on 6th February, 2019 renders the proceedings of that day worthless and the entire judgment a nullity.

I must observe that it has never been the contention of the appellants' counsel in the lower court that Obiorah, J. sat and participated at the proceedings of 6th February, 2019. It is elementary that in such a situation Obiorah, J. cannot come back to sit as if he never absented himself. The proper order in such a situation is for the case to start de novo and not for counsel to try to suggest before this court that there might be conflicts in the record of appeal.

The correct order to make is to declare the judgment of the trial tribunal a nullity as a result of one of the panelist not sitting on a day proceedings were held.

Learned counsel for the appellants' ought to have advised his clients that failure of Obiorah, J. to sit on 6th February, 2019 and then return to court and prepare and deliver the majority judgment is a fundamental error that remains irredeemable for all time.

The tribunal was not properly constituted as regards numbers of the panelists on 6th February, 2019. The absence of Obiorah, J. from proceedings on 6th February, 2019 affected the competence of the tribunal to deliver a judgment in any form.

I affirm the majority judgment of the Court of Appeal. The majority decisions of the tribunal is a nullity.

The preliminary objection is overruled and the appeal dismissed.

Appeal Nos. SC.554/2019 and SC.555/2019 are also dismissed.

Parties to bear their respective costs in the appeal.

I. T. MUHAMMAD, Ag. C.J.N.: This is an appeal from the decision of the Court of Appeal, which, by a majority, declared the judgment of the Tribunal a nullity. Dissatisfied with the decision of the Court of Appeal, the appellants appealed to this court.

I had the advantage of reading in draft, the judgment just delivered by my learned brother, Rhodes-Vivour, JSC, I agree with the reasoning and conclusion contained therein, that the appeal lacks merit and should be dismissed, I, too, dismiss the appeal for lack of merit. I abide by all orders made in the leading judgment including one on costs.

KEKERE-EKUN, J.S.C.: I have hada preview of the judgment of my learned brother, Olabode Rhodes-Vivour, J.S.C. just delivered.

I agree with the reasoning and conclusion reached therein. agree that the preliminary objection raised by the 1st respondent lacks merit. It is hereby overruled. I shall make a few comments in support of the lead judgment in respect of issue 1.

The appellant's contention in issue 1 is that the lower court was wrong when, in its majority judgment, it held that the majority judgment of the trial tribunal delivered on 22nd March, 2019 was a nullity, as Obiorah, J. who delivered the lead judgment was absent on the 6th February, 2019 when the evidence of RW12 and RW13 were taken.

It is contended on behalf of the appellants that having regard to the record of proceeding of 6th February, 2019, whose heading contains the names of the 3 Judges constituting the tribunal, it was speculative to contend that Obiorah, J. did not sit just because there is no indication at the foot of the proceedings of the day that Obiorah, J. signed the court's record for the day. It is contended that the onus is on the party impugning the record to prove the contrary.

It is also argued that the non-participation of Obiorah, J. would at best, render the proceedings voidable but not void. That it is an irregularity that does not go to the root of the adjudication. It is contended on behalf of the 1st respondent on the other hand that while Obiorah, J. did not participate in the proceedings of 6th February, 2019, he wrote the majority judgment of

the court and proceeded to review evidence taken on that day and made some far reaching findings thereon, thereby breaching the respondents right to fair hearing. It is contended that the entire proceedings and the judgment founded thereon are a nullity. It has also been argued that the issue of impugning the record does not arise as there is no dispute as to the fact that Obiorah, J. did not sign the proceedings of the day in question.

I will start by agreeing with learned senior counsel for the appellants that where the court's record is impugned, there is a procedure that must be followed. It is by the filing of an affidavits setting out the facts or part of the proceedings omitted or wrongly stated in the record. The affidavit would then be served on the Judge or registry of the court concerned for their reaction. A challenge to the record presupposes that the party complaining is asserting that the record is faulty or incorrect. He must therefore first formally impeach the record. See: *Gonzee (Nig) Ltd. v. Nigerian Educational Research and Development Council & Ors.* (2005) 13 NWLR (Pt. 943) 634; Ojengbede v. Esan (2001) 18 NWLR (Pt. 746) 771; *Ogli Oko Memorial Farms Ltd. v. Nigerian Agricultural & Co-operative Bank Ltd. & Anor* (2008) 12 NWLR (Pt. 1098) 412.

In the instant case, the 1st respondent does not seek to impeach the record. He is not contending that the record of 6th February, 2019 is not a true reflection of the day's proceedings. Rather, the contention is that what the record reveals is that P.C. Obiorah, J. did not participate in the days preceding and that is why he did not append his signature thereto.

Indeed, if anything, it is the appellants who are contending that the record is incorrect by asserting that the heading of the day's proceedings is conclusive proof of Obiorah, J's participation on that day and the non-signing of the day's proceedings does not prove that he was absent. It goes without saying that not only the court, but the parties are bound by the record of proceedings as transmitted to this court. In the absence of any formal challenge to its authenticity, the court will consider it as it is.

The proceedings for 6/2/2019 span pages 3693 - 3698 of the record. 1The heading reads:

"In The Osun State Governorship Election Petition

Tribunal

Holden at Abuja

On Wednesday the 6th day of February, 2019

Before their Lordships

Hon. Justice Muhammad I. Sirajo - Chairman

Hon. Justice Peter C. Obiorah - Member I

Hon Justice Adegboye A. Gbolagunte - Member II

Petition No. EPT/OS/Gov/1/2018"

At the conclusion of the day's proceedings, the following appears:

Signed

Chairman

06/02/2019

Signed

Member II

06/02/2019

The record is a certified true copy of the proceedings before the tribunal. As stated earlier, there has not been any attempt to impugn the record. It is glaring that Member I, P.C. Obiorah, J. did not sign the proceedings for that day. By signing the proceedings for each day, each member confirms that it is the correct account of what transpired on the day. The heading of the day's proceedings is usually done by the Registrars of court. It is an administrative function. The sitting Judges have no role to play. Their signature at the conclusion of the day's proceedings is what authenticates the record for that day.

Our attention has been drawn to several other pages of the record, where it is clear that at the end of each day's proceedings, all the members of the tribunal appended their signatures. Indeed, in the format adopted, the Chairman appears in the Centre while Members I and II appear below the Chairman on the left and right of the page respectively. For the proceedings of 6/2/19, the name of the Chairman and Member II are placed vertically, one above the other, indicating that Member I was not present and therefore did not sign.

The appellants have not, at any stage, asserted that P.C Obiorah, J. was present on 6/2/2019, Their contention is that the inclusion of his name in the heading of the day's proceedings is conclusive proof that he sat on that day. I find myself unable to agree. It is my considered view

that the inclusion of Obiorah. J's name on the heading of the court's preceding cannot be so construed. It is his signature at the conclusion of the proceedings that constitutes the proof that he actually sat on that day and took part in the proceedings. The consistency of the signatures of all members of the tribunal at the end of each day's proceeding throughout the record suggests that if Obiorah, J. sat on 6/2/2019 he would have signed the proceedings.

What then is the effect of the failure of the learned Judge to sit on 6/2/2019? The evidence of two crucial witnesses was heard on that day - RW12, Ayoola Soji, a polling agent for the 3d respondent at PUO8 Ward 09, Ilawo/lsoko/lsundunrin in Ejigbo Local Government and RW13, Oladejo Kazeem a polling agent for the 3rd respondent in PU004 Ward 08 in Orola Local Government Area of the State. RW12 testified that from his observation of what transpired on the day of the election he discovered Form EC8A that the total number of used and unused ballot papers did not tally. Through him, exhibit R168A was tendered under cross-examination. It was a white sheet of paper with 35 carbonized sheets of paper placed under it, given to him to sign in open court to prove the point that the 35th carbonized sheet was bound to be faint and would not show clearly what had been written on the original first' sheet. This was to challenge the assertion made by the 1st respondent that the certified true copies of Form EC8A had been mutilated after the carbon copies had been given to the parties' agents. It was contended that certain entries on the form did not correspond with the entries on the carbon copies. RW13 also gave evidence as to his observations during the election and he was duly cross-examined on his evidence by the respective opposing counsel. The cross examination of a witness is a crucial aspect of any trial. It enables the Judge to assess his credibility from personal and direct observation of his demeanor.

It is pertinent to note at this stage that the Chairman, Hon. Justice M.I. Sirajo wrote a dissenting judgment. The majority decision was written by P.C. Obiorah, J. His Lordship Adegboye E. Gbolagunte, J., Member II, concurred. In the course of writing the Judgment, Obiorah, J. reviewed the evidence of all the witnesses, including the evidence of RW12 and RW13 even though he was not present when they testified, nor did he witness their cross- examination. He made findings on the potency of exhibit R168A, which was rejected and drew conclusions on an aspect of the petition regarding the presumption of regularity of the conduct of the election.

The consistent position of this court has always been that where members of the court who wrote the judgment were not present throughout the hearing, the entire proceedings and any

judgment founded thereon are a nullity. See: *Ubwa v Tiv Area Traditional Council* (2004) 11 NWLR (Pt. 884) 427 @ 436A. His Lordship Tobi, J.S.C. held at page 438 C- E:

> "In this appeal, the appeal was heard by Akpabio, Umoren and Chukwuma-Eneh, JJCA on 18/11/99 when judgment was reserved to 27/1/2000. The judgment was not ready on 27/1/2000 and It was further adjourned to 14/2/2000. On 14/2/2000; the judgment was delivered by a panel of Akpabio; Muhammed and Umoren, JJCA. The judgments that were delivered were those of Akpabio; Umoren and Mangaji; JJCA. As seen from above; Mangaji; JCA was not in the panel that heard the appeal. It was Chukwuma-Eneh, JCA who was on the panel with the 2 others and not Mangaji, J.C.A.
>
> In view of the fact that Mangaji, J.C.A. was not in the panel, he could not have written any judgment for delivery.
>
> In the circumstances, the entire proceedings in the Court of Appeal are a nullity. I set aside the judgment of the Court of Appeal."

See also: *Sokoto State Govt. v Kamdex (Nig) Ltd*. (2007) 7 NWLR (Pt. 1034) 466 492 493 F- A. It is noteworthy that these two cases involved judgments of the Court of Appeal where one of the Justices who wrote the judgment of the court did not participate in the hearing of the appeal. In other words, even though the hearing consisted of a consideration of briefs of argument and not oral evidence, the court still found the judgment to be a nullity.

Similarly, in *Nyesom v Peterside* (2016) 7 NWLR (Pt. 1512) 452 @504- 505 H- A, this court held that a ruling of the tribunal delivered on 9/9/2015 by Leha, J., Taiwo, J., (Members) and Ambursa, J. (Chairman) when Ambursa, J. did not participate in the hearing of the motion: was a nullity, as Ambursa, J. could not have formed an opinion on the submissions of counsel, which he did not hear. In Awolola v. Governor, Ekiti State (2019) 6 NWLR (Pt. 1668) 247 266 D - E, this court per Galumje, J.S.C. agreed with the decision of the West African Court of Appeal (WACA) in the following cases: Nana Tawiah III v. Kwasi Awozi 3 WACA 52: Akosuah Owiwa & Anor v. Adjoa Kwaseko 3 WACA 230 & Chief Yaw Damoah v. Chief Kofi Tanbil & Anor 12 WACA 167, to the effect that where variation of the composition of the court occurs at the trial court where witnesses testified, it was inappropriate for Judges who did not hear some of the

witnesses testify and did not observe their behaviour/demeanor during testimonies, to participate in the delivery of the judgment. That is precisely, the situation we are faced with in this appeal.

I agree with my learned brother, Olabode Rhodes-Vivour, J.S.C, that the case *of Adeigbe v. Kusimo* (1965) NMLR 284 @ 287, relied upon by learned counsel for the appellants is not apposite in the circumstances of this case, as that case involved assessors sitting with a Judge. Their role was advisory and they were not expected to proffer any legal opinion. They had no vote. Also, the Chairman who wrote the judgment sat throughout the proceedings.

In the most recent decision of this court in *Kalejaiye v. Legal Practitioners Disciplinary Committee & Anor* (2019) LPELR - 47035 (SC), (2018) 8 NWLR (Pt. 1674) 365 per Nweze, J.S.C. this issue was dealt with extensively. The court held that the decision rendered by the respondent committee amounted to a nullity because Dahiru, C. J., who participated in rendering the decision, did not participate throughout the hearing of the complaint against the appellant. The case of *Woluchem v Gudi* (2004) 3 WRN 20 @52 -53 was referred to wherein the importance of the unique opportunity of a trial Judge of seeing and hearing witnesses testify of observing their demeanor, candor or partisanship before reaching a determination in the matter, was emphasised. The court also held that the delivery ofjudgment by a Judge who did not participate in
all the stages of the trial amounts to a violation of the appellant's fundamental right to fair hearing. So it is in the instant case.

No doubt a lot of industry went into prosecuting and defending the petition before the Tribunal and in the preparation of the judgment. Unfortunately, the position of the law is that any defect in the competence of a court is fatal, no matter how well the case is conducted and decided, as the defect is extrinsic to the adjudication. See: *Madukolu v. Nkemdilim* (1962) All NLR 587, (1962) 2 SCNLR 341 348; *Leedo Presidential Motel Ltd. v. B.O.N Ltd & Anor:* (1998) 10 NWLR (Pt. 570) 353; *Skenconsult v. Ukey* (1981) 1 SC 6 @26.

It is for these and the more detailed reasoning in the lead judgment that I agree with the majority decision of the Court of Appeal that the majority judgment of the trial Tribunal is a nullity. I also dismiss the appeal and affirm the majority judgment of the lower court on the issue. In the same vein, I dismiss appeals nos. SC. 554/2019: *Senator Nurudeen Ademola Adeleke & Ano: v. APC & Ors*. and SC.555/2019: *Senator Ademola Adeleke & Anor: v INEC & Ors*., which, as agreed by learned counsel at the hearing of the appeal, are to abide the decision in the instant appeal. Parties to bear their respective costs.

SANUSI, J.S. C. : This is an appeal against the judgment of the Court of Appeal, Abuja Division (the lower or court below) delivered on the 9th of May, 2019 wherein a majority of 4-1 Justices of the lower court set aside the majority of 2 to 1 decision of the Governorship Election Tribunal (simply hereinafter referred to as "the Tribunal").

Facts

The 1st respondent along with the 1st appellant and 46 others contested election for the office of the Governor of Osun State and at the conclusion of the said election, the 2nd respondent (INEC) declared the election inconclusive. A re-run election was thereafter ordered and scheduled to take place on 27th of September, 2018.

After the conclusion of the re-run election, the 1st respondent emerged the winner of the election and was declared and returned as duly elected by the 2nd respondent (INEC).

Dissatisfied with the outcome of the election, the appellant filed a petition dated 16th October, 2018 at the tribunal. At the conclusion of the hearing of the petition at the tribunal, by a majority decision, the tribunal upturned the verdict in favour of 2nd respondent and declared the 1st appellant as the winner of the election.

The appeal of the 1st respondent to the court below was Successful, hence this appeal, to the Supreme Court by the appellant.

Meanwhile, one of the issues submitted for the determination at the court below revolved around the alleged non-participation of a member of tribunal Hon. Justice Obiorah (member I) in the proceedings of 6th February, 2019 and delivering the majority judgment of the 22nd March, 2019. In arguing this appeal the learned counsel to the appellant submitted 10 issues for determination. The ten issues for determination are discussed in the counsel's submission hereunder but for the reason I shall give presently, I shall restrict my discourse in the first issue only. Which I only regards as material and relevant to this judgment.

Issue No. 1

Issue No.1 deals with whether the court below was right in holding that the majority decision of the tribunal was a nullity. The learned counsel for the appellant argued that the proceedings of the tribunal on the 6th of February 2019, was conducted by the 3 members of the tribunal. He pointed out that the complaint of the 1st respondent was that Obiorah, J. did not sign

the record of proceedings that day, but only his name was recorded and he argued in support of the contention that His Lordship did not sit on that day. He pointed out further, that this contention is inconsistent with the record of proceedings compiled at the instance of the 1st respondent as the appellant before the lower court. He contended that none of the parties at that point raised the issue as at which time the matter would have been fully resolved in the presence of Obiorah, J. He submitted that where there is any reason to add or subtract from the record, the party desiring that clarification or alteration has the burden of placing before the Judge convincing and compelling evidence in that regard. He cited the case of *Musa v. State* (2017) 4 NWLR (Pt.1555)187 and *Adeigbe v. Kusimo* (1965) NMLR 284 at 287.

Still on this issue to buttress his argument further on non participation of Obiorah, J, the learned counsel referred to paragraphs 5.03 at page 4060 vol. 6 of the record where the appellant's counsel submitted that the record of the tribunal at page 36 93 disclosed the names of three Judges on 6/2/19 but that only 2 of them signed same. He argued that the essence of referring to this is to show that the appellants changed from their earlier position which they maintained from the lower court up till this court.

He argued since the proceeding of 6/2/2019 was signed then the proceeding of 6/2/2019 cannot be correct to say that there was any conflict in the record of tribunal. He submitted that even if there is any conflict, it is the duty of the appellants who have admitted that only 2 Judges signed the proceedings on that day to challenge the record as being incomplete by way of affidavit deposing to the fact that Obiorah, J. was present and had actually participated in the proceedings. He submitted that Justice Obiorah did not take part in the proceedings ot 6/2/19 and he still went ahead to review the evidence of witnesses, discountenancing the said evidence and also summarily condemned counsel's argument is sufficient to vitiate the entire judgment.

He cited the case of *Eghobmien v. FMBN Ltd*. (2002) 17 NWLR (Pt. 797) 488 and submitted that it is constitutionally wrong and legally unacceptable for a decision of a court of tribunal to be delivered by a Judge who did not hear or participate in the proceedings. He also referred to the case of *Shanu v. African Bank (Nig) Plc* (2002) 17 NWLR (Pt. 795) 185.

In order to have a clear picture, the antecedents of what transpired in this proceeding, even at the risk of being repetitive, which culminated into the subject matter of this appeal, I think it will not be out of place to give a brief history of the proceedings conducted at the Governorship

Election Tribunal of Osun State of Nigeria which had later become the core issue canvassed by learned counsel for the parties in this appeal.

By the powers conferred by the Constitution of the Federal Republic of Nigeria, the Court of Appeal set up a Governorship Election Tribunal to hear and determine election petitions filed by petitioners challenging the Governorship Election held in Osun State on 22nd September, 2018. After the said election, the 2nd respondent INEC declared same inconclusive and fixed a re-run election to be held on 27th September, 2018. The 2nd respondent's decision to declare the election of 22/9/2018 inconclusive was informed by anomalies that occurred in seven polling units such as hijacking of election materials, violence, mal function of card readers and misbehavior of thugs by disrupting voting process and disappearance of some presiding officers.

After the conduct of the re-run election on 27th September, 2018, the 1st respondent scored 255,505 votes as against the votes of 255,023 scored by the appellant his immediate follower in votes scores. The 2nd respondent thereupon, declared the It respondent the winner of the said election having scored the highest number of votes at the elections. It is apt to say that the 1st respondent was declared winner contested the election on the ticket of All Progressives Party (APC), the first respondent, while the appellant contested on the platform of Peoples Democratic Party (PDP) Other remaining forty four candidates also contested the election along with the 1st respondent and the 1st appellant in various parties and scored various number of votes. Their scores of votes need not be set out here as this are not relevant to this appeal. It is apposite to say, that the appellant herein, became disenchanted with the result of the rerun election in which he became second, hence he decided to file a petition before the Osun State Governorship Election Tribunal (hereinafter referred to as "tribunal"). The tribunal constituted by the Court of Appeal President (PCA) comprised three members, namely, Hon. Justice Sirajo as Chairman, Hon. Justice Obiorah as member 1 and Hon. Justice Gbolagunte as member 2.

After concluding the preliminaries, the proceedings went on in earnest. Witnesses were called by some of the parties and several documents were tendered and admitted as exhibits by the tribunal. On the whole, eighty (80) witnesses were called by the petitioner (now appellant). The 1st respondent did not call any witness but tendered numerous documentary exhibits from the Bar. Then when the 2nd respondent opened its defence, it called seven witnesses and closed its case on 5/2/2019. The 3rd respondent on its part, called two witnesses and closed its case. After all the parties closed their cases, the learned counsel to the parties addressed the tribunal.

In the end, the tribunal on 22nd March, 2019 delivered a split judgment with a majority of two to one in favour of the petitioner (now appellant) with Obiorah and Gbolagunte J.J handing down a majority judgment, while the chairman of the tribunal Sirajo J. gave a dissenting judgment. Somewhere in the majority judgment, the tribunal found as below:-

> "In conclusion, based on our resolutions of all the issues for determination and our findings we hereby declare that there is merit in this petition. We accordingly make the following final orders:
>
> 1. The 2nd respondent Adegboyega Isiaka Oyetola, was not duly elected and/or returned by a majority of lawful votes cast Governorship Election held on Saturday 22nd September, 2018 and the Re-run Election of Thursday 27th September, 2018 and therefore his declaration and return as the Governor Election of Osun State is null, void and of no effect whatsoever.
> 2. The petitioners scores the majority of lawful votes cast at the election to the office of the Governor of Osun State and the 1st petitioner, Senator Ademola Nurudeen Adeleke, having fulfilled the requirements of section 179 (2) (a) and (b) of the Constitution, as amended is hereby declared the winner of the said election and returned as the duly elected Governor of Osun State.
> 3. The 1st respondent's decision to order for and conduct a rerun election for the office of the Governor of Osun State in the following seven polling units - Polling Unit 012, Adereti Ward 7 and Polling Unit 010 in Osi Ward 8 of Ife South Local Government, polling unit 2 kin Oyere II Alapata Village Ward 10 in Ife North Local Government polling unit 017 in Ward 5 in Osogbo Local Government, polling units 1 and 4 in Ward 8 polling units 3 in Ward 9 in Orolu Local Government on 27th September, 2018 is null, void and of no effect whatsoever and consequently the result of the rerun election is hereby nullified.
> 4. The Certificate of Return issued by the 1st respondent to the 2nd respondent, Adegboyega Isiaka Oyetola is hereby nullified.

5. The 1st respondent, Independent National Electoral Commission, is hereby ordered to issued senator Ademola Adeleke a Certificate of Return as the duly elected Governor of Osun State of Nigeria forthwith.
6. Cost of N200,000.00 (Two hundred thousand naira) only is awarded to the petitioners against the 2nd and 3rd respondents.

Piqued by the judgment of the tribunal, the 1st and 2nd respondents appealed to the Court of Appeal (the lower court for short) (Coram Sankey, J.C.A, Yahaya, JCA, Akeju, J.C.A, Sanga J.C.A. and Mbaba, J.C.A.). After hearing the appeal, the lower court also delivered split judgment with a majority of 4 to 1 with Mbaba, J.C.A. dissenting. A salient excerpt the majority judgment of the lower court which became subject matter of this appeal reads as below:-

> "……. the judgment delivered by Obiorah, J. who did not sit with the other Judges on the Governorship Election Tribunal to hear the proceedings on 6th February, 2019 was a nullity because his absence at one of its sittings certainly affected competence of the tribunal. It is impossible to procure or salvage a majority opinion in a judgment which is a nullity. I accordingly so hold and resolve this issue in favour of the appellant." Consequently, from all I have said so far, the appeal succeeds on this ground. It is allowed. Accordingly I declare the proceedings and judgment of the tribunal delivered on 22 March, 2019, a nullity, I hereby enter an order setting aside the entire proceedings of the tribunal, including its judgment and final orders".

The Court of Appeal then proceeded to address the other outstanding issues and concluded as follows:

> "In the result, having resolved issues 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 in favour of the appellant, the appeal succeeds. Accordingly, I allow the appeal and set aside the judgment of the Osun State Governorship Election Tribunal in petition No. EPT/05/GOV/01/2018 delivered on 22 March, 2018."

At the hearing of the appeal before us on 17th June, 2019 the learned senior counsel for the 1st respondent Chief Wole Olanipekun moved and argued a preliminary objection the notice of which he had earlier filed in June, 2019 and with written address on same and also he filed a reply on point of law on 13/6/2019. The appellants counsel Dr. Ikpeazu opposed the preliminary objection by filing written address on 10/6/2019. In addition, he filed a motion on notice on the

same 10/6/2019 for correction of some errors. Both the preliminary objection and the motion on notice have been ably and adequately addressed in the lead judgment hence I am not prepared to deal with them here again.

I decide to, more importantly deal with the substantive appeal. In doing so I shall consider issue No. 1 in the 1st respondent's brief of argument touching on the propriety of the majority judgment of the lower court in which also the validity of that judgment was challenged in view of the absence of member No. l at the proceedings held by the tribunal on 6th February, 2019. Incidentally as shown by the printed record of appeal the majority judgment of the tribunal was written and delivered by Hon. Justice Obiorah (member I).

As I said earlier, the majority judgment was made subject matter of the appeal since crucial point touching on its validity is being challenged as the 1st respondent's learned senior counsel prayed it be declared a nullity due to the absence of Obiorah, J. in the proceedings held by the tribunal on 6th of February, 2019. It is in the view of the importance and seriousness of the attack on the majority judgment of the tribunal in which the lower court also largely based its judgment now being appealed against, that I deem it worthwhile and expedient to consider the first issue which in my view relates to issue of jurisdiction. This is because if the allegation or attack on the majority judgment of the tribunal is found to be correct, or is substantiated, then the attack on it will obviously render the said judgment a nullity as held by the lower court, since the lower court cannot sit on appeal on a judgment which is a nullity and void.

However, before I delve into the contents of the record especially the proceedings held by the tribunal on 6/2/2019 which is the core point raised in the first issue raised by the 1s" respondent and was similarly made an issue too in the appellants' brief of argument, my lords, permit me to pause a little and reflect on the propriety of the record of appeal, particularly on the proceedings held by the tribunal on 6/2/2019. The appellants' learned senior counsel in his submission seems to challenge the correctness of the record of appeal by arguing that the heading made on the proceedings held on 6/2/2019 which bore the names of the Chairman of the tribunal and its two other members, is a conclusive proof that Obiorah, J. (member) had duly participated in the proceeding of the 6/2/2019 and that his failure to sign it should not be regarded as a proof that he was absent at the proceedings held on that day.

On the other hand, the 1st respondent's counsel emphasized that he was not impeaching the record that the proceeding of 6/2/19 was not what had actually transpired on that day, but rather

all he was saying is that Obiorah, J. did not sit on that fateful day and that was why he did not sign that portion of the record. It would seem to me that it is the appellant's counsel who is challenging the record of appeal and not the 1st respondent. That being so is his responsibility to challenge the record in the manner the law provides.

I have closely examined the record of proceedings of the tribunal in its entirety. It is noted by me, that each day's proceeding was done under the heading stating the names of the Judges of the tribunal. Also, at the end of each day's proceedings or at intervals or during adjournments or bench ruling delivered, the chairman and each member appended his signature as shown on the certified true copy of the record of appeal for purpose of authentication. But with regard to the proceeding held on 6/2/2019, only the signatures of the chairman and member 2, Justice Gbolagunte, clearly appeared, while the signature of member 1 Obiorah, J. conspicuously absent. Records do not tell lies, especially where they are duly certified. Since the contention of the learned senior counsel of the appellants is that the record was incorrect, he should have followed the proper procedure of challenging the correctness, validity or authenticity of the record of appeal.

It suffices to say, that as shown by the record of appeal, in all days proceedings of the tribunal, Obiorah, J's name appeared and he F also appended his signature at the end of the proceedings, except of course, the proceedings held on 6" February, 2019. Learned senior counsel for the appellants referred to page 3693 of the record and insisted that the proceedings of the tribunal held on 6/2/2019 was before the three Judges and that the issue of Obiorah, J's absence at the proceedings of 6/2/2019 was not raised, adding that the 1st respondent ought to have sought for clarification for Obiorah, J. by way of serving an affidavit on him for clarification. He cited the case of *Musa v State* (2017) 4 NWLR (PL1555) 187; *Adegbuwi v. APC* (2014) LPELR, (2015) 2 NWLR (Pt. 1442) 1. Also relying on cases of *Adeigbe v. Kusinmo* (1965) NMLR 284; *Madukolu v. Nkemdilim* (1962) 2 NSCC 379, (1962) 2 SCNLR 341; *N.JC v. Dakwang* (2019) LPELR-46927 (SC), (2019) 7 NWLR (Pt 1672)532 and *Shuaibu v Nigeria Arab Bank Ltd* (1998) 5 NWLR (2020] 6 NWLR (Pt. 51D 582), he submitted that lack of consistency in sitting by a panel does not render proceedings null or void. It is noted by me, that the learned appellants' counsel was inconsistent in that in the lower court he agreed that Obiorah, J. did not actually sit as per his oral submission there.

From the facts disclosed by the record of appeal, I am in entire agreement with the findings of the lower court that Obiorah, J. (member 1) did not actually sit or participate at the proceedings

held by the tribunal on 6/2/2019. As can be gleaned from the record of proceedings held on 6/2/2019, two vital witnesses were heard namely RWI2 (Ayoola Soji) and RW13 Oladejo Kazeem. Both of them gave very crucial testimonies leading to the tendering and admission of some vital documentary exhibits. Some of these exhibits featured prominently in the majority judgment as Obiorah, J. commented or relied on them in the majority judgment of the tribunal authored, written and delivered by him. Similarly, the two witnesses were rigorously cross examined on that day. It must be stressed here, that cross examination of witness is very vital on a proceeding as that affords the Judge a sufficient opportunity to watch and assess how credible and reliable that witness being so cross examined is, by watching his behavior and demeanour in court when responding to questions he was asked or question that was put to him. That can only be done in the presence of the Judge anyway.

As I remarked above, it was Obiorah, J. who wrote the majority judgment of the tribunal even though he apparently did not participate or was absent when the proceedings of 6/2/2019 were held. It needs to be repeated here, that in his judgment, he reviewed the evidence of RW12 and RW13 who testified in his absence and who he also did not have the opportunity of seeing, watching and assessing. Similarly, he made findings on exhibit R168A (a rejected exhibit) and drew conclusions on it.

Now the question that remains to be answered is to decide on the effect of the majority judgment of the tribunal, which was delivered without the participation of Obiorah, J. (member 1) on 6th February, 2019.

Governorship Election Tribunal is a creation of the Constitution of the Federal Republic of Nigeria 1999 (as amended). By the provisions of section 285 (3) Paragraph 2(1) of 6th Schedule it is provided thus:-

2(1) Governorship Election Tribunal shall consist of chairman and two other members.

The above constitutional provisions presupposes that a tribunal for Governorship Election must comprise chairman and two member, no more no less throughout the conduct of its proceedings. Any defect in the composition of a court is a nullity no matter how thorough or properly it was conducted. See *Madukolu v. Nkemdilim* (*supra*) 374. Also the sitting or participation by members in the proceedings must always be maintained and consistent throughout the proceedings right from the beginning through to the end of the proceedings. Where for whatever reason, one of the Judges is absent or indisposed, the proceedings must be adjourned.

In *Nyesom Wike v Peterside* (2016) 7 NWLR (Pt.1512) 452. The Governorship Election Tribunal for Rivers State was hearing an election petition. Midway, the original chairman was removed and substituted by another Judge by name Ambursa, J. In the course of its proceedings, a motion was heard not in the presence of Ambursa, J. (the new Chairman) and ruling was given by him. On appeal, this court held that the ruling on the motion by the tribunal delivered on 9/9/2015 by the tribunal comprising two other members and its chairman Ambursa who did not participate was a nullity as he could not have formed an opinion on the submission of counsel he was not opportune to hear.

Also recently, this court in the case of *Kalejaiye v. Legal Practitioners Disciplinary Committee & Anor* (2019) LPELR 470 35 (SC), (2019) 8 NWLR (Pt. 1674) 365 held that a decision rendered by the respondent committee was a nullity because Dahiru CJ who took part in the rendering of decCision was not present throughout the hearing or proceedings in the complaint made against the appellant. See Also *Woluchem v Gudi* (2004)3 WRN 20@52/53.

I must state here, by way of emphasis, that although Obiorah, J. was consistent in the conduct of the proceedings of the tribunal on virtually all the days, the record of appeal glaringly showed that he was absent or did not participate in the proceedings held on 6th February, 2019 when RW12 and RW13 testified during which vital exhibits were tendered and admitted in evidence. This therefore confirms that he did not see the exhibits before they were admitted on that day or listened to the rigorous cross- examination of the two vital witnesses. His absence on 6/2/2019 has therefore marred the entire exercise/assignment of the tribunal in that the entire exercise had been rendered otiose as the entire judgment he wrote and delivered had become a nullity, or null and void and of no effect whatsoever as rightly found by the lower court. Obiorah, J's judgment wherein he commented on the testimonies of RW12 RWI3 and the exhibits tendered on that day must have been based on the realm of conjecture which is unacceptable in law. The short and long story 1st therefore, is that the absence of Obiorah, on 6th February, 2019 made the tribunal incompetent to render the judgment. The majority judgment of the tribunal is therefore a nullity. The effect of all that I have said is that the 1st issue is resolved against the appellant.

In the result, for these few remarks of mine and for the fuller and more detailed reasoning marshalled in the lead judgment, I shall also dismiss this appeal and affirm the majority judgment of the lower court. Also since all the learned counsel to the parties in this appeal and appeals nos. SC.554/2019 and SC.555/2019 had earlier agreed even before arguing the appeals that the two

latter appeals should abide the judgment in this instant appeal, as a corollary the two appeals Nos.SC.554/2019 and SC.555/2019 are hereby equally accordingly dismissed.

I make no order as to costs, so each, of the parties should bear his/its respectively costs.

ABBA AJI, J.S.C.: The fuller and more comprehensive facts are as narrated by my learned brother, Rhodes-Vivour, J.S.C, in his lead judgment. The appellants formulated 10 issues for determination. However, the other 9 issues are hinged on the 1st issue, which I will address herein:

> Whether based on the facts before the court, the learned Justices of the Court of Appeal were wrong when they held that the majority judgment of the tribunal was a nullity as Obiorah, J. who delivered the lead judgment was absent on 6th February, 2019 when evidence of RW12 and 13 were taken.

It is on record that the proceedings of the tribunal on 6/2/2019 wherein RW12 and RW13 gave evidence on oath, were cross- examined and several vital documents tendered was not empanelled by Obiorah, J. Coincidentally, he turned out to write and deliver the majority and lead judgment of 22/3/2019.

By the rules and canons of natural justice, what qualifies and empowers a Judge to Judge and decide fairly and judiciously on matter wherein two contending parties are involved is the fact that he has been able to hear both sides to know where the pendulum of justice tilts and preponderates. Does the law judge or condemn a man before hearing him? This has remained the eternal word of God and the law of natural justice. Fair hearing must be accorded those who must come under the decision and judgment of any Judge or umpire through an unbiased and full understanding of the facts and issues involved and not through partial and uncompleted hearing or proceedings.

It is now settled that a judgment delivered by a panel, where one of them did not hear the argument nor was he present at the hearing is a nullity. See Per Ogbuagu, J.S.C, in *Sokoto State Govt. of Nigeria & Ors. v. Kamdex (Nig) Ltd*. (2007) LPELR-3093 (SC), (2007) 7 NWLR (Pt. 1034)466. Per Kekere-Ekun, JSC, rightly and boldly handled such a matter in *Nyesom v. Peterside* (2016) LPELR-40036 (SC). (2016) 7 NWLR (Pt. 1512) 452, wherein he analyzed as follows:

> ".....It is my view that the principle is applicable to any court or tribunal that sits in a panel of two or more members. In the instant case, Pindiga, J. as chairman with Leha, J. and Taiwo, J. heard the application. The ruling delivered on 9/9/2015 signed by Ambursa, J. as Chairman and Lena and Taiwo, JJ as members, reviewed

> the submissions of learned counsel made at the hearing of the application before dismissing same. There is no doubt that Ambursa, J. could not have formed an opinion on the submissions of learned counsel, which he did not hear. In the eyes of the law only Leha, J. and Taiwo, J. delivered the ruling, the signature of Ambursa, J. on the ruling was invalid. In the case of *Sokoto State Govt. v. Kamdex Nig. Ltd* (2007) 7 NWLR (Pt. 1034) 466, a similar situation arose where a Justice of the Court of Appeal who did not participate in the hearing of the appeal wrote and delivered a judgment therein. The judgment so delivered was declared a nullity, See also: *Ubwa v.Tiv Traditional Council* (2004) 11 NWLR (Pt. 884) 427. The remaining two members of the tribunal who participated in the hearing of the application and delivered opinion therein could not form a quorum i the absence of the chairman who participated in the hearing. The tribunal was not properly constituted for the delivery of the ruling and therefore lacked the competence to do so. See *Madukolu v*. Nkemdilim (1962) 2 SCNLR 341."

It is now a well-settled principle of law that the issuee of jurisdiction is an all so important one, which must be decided before a court can proceed to adjudicate on a matter. Further, the issue of jurisdiction may be substantiated through the presence of certain features as laid down in the age old judicial authority of *Madukolu v. Nkemdilim* (1962) 2 NSCC 374 at 379-378, (1962) 2 SCNLR 341, wherein this honourable court held thus:

> "Put briefly, a court is competent when -
>
> a. It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and
> b. the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and
> c. the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

See Per Bage, J.S.C. in *Angadi v. PDP & Ors.* (2018) LPELR-44375s (SC), (2018) 15 NWLR (Pt. 1641) 1.

A tribunal is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another. By virtue of section 285(3)

and paragraph 2(1) of the 6th Schedule of the 1999 Constitution (as amended), the Governorship Election Petition Tribunal shall consists of a Chairman and 2 other members. In the proceedings of 6/2/2019, wherein RWI2 and RW13 gave evidence on oath, were cross-examined and several vital documents tendered, Obiorah, J. was not among the "Chairman and the two other members." Thus, the tribunal was not properly constituted as regards numbers and qualifications of the members of the tribunal, which automatically affects the jurisdiction of the tribunal to hear and determine the election petition, especially where evidence was taken, what makes it worse is that a Judgment or decision came out of it by who did not partake in the vital proceedings of 6/2/2019 wherein evidence and cross-examination of vital witnesses took place.

It is settled law that a judgment that is a nullity has no legal validity and can confer no right nor impose any obligation on anybody. Any defect in the composition of an Election Tribunal is fatal, for the proceedings are a nullity no matter how well they handled and decided. The defect is extrinsic to the proceedings. See Per Rhodes-Vivour, J.S.C. in MPPP. & & Ors. (2015) LPELR-25706(SC), (2015) 18 NWLR (Pt. 1491) 251.

The judgment delivered on 22/3/2019 being a nullity, this appeal is dismissed.

AKA' AHS, J.S.C. (Dissenting): I have the privilege of reading before now the judgment of my learned brother, Rhodes-Vivour, J.S.C. dismissing the appeal on the ground that the tribunal was not properly constituted as regards number of panelists who sat on 6th February, 2019 as the absence of Obiorah, J. from the proceedings of that date affected the competence of the tribunal to deliver the judgment in any form. He proceeded to affirm the majority judgment of the Court of Appeal, which nullified the majority decision of the tribunal. I am, with respect disagreeing with this judgment. In doing so, I wish to limit myself to the issue whether there was a challenge of the records as compiled and transmitted to the lower court and if so, the party on whom the burden lay to produce the records that will confirm whether Obiorah, J. sat on 6th February, 2019.

The tribunal delivered its judgment on 22nd March, 2019. In a split decision of 2-1, the tribunal found merit in the petition and declared:-

1. The 2nd respondent, Adegboyega Isiaka Oyetola; was not duly elected and/or returned by a majority of lawful votes cast in the Osun State Governorship election held on Saturday 22nd September and the Re-run Election of Thursday 27th September: 2018 and therefore his declaration and return as the Governor elect of Osun State is null; void and of no effect whatsoever.
2. The petitioners scored the majority of lawful votes at the election to the office of the Governor o of Osun State and the 1st petitioner, Senator Ademola Nurudeen

Adeleke; having fulfilled the requirements of section 179(2) (a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999, as amended, is hereby declared the winner of the said election and returned as the duly elected Governor of Osun State.

3. The 1st respondent's decision to order for and conduct a re-run election for the office of the Governor of Osun State in the following seven polling units- Polling Unit 02; Adereti Ward 7 and Polling Unit 010 in Osi Ward 8 of Ife South Local Government; Polling Unit 2 in Oyere 11 Alapata Village Ward 10 in the Ife North Local Government; Polling Unit 017 in ward 5 in Oshogbo Local Government; Polling Units I and 4 in Ward 8; Polling Unit 3 in Ward 9 in Orolu Local Government on the 27th September; 2018 is null, void and of no effect whatsoever and consequently the result of the re-run election is hereby nullified.
4. The Certificate of return issued by the 1st respondent to the 2nd respondent, Adegboyega Isiaka Oyetola is hereby nullified.
5. The 1st respondent; Independent National Electoral Commission is hereby ordered to issue Senator Ademola Nurudeen Adeleke a Certificate of Return as the duly elected Governor of Osun State of Nigeria forthwith,
6. Cost of N200; 000.00 (Two hundred thousand Naira) only is awarded to the petitioners against the 2nd and 3rd respondents."

The Chairman of the tribunal, Sirajo, J. delivered a dissenting Judgment dismissing the petition as lacking in merit. Adegboyega Isiaka Oyetola, 2nd respondent in the petition was dissatisfied with the majority judgment and he filed his notice of appeal on 26 march, 2019 which contained 39 grounds of appeal. (See vol. 5 pages 3969-4011) of the record in SC. 553/2019. The 1st ground of appeal reads:-

"Ground 1.

The entire majority judgment of the lower tribunal a nullity, same having been written/delivered by the honourable Justice P. C. Obiorah, who did not participate in all the proceedings of the tribunal, and who was not present when all the witness gave evidence.

Particulars

(i) The honuoroble Justice P. the majority judgment of dated 22nd March, 2019.

(ii) The said honourable Justice P. C. Obiorah did not take part in the proceedings of the Tribunal of 6th February, 2019.

(iii) On 6th February, 2019 RW12 (Ayoola Soji) and RW13 (Oladejo Kazeem) gave evidence and were cross-examined by counsel to the appellant as well as counsel to the 3rd respondent.

(iv) Counsel to the appellant tendered exhibit R168A through RW12, in open tribunal, on 6th February, 2019.

(v) The said exhibit R168A was produced in the open tribunal on 6th February 2019 by RW12; at the instance of the appellant's counsel who asked R12 to so do.

(vi) RW13, under cross-examination by appellant's counsel on 6th February, 2019 gave a graphic but detailed account of how the 1st respondent came to his village (ldi-1ya) in Orolu Local Government Area of Osun State); to canvass for votes, preparatory to the re-run election of 27th September, 2018.

(vii) At pages 142-143 of the type-written judgment of the lower tribunal; honourable justice P. C. Obiorah reviewed the evidence given by RW12 (Ayoola Soji) on 6th February, 2019 as well as exhibit 168A which was tendered through him by appellant's counsel of the same day.

(viii) At pages 143-144 of the type written judgment of the lower tribunal; Honourable Justice P. C. Obiorah reviewed the evidence given by RW13 (Oladejo Kazeem) on 6th February 2019.

(ix) At page 156 of the type-written judgment of the lower tribunal, honourable Justice P. C. Obiora reviewed appellant's counsel's submission on the evidence given by RW12 on 6th February, 2019, and the relevance which appellant sought to place on the evidence, exhibit R168A tendered through him as well as the demonstration done by RW12 on the exhibit on 6th February; 2019.

(x) At pages 167-169 of the type written judgment of the lower tribunal, the Honourable Justice P. C. Obiora disagreed with the contention of appellant's

counsel on exhibit R168A tendered by RW12 on 6th February; 2019 holding that same is not tenable for several reasons which he adduced.

(xi) The Hon. Justice P. C. Obiora did not see RW12 and RW13 give evidence; and he did not watch their demeanor in open tribunal.

(xii) The writing of and/or the participation of the Honourable Justice P. C. Obiora, in the writing of the judgment of the lower tribunal of 22nd March 2019, and delivery of same; vitiates the entire judgment.

Altogether, 12 issues were distilled from the 39 grounds of appeal filed and issue I was distilled from grounds 1 and 2 dealing with Issue 1, the majority judgment by Sankey J.C.A. has this to say about the records:-

> "It is an elementary principle of law that parties, as well as the court are bound by the record of the court. Therefore, from a juxtaposition of pages 3698 of the record of proceedings with page 3698 thereof it is indisputable that the information therein is inconsistent and/or incompatible. For whereas on the heading of the day's proceedings of 6th February, 2019, the names of three Judges, to wit: Hon. Justice I. Sirajo - Chairman, Hon. Justice Peter C. Obiorah - Member 1, and Hon. Justice Adegboye A Gbalagunte - Member II, are set out thereat, at the end of the day's proceedings reflected at pages 3698 of the record, only two out of the three Judges listed in the heading at page 3698 to wit: the Chairman and Member II; signed the proceedings; while the signature of member I is conspicuously absent. From the information that is apparent on the face of the record, even though it is indicated that the day's proceedings on 6th February, 2019 were to be taken and heard by the Judges, at the end of the day, only two out of the three signed the proceedings. In the absence of any explanation, I agree with learned Senior Counsel for the appellant that the implication of only two of the three Judges signing the record at the end of the day's proceedings is that member II, Hon. Justice Peter Obiorah did not participate in the day's proceedings".

I am unable to agree with this conclusion. The record which was before the lower court was the record transmitted to it by the registry of the tribunal, which were certified as correct. The actual records of the tribunal was not before the lower court. The court should have either *suo motu*

summoned the Registrar of the tribunal to produce the authentic records of the Judges to compare them with the certified copy or learned counsel for the appellant in the Court of appeal, would have challenged the record and this would have enabled the Registrar of the tribunal and Justice Obiorah to clear the air on the apparent discrepancy. If there was any person who should impugn the record it is the appellant at the Court of Appeal and as rightly stated by Sankey, J.C.A, the procedure laid down for impugning the record of proceedings of a court or tribunal is for the party challenging the same to swear to an affidavit setting out the fact(s) that was/were omitted or wrongly stated in the record. Such affidavit is to be served on the Judge and/or Registry of the court or tribunal concerned, as well as the counsel on the other side. This was not done and the onus is on the party who alleged that Obiorah, J. did not sit simply because he was shown as not having signed the certified record.

This court dealt with the issue of non-signing of a judgment by the Judge in Ahmed CBN (2013) 11 NWLR (Pt. 1365) 352 where Onnoghen, J.S.C. (as he then was) stated at page 373:-

> "It is their (applicants') contention that exhibit F, the certified true copy of the judgment of Justice Ariwoola, JSC, was not signed nor was it dated by His Lordship thereby rendering same void. This is unfortunate as exhibit F is nothing but a certified true copy of the original judgment of His Lordship, which was delivered on the 6th July, 2012. His Lordship is not expected to sign a certified true copy of his judgment in fact the practice is not 1or a certified true copy of a document to be signed the same way as the original.
>
> It is not to be signed at all.
>
> It is the certification by the appropriate officer that makes the documents authentic. If applicants seriously contend that the judgment of His Lordship was not signed the proper thing to do to establish that fact is to exhibit the original copy of the judgment not a certified true copy".

In the same vein, if learned senior counsel for the appellant in the lower court seriously contended that Obiorah, J. did not sit on 6th, February, 2019, what he ought to have done is to swear to an affidavit annexing the original record of the sitting of the 6th February, 2019 which would have brought out the fact that Obiorah, J. did not in fact sit on 6th February, 2019.

The arguments of learned senior counsel and the majority decision of the Court of Appeal nullifying the majority decision of the tribunal on the basis of Obiorah, J. being absent and not sitting on 6th February, 2019 was based on conjecture.

The cases of *Ubwa v. Tiv Area Traditional Council* (2004) 11 NWLR (Pt. 844) 427; *Shuaibu v. Nigeria Arab Bank Ltd* (1998) 5 NWLR (Pt. 551) 582; *Sokoto State Government v. Kamdex Nig. Ltd* (2007) 7 NWLR (Pt. 1034) 466; *Awolola v. Governor Ekiti State* (2019) 6 NWLR (Pt. 1668) 247 and *Kunle Kaleiaiye v. LPDC Anor* (2019) LPELR 47035 (SC), (2019) 8 NWLR (Pt. 1674) 365 all dealt with composition of the panel and the record showed when a member of the panel was absent but took part subsequently in proceedings. In this case it is the issue of non-signing of the records even though the member is reflected as having participated in the proceedings. As Mbaba, J.C.A. said in the minority judgment and I agree with him that where and when it is established that the party who wrote or took part in the delivery of judgment did not hear the case or took part in the hearing, this would vitiate the whole trial and would lead to the declaration nullifying the whole proceedings. And as he pointed out, the allegation that Obiorah, J. did not sit with the panel on 6th February, 2019 is at best, a well articulated speculation by learned counsel for appellant, as per address founded on the inference that Obiorah, J. did not sign the proceedings of 6/2/2019.

It is on account of this that I disagree with the conclusion reached by my learned brother, Rhodes-Vivour JSC dismissing the appeal in SC.553/2019, SC.554/2019 and SC. 555/2019 as lacking in merit and striking out appeal no. Sc. 556/2019 as being academic. I find that the appeal is meritorious and I accordingly allow it. The declaration by INEC, the 2nd respondent that the election held on 22nd September, 2018 as inconclusive and the order for a rerun on 27th September, 2018 is null and void since the 1st appellant still emerged the winner of the election, with the highest number of votes cast at the election and met with the constitutional requirement of securing one-quarter of the votes cast in at least two-thirds of the Local Government Areas constituting Osun State on 22nd September, 2018 as stipulated in section 179 (2) (a) and (b) of the Constitution which provides:-

> "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 a majority of the votes cast at the election; and

(b) he has not less than one-quarter or the votes cast at the election in each of at least two-thirds of all the local government areas in the State".

The guidelines contained in the Manual for election issued by INEC must not override the clear provisions of the Constitution and the Electoral Act 2010 On the whole appeal nos. SC. 553/2019; SC. 554/2019; and SC. 555/2019 and SC. 556/2019 are meritorious and they are hereby allowed. The majority decision of the Court of Appeal which nullified the majority judgment of the tribunal is hereby set aside. The majority judgment of the Tribunal declaring the appellant as the winner and duly elected Governor of Osun State the Gubernatorial Election held on 22 and 27 June 2019 is hereby restored and the 2nd respondent is hereby ordered to Issue him with the Certificate of Return.

GALUMJE, J.S.C. (Dissenting): Parties had agreed that appeals numbers SC.554/2019; SC.555/2019 shall abide the decision in this appeal. So the decision in this appeal shall be the decision in this appeal, mentioned hereinabove.

The 1st appellant herein was a candidate sponsored by the 2nd appellant, a political party registered with the 2nd respondent at the State Governorship Election which was conducted on the 22nd and 27th September, 2018. The 1st respondent was a candidate of the 3rd respondent, also a political party registered with the 2nd respondent at the said election.

At the end of the election on the 22nd September 2018, the 1st appellant scored 254, 698 votes, while the 1st respondent scored 254,345 votes. Several candidates from other political parties also contested the election. The 2nd respondent declared the election of 22nd September 2018 inconclusive after election in seven polling units across four local governments were cancelled. A rerun election in the seven polling units was ordered and same was conducted on the 27th of September, 2018 after which the 2nd respondent declared the 1st respondent as the winner of the election with 255,505 votes as against the 1s appellant's 255,023 votes.

The 1st and 2nd appellants were dissatisfied with the conduct of the election and the result as announced. Being aggrieved, they filed a petition on the 16th October, 2018 before the Osun

State Governorship Election Petition Tribunal. The main grounds of the petition as found at paragraph 15 of the petition are hereunder reproduced as follows:-

1. That the 2nd respondent was not duly elected by the majority of lawful votes cast at the Governorship Election in Osun State held on September 22nd 2018 and the rerun election held on 27th September 2018.
2. That the declaration and return of the 1st respondent as the elected Governor of Osun State is invalid by reason of substantial non-compliance with the provisions of the Electoral Act 2010 (as amended), during the Governorship Rerun Election in Osun State of 27th September, 2018.
3. That the declaration and return of the 1st respondent as Governor elect of Osun State is invalid by reason of corrupt practices, during the Governorship Rerun Election in Osun State of 27th September, 2018.

The respondents filed their respective replies. Issues have been joined; the petition was set down for trial. Parties their respective witnesses and tendered tons of document which were admitted in evidence. Learned counsel for the respective parties addressed the court. In a reserved and considered judgment delivered on Friday the 22d March 2019, the tribunal in a split decision of 2 - 1 set aside the declaration made by INEC in favor of the 1st respondent, declared the 1st appellant the winner of the election and returned him as elected Governor of Osun State. The chairman of the tribunal delivered a dissenting judgment.

The respondents were dissatisfied with the judgment. They filed an appeal at the Court of Appeal (the lower court). The appeal was heard by a panel of five justices. By a majority of 4 - 1, the appeal was allowed. The majority judgment of the tribunal was set aside and in its place, the INEC's declaration that the 1st respondent is the winner of the governorship Election in Osun State was affirmed. Ita George Mbaba, J.C.A. in his dissenting judgment dismissed the appeal.

The appeal before this court is against the majority judgment of the lower court. The appellants' notice of appeal at pages 4279-4307 of the printed record of this appeal, filed on the 15th of May, 2019 contains thirty one grounds of appeal.

Parties filed and exchanged briefs of argument. Dr. Onyechi Ikpeazu, Senior Advocate of Nigeria and a host of Senior Advocate of Nigeria and other learned counsel settled the appellants' brief of argument which was filed on the 24th May, 2019. On behalf of the appellants, ten issues

were formulated for determination of this appeal. These issues are reproduced hereunder as follows:-

1. Whether based on the facts before the Court the learned Justice of the Court of Appeal were wrong when they held that the majority judgment of the tribunal was a nullity as Obiorah, J. who delivered the lead judgment was absent on 6th February, 2019 when evidence RW12 and RW13 were taken.
2. Whether the learned Justices of the Court of Appeal were wrong when they held that the 1st respondent issue one (J) at the Court of Appeal encompassed both grounds 1 and 2 of his Grounds of Appeal and thus dwelt on the effect of the evidence of RW12 and RW13 on the majority judgment of the tribunal.
3. Whether the learned Justices of the Court of Appeal were wrong when they held that the petition did not present ground of complaint based on non-compliance against the election of 22nd September) 2018.
4. Whether the learned Justices of the Court of Appeal were wrong when they held that having invalidated the election in seventeen (17) polling units, the appropriate order the tribunal could have made having regard to section 140(1) and (2) of the Electoral Act 2010 was for fresh election.
5. Whether the learned Justices of the Court of Appeal were wrong when they held that in the circumstances of the case, the appellants waived their right to complain about non-compliance at the election which took place on 22nd September, 2018.
6. Whether the learned Justices of the Court of Appeal were wrong when they held that grounds in paragraph 15(ii) and (iii) were incompetent and violate section 138(i) of the Electoral Act, 2010.
7. Whether the learned Justices of the Court of Appeal were wrong when they held that the reliefs granted by the tribunal amounted to double compensation.
8. Whether the learned Justices of the Court of Appeal were wrong when they held that the reliefs claimed by the appellants were directed at the election of 22nd September, 2018 and were not grantable as they were founded on an inconclusive election.
9. Whether the learned Justice of the Court of Appeal were wrong when they held that the relief's being declaratory, the appellants had the burden of establishing that

election duly held in seven (7) polling units before they can reach the conclusion that the Returning Officer had no legal right to cancel the result of the seven (7) polling unit but failed to discharge that burden.

10. Whether the learned Justices of the Court of Appeal were wrong when they held that appellants failed to prove that the failure by the INEC staff to make entries With respect to the eight (8) columns in Forms EC8A in the impugned forms EC8A was not substantial non- compliance which affected the result of the election.

Chief Wole Olanipekun, Senior Advocate of Nigeria, Leading a host of other Senior Advocate of Nigeria and other leaned counsel issued a notice of preliminary objection to the competence of the notice of appeal which was filed on the 6th of June, 2019.

The notice of preliminary objection reads thus:-

> "Take notice that the applicant shall before or at the hearing of this appeal, raise a preliminary objection to the jurisdiction of this honorable court; or in the alternative, the competence of issue 10 of the appellants' brief of argument filed on 24 May, 2019. notice is accordingly given that the applicant shall seek the striking out and/or dismissal of the appeal *in limine*; or in the alternative, the striking out of issue 10 of appellants' brief of argument filed on 24th May, 2019.

Take further notice that the grounds for the notice of preliminary objection are as follows:-

i. A notice of appeal is the originating process, which confers jurisdiction on an appellate court.

ii. Parties who brought this appeal have described themselves as "1st and 2nd respondents" in the notice of appeal filed on 15th May, 2019.

iii. It is the duty of a respondent to defend the judgment of the lower court and not to attack same.

iv. Further to (ii) and (iii)) *supra*, the notice of appeal is incompetent and thus liable to be struck out and/or dismissed.

v. Upon the striking out and/or dismissal of the notice of appeal, the entire appeal is by extension struck out and/or dismissed.

vi. Without prejudice to (i) - (v) supra, an omnibus ground of appeal is not a ground of appeal from which issues of law can be distilled and argued.

vii. Ground xxxi of the notice of appeal is an omnibus ground of appeal from which issues cannot be distilled.

viii. Senator Ademola Nurudeen Adeleke and Peoples Democratic Party (PDP), have distilled their issue 10 from the omnibus ground of appeal.

ix. The said issue 10 is liable to be struck out for being incompetent. Also take notice that applicant shall at the hearing of the notice of preliminary objection, rely on the notice of appeal and appellants' brief of argument, which already form part of the record of this honourable court."

A Written address in support of the preliminary objection is attached to the notice.

Thereafter and in case the preliminary objection fails, on behalf of the respondent seven issues were formulated for determination of this appeal, and I reproduce them as follows:

1. Considering the fact that the majority judgment of the trial tribunal was written and/or delivered by honourable Justice P. C Obiorah who did not participate in all the proceedings of the trial tribunal, particularly the proceedings of 6th February, 2019, when RW12 and RW13 gave evidence (and were extensively cross-examined), whether the lower court was not right by setting aside the said judgment.
2. Whether the lower court was not right by holding that the grounds and relief sought in the petition do not confer jurisdiction on the trial tribunal.
3. Was the lower court not right, relying on binding decisions of the Supreme Court, when it came to the conclusion that the appellants had waived any right they had against the rerun election of 27th September, 2018.
4. Considering the fact that ground 2 (paragraph 15(ii) of the appellants' petition at the trial tribunal) was restricted to allegations of non-compliance with the provisions of the Electoral Act against the rerun election of 27th September, 2018, whether the lower court was not in order by setting aside the decision of the trial tribunal regarding allegations of non-compliance against the election of 22nd September, 2018.
5. Was the lower court not right to have set aside the majority decision of the trial tribunal which invalidated the 27th September 2018, rerun election.

6. Having regard to the fact that the trial tribunal specifically found that the petitioners failed to prove allegations of over-voting and voiding of valid votes, among others, whether the lower court was justified to have set aside the decision of the trial tribunal which subsequently nullified elections in 17 polling units.
7. Considering the position of the law, including binding decisions of both the lower court and Supreme Court, whether the lower court was not perfectly in order with respect to its decision on the certified true copies and the pink copies of forms EC8A tendered by the appellants.

Learned senior counsel for the appellants filed a reply brief on the 30th May, 2019 and thereafter, by a motion on notice filed on the 10th of June, 2019 sought from this court the following relief:-

> "For an order correcting and or amending the description of counsel appearing underneath the signature columns in the appellants notice of appeal appellants brief of argument and appellants' reply brief to the brief of the 1st respondent by substituting the description 1st and 2nd respondents' counsel" with "appellants counsel".

A written brief in support of the motion aforementioned is attached to the motion paper.

The respondents filed a counter affidavit on the 14th June 2019 to the motion of the appellants and attached a written address endorsed by Chief Wole Olanipekun, the senior counsel as well as other counsel appearing with him.

Before I proceed to consider learned senior counsel's argument in support of the appeal, it is pertinent to deal with the motion filed by the appellants first as a preliminary issue and thereafter I will deal with the notice of preliminary objection. The object of preliminary objection is to challenge the competence of an appeal or the hearing thereof. If successful, it terminates the appeal *in limine*. That is why when such notice of preliminary objection is issued, it must be heard and determined one way or the other before the determination of the appeal or otherwise. See *Garba v. Mohammed &Ors*. (2016) LPELR-40612 (SC), (2016) 16 NWLR (Pt. 1537) 114; *Ogidi v Egba* (199 10 NWLR (Pt. 621) 42: *General Electric Company v. Akande & Ors* (2011) LPELR-9356 (SC). (2012) 16 NWLR (Pt. 1327) 593, *SPDCN v. Amadi* (2011) 14 NWLR (Pt. 1266) 157 at 192. The appellants' motion on notice is supported by an affidavit of thirteen paragraphs deposed to by Nwamaka Ofoegbu, learned counsel in the office of Dr. Onyechi Ikpeazu the learned senior

counsel for the appellants. The notice of appeal which learned counsel wants to amend and the amended notice are not attached to the application.

Also not attached are the appellants' brief of argument and the reply brief listed in the appellant's prayers as the processes sought to be amended and the amended copies for this court to deem as properly filed. It is not the business of this court to comb through volumes of records in order to find these processes that are listed for amendment. To that extent, I agree with Chief Wole Olanipekun SAN, who argued at the hearing of this motion that the application is incompetent and liable to be struck out. I accordingly strike out the appellants' motion filed on the 10th of June, 2019.

On the preliminary objection, learned senior counsel for the 1st respondent is urging this court to hold that the notice of appeal filed by the appellant is incompetent on the ground that learned counsel for the appellants have described themselves as 1st and 2nd respondents' counsel. I think this is driving reliance on technicality too far. The insertion, 1st and 2nd respondents counsel in the notice of appeal, after the list of counsel, was made by learned counsel for the appellants. This court has held in a number of cases that the sins of counsel will not be visited on a party. See *Mains Ventures Ltd v. Petroplast Ind. Ltd* (2000) 4 NWLR (Pt. 651) 151; *Enyibros Foods Processing Co. Ltd. & Anor v. NDIC & Anor* (2007) LPELR – 1149 (SC), (2007) 9 NWLR (Pt. 1039) 216; *Okpala v. Okpu* (2003) 5 NWLR (Pt. 812) 183.

In *Oyegun v. Nzeribe* (2010) 7 NWLR (Pt. 1194) 577 at 596 para. C, this court, per Adekeye, J.S.C. said:-

> "Unfortunately, the blunder committed here was mistake of counsel. It is trite that courts would not visit the blunders, mistake and inadvertence of counsel on the litigant or penalize a litigant for the mistake of the registry."

Apart from the fact that the insertion of the 1st and 2nd respondents' counsel, which I think is innocuous, learned senior counsel for the 1st respondent seem to have fallen into the same trap when the notice of the preliminary objection was said to have been issued by an applicant. Order 2 rule 9 of the Supreme Court Rules provides as follows:-

> "A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days' notice thereof before hearing, setting out the grounds of objection and shall file such notice together with ten copies thereof with the Registrar within the same time.

2. If the respondent fails to comply with this Rule the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such other order as it thinks fit."

The notice of preliminary objection issued by an applicant in this appeal is not in accordance with the rules of this court which provides for issuance of preliminary objection by respondent.

What is actually required to sustain a notice of appeal is to set out the grounds of appeal, the reliefs that are sought from this court and the signature of the appellant or that of his counsel. The insertion of counsel for appellant is just a surplussage. Even if it is not inserted, the notice of appeal will not be rendered void.

For the essence of notice of appeal is to give adequate notice to the appellant's adversary about the nature of the complaint that he will be confronted with in court. Where such notice is understood by the adverse party, it is competent. See *Aderoummu v. Olowu* (2000) 4 NWLR (Pt. 652) 253; *Ibrahim v. Osunde* (2003) 2 NWLR (Pt. 804) 2; *Ogbebor v. Danjuma* (2003) 15 NWLR (Pt. 843) 403.

The 1st respondent by his preliminary objection seeks to achieve a result through technicalities. This court has clearly enjoined the courts not to be unduly tied down by technicalities, particularly where no miscarriage of justice would be occasioned. Justice can only be done in substance and not by impeding it with mere technical procedural irregularities that occasion no miscarriage of justice. See Consortium *M. C v. NEPA* (1992) 6 NWLR (Pt. 246) 132 at 142; *Falobi v. Falobi* (1976) 1 NMLR 169; *Bello v. A.-G of Oyo State* (1986) 6 NWLR (Pt. 45) 828; *Okonjo v. Dr. Odje* (1985) 10 SC 267.

In my view, the fact that the learned counsel for the appellants described themselves as counsel for the respondents should not be allowed to defeat the cause of justice in this appeal. For human beings are mere mortals susceptible to human error. Where such errors are harmless, they are pardonable.

The case of Senator Magnus *Ngei Abe & Ors v. INEC & 3 Ors*. unreported case No. SC.197/2019 delivered on 8th day of April, 2019, which learned senior counsel cited and relied upon cannot be compared with the error in the instant appeal. In that case, the appellant did not

ask for any relief from this court. This court has consistently held that a court is not a Father Christmas or charitable organization that will dish out reliefs that have not been asked for.

In A.-G. *Federation v A.I.C. Ltd*. (2000) 10 NWLR (Pt. 675) 293, it was held that a court has no power to make an order or grant a relief which has not been asked for by the plaintiff in his pleadings. This was the approach in the Magnus Abe 's case. 1st respondent is asking this court, by the preliminary objection to dismiss this appeal *in limine*. In *Inakoju v. Adeleke* (2007) 4 NWLR (Pt. 1025) 427 at 574 paras. F-G, this court, per Tobi, JSC held:-

> "Dismissal of an action *in limine* is the most punitive relief that a court can grant a defendant against the plaintiff. Because of its punitive nature, courts of law are reluctant or loath in granting it. In other words, courts of law cannot grant the relief for the mere asking on the part of the defendant. There must be legal basis for the request and a corresponding legal basis for granting it."

In this appeal, I find the preliminary objection not sustainable. Accordingly, same is overruled.

Now the course is clear for me to consider the submissions of learned counsel in support of the issues they have formulated for determination of this appeal. The appellants are the aggrieved party. It is their compliant that will be looked into. The respondents duty is to reply to their complaints, since they did not file a cross appeal. This being so, I will rely on the issues formulated by the legal team of the appellants in the determination of this appeal.

On the first issue for determination of this appeal, it is submitted that the lower court was wrong when in its majority judgment, it held that the majority judgment of the tribunal was a nullity on the ground that Obiorah, J. who delivered the majority judgment was absent from the proceedings of the tribunal on the 6th of February, 2019. Learned senior counsel made reference to the tribunal's proceedings on the 6th of February, 2019 at page 3698 of the record of this appeal and contended that the tribunal's record shows that the proceedings of 6th February 2019 were conducted before three members of the tribunal. Learned senior counsel for the appellants submitted that the respondents herein did not raise the issue of non-participation of Obiorah, J. before the tribunal during their so that Obiorah, J. could react to it, but raised it at the Court of Appeal when Obiorah, J. had no opportunity to react. According to the learned senior counsel, this court is bound by the record which shows clearly that the proceedings of 6th February, 2019 as conducted before the three members of the tribunal. In aid, learned senior counsel cited *Musa v. State* (2017) 4 NWLR (Pt. 1555) 187.

In a further argument, learned senior counsel submitted that the act of recording proceedings in court is a judicial act and the onus is on the party seeking to impugn the record to prove the contrary. In aid, learned senior counsel cited *Adegbuyi v. APC* (2014) LPELR – C 24214 (SC), (2015) 2 NWLR (Pt. 1442) 1; *Sommer v. FHA* (1992) LPELR -3103 (SC) P.11 at paras. C-E, (1992) 1 NWLR (Pt.
219) 548. Learned senior counsel then went into the argument of whether a variation of panel during the hearing of a matter is void or voidable. This I think is inapplicable here.

Chief Wole Olanipekun, learned senior counsel, leading several other silk and learned counsel, submitted that the appellants had admitted at the lower court that Obiorah, J. did not participate in the proceedings of 6h February 2019, as such they cannot be heard to argue otherwise before this court. In a further argument, learned senior counsel submitted that if there is conflict in the record of the tribunal, it is the duty of the appellants who admitted that only two Judges signed the proceedings of that day and that Obiorah, J. who delivered the majority judgment of the tribunal, did not sign the proceedings, to have challenged the record as being incomplete and in doing so come forth with an affidavit sworn to by the appellants or any of their counsel who was present in court on that day, deposing to the fact that Obiorah, J. was present and indeed participated in the proceedings.

Learned senior counsel submitted that the testimonies of RW12 and RW13, as well as exhibit R168A tendered through RW12 were extensively analyzed in the judgment of Ob1oran, J. who did not participate in the proceedings in which the testimonies or the witnesses were taken. It is learned senior counsel's view that the majority judgment at the tribunal is a nullity, as such the lower court was right when it declared the judgment a nullity.

In aid, learned senior counsel cited and relied on several authorities, some of which are *Ubwa v Tiv Area Traditional Council* (2004) 11 NWLR (Pt. 844) 427 at 436-437; *Sokoto State Governnment v. Kamdex (Nig.)* (2007) 7 NWLR (PL1034) 491- 492; Shuaibu V Nigeria Arab Bank Lid (1998) 5 NWLR (Pt. 551) 582 at 603; *Awolola v. Governor Ekiti State* (2019) 6 NWLR (Pt. 1668) 247 at 266; *Kunle Kalejaiye v. The LPDC & Anor* (2019) 1 PELR - 47035 (SC), (2019) 8 NWLR (PL. 1674) 365 and a host of other cases. Finally, learned senior counsel urged this court resolve this issue against the appellants and dismiss the appeal in its entirety.

In the reply brief, learned senior counsel forcefully denied the submission of learned senior counsel for the 1st respondent that the appellants had admitted at the lower court that Obiorah, J.

did not sit on the 6h of February, 2019. On the contrary learned senior counsel argued that there is no part of the record where such admission was recorded.

The assertion that the appellants admitted at the lower court that Obiroah, J. did not participate in the proceedings of 6th February, 2019 is not correct. The brief of argument filed on behalf of the 1st and 2nd appellants who were1st and 2nd respondents. Respondents at the lower court is at pages 4056 -4095 of volume 6 of the records of this appeal. At page 4059-4060, learned counsel for the appellants stated as follows:-

> "It is contended with utmost respect, that that postulation is not correct. The fact that all the member of the tribunal or that a chairman of a tribunal did not sit in all (The proceedings of the tribunal is neither an issue of lack of jurisdiction nor matter of nullity of the proceedings. I shall address that point subsequently, *but suffice it to say at this stage that the record of the tribunal at page 3693 will disclose the names of three (3) Judges of the tribunal on 6th February, 2019, although only two (2) of them signed this proceedings of that day*. That is all the record disclose, and nothing more." (*Italics mine for emphasis*).

This is clearly not an admission that Obiorah, J. did not participate in the proceedings of 6th February, 2018. Learned counsel's argument on the issue of nullity of judgment was not an admission of absence of Obiorah, J. Learned senior counsel rather made it clear that the record showed that the day's proceedings were conducted before three (3) Judges, and one did not sign the day's proceedings. His argument on nullity of judgment was just a research finding, whichhe believed that even if the learned Justice Obiorah, J. was absent, it will not nullify the judgment. This is by any stretch of imagination not an admission of absence of Obiorah, J.

On who lies the burden of prool that Obiorah, J. did not sit a participated in the proceedings of 6" February 2019, learned senior counsel for the appellants submitted that the burden of proof is on the 1st respondent who raised the issue at the lower court, and not the appellant.

For a clear view of the proceedings of 6" February 2019, I wish to reproduce the opening paragraph of page 3693 of the record of this appeal, and the last proceeding of the day at page 3698 as follows:-

> In the Osun State Governorship Election Petition
>
> Tribunal

Holden at Abuja

On Wednesday The 6th Day of February, 2019

Before Their Lordships

Hon. Justice Muhammad I. Sirajo - Chairman

Hon. Justice Peter C. Obiorah - Member 1

Hon. Justice Adegboye A. Gbolagunte - Member 2

Petition No. EPT/OS/GOV/2018

Between:

1. Senator Ademola Nurudeen Adeleke
2. Peoples Democratic Party (PDP)} - Petitioners

V.

1. Independent National Electoral Commission (INEC)
2. Adegboyega Isiaka Oyetola
3. All Progressives Congress (APC) - } Respondents

Tribunal: In view of the conclusion of evidence today by the 3rd respondent, the parties shall file their respective address within the statutory period provided by the Electoral Act. The addresses shall be adopted on 07/03/19.

"Signed
Chairman
06/02/2019

Signed
Member II
06/02/2019

On this day, two witnesses were taken. One Ayoola Soji – 381 and Oladejo Kazeem, who testified as RW12 and RW13. During the testimony of RW12, two exhibits were tendered. Objection to these document were reserved and the decision in which the documents were admitted was signed by the chairman alone. Also at the end of the testimony of each witness, the Chairman signed alone.

The Chairman and member II are said to have signed the last paragraph of the days preceding which directed parties to file their respective addresses within the statutory period provided by the Electoral Act, which addresses were adjourned to 07/03/2019 for adoption.

From the proceedings reproduced above, there is nowhere, where the actual signature of the Chairman and member II are endorsed. It is the registry that compiled the record that merely inscribed the word signed, followed by the designations of the Chairman and members. It is very clear from the record that the proceedings of 6th February, 2019 was conducted before the three member panel. Courts are bound by the record of appeal, as such the lower court was bound to accept that the proceedings of 6th February 2019 was conducted before a panel of three members, but one member did not append his signature at the end of the days proceedings.

The question will then be narrowed to the effect of failure to sign at the end of the days proceedings.

My lord, Sankey J.C.A. who delivered the lead judgment correctly stated the position of the law with respect to the bindingness of the record of appeal at pages 4145 - 4146 of volume 6 of the record of appeal, but somersaulted in its application. This is what Sankey J.C.A. said:-

> "On the contention that His Lordship's name was contained in the heading of the days proceedings of 6th February, 2019 at page 3693 of the record even though he did not sign the days proceedings (at page 3698 thereof), it must be said that this court is a court of facts and law. Therefore, it is inappropriate for the court to indulge in conjecture and/or speculator that the failure of Obioah, J, to sign the proceedings of 6th February, 2019 is attributable to a default by the registry of the tribunal which prepared the record of proceedings. In fact, the court is without jurisdiction to engage in supp0sition of what should be. If that was the case, then such as issue should have been raise and canvassed by challenging the correctness of the record of proceedings. The procedure laid down or impugning the record of proceedings of a court or tribunal is for the party challenging the same to swear to an affidavit setting out to fact(s) that was omitted or wrongly stated in the record. Such affidavit is to be served on the Judge and/or registry of the court or tribunal concerned, as well as on counsel on the other side. See *Amedu v. F.R.N.* (2009) LPELR - 8212 (CA) 12; *Gonzee Nig Ltd v. NERDC* (2005) All FWLR (Pt. 274)

> 235, 245 & *UBA Plc v. Ujor* (2001) 10 NWLR (Pt. 722) 89 in this case. This has not been done."

It was the 1st respondent who raised at the lower court for the first time that Obiorah, J. was absent from the proceedings of the tribunal on the 6th February 2019, despite the fact that the record shows that the proceedings were conducted before the three members of the panel. By the provision of section 136(1) of the Evidence Act 2011, the first respondent had the burden to prove that Obiorah, J. did not sit to participate in the days proceedings. That could have been done by impeaching that part of the record that says Obiorah, J. sat and participated in the proceedings of 6 September, 2018. For avoidance of doubt, section 136(1) of the Evidence Act provides as follows:-

> "The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person, but the burden may in the course of a case be shifted from one side to the other.

Since that was not done, the record is binding on both the lower court and this court. To hold that Obiorah, J. was absent from the Sitting of the tribunal will amount to speculation, as such finding will not be supported by any evidence.

I really don't want to believe that Obiorah, J. was absent from the court as it is being canvassed by learned senior counsel for the 1st respondent. The Chairman of the tribunal is a High Court Judge Court Judge with considerable experience in election petitions. Although the quorum of an election tribunal as provided for under section 285(4) of the Constitution is the Chairman and one other member, the Chairman should have known that variation of the panel fora single day in which vital witnesses are taken, is fatal to the proceedings of the day. For whatever reason he allowed proceedings to go on. Clearly, this is not what the parties asked for and they did not contribute in any way to this lapse. The petitioners desire was to have their petition determined, where the error is committed by the court and it is shown that neither the parties, nor their counsel are involved, it is unfair that they will be held accountable. At this level, it is the judiciary that is on trial and not the litigants.

The cases of *Sokoto State Government v Kamdex (supra), Ubwa v. Tiv Area Traditional Council (supra), Shuaibuv. Nigeria Arab Bank (supra*) as well as *Kalejaiye v. LPDC & Anor* (*supra*) were decided on the basis of Bench variation. The information leading to the discovery of

Bench variation was not obtained from the signature of the panel members or lack of it. Rather the information was obtained from the list of the panel members as set out in the heading of each day's proceedings. So also are the cases *Nana Tawiah 111 v. Kwasi Awudzi 3 WACA 52; Akosuah Onwiwa& Anor v Adjoa Kwaseko 3 WACA* 230; *Chief Yaw Danoah v. Chief* Kofi *Tail & Anor* 12 WACA 167 where the bench variation occurred at the trial court. In the instant case, there is no evidence of bench variation, as nobody has been mentioned as the person who sat in place of Obiorah, J. The host of authorities cited by learned senior counsel for the 1st respondent are clearly irrelevant in this case.

What then is the effect of the failure to sign the proceedings of 6th February 2019 by Obiorah, J.? The record before this court is a certified copy. Where Obiorah, J. signed all previous proceedings, there is presumption of regularity by virtue of section 168(1) of the Evidence Act, that he signed the proceedings of 6th September, 2018. In Ahmed v C.B.N. (2013) 11 NWLR (Pt. 1365) 352 at 373 paras. F- H, which was cited and relied upon by learned senior Counsel for the appellants, this court, per Onnoghen, JSC (as he then was) held:-

> "To begin with, applicants admit that the judgment of the court in the appeal was delivered in open court on the 6th day of July, 2012 but that counsel for the applicants could not obtain a certified copy of all the Judgments except three of them leaving out those of Justices Tabai, JSC and Ariwoola, JSC.
>
> It is their contention that exhibit F the certified true copy of the judgment of Justice Ariwoola, JSC, was not signed nor was it dated by His Lordship thereby rendering same void. This 1S unfortunate as exhibit F is nothing but a certified true copy of the original judgment of His Lordship which was delivered on the 6th July, 2012. His Lordship is not expected to sign a certified true copy of his judgment in fact the practice is not for a certified true copy of a document to be signed the same way as the original. It is not to be signed at all.
>
> It is the certification by the appropriate officer that makes the documents authentic. If applicants seriously contend that the judgment of His Lordship was not signed, the proper thing to do to establish that fact is to exhibit the original copy of the Judgment, not a certified true copy."

This is clearly the same situation in this case. The record of appeal before the lower court is a certified copy which has no signature of any of the members of the tribunal. The contention

that Obiorah, J. did not participate in the sitting of the 6th February 2019, because he did not append his signature could only be established if the original record of the proceedings of that day is produced. Honourable Justice Obiorah, J. did not need to sign the certified copy of the proceeding which had been authenticated by the Registrar's certification. This issue is therefore resolved in favour of the appellant and against the respondent.

The 2nd issue for determination of this appeal question the propriety of assessment of the evidence of RW12 and RW13 by Obiorah, J., who was alleged to be absent from the proceedings of 6th February, 2019. In my resolution of the 1st issue for determination, concluded that Obiorah, J. was not absent from the proceeding the 6th February 2019 as shown by the records of this appeal.

Generally, the appraisal of oral evidence and ascription of probative value to such evidence is the primary duty of a tribunal of trial and the essence is that it is that tribunal of trial that has the opportunity of hearing and assessing the evidence and demeanor witnesses. Obiorah, J. as a member of the panel of the tribunal that heard witnesses, including RW12 and RW13, is very much competent to assess the testimonies of all the witnesses and ascribe probative value to such evidence. Where assessment of evidence. Where assessment of evidence and ascription of probative value to such evidence is carried out by a tribunal of trial, an appellate court has no jurisdiction to interfere in absence of special and/or exceptional circumstances. See *Adeye & Ors. v. Adesanya & Ors.* (2001) 5 NSCQR 522 at 531, (2001) 6 NWLR (Pt. 708) 1; *Eki v. Ciwa* (1977) 11 NSCC QR 522 96.

The assessment and ascription of probative value to the testimonies of RWI2 and Rw13 by Obiorah, J. has not occasioned a miscarriage of justice to the respondents. The 2nd issue formulated by the appellant is resolved against the 1st respondent and in favour of the appellants.

The 3rd issue, even at the risk of repetition, reads as follows:

> "Whether the learned Justices of the Court of Appeal were wrong when they held that the petition did not present grounds of complaint based on non-compliance against the election of 22nd September, 2018."

For a proper consideration of this issue, I hereby set out the provisions of Section 138(1) of the Electoral Act as follows:-

a. that a person whose election is questioned was, at the time of the election, not qualified to contest the election;

b. that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;

c. that the respondent was not duly elected by majority of lawful votes cast at the election; or

d. that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

The grounds upon which the appellant's petition is predicated are as follows:-

i. That the 2nd respondent was not duly elected by the majority of the lawful votes cast at the Governorship Election in Osun State held on September 22, 2018 and the Re-run Election held on September 27, 2018.

ii. That the declaration and return of the 2nd respondent as the elected Governor of Osun State is invalid by reason of substantial non-compliance with the provisions of the Electoral Act 2010 (as amended), during the Governorship Rerun Election in Osun State of September 27th 2018.

iii. That the declaration and return of the 2nd respondent as Governor elect of Osun State is invalid by reason of corrupt practices, during the Governorship Rerun Election in Osun State of September 27, 2018.

Commenting on this issue, the lower court rightly held that grounds of petition are jurisdictional as they define the confines the challenge to an election. The lower court went on to examine the provision of section 138(1D(6) of the Electoral Act and several authorities on the issue of grounds of petition and came to the conclusion that the 2nd ground of the petition is incompetent as it is not a complaint based on non-compliance as provided under section 138(1)(b) of the Electoral Act, 2010 (as amended). The lower court also held that the complaint at paragraph 15 (i) of the petition was directed at the rerun election of 27th September, 2018, as such all facts and evidence adduced in support of an allegation of non-compliance with the election of September 22nd, 2018, which did not come within the ambit of ground 15(1) of the petition are outside the contemplation of Ground 15()) upon which the petition was presented.

Ojukwu v. Yar 'adua (2009) 12 NWLR (Pt. 1154) 50 at 121 paras C- E, which was cited and relied upon by learned senior counsel to 1st respondent, this court, per Tobi J.S.C. had this to say:-

> "A petitioner is required to question an election on any of the grounds in section 145(1) of the Act. He is expected to copy the section 145(1) grounds word for word. I think a petitioner can also use his own language to convey the exact meaning and purport of the subsection. In the alternative situation, a petitioner cannot go outside the ambit of section 145(1) of the Act. In other word, he cannot add to or subtract from the provisions of section 145(1). In order to be on the safer side, the ideal thing to do is to copy the appropriate ground or grounds as in the subsection. A petitioner who decides to use his own language has the freedom to do so, but he should realize that he is taking a big gamble, if not a big risk."

Section 138(1)(b) of the Electoral Act provides for 'election,' while the appellant ground ii talks of 'declaration and return. They are clearly not the same. While election comprises of the process of accreditation and voting. 'declaration and return', is restricted to the announcement of the result only. Even though a petitioner is allowed to used his own language, the language used must convey the exact meaning and purport of section 138 (1)(b) of the Electoral Act. I agree entirely with the lower court that the 2nd ground of the petition being incompetent is liable to be struck out.

However, the 1 ground of the petition conveys the meaning and purport of section 138(1)(c) of the Electoral Act. That ground alone can sustain the petition. See *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1; *Biyu v. lbrahim* (2006) 8 NWLR (Pt. 981) 10. The first ground of the petition complains against both the election of 22nd

September 2018 and 27th September 2018. The complaint does not have anything to do with non-compliance with the Electoral Act during the election, but failure of INEC to announce the correct winner of the election.

On the fourth issue for determination of this appeal, learned senior counsel for the appellant submitted that the lower court was wrong when it held that the appropriate order the tribunal would have made, was to order for fresh election under section 140(1) and (2) of the Electoral Act 2010 after it invalidated the election in seventeen polling units. In a further argument, learned counsel submitted that section 140(1) of the Electoral Act deals with the total election and not elections in some polling units. Learned senior counsel submitted that the tribunal's failure to declare for a fresh election was consistent with section 140 (3) of the Electoral Act, and that the provision of section 140(2) was struck down by the Federal High Court in *Labour Party v. INEC & Ors.* Unreported suit No. FHC/ABJ/CS/309/2011. Learned senior counsel also cited in support the authority of Wada v Bello (2016) 17 NWLR (Pt.

1542) 374 paras. A-D.

Even though the decision of the Federal High Court in *Labour Party v. INEC & Ors. (supra)* is not binding on this court, it is a decision superior court of record as it is subsisting since

it has not been set aside. Like my brother, Fabiyi, J.S.C. in *Jev v. Iyortom* & 2 Ors. (2014) 5 - 6 SC (PLIID. (2014) 14 NWLR (Pt. 1428) 575, since the judgment of the Federal High Court is not on appeal before this court, I maintain a stoic stance and hereby keep my peace.

Now on whether the learned Justices of the Court of Appeal were wrong when they held that in the circumstance of this case, appellants waived their right to complain about non-compliance at the election which took place on 22nd 2018, September, 2018, learned senior counsel submitted that the Court of Appeal cannot be correct. I also think the Court of Appeal is not correct in holding that, because the appellants participated in the rerun election of 27th September 2018, they waived their right to complain against the election of 22nd September, 2019. This is because, a party who does not participate in an election, has no right to question or challenge that election. He is a total stranger and cannot be heard. See *Eze v. PDP* (2018) LPELR - 44907 (SC), (2019) 1 NWLR (Pt. 1652) 1: *Shinkafi & Anor v. Yari & Anor* (2016) 3 SCM 133 (2016) 7 NWLR (Pt. 1511) 340. This preposition of law is settled by section 285(13) of the Constitution of the Federal Republic of Nigeria 1999, as altered by the 4th Alteration Act No. 21 of 2017, which provides as follows:-

> An election tribunal or court shall not declare any person a winner at an election in which such a person has not fully participated in all stages of the election."

The petitioner filed before the tribunal a petition in which he prayed to be declared the winner of the election. That being so, he had a constitutional duty to participate in all the stages of the election. The authority of *Sylva v. INEC* (2012) 13 NWLR (Pt. 1316) 85 which is cited by learned senior counsel for the 1st respondent is no longer the law on this point, as it has been overtaken by section 285(3) of the Constitution. By the appellants' participation in the rerun election, they did not in any way waive their rights of complaint against the election of 22nd September 2018, rather, their right is enhanced by virtue of their participation in the rerun election. A situation of whether head or tail you loose, should not be foisted on the appellants.

The 7th and 8th issues even if resolved against or in favour of any of the parties, will in no way alter the outcome of this appeal. The tribunal in my view did not grant any double compensation, nor was the first ground of the petition directed at the election of 22nd September, 2018 only. I have clearly set out the 1st ground of the petition elsewhere in this judgment, I will say no more on these two issues.

The 9th issue is whether the learned Justices of the Court of Appeal were wrong when they held that the reliefs being declaratory, the appellants had the burden of establishing that the returning Officer had no legal right to cancel the result of the seven polling units but failed to discharge that burden.

Mr. Adeosun Adegboyega Rasaki, the State collation agent for the 1st and 3rd respondents testified as follows:

> "The Local Government Returning Officers gave account of what happened in the polling units. 1 listed that the election of these units could not be finalized and so the results for the units listed in my evidence were cancelled. At any point of aggregation of the results for all the 30 Local Government, the State Returning Officer informed us that since the number of voters in the cancelled polling units exceeded the margin of votes between the two leading aspirants, they decided to declare the election inconclusive and ordered for a rerun of 27th September 2018. All the party agents that signed exhibit R102 were there when the Returning Officer made the pronouncement."

Under cross-examination, this witness admitted that when the decision was taken to cancel the result of the election from the seven polling units, the polling units agents were not there. From this evidence and the pleadings of the parties, it is very clear that it was the State Returning Officer that cancelled the result of the election in seven polling units. I am conscious of the fact that the appellants are seeking declaratory reliefs as it concerns the power of the Returning Officer of the 1st respondent to cancel elections in seven polling units and order a rerun election.

The law is settled that they must succeed on the strength of their own case. This they did through the unchallenged evidence of PW74 and paragraph 21 (b) and 24 of the petition that gave strength to the evidence of PW74. At paragraph 16 of the reply to the petition, the 1st respondent admitted that it was the Returning Officer that cancelled the election in the seven polling units, when it averred as follows:-

> "That the Returning Officer appointed by the 1st respondent has the right under the relevant laws and manuals of the 1st respondent to cancel any election and fix another date for a supplementary election as was done on the 22nd September, 2018 and 27th day of September 2018 respectively."

The question is whether the State Returning Officer has the power to cancel election. The duties of a State Returning Officer are spelt out in paragraph 3.11 steps 1 - 16, pages 8 1-82 of the Manual for Election Officials 2018, which is exhibit P615 in this case. A careful study of the provision of the relevant paragraphs of the manual, will clearly show that the activities of the State Returning officer do not include power to cancel any result of election, His duty is to compare the total number of voters on from EC40G(3) with the margin of win of the two leading candidates and the margin of win is not in excess of the total number of registered voters of the polling units

where election was cancelled or not held decline to make a return until another election is conducted in the affected polling units.

By chapter 3, paragraph 3.2 of the Manual for Election Officials 2018, the power to cancel election at the polling units' vests with c the presiding officers who will make report of the incidence to the ward collation officer. This is so because the Presiding Officer is in charge of the election at the polling unit and he is in the field and better informed of the happenings at the polling units. It is the Presiding Officer's report that will be acted upon and not even the report of the ward collation officer.

In the instant case, there is no evidence that any of the Presiding Officers in the seven polling units prepared a report in which it cancelled election in those polling units. Cancellation of election in those polling units, especially when RW11 admitted under cross-examination that same was carried out in absence of polling agents is illegal. This is the position this court took in *Doma v. INEC* (2012) 13 NWLR (Pt. 1317) 297 at 328, paras. C D, where Muntaka-Coomassie, J.S.C. held:-

> "What baffles me the most is the fact that the result of the election was shamelessly cancelled and voided by a collation officer and not by the Presiding Officer, DW9 who has power in law to have done so at the polling unit.
>
> How can DW3 a collation officer, have the guts of cancelling the result of a whole election and that action would be accepted. Having considered the whole issue I think the position taken by the court below was correct in law."

In the recent authority of *Ikpeazu v. Otti* (2016) 8 NWLR (Pt. 1513) 38 at 84-85 paras. C-B, this court, per Galadima, J.S.C. held:

> "Beyond argument of respective counsel on this issue the law has been fairly settled on whose responsibility it is to cancel all election result. The two lower courts are ad idem on this. It cannot be disputed either that the appellant and the respondents herein were in agreement as well at the trial tribunal that the State Returning Officer had no power whatsoever to cancel polling results.. In *Doma v. INEC* (*supra*), the authority to cancel election results came up for consideration. In the case, DW3 who was the collation officer purported to have cancelled results of the election as against DW9 who was the Presiding Officer at the polling unit. This court did not

> only hold that the State Returning Officer has no power in law to cancel election result, but deprecated his 'guts' to have done so."

By my conclusion, I am of the firm view that the cancellation of the election in the seven polling units by the State Returning Officer is clearly illegal. Therefore, since the rerun election of 27th September 2018 is predicated on the unlawful cancellation of the elections in the seven polling units, it is illegal as well. There is no way something will be put on nothing and same can stand. By the result that was announced by the 2nd respondent after the election of 22nd September, 2018, the scores which have not been disputed and which I have set out elsewhere in this judgment, the appellant did satisfy the constitutional requirement to be declared Governor - elect, as set out under section 179 (2) (a) and (b) of the Constitution of the Federal Republic of Nigeria 1999. For avoidance of doubt, section 179(2) (a) and (b) of the Constitution provides as follows:-

> "179(2) A candidate for 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 a majority of the votes cast at the election; and 3
>
> (b) he has not less than one quarter of votes cast at the election in each of at least two thirds of all the local government areas in the State.

Section 1(1) of the Constitution provides as follows:-

> "The Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria."

Section 1(3) of the same Constitution also provides as follows:-

> If any other law is inconsistent with the provisions of this constitution this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."

The 1st appellant having fulfilled the requirement of the Constitution by scoring the highest number of votes cast at the election of 22nd September, 2018, and having achieved not less than one quarter of the votes cast at the election in each of at least two thirds of all the local government areas in Osun State, no other law in the land whatever called should have been employed to declare the election inconclusive and order for any election. The Constitution is the grundnorm, which we as people of Nigeria have enacted for ourselves. Its observance in breach, will portray us as unserious people.

This issue is resolved in favour of the appellant.

Having found that the rerun election of 27th September 2018 is illegal, null and void, it is unnecessary to venture into the consideration of the 10th issue for determination of this appeal.

Having resolved all the issues raised by the appellants for determination of this appeal in the appellant's favour, this appeal shall be and it is hereby allowed. The judgment of the lower court is hereby set aside. The majority judgment of the tribunal is hereby restored and affirmed.

The costs of this appeal is assessed at N500, 000 in favour of the appellants and against the respondents.

Appeal dismissed.