AN APPRAISAL OF THE REQUIREMENTS OF PROOF IN THE HEARING AND DETERMINATION OF ELECTION PETITION IN NIGERIA

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JUNE, 2014.

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A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA,

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DEPARTMENT OF PUBLIC LAW
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NIGERIA

JUNE, 2014.

DECLARATION

I declare that this thesis entitled: **AN APPRAISAL OF REQUIREMENTS OF PROOF IN THE HEARING AND DETERMINATION OF ELECTION PETITION IN NIGERIA** is a product of my own research and has to the best of knowledge never been presented anywhere, or anytime by anybody, institution or organization. All works consulted have been dully acknowledged in the text and a list of references provided.

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Yakubu TANIMU **SIGNATURE/ DATE**

CERTIFICATION

This thesis entitled: **AN APPRAISAL OF REQUIREMENTS OF PROOF IN THE HEARING AND DETERMINATION OF ELECTION PETITION IN NIGERIA** by Yakubu TANIMU meets the requirement and regulations governing the award of the Degree of Master of Laws of the Ahmadu Bello University and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is, first and foremost dedicated to the Almighty God, for His mercies and kindness to me and my life. Glory and honour be to Him.

This work is also dedicated to my parents, wife and children.

ACKNOWLEDGEMENT

My profound gratitude goes to my first supervisor, Dr. Yusuf Dankofa, who in spite of his tight schedules painstakingly read through the manuscript and made all the necessary corrections. I can boldly declare that the outstanding quality and success of this research is attributable to his constructive criticisms and intelligent suggestions. I remain deeply grateful.

I am deeply indebted to my second supervisor, Dr. Kabir Danladi whose academic and wise counsel led to the smooth completion of this research. May Almighty God reward him.

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My amiable father, Alh.Tanimu Bubba Atabs, sweet mother, Haj. Maryam Tanimu Atabs, my beloved wife, Mrs. T.Y Atabs (Sweet Ai) and my children, Mohammad Sanusi(Amir) and Thayyibat(Amira) deserved special acknowledgement for always standing by me. Your kindness and assistance towards me will never be forgotten.

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ABSTRACT

Election petition is the only viable and recognized alternative open to any person or party dissatisfied with the conduct of an election under our laws to ventilate his or her grievance(s). Over the years litigants/petitioners have continued to patronize the election petition tribunals/courts with minimal or no success as most of the petitions ended up being thrown out for noncompliance with the applicable electoral legislation or want of proof. What provoked this research was the need for an appraisal of the requirement of proof in the hearing and determination of election petition with a view to unearthing why it is a near impossibility to prove election petition anchored on some grounds. This research adopts a doctrinal method. Relevant legislations, textbook, literature and particularly case laws are explored for a good understanding of the requirements of proof under the Electoral Act, 2010 as amended. Although there is an attempt by the Electoral Act 2010 as amended to address the issue of time frame for hearing and determination of petition, it failed to address the age long agitation of technicalities in the dispensation of electoral justice. The requirements that noncompliance must not only be substantial but must substantially affect the result of the election and sundry other requirements of proof appear to be a clog in the proof of election petition. It is advocated that electoral umpire and judges should uphold substantial justice over and above technicalities. The requirement of proof of noncompliance should be made optional and a mid-course approach should be adopted in proof of corrupt practices instead of proof beyond reasonable doubt as currently practiced. The thesis contains more revelations and startling recommendations.

TABLE OF CONTENTS

Title page - - - - - - - - - - i

Declaration - - - - - - - - - - ii

Certification - - - - - - - - - - iii

Dedication - - - - - - - - - - iv

Acknowledgment - - - - - - - - - v

Abstract - - - - - - - - - - vi

Table of Contents - - - - - - - - - vii

Table of Cases - - - - - - - - - - xii

Table of Abbreviation - - - - - - - - - xix

CHAPTER ONE: GENERAL INTRODUCTION

1.1 Introduction - - - - - - - - - 1

1.2 Statement of the Problem - - - - - - 5

1.3 Scope of the Research - - - - - - - - 6

1.4 Aims and Objectives - - - - - - - - 6

1.5 Justification of the Study -- - - - - - - 7

1.6 Research Methodology - - - - - - - 8

1.7 Literature Review - - - - - - - - 8

1.8 Organizational Layout - - - - - - - 12

CHAPTER TWO: ELECTION PETITIONS

2.1 Introduction - - - - - - - - - 13

2.2 Jurisdiction in Election Petition - - - - - - 14

2.3 Parties of Election Petition - - - - - - - 16

2.3.1 Joinder of Electoral Officers - - - - - - - 19

2.3.2 Effect of Non Joinder of a Necessary party - - - - - 23

2.4 Filing of Petition - - - - - - - - 24

2.4.1 Filing Fees - - - - - - - - - 26

2.4.2 Time for Filing Election Petition - - - - - - 27

2.5 Time for Hearing and Determination of Election Petition - - - 30

2.5.1 Enlargement of Time for Hearing and Determination of Petition- - 32

2.5.2 Effect of Order of Retrial by an Appellate Court - - - - 33

2.5.3 Computation of Time in Election Petition - - - - - 34

2.5.4 Placement of Public Holidays, Sunday and Saturday on

Computation of Time - - - - - - - - 37

2.6 Contents of a Petition - - - - - - - - 40

2.7 Grounds for Challenging an Election - - - - - 43

2.8 Conclusion - - - - - - - - - 48

CHAPTER THREE: PROOF ON NON COMPLIANCE AND CORRUPT PRACTICES

3.1 Introduction - - - - - - - - - 49

3.2 Non Compliance - - - - - - - - 50

3.3 Burden of Proof of Non Compliance - - - - - 57

3.4 Standard of Proof of Non Compliance - - - - - 60

3.5 Electoral Malpractices/Corrupt Practices - - - - - 61

3.6 Electoral Malpractices and Electoral Irregularities - - - - 64

3.7 Categories of Electoral Malpractices/Corrupt Practices - - - 65

3.7.1 Bribery - - - - - - - - - 66

3.7.2 Undue Influence and Threatening - - - - - - 66

3.7.3 Treating - - - - - - - - - 67

3.7.4 Impersonation and Voting When not Qualified - - - - 68

3.7.5 Rigging or Over Voting - - - - - - - 68

3.7.6 Fictitious or Unauthorized Pooling Station - - - - - 70

3.7.7 Other forms of Corrupt Practices - - - - - - 71

3.8 Burden of Proof of Corrupt Practices/Electoral Malpractices - - 71

3.9 Standard of Proof for Corrupt Practices/Electoral Malpractices - - 74

3.10 Conclusion - - - - - - - - - 77

CHAPTER FOUR: PROOF OF QUALIFICATION AND DISQUALIFICATION OF CANDIDATE

4.1 Introduction - - - - - - - - - 79

4.2 Jurisdiction - - - - - - - - - 80

4.3 When to Challenge the Qualification of a Contestant - - - 83

4.4 Forms of Disqualification and Qualification - - - - - 85

4.4.1 Conviction - - - - - - - - - 85

4.4.2 Employment and Dismissal from Public Service - - - - 87

4.4.3 Indictment for Embezzlement - - - - - - - - 89

4.4.4 Requisite Educational Qualification - - - - - - 91

4.4.5 Citizenship - - - - - - - - - 92

4.4.6 Non Payment of Tax - - - - - - - - 93

4.4.7 Contravention of the Code of Conduct - - - - - 94

4.4.8 Other forms of Disqualification - - - - - - 95

4.5 Burden of Proof - - - - - - - - 96

4.6 Standard of Proof - - - - - - - - 97

4.7 Conclusion - - - - - - - - - 97

CHAPTER FIVE: PROOF OF UNLAWFUL EXCLUSION AND MAJORITY OF LAWFUL VOTES

5.1 Introduction - - - - - - - - - 98

5.2 Unlawful Exclusion - - - - - - - - 98

5.3 Burden of Proof of Unlawful Exclusion - - - - - 103

5.4 Standard of Proof for Unlawful Exclusion - - - - - 104

5.5 Majority of Lawful Votes Cast at an Election - - - - 104

5.6 Burden of Proof of Majority of Lawful votes Cast - - - - 106

5.7 Standard of Proof of Majority of lawful votes Cast - - - - 107

5.8 Conclusion - - - - - - - - - 108

CHAPTER SIX: SUMMARY, CONCLUSION AND RECOMMENDATIONS

6.1 Summary - - - - - - - - - 109

6.2 Conclusion - - - - - - - - 110

6.3 Recommendations - - - - - - - - 113

Bibliography - - - - - - - - - 117

TABLE OF CASES

REC v. NWOCHA (1991) 2 NWLR (pt 174) P.732 - - - 13

OKONKWO V. INEC(2004)1 NWLR (pt854) P.242- - - - --- 14

DOUKPOLAGHA v. GEORGE (1982) 4 NWLR (pt 236) P.444 - 15

NEC v. NRC (1993) 1 NWLR (pt 267) P.20 - - - - 16

MAIKORI v. LERE (1992) 3 NWLR (pt 231) P.525- - - 16

NNAMANI v. NNAJI (1999) 7 NWLR (pt 610) P.313 - - - 17, 23

OBASANJO v. BUHARI (2002) 7 NWLR (pt 850) P.510 - - 18, 22

JIDDA v. KACHALLAH (1999) 4 NWLR (pt 599) P.426 - - 20, 92

TAFIDA v. BAFARAWA (1999) 4 NWLR (pt 597) P.70 - - - 20, 23

EGOLUM v. OBASANJO (1999) 7 NWLR (pt 611) P.355 - - 20

NZE v. NWAWE (1999) 13 NWLR (pt 635) P.396 - - - - 20

ODUKA V. OKWARAJIA & ZORS (1999) 4 NWLR (pt 597) P.35 - 21

OBASANJO v. YUSUF (2004) 9 NWLR (pt. 887) P.14 - - 21,35,44

JANG v. DARIYE (2003) 15 NWLR (pt 843) P.436- - - 25

ADEBIYI v. BABALOLA (1993) 1 NWLR (pt 2671) P.1 - - 24

NWOBUDU v. ONUH (1984) AL NLR VOL 1 P.1 - - - 26

MALAH v. KACHALA (1999) 3 NWLR (pt 596) P.309 - - 26,29

OLANIYONU v. PROFESSOR EMEAWA (1989) 5 NWLR (pt 122) P.501 27

FEMI v. SUNDAY (1999) 8 NWLR (pt 613) P.92 - - - - 27

BALOGUN v. ODUMOSU (1999) 2 NWLR (pt 592) P.590 - - 28,39

OTU v. INEC (1999) 5 NWLR (pt 602) at P.250 - - - - 28

ALATAHA V. ASIN (1999) 5 NWLR (pt 601) P.32- - - 28,35

LAMIDO v. TURAKI (1999) 4 NWLR (pt 600) 578 - - - 23, 29

ONOCHIE v. ODOGWU (2006) 6 NWLR (pt 975) P.65 - - - 31

PDP v. CPC (2012) 4 WRN P.1 - - - - 31,32,39

FADARE v. A.G (1982) 4 S.C p.1 - - - - - - 34

SULE v. KABIR (2010) 2 WRN P.21 - - - - - - 36

IMERH v. DKON (2012) 3 WRN P. 179 -- - - - - 36

KAIGAMA v. INEC (1993) 3 NWLR (pt 284) P. 681 - - 38

KHALIL v. YARADUA (2003) 16 NWLR (pt 847) P.446 - -- 41

OWURU v. INEC (1999) 10 NWLR (pt 622) P.201 - - - 42

BUHARI v. YUSUF (2003) NWLR (pt 841) P.446 - - - - 42

EFFION V IKPEWE (1999) 6 NWLR (Pt 606) P.260 43

ABIMBOLA V ADEROJU (1999) 5 NWLR (Pt 601) P.100 43

EZEOBI V NZEKA (1989) 1 NWLR (Pt 98) P.478 43

OGBORU V IBORI (2004) 7 NWLR (Pt 871) P. 192 46

AGBALLAH V CHIME (2009) 1 NWLR (pt 1122) P. 384 50

NWOLE V NWOAGWU (2004) 15 NWLR (Pt 985) P.61 55,

OJUKWU V YAR'ADUA (2008) ALLFWLR (pt 408) P.1409 51

BASHEER V SAME (1992) 4 NWLR (Pt 236) P. 491 54

VICTOR IMIERE V HELEN SALAMI (1989) 2 NEPLR P. 161 53

OPUTEH V ISHIDA (1993) 3 NWLR (Pt 279) P .34 54

ENG. ALH. MOGAJI ABDULLAHI V ALH. KABIR IBRAHIM GAYA

(1992) 2 N.E.P.A.R P.214 55, 105

NGWU V MBA (1999) 3 NWLR (pt 595) P. 400 55,69

BUHARI V OBANSAJO (2005) 2 NWLR (Pt 910) P. 241 56,

BUHARI V OBASANJO (2005) 50 WRN P.1 57

UGHAMADU V NDIBE (2010) 46 WRN P. 55 57,71

MASKA V IBRAHIM (1999) 5 NWLR (Pt 599) P. 415 58

AONDAKA V AJO (1999) 5 NWLR (Pt 602) P. 206 58,89

ABBA V JUMARE (1999) 5 NWLR (Pt 602) P.270 58

SWEN V AZUNGWE (1966) NWLR P. 267 60

ABUBAKAR V YAR'ADUA (2008) 19 NWLR (Pt 1120) P. 1 60

ANGBAZO V EBYE(1993) 1 NWLR (Pt268) P.133 60

MOGAJI & ORS V MADAM RALIATU ODOFIN(1978) 4SC P. 94 50,61

YUSUF V OBASANJO (2003) 16 NWLR (Pt 847) P. 554 63

WUAM V ATO (1999) 5 NWLR (Pt 601) P.150 65

ALALADE V AWODOYIN (1999) 5 NWLR (Pt 604) P. 529 65

ALH IBRAHIM SAIDU MALUNFASHI V ALH USMAN YABA & ORS

(1999) 4 NWLR (Pt 598) P. 230 65

MAIGORO V ALHAJI SAIDU & I ANOR (1965) ALL NLR P. 561 67

SERIKI V ARE (1999) 3 NWLR (Pt 595) P. 469 69

EMESIN V NWACHUKWU (1996) 6 NWLR (Pt 605) P.155 70

BADAWI V ADAMU (1999) 3 NWLR (Pt 594) P. 303 70

ETUK V ISEMIN (1992) 4 NWLR (Pt 236) P. 402 70

EZE V OKOLOAGU (2010) 3 NWLR (Pt 1180) P.183 72,74,105,107

FALAE V OBASANJO (1999) 4 NWLR (Pt 599) P. 476 72,83,86

BUHARI V OBASANJO (2005) 13 NWLR (Pt 941) P.1 59,72,75,95

BUHARI V INEC (2008) ALLFWLR (pt 437) P.58 73

KWARA V INNOCENT (2009) 1 NWLR (Pt 1121) P. 179 74,97,103

EBOH V OGUNJIOFOR (1999) 3 NWLR (Pt 595) P.419 74

EDET V EYO (1999) 6 NWLR (Pt 605) P. 18 75

UDEAGHA V OMEGARA (2010) 11 NWLR (Pt 1204) P. 168 75

OGUNYOMBO V OKOYA (2002) 16 NWLR (pt 793) P. 22 76

AJADI V AJIBOLA (2004) 16 NWLR (Pt 898) P. 91 80

ENAGI V INUWA (1992) 3 NWLR (Pt 231) P. 549 80

PETERS V DAVID (1999) 5 NWLR (Pt 603) P. 486 81

TSOHO V YAHAYA (1999) 4 NWLR (Pt 600) P. 657 81

BALEWA V MUAZU (1999) 5 NWLR (Pt 604) P. 636 82

ONIFADE V OYEDEMI (1999) 5 NWLR (Pt 601) P.54 84

IMAM V SHELF (2005) 4 NWLR (Pt 914) P. 80 84

ASIKPO V OKENE(1995) 5 NWLR (Pt 604) P.578 86

SANYAOLU V INEC (1999) 7 NWLR (Pt 612) P. 600 86, 95

LAWAL V YAMA (2004) 9NWLR (pt 877) P. 117 86

ADEFEMI V ABEGUNDE (2004) 15 NWLR (Pt895) P. 1 88

DANIEL V AJADI (1998) 1 NWLR (Pt 574) P. 524 88

UNCP V DPN (1998) 8 NWLR (Pt 560) P. 90 89

DAGGASH V BULAMA (2004) 14 NWLR (Pt 982) P. 144 89,90

AC V INEC (2007) ALLFWLR (pt 378) p.1025 90

OGBEIDE V OSULA (2004) 12 NWLR (Pt 886) P. 86 93

LANTO V WOWO (1999) 7 NWLR (Pt 610) P. 227 93

RIMI V INEC (2005) 6 NWLR (Pt 920) P. 56 94

BUHARI V INEC (2008) 19 NWLR (Pt 1120) P. 246 97

PPA V INEC (2010) 12 NWLR (pt1203) P. 98 101

ODON V BARIGHA AMANGE (2010) 12 NWLR (Pt 1207) P.13 97

ATIKU V INEC (2007) ALL FWLR (Pt 353) P. 3 101

AMAECHI V INEC (2007) 18 NWLR (Pt 1065) P. 105 102

CPC V UMAR (2012) 12 NWLR (pt 1325) P. 609 102

AGAGU V MIMIKO (2009) 7 NWLR (Pt 1140) P. 343 103

INEC V AC (2009) 2 NWLR (pt 1126) P. 544 103, 104

M. H. OKUNLOLA V D. OGUNDIRAN & 1 OR (1962) 1 NLR (Pt 1) P. 83 105

ALH UMAR MUSA YAR'ADUA V ALH SAIDU BARDA (1992)

3 NWLR (Pt 231) P. 628 105

KURFI V MOHAMMED (1993) 2 NWLR (Pt 277) P. 602 105

IG E. V AKINYEMI (1998) 7 NWLR (Pt 557) P. 281 106

CHIMA ANOZIE V DR. KEN OBICHERE & ORS (2006)

8 NWLR(Pt981) P.140 107

TABLE OF ABBREVIATIONS

INEC: Independent National Electoral Commission

ALL NLR: All Nigeria Law Report

P.: Page

Pt.: Part

NWLR: Nigeria Weekly Law Report

JCA: Justice of the Court of Appeal

FRN: Federal Republic of Nigeria

WRN: Weekly Report of Nigeria

SC: Supreme Court

CLA: Calabar

N.E.P.AR: Nigeria Election Petition Appeal Report

JSC: Justice of Supreme Court

NMLR: Nigeria Monthly Law Report

ALL FWLR: All Federation Weekly Law Report

NLR: Nigeria Law Report

V: Versus

I.e.: That is

Viz: Namely

E.g. For example

E.t.c: and so forth

CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION

Elections generally are guided by statutory provisions. Not only must the body to take charge of the conduct of the election be established by law, the regulation of the conduct of the election inter alia the registration of voters, the procedure at an election and act that constitute electoral offences as well as determination of election petition arising from election must be matters for which specific provisions are made. Section 153 of the Constitution of the Federal Republic of Nigeria, 1999 as amended establishes the Independent National Electoral Commission (INEC) while the Electoral Act 2010 as amended, in the main, regulates the conduct of Federal, States and Federal Capital Territory Area Council Elections.

Generally, a law to regulate conduct of election must anticipate complaints arising thereof and institutions for investigation and determination of the complaints. The final determination of any complaint arising from an election closes the election process. It is in this latter aspect that this research intends to focus.

It is interesting to note that the procedure for questioning an election is clearly stated in section 133 (1) of the Electoral Act[1], herein reproduce thus:

> *No election and return at an election under this Act shall be questioned in any manner other than by petition complaining of an undue election or undue return {in this Act referred to as an "Election Petition"} presented to the competent tribunal or court in accordance with the provisions of the constitution or of this Act and in which the person elected or joined as a party.*

[1] Electoral (Amendment) Act, 2010

The term election petition as used in the above section refers to an originating process by which an unsuccessful candidate in an election or political party or any other person vested with statutory locus, seeks to question the return of a successful candidate at an election as undue either as a result of non-compliance with the electoral law or that the person who has been returned was at the time of the election not qualified to stand for the election or that a substantial number of votes by virtue of which the winner was declared were invalid or because the petitioner was validly nominated to run for the election but was unlawfully excluded from the election[2]. The fundamental issue in election petition is to question the election of a candidate as a victor and as such, it must be shown that the purported election or return was void or that the winner was not returned by a majority of lawful votes[3].

The grounds forming the basis of an election petition must be one of those recognized under the Electoral Act or the Constitution and must be related to or must have arisen out of acts or omissions that were contemporaneous with the conduct of the election. It is now axiomatic and trite law that election tribunal has no power to investigate matters which took place before the conduct of election[4].

The grounds under which an election may be questioned are statutorily articulated in section 138 (1) of the Electoral Act[5]viz:

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

[2]Aderemi O (2006) Electoral Law & Practice in Nigeria, AderemiOlatubira& Co. Akure P. 84
[3] Id
[4]Id
[5] 138 (1) Electoral (Amendment) Act, 2010

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.

The 1999 Constitution as amended has established various institutions and invested them with powers to determine election petition. The constitution also provides for a system of appeal. S. 239 of the Constitution for example has vested into the Court of Appeal the original jurisdiction to the exclusion of any other court in Nigeria with power to hear and determine any question as to whether:

a) Any person has been validly elected to the office of the president or vice-president

b) The term of office of the president or vice-president has ceased or

c) The office of the president or vice-president has become vacant.

The Constitution also established a clear appeal mechanism for offices of the President and Vice President. Section 233 (1) of the 1999 Constitution as amended provides that petitions shall lie as of right from the court of appeal to the Supreme Court in all matters emanating from the election.

The National Assembly Election Tribunal has the sole original jurisdiction to determine petitions as to whether any person has been duly elected as a member of the National Assembly, the term of office of any person has ceased, the seat of a member of the senate or a member of the House of Representatives has become vacant and any question or petition brought before it[6]

[6] S 285 (1) of **the Constitution** of the FRN 1999 as amended

Election Tribunals play important roles in the determination of electoral disputes in Nigeria. Since independence the Courts/Election Tribunals have continued to be the major, if not the sole organs tasked with the responsibility of resolving election disputes in Nigeria. The roles of these Courts/Election Tribunals are indeed crucial for the survival of democracy and the rule of law in Nigeria. The Courts/Election Tribunals determine the electoral disputes which cannot be concluded through the ballot boxes. Any person that is dissatisfied with the results at the poll as declared by the Independent Electoral Commission (INEC) relies on these election dispute resolution institutions for redress. The Courts/Election Tribunals are the last hope of such contestants. The judgments of Courts/Election Tribunals are therefore important for restoration of hope in the electoral and democratic process and the rule of law[7].

It is important to bear in mind that election petition can only be resolved by calling witnesses and leading evidence at the hearing. It is axiomatic that the onus of proof is always on the petitioner to establish his complaint or petition upon the balance of probabilities or beyond reasonable doubt where the petition borders on irregularities that have criminal elements in nature. The question is, while the task appears to be simple to accomplish has it been so in practice?

Jurists and legal luminaries have continued to question the yard stick or standard used by election tribunal judges in arriving at most of its judgments and rulings[8]. The reason for the general outcry is not far-fetched. It appears the Electoral Act and/the Election Tribunals have made the requirements of proof of electoral irregularities to be a near impossibility. The spillover effect of this is that, it has made elections to be a do or die affair because once returned it is an uphill and heculaneous task to dislodge.

[7]LADAN M. T. AND KIRU A. I, (2005) **Election Violence in Nigeria**, Afstrag – Nigeria P. 20
[8]id

In this research, the author has attempted to dissect and discuss critically the various statutory grounds under which an election petition may be brought; the requirements of proof of each ground and an in-depth analysis of the various tests and standards evolved by Election Tribunals vis-a-vis the reasoning and rationale behind those yard sticks.

1.2 STATEMENT OF THE PROBLEM

Nigerian electorates have continued to wonder why in spite of the apparent and manifest cases of electoral malpractices and non-compliances; the courts/ election tribunals have continued to throw out election petition cases for want of proof. While some electorates and stake holders attribute the sorry state of the petitioners to the almost impossible requirements of proof evolved by the courts and the Electoral Act others view it as the problem of legal practitioners who have poor appreciation of the dynamics of proof in election petition particularly the extent of proof and evidential burden.

This trend of event now gaining grounds if not checked is capable of threatening our nascent democratic institutions and eroding the confidence of the electorates in the post-election judicial process. The recent unrest in some parts of Northern Nigeria following the announcement of the winner of the presidential election should serve as a gauging point for our electoral and judicial managers. There is no gainsaying that the resultant consequence(s) of this will be anarchy and lawlessness.

In this research, attempt has been made to appraise the extent of proof in election petition with a view to ascertaining why it is a near impossibility to prove some electoral malpractices and possibly highlight some grey areas as well as proffer some recommendations thereon. Emphasis would also be given to the naughty issues of standard and burden of proof in election petition

1.3 SCOPE OF THE RESEARCH

This research is confined to appreciating on a general note what election petition in Nigeria is all about. It tries to study those preliminary items that need to be settled before a competent petition is said to be filed and therefore liable to proof.

The study also engages on a in depth examination of the four (4) statutory grounds under which an election petition may be filled under the Electoral Act 2010 as amended and other previous legislation

The research critically assessed the twin evidential principles of burden and standard of proof and other yardsticks/requirements evolved by the Courts/Tribunals in proof each ground and the difficulty (ies) inherent in each of them if any. The efficacy and effectiveness of the standards/requirements of proof of the statutory grounds are identified; suggestions and recommendations for reforms are proffered.

1.4 AIMS AND OBJECTIVES OF THE RESEARCH

This research seeks to achieve the following objectives:

a. To provide an in-depth analysis of the basic elements a petitioner or respondent need to prove or defend an election petition anchored on any of the statutory grounds of challenging an election petition under section 138 of the Electoral Act 2010 as amended.
b. To study the various standards and yardsticks evolved by the Election Petition Tribunals and Courts in arriving at most of their rulings and judgments vis a vis the yearnings and expectations of the electorates who seem to be fast losing confidence in the post election judicial process.

c. To expose the general public and in the process acquaint them on the dynamics of proof in election petition and the workings of the Election Petition Tribunals.

1.5 JUSTIFICATION OF THE STUDY

This research on the requirement of proof in election petition will be of immense benefit to pre-election petition judges and election petition judges. This is so because it brings to the fore the contentious issues of burden and standard of proof and the extent to which these evidential principles can be made applicable to election petition. The findings, observations and recommendations will no doubt further equip the judges to pass sound and qualitative rulings and judgments that will satisfy the yearnings and expectations of the electorates who are fast losing hope in post-election judicial process.

Owing to many years of military rule in Nigeria, the mastery of the art and proof of election petition has become a daunting and tedious task for most practicing and non-practicing lawyers. This has led to striking out of most election petition cases and the little that survived to hearing stage dismissed for lack of proof. This research seeks to equip lawyers with the basic skills and tact needed to successfully prove or defend election petition as the case(s) may be.

This research will equally be of immense benefit to the stakeholders in the Nigerian electoral system particularly the Independent National Electoral Commission (INEC) and the legislature. They will no doubt find the findings, observations and recommendations very resourceful and worthy of note. It is our hope that it will allow for a more robust and balance regulation and fair handling of our electoral system and legislation.

1.6 RESEARCH METHODOLOGY

The research method used is doctrinal research based on available literatures, laws, statutes and decided cases; journals, seminar papers, periodicals, newspapers, and research works in the library relevant to the topic are consulted and properly acknowledged.

1.7 LITERATURE REVIEW

The bulk of this research is a statute and case law based. The laws and regulations that guided the conduct of elections and the trials in election petition tribunals/courts from the commencement of our democratic journey till date were derived from Decrees, Laws and constitutions. Worse, the theme of the research suggest a study of the outcomes of the romance between the provision of the laws on election petition and the findings/decisions of courts/tribunals on tested election petition cases.

Caveat must be sounded here that the above proposition should not be mistaken to mean that there are no books or literatures on requirements of proof in election or are less important to the research. As a matter of fact the research immensely benefited from the writings and opinions of the learned authors whose works were consulted in this research however, not without some shortcomings or gaps.

Afe Babalola (SAN) one of the leading authorities on Election Petition in Nigeria in his book titled ELECTION LAW AND PRACTICE IN NIGERIA VOL.1 wrote extensively on the historical development and legislative changes regarding election and election petition trials. The book traced the history of elections in Nigeria from colonial time to independence and post independence election. The book discussed issues up to Electoral Act 2006 and trials before election petition tribunals and courts. However the book appears to be merely interested in the

historical development and legislative changes regarding Election in Nigeria than with the means and mode of proof of election cases. The book equally does not cover up to the Electoral Act, 2010 as amended being the current applicable legislation on election in Nigeria and the amendments to the 1999 Constitution and the Evidence Act 2011.

Ogunjinmi A.A in his book titled "A PRACTICAL APPROACH TO ELECTION PETITION PROCEDURE IN NIGERIA" tried to give the elementary and practical approach to conduct of Election Petition in Nigeria from the stage of presentation of the petition to the hearing and determination of the petition while highlighting the steps and things required of the parties thereon. The learned author in his attempt to cover all aspects of election petition failed to give much emphasis/attention to the requirement of proof being the area of core interest in this research, even the little discussed do not substantially represent the current position of the law as the Electoral Act has been amended severally with attendant changes to the legal regime on Election petition.

Another book that is worth mentioning in this research is PRACTICAL GUIDE TO ELECTION PETITION BY JOSHUA E. O. The book appears to share the same theme with this research in that it is case law based. The author tried to analyze through judicial authorities the requirements of proof in election petition, burden of proof and standard of proof of virtually all the statutory grounds for challenging an election. As comprehensive as this book may look, it did not the book evaluate the soundness or other wise of the judgments or decisions of the tribunals/courts beyond reproducing them. Again the book is authored on the basis of the Electoral Act, 2006, an Electoral legislation that is repealed and replaced by Electoral Act, 2010 as amended.

Worthy of note is a book authored by Nwabueze B.O. titled NIGERIAN PRESIDENTIAL CONSTITUTION (1979 – 83) THE SECOND EXPERIMENT IN CONSTITUTION DEMOCRACY. The book although concerned about Nigerian Presidential System as contained in 1979 Constitution, it also discusses the various aspects of election from the angle of the electoral commission to the holding of an election and post-election judicial process. It is aimed at providing guidance and general education to politicians, voters and lawyers alike. The book although of immense use in this research does not put or proffer any suggestion on the efficacy or otherwise of the various tests evolved by election petition tribunals/courts in resolving election dispute neither does it reflect the current constitutional and electoral changes to our current electoral legislation. The book also did not appear to be thematically interested in detail analysis of the requirements of proof in election petition.

The book titled ELECTORAL LAW AND PRACTICE IN NIGERIA by Aderemi O is another work consulted in this research. The author who tried to give a general overview of election in Nigeria dedicated a whole chapter of his work in analysis of the four statutory grounds and even delved into the constitutional ground as created by the Supreme Court in the celebrated case of OBASANJO V YUSUF (INFRA). Although the book discussed the statutory grounds and the constitutional ground, it was in a passive and general manner as the work equally failed to evaluate the various standards/yardstick evolved by courts/tribunal in resolving election dispute nor did it engage in an in depth analysis of same. Just like other authorities consulted, it is premised on the Electoral Act 2006 which is no longer the applicable and operational electoral legislation in Nigeria.

The research immensely benefited from a book titled LAW AND PRACTICE OF EVIDENCE IN NIGERIA authored by Afe Babalola particularly the array of Contributors to the book. The book discussed topical issues in the field of Nigerian law of evidence including the twin concepts of burden and standard of proof. The book's approach is general and did not customize burden and standard of proof as is being advocated for in this research. Equally the book was based on the repealed Evidence Act same having been repealed and replaced with the Evidence Act 2011.

The research also consulted articles written in academic journals. One of such articles is "Election Petition in Nigeria: Buhari v Obasanjo in Perspective[9]" by Prof B.Y Ibrahim. The article concisely appraised election petition generally from the preliminary aspect to the proof of election using the case of Buhari v Obasanjo as template and made far reaching and profound recommendations. However the article was based on Electoral Act 2002 which has repealed and replaced with Electoral Act 2010 as amended. Again most of the recommendations such as the need for speedy trials, joinder, and number of witnesses amongst others have been overtaken by subsequent legislations including the Electoral Act 2010 as amended.

The research also consulted another article authored by Dr A.K Usman titled "Buhari v Obasanjo: Law and Justice on the Cross[10]". The article reviewed the Supreme Court judgment in that case and critically analyzed their reasoning particularly wondering why the Supreme Court could not void the election having accepted that the election was anything but a sham and defective. The author although also made profound recommendations most of them were taken care of by subsequent legislation. The article was based on Buhari (no 2) and Electoral Act 2002. This is not the current legal regime on electoral matters as the said Electoral Act has been

[9] Ahmadu Bello University Law Journal, Vol 24-25
[10] Ahmadu Bello University Journal of Public and International Law Vol 1 No1

repealed and replaced by Electoral Act 2006 which has also been repealed and replaced with Electoral Act 2010 as amended.

The statutes that governed the elections and judicial decisions of courts and tribunals are examined and analyzed with a view to ascertaining whether they have served the purposes of translating the wishes of the Nigerian electorates and sustenance of democracy.

1.8 ORGANIZATIONAL LAYOUT

The work comprises of six (6) chapters. The first chapter introduces the subject matter and lays foundation for the research.

Chapter two dwells on the election petition in general by highlighting the competence of a petition, proper parties, time frame, content of election petition, grounds for bringing petition, jurisdiction and sundry related issues.

Chapter three, four and five discuss extensively the statutory grounds for challenging an election and the requirement of proof of each ground. The difficulty (ies) of proving some of the grounds is also highlighted.

Chapter six provides the summary, the findings or observations of the research are highlighted in the conclusion and recommendations or suggestions equally proffered.

CHAPTER TWO

ELECTION PETITIONS

2.1 INTRODUCTION

Election petition is the only viable alternative available to any unsuccessful candidate or political party aggrieved by the conduct of an election in Nigeria to ventilate his/her dissatisfaction and seek for redress at the appropriate court/ tribunal that has the jurisdictional competence to entertain same.

Election petition is an originating process by which an unsuccessful candidate at an election or his political party or any other person vested with statutory locus seeks to question the return of a successful candidate at an election as undue, either as a result of noncompliance with the electoral law or that the person who has been returned was not at the time of the election not qualified to stand for the election or that the election in which the winner was declared is invalid or because the petitioner was validly nominated for the election but was unlawfully excluded from the election.

Election petitions are proceedings sui generis and are not considered to be identical with other civil proceedings. They do not really deal with civil rights and obligation properly so called. A statute creating election processes and procedures for election petition lays down specific ambits as to when, how and why an election petition may be brought and required periods for certain steps, quite different from ordinary civil proceeding[1].

In this chapter attempt shall be made to look at the various departments or segments in election petition with a view to appreciating at a glance what election petition is all about.

[1] REC V. NWOCHA (1991) 2 NWLR Pt 174 at page 732

2.2 JURISDICTION IN ELECTION PETITION

Jurisdiction refers to the competence of the Court or Tribunal to entertain a matter brought before it. Jurisdiction of Court/ Tribunal may be in terms of composition, subject matter or territorial coverage. It is axiomatic that no matter how proceedings are beautiful or transparently done, where a court or tribunal has no jurisdiction, it is an exercise in futility[2]. Succinctly put therefore jurisdiction is the life wire that sustain and give teeth to any court or tribunal[3].

The 1999 Constitution as amended has established various institutions with powers to determine election petition. The Constitution also provides for a system of appeal. S.239 of the Constitution has invested the Court of Appeal with original jurisdiction to the exclusion of any other court in Nigeria with power to hear and determine any question as to whether:

a. Any person has been validly elected to the office of the President or Vice President.
b. The term of office of the President or Vice-President has ceased or
c. The office of the President or Vice-President becomes vacant.

The Constitution also established a clear appeal mechanism for offices of the President and Vice-President. Section 233 (1) e of the 1999 Constitution as amended provides that petitions shall lie as of right from the Court of Appeal to the Supreme Court in all matters emanating from the election. The composition of Court of Appeal for the purpose of election petition under S. 239 is at least three (3) Justices of the Court of Appeal[4].

The National Assembly Election Tribunal has the sole original jurisdiction to determine petitions as to whether any person has been duly elected as a Member of the National Assembly, the term

[2] OKONKWO V. INEC(2004)1NWLR(PT854)P.242
[3] Joshua A. E, (2011)***Practical Guide To Election Petition***, Diamond real Resources Consult, Abuja p.323
[4] S 239 (2) of the **Constitution** of the Federal Republic of Nigeria 1999 as Amended

of office of any person has ceased, the seat of a Member of the Senate has become vacant and any question or petition brought before the Election Tribunal was properly or improperly brought[5]. Appeal lie as of right to Court of Appeal which is the final court in this wise[6].

The Constitution also provides for a Governorship and Legislative Houses Election Tribunal for each state charged with the determination of election matters that concern elections into office of Governor, Deputy Governor or House of Assembly. The Tribunal shall to the exclusion of any other Court or Tribunal have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of the Governor or Deputy Governor or as a Member of any Legislative House[7]. Appeals from the Governorship and legislative House Election Tribunal lie as of right to the Court of Appeal[8] and to Supreme Court by virtue of S 233 (2) e of the 1999 Constitution as amended. The composition for both National Assembly Election Tribunal and Governorship and legislative Houses Election Tribunal is a chairman and two other members[9].

It must be borne in mind that Election Tribunals are assignment bound which presupposes that it is not a Tribunal or Court for all election related issues. Thus is in the case of DOUK POLAGHA V GEORGE[10], after the primaries conducted by the NRC, Mr. Ada George emerged as the winner to the dissatisfaction of the appellant. The appellant filed a petition challenging the election of the 1st respondent on the ground of irregularities at the primaries.

[5]Ibid S 285 (1)
[6]Ibid S 246 (3)
[7]Ibid S 285 (2)
[8] Ibid S 246 (1) c
[9]Ibid S 285 (3)
[10] (1992) 4 NWLR (pt 236) page 444

The election tribunal declined jurisdiction and the appellant appealed to the Court of Appeal. In dismissing the appeal, the Court of Appeal has this to say: *"An Election Tribunal is given exclusive power to hear and determine an election petition. However, the tribunal has no power to conduct "all trials" in respect of election nor does it make the election tribunal the authority for decision on preliminary matters before elections are held".*

Similarly, it has been held in chain of judicial authorities that Election Tribunal has no power to determine dispute over primary elections within the political party for the selection or nomination of candidate to contest election on the platform of parties. A petition must be brought under one of the grounds or such grounds, specified under the law, the intra-party complaint is not among such grounds[11].

It is evident in view of the foregoing that, the jurisdiction of Election Tribunal can only be activated if the substance of the petition is rooted among any of the recognized grounds for challenging an election.

2.3 PARTIES TO ELECTION PETITION

A person seeking to challenge the result of an election must be able to satisfy the election Tribunal that he falls within the categories of persons who have the right to challenge the election. The presenter of the petition is the petitioner and a person whose election is being challenged or a person who took part in the conduct of an election and whose conduct is being complained by the petitioner is referred to as the respondent.

Generally, under the various statutes that have been enacted in Nigeria on election petitions the following categories of persons have the right to go to court and present an election petition.

[11] NEC V NRC (1993) 1 NWLR (pt 267) P 20 MAIKORI V LERE (1992) 3 NWLR (pt 231) 525

i. A person who claims to have had a right to contest the election.

ii. A person who claims to have had a right to be returned as a winner at the election.

iii. A candidate at an election

iv. A political party.[12]

The important point to note however is that, each electoral law, makes provision for the category of persons that can file election petitions. S 137 (1) of the Electoral Act limits the right to bring an election petition to: one or more of the following persons:

a. A candidate in an election

b. A political party which participated in the election.

It must be appreciated that the right to contest an election is not a common law right. It is created by statute and anyone seeking relief under such a law must bring himself strictly within the provisions of the law.

In the case of NNAMANI V NNAJI[13], the Court of Appeal while allowing the appeal observed:

> *Once a petitioner indicates in a petition that he was a candidate, is enough to vest him with locus standi to sue. That is his right to sue because it is the capacity of the candidate which is the highest. A candidate who contested an election and failed does not need a further identification by way of descriptive words of a decorative or embellishing nature to sustain a cause of action in election petition. That he was a candidate at the election is enough right to sustain the action.*

The Act makes it compulsory that the person whose election is being challenged and any person who took part in the conduct of the election and whose conduct in that regard the petitioner has any complaint must be joined as Respondent(s)[14].

[12]AFE BABALOLA (2007) ***Election Law and Practice,*** Emmanuel Chambers, Ibadan, Vol. 1 pg 304.
[13](1999) 7 NWLR (pt 610) P. 313.

The Supreme Court in OBASANJO V BUHARI[15] comprehensively addressed the categories of necessary parties to an election petition including who is a necessary respondent to an election petition under section 133, Electoral Act 2002.

The three (3) issues raised for determination in that case were:

a. Whether or not P.D.P, the victorious political party which sponsored, funded and campaigned for its candidate is a statutory party in a petition challenging the election and alleging unlawful returns; and if not,
b. Whether PDP is not a necessary party having regards to the numerous allegations of misconduct made against PDP being participating political party.
c. Whether a candidate in an election and the party that sponsored him can be deemed to be one and the same for the purpose of a petition and whether or not the failure to consider the alternative prayers at all does not constitute a breach of Appellants right to fair hearing and thereby occasioning miscarriage of justice.

It is interesting to note that while section 133 (1)(a) and (b) (now section 137 (a)(b) Electoral Act, 2010 as amended) is concerned with those who can present an election petition, section 132 (2) (now section 137(2) Electoral Act 2010 as amended) deals with those who should be made respondents to the petition.

In trying to resolve the three (3) issues formulated above vis-à-vis section 133 of the Electoral Act 2002, the Supreme Court held per Iguh JSC thus:

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[14] S 137 (2) & (3), Electoral Act 2010 as Amended
[15](2002) 7 NWLR (pt 850) P. 510.

> *It is not disputed that the ANPP as a political party participated in the relevant election and was therefore properly joined as the third petitioner in the present petition. It seems to me plain also that the National Assembly which in their wisdom made express provision under section 133 (1) to the effect that a political party which participated in an election may present an election petition; deliberately omitted to make a similar provision in favour of such political party as a respondent under section 133 (2) of the Act. This omission on the part of the National Assembly for the inclusion of a political party as a respondent under section 133 (2) of the Electoral Act is clearly significant and worthy of note. In my view, it cannot be said that when the legislature enacted S 133 (2), they were oblivious of the provisions of sections 133 (1) of the Act. Accordingly, I am not prepared to accept that the legislature by S 133 (2) of the Electoral Act must be understood to have enacted that the joinder of a political party as a respondent in an election petition is mandatory and in default of which such petition is rendered in competent.*

Lastly, it is settled in array of judicial authorities that, where in an election petition, a particular respondent feels that he or she is improperly joined, it is the prerogative of the party or person to move the court or tribunal to strikeout his or its name. The petitioner can also move the tribunal to strike out a respondent that he or she feels is no longer wanted or required.[16]

2.3.1 JOINDER OF ELECTORAL OFFICERS

Where a petitioner complains of the conduct of an electoral officer, a returning officer or any other person who took part in the conduct of an election, the electoral officer, presiding officer, returning officer or that other person shall for the purpose of the law be deemed to be a respondent and shall be joined in the election petition as a necessary party[17]. These provisions are in agreement with the principle of joinder in law of a necessary party. A necessary party is a person, body or an institution who or which the petitioner must make a party in order to establish

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26 id

[17] section 133(2) of the Electoral Act, 2002 and section 144(2) of the Electoral Act, 2006

his cause of action and establish a nexus between him, the complainant and act complained of[18]. It has also being held that a necessary party to a petition is a person whose right will be affected by the order of the court[19].

In the case of EGOLUM V OBASANJO[20], an allegation of fraud and other electoral offences were made against certain electoral officers but were not joined as parties to the election petition. The Supreme Court held per Belgore JSC at page 397 as follows:

> *The principle of our law is that no person shall be guilty without being given the opportunity to defend himself. Every person against whom an allegation is made must be confronted with that allegation so that he can offer his defence that is the purport of section 50(2) of the Decree No.6 of 1999 (supra). The petitioner who complains that an Electoral officer, a returning officer or any other person involved in the election by conduct has vitiated the election must presume that officer etc as a necessary party and must make him a party. In paragraphs 9, 10, 12, 13, 14, 15, 16, 17, 18 and 19 of the petition, the petitioner made many serious allegation including fraud and other electoral offences, but the electoral officers, returning officers etc have not been made parties i.e respondents to the petition. This short coming in the petition made those paragraphs incompetent.*

A caveat must be sounded at this juncture that, it is not all electoral officers that must be joined in an election petition to make it competent. It is only those particular officers whom allegations are made against in the petition that are required to be joined in the petition. Thus in NZE V NWAWE[21], the Court held that since allegation were made against returning officers, it is not necessary that presiding officers be joined to the petition.

[18]JIDDA V KACHALLAH (1999) 4 NWLR (pt 599) at page 426
[19]TAFIDA V BAFARAWA (1999) 4 NWLR (pt 597) pg 70 (Case No. 99)
[20](1999) 7 NWLR (pt 611) pg 355.
[21] (1999) 13 NWLR (pt 635) pg 396 (Case No. 101)

However, it must be noted that where allegations were made without mentioning any official specifically, it be necessary to join all officials responsible for the election except such officials that cannot in any way be connected with such allegation made. This was the ratio in ODUKA V OKWARAJIA & 200 (1)[22].

The Supreme Court in the recent case of OBASANJO V YUSUF[23],restated the position of the law concerning joinder of electoral officers and security personnel at polling stations. The court held in that case, that if an election petition complains of the conduct of an electoral officer, a presiding officer, a returning officer or any other person who took part in the conduct of an election; such officer or person shall for the purpose of Electoral Act 2002 be deemed to be respondent and shall be joined in the election petition in his or her official capacity as a necessary party.

The Supreme Court further opined that where such an officer is not joined, the short coming will render the relevant paragraphs containing the allegation against the officer incompetent. The Court however pointed out that unnamed, unidentified and unassigned police and army personnel as well as political party agents and or thugs cannot be made parties to election[24].

It is to be appreciated that the Electoral Act 2010 as amended has placed the petitioner in a far more advantageous and important position so much so that he is no longer required to join copious INEC officials as she is deemed to defend any petition for herself and on behalf of its officers and therefore render the joinder of electoral officers, presiding officer or returning officer unnecessary.

[22] (1999) 4 NWLR (pt 597) Pg 35
[23](2004) 9 NWLR (pt 887) P. 14.
[24]id

For proper appreciation section 137(3) is herein reproduced:

> *If the petitioner complains of the conduct of Electoral officer, a presiding officer or returning officer, it shall not be necessary to join such officers or persons notwithstanding the nature of the complaint and the commission shall, in this instance, be*
>
> *(a) Made a respondent; and*
>
> *(b) Deemed to be defending the petition for itself and on behalf its officers or such other persons.*

In the recent case of BUHARI V OBASANJO (Supra), the Court of Appeal held that the principle of civil procedure on joinder and non joinder of necessary parties applies to election petition even though it is sui generis. Accordingly, it is necessary to join the electoral body where imputations are made against it. Even where there are no accusations of impropriety leveled against it, it is apt to join it to secure its obedience to the final order the court may make.

At the risk of sounding repetitive the new legal regime as encapsulated in S 137(3) of the Electoral Act has made it unnecessary to join electoral officers as they are deemed to be agents of their principal, i.e. the electoral body and the joinder of such electoral body is sufficient to enable the election tribunal/Court to assume jurisdiction. This new section has no doubt changed the principle of joinder in election petition and has provided succor to petitioners who would ordinarily have their petitions struck out for non joinder.

2.3.2 EFFECT OF NON JOINDER OF A NECESSARY PARTY

It is a trite principle of law that where a necessary party is omitted in a petition, the tribunal lacks jurisdiction to entertain the case as failure to join such a necessary party is fatal to the action and the defect is not curable.[25]

In LAMIDO V TURAKI[26], appellant contended that by virtue of section 33(2) of Decree No.3 of 1999 the non joinder of the presiding officers was not fatal to the petition as there were already deemed to be respondents to the petition and their non joinder did not affect the jurisdiction and competence of the tribunal to hear and determine the petition. It was also canvassed for the appellant that the tribunal ought to have used its inherent power and jurisdiction to *suomotu* order their joinder to enable it adjudicate the claim on the merits rather than striking out the petition on mere technicality. The Court of Appeal per Amaizu JCA (as he then was) while disagreeing with the above contention opined the *"provision means that the presiding officers are deemed to be respondents to the petition, and they must be joined"*.

There is however a change in the law relating to the effect of non joinder of an electoral officer, a presiding officer or a returning officer in an election petition under the electoral Act 2010 as amended. In section 137(3) of the Electoral Act, 2010 as amended, a provision has been added to section 133 (2) of Electoral Act, 2002, reenacted in that sub section. The provision is to the effect that it shall not be necessary to join the electoral officers, presiding officers, or returning officers as the electoral commission is deemed to defend the action for itself and behalf of its officers or such other persons. It therefore follows that the position of the law now is that the non joinder of electoral officer, presiding officers or returning officer is not fatal.

[25]TAFIDA V BAFARAWA (1999) 4 NWLR (pt 597) P. 70 and NNAMANI V NNAJI (1999) 7 NWLR (pt 610) 313 (Case No. 38)
[26] (1999) 4 NWLR (pt 600) p. 578

Although S 137(3), appears to have addressed the difficulty of having to include so much respondents thereby making the petition needlessly voluminous. It must be construed in the writer's opinion to cover only instances in which such electoral officers acted within the confines of their schedules. Where the activities of the latter transcends his instruction or schedules such as to when he is proved to have connived in and abated the perpetration of electoral malpractices, contrary to his official instruction, he should not be shielded by the commission but should be promptly and fairly tried and dealt with appropriately where his misdeeds were established at the state high court of the state where the alleged electoral offence took place or high court of the federal capital where offences were committed within the Federal Capital.

2.4 FILING OF THE PETITION

The procedure for filing an election petition depends on the law establishing the tribunal or Court and the election in issue. The Electoral Act, 2010 as amended just like the previous enactments on elections in Nigeria has introduced its own procedure which a petitioner must comply with before a competent petition could be validly filed. The filing of an election petition may be more stringent than of an ordinary civil suit.

Before any Election petition case is filed, one fact must be established; the election(s) must be conducted and declaration must be made thereby suggesting the petitioners are contending the return of the election as "Undue return or Undue Elections" where no election was conducted or declaration made there could never be a ground for the filling of a petition before any election tribunal. Where such is done the tribunal is bound to strike the petition out for want of jurisdiction[27].

[27] ADEBIYI V. BABALOLA (1993) 1 NWLR (pt 267) P. 1

In the recent case of JANG V DARIYE[28] the Court of Appeal held that the powers of election tribunal to entertain an election petition do not extend to matters that took place before the elections were held as such matters are categorized as intra-party affairs.

Paragraphs 37 of the 1st schedule to the Electoral Act provides thus:

(1) *The fees payable on presentation of an election petition shall not be less that N1000.00*

(2) *A hearing fee shall be payable for the hearing at the rate of N40 per day of the hearing but not exceeding N200 in all, but the Tribunal or Court may direct a different fee to be charged for any day of the hearing.*

(3) *For the purpose of sub-paragraph (2) of this paragraph, the petitioners shall make a deposit of not less than N2000 at the time of presenting his petition.*

(4) *Subject to the provisions of this paragraph, the fee payable in connection with an election petition shall be at rates prescribed for Court proceedings in the Federal High Court.*

On the issue of payment of fees at the Court/Tribunal registry once payment are made for the filing fees, then the petition could be said to be properly initiated. The registry of the court could take cognizance of the payment hence proceed with other administrative functions in trying to bring the petition proper before the tribunal.

The prima facie evidence of the payment is the receipt of payment being issued to the petitioner and then the registry will certify the petition filed. In filing an election petition before any election Petition Tribunal established under the Electoral Act, 2010 as amended, two things are of great importance. They are:

[28] (2003) 15 NWLR (pt 843) p. 436

(a) The time of presenting election petition.

(b) The payment of requisite fees. Needles to state that strict compliance with these two conditions/requirements is germane to the life line of the election petition.

2.4.1 FILING FEES

After the petitioner had presented his petition to the registry for filing, the Act has provided for the fees payable for the purpose of proper entry of petition. These fees are meant for:

i. Security deposit

ii. Fees for service and publication

iii. For certifying the copies of the petition

iv. Hearing fees[29]

It must be emphasized that where these fees are not paid or fully paid as at the time of filing the petition, the petition would be deemed as not properly filed and will be struck out. It is worthy to note however that among those scheduled fees, it is only security deposit whose non-payment would not be fatal to the petition or lead to the petition being struck out, rather the proceedings would be stayed until security deposit is fully paid[30], such default or non compliance was held to be a mere irregularity[31].

The issue of payment of filing fees or presentation fees had been held to be an issue that goes to the jurisdiction of the Tribunal not withstanding whose fault it would be[32]. Where an election petition is delivered to the Registry of election petition and fees not paid, the petition is deemed

[29] Paragraph 37 to the first schedule
[30] Paragraph 2 (4) to the 1st Schedule
[31] NWOBODU V ONUH (1984) ALNLR, VOL. 1
[32] MALAH V KACHALLAH (1999) 3 NWLR (pt 594) P. 309 at P. 313

defective and the tribunal lacked the jurisdiction to entertain the petition. The position is equally same where the issue is non adequate payment of fees.[33]

In OLANIYONU V PROFESSOR EMEAWA[34] the Court of Appeal per AKANBI JCA (as he then was) had this to say: *"The issue of payment of fees or security for cost is fundamental to the hearing of the petition. They are not mere matters of form. Without such payments, the petition has no leg to stand on, and it must necessarily collapse".*

From the above decisions of the Court of Appeal, it could be observed that the tribunals or Courts on election petition had developed a hard posture against any failure to pay fees at the appropriate time and in full. It is our humble view that, the Courts/Tribunals view is rather harsh and too technical as the Courts/Tribunals did not avert their minds to the nature and importance of the election petition from the jurisprudential aspect thereby occasioning grave injustice and defeating genuine election petition cases.

2.4.2 TIME FOR FILING ELECTION PETITION

One of the most important provisions in all the Laws relating to election petition tribunals is essentiality of time. The rationale or spirit of the various laws relating to election petition is that as much as possible, petitions should be given accelerated and expeditious adjudication to enable parties knows their positions and to equally enable the voters know the result of the election in which they had voted.

Reasoning along the line of this proposition above PATS-ACHOLORU JCA (as he then was) had this to say *"It is the intention of the legislators that parties stick strictly to the times stated in*

[33] REMI V SUNDAY (1999) 8 NWLR (pt 613) P. 92
[34] (1989) 5 NWR (pt 122) 493 P. 501 at 501 – 502.

the Decree. The Court could not help anyone who decided to sleep only to wake up when it is too late"[35].

It is important to note that compliance with statutory provision as to time within which to file an election petition is a fundamental pre-condition the breach of which had been held to be incurable. Thus, where the statutory provision has not been complied with, the Court has no jurisdiction to entertain the petition.[36]

In determining when to file an election petition, recourse must be had to the enabling statute in each particular case. Although the time frame vary from one legislation to another, the consequences of non compliance has remained the same. Under section 134 of the Electoral Act, 2010 as amended, an election petition must be presented within twenty-one (21) days from the date of the declaration of results of such election complained of.

In ALATAHA V ASIN[37], Local Government Election was conducted under the Local Government (Basic Constitutional and Transition Provisions) Decree No. 36 of 1998. Section 82 of the Decree provides as follows:*"An election petition under this Decree shall be presented within fourteen days from the date on which the result of the election is declared".*

The Court held that a petition presented outside fourteen days as prescribed by the statute will be statute barred. In this case the respondent raised a preliminary objection to the petition asking that it be struck out in *limine* for incompetence. The objection was premised on the fact that the return of the 1st and 2nd respondents was made on the 7th December, 1998 and the petition was filed on the 22nd December, 1998 which was more than 14 days after the return was made. The

[35]BALOGUN V ODUMOSU (1999) 2 NWLR (pt 592) P. 590 (Case No. 86).
[36]OTU V INEC (1999) 5 NWLR (pt 602) at 250
[37] (1999) 5 NWLR (pt 601) 32

Court of Appeal upheld this contention and struck out the petition on the ground that it lacked competence.

In LAMIDO V TURAKI[38], the court considered section 132 of the state Government (Basic Constitutional and Transition Provisions) Decree No.3 of 1999 which provides thus *"An election petition under the Decree shall be presented within 30 days from the date on which the result of the election is declared".* In this case the court held that the election petition presented over 50 days after the result of the election was announced was statute barred.

In MALAH V KACHALLAH (Supra) a petitioner was unable to file the petition within the statutorily prescribed time due to administrative problems. The Court of Appeal held that administrative difficulties encountered by the petitioner in the course of filing the petition cannot override the provisions of the law. Therefore since the respondents' petition was filed outside the time prescribed by the enabling statute, it is statute barred.

As sound as the above position might appear to be in respect of the computation of time, it is however important to note that the stark reality of what is obtainable in practice makes it almost impossible for a potential petitioner to benefit from the whole statutory time given to him due to so many factors.

There are times when a declaration may not even be made public until when days had ran out to the petitioner or when few days were left for the petitioner(s) to present petition. The petitioners in certain occasions find it difficult to get access to the declaration form to know the exact date of the declaration and figure or votes scored.

[38] (1999) 4 NWLR (pt 600) 578 (Case No. 89)

Although there is a mark improvement in the prompt declaration of result and access to same, it is the writer's humble view that the Electoral Act, 2010 be further amended to allow for extension of time to file a petition in cases where there are genuine and cogent reasons to grant such application. Election petition judges should imbibe the spirit of judicial activism in construction and computation of time rather than strictly adhering to the wordings of the statutes even when it is causing hardship and injustice.

2.5 TIME FOR HEARING AND DETERMINATION OF ELECTION PETITION

Before the advent of the present legal regime on electoral matters (ie Electoral Act, 2010 as amended) election cases and appeals there from took several years before conclusion. In most cases, the respondent (the incumbent) would almost serve out his tenure when final judgment was delivered, as witnessed in Ekiti and Osun States amongst others.

In an attempt to remedy the absurdity created by this unpalatable scenario, the legislature introduced section 285 (6) and (7) of the 1999 Constitution as amended. The subsections provide as follows:

> (*6) An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition*
>
> *(7) An appeal from a decision of the election tribunal or court shall be heard and disposed within 60 days from the date of delivery of judgment.*

The above provision of the Constitution is also adopted ipsissima verba by section 134 (2) and (3) of the Electoral Act, 2010. A literal interpretation of the foregoing provisions of the Constitution would no doubt assume the following meaning.

1. *An Election tribunal has no power whatsoever to sit beyond 180 days from the date of filing of the petition*
2. *An Appeal Court has no jurisdiction to entertain an appeal beyond 60 days from the date of the delivery of judgment of the tribunal appealed against.*

Thus by implication, once an election petition is filed or an appeal is lodged against the decision of an election tribunal, both Petitioner/Appellant, the respondents themselves as well as the tribunal itself would be counting days and dates because the matter should be determined on or before the expiration of the duration provided for by section 285 (6) and (7) of the 1999 Constitution as amended which is *impari* material with section 134 (2) and (3) of the Electoral Act 2010 as amended. One striking factor about these sections of the law is that they used the word "shall" which connotes an obligation and hence same is mandatory and must be strictly complied with[39]

Another Constitutional provision worthy of note herein is section 285 (8) it provides thus *"The court in all appeals from election tribunals may adopt the practice of first giving its decision and reserving the reasons thereto for the decision to a later date"*. Needless to state that a court that gives its decision and adjourn to another date to give reasons for its decision cannot be said to have concluded that matter until such reasons are given.

It is therefore submitted that in an election where the appellate court decides to deliver its decision and fixes another date to give the reason for that decision, it must perform that task within the stipulated 60 days allowed by Law [40].

[39] ONOCHIE V. ODOGWU (2006) 6 NWLR (pt 975) p. 65.

[40] PDP V CPC (2012) 4 WRN pg 1

2.5.1 ENLARGEMENT OF TIME FOR HEARING AND DETERMINATION OF PETITION

The question which may agitate the minds of some legal practitioners and stakeholders as regards this new legal regime on electoral matters is whether an election tribunal or appeal court can extend the time for its sittings in the interest of justice beyond the time prescribed by law. This question necessarily arises because respondents may with either bonafide or malafide intent pre-occupy the tribunal or court with preliminary objection and interlocutory application and in the process eat up into the time limit of the tribunal to hear and determine election petition cases.

It is not in doubt that paragraph 45 (1) of schedule 1 to the Electoral Act empowers the tribunal to enlarge time for doing any act or taking any proceedings on such term as the justice of the case may require. This provision, however, may not avail a tribunal which find itself running out of time as this paragraph is made subject to section 134 of the Electoral Act 2010 as amended which fixes the time limit of the tribunal[41].

Furthermore paragraph 45 (1) of schedule 1 of the Electoral Act is inferior to section 285 of the Constitution and thus cannot override the constitutional provision[42]. In the same vein, the said paragraph 45 of the first schedule to the Electoral Act is inferior to section 134 of the Electoral Act and thus cannot alter, override or supersede. Besides it is not a known legal norm that a court should extend its own life span in matters which have been fixed by law neither would an appellate court have such power either to grant such extension to a tribunal[43].

[41]PDP V CPC (2012) 4 WRN pg 1 at pg 11 R 3
[42] S. 1 ***Constitution*** of the FRN 1999 (as Amended)
[43]PDP V CPC (2012) 4 WRN pg 1 at pg 11 R 4.

It is submitted in view of the foregoing that extension of time is not in the contemplation of both section 285 (6) and (7) of the Constitution and section 134 (2) and (3) of the Electoral Act and therefore paragraph 451 cannot be used to express such intent or grant such an extension as meant to be used to grant extension of time only for procedural steps after election has been filed and such extension does not include the Tribunals life span.

2.5.2 EFFECT OF ORDER OF RETRIAL BY AN APPELLATE COURT

It is crystal clear that both section 285 of the Constitution and section 134 of the Electoral Act appear to be silent in situations where an appellate court orders for a retrial of an election matter de-novo. In this scenario how would the 180 days rule work? The answer to this novel issue in the humble opinion of the researcher is that where the tribunal rehearing the matter is reconstituted, 180 days should start afresh. This conclusion can be gleaned from the wordings of both section 285 (6) and (7) and section 134 (2) and (3) of the Electoral Act which use the word "election tribunal" as the subject. Thus a particular tribunal has no power to sit beyond 180 days. It would have been interpreted otherwise if the sections had read "a cause or matter filed in a tribunal shall be determined within 180 days of the date of filing of the petition". In this case, the "cause or matter" is the subject. Therefore an appellate court must of necessity order that a matter being remitted for trial de-novo shall be heard by a fresh panel so as to enable the new panel start a fresh count of the 180 days regulation.

There is no gainsaying the fact that this new legal regime is intended to cure the mischief occasioned by protracted litigation hitherto witnessed in electoral matters in Nigeria over the years. Thus it is intended to address the Marxim justice delayed is justice denied. However a serious caution and judicial activism need to be brought to bear least it becomes another means

of subverting justice in the name of speedy trial. The gubernatorial election petition of Benue State between the PDP and ACN and that of Dora Akunyili and Senator Christ Ngige where the petitioners for no fault of theirs have been told that their petitions have expired by reason of efluxion of time (180 days) are classical examples.

2.5.3 COMPUTATION OF TIME IN ELECTION PETITION

In determining whether or not an action is statute barred, it is important to determine first when time begins to run. In FADARE V. ATTORNEY GENERAL[44], the Supreme Court held that time begins to run when there is in existence, a person who can sue and another who can be sued and all facts have happened which are material to be proved to entitle the plaintiff to succeed.

Section 134 (1) of the Electoral Act, 2010 as amended provides thus: *"An election petition shall be filed within 21 days after the date of the declaration of results of the election"*. It therefore implies that the time of filing a petition is of the essence and any petitioner who decides to sleep is his own funeral as his action/petition would not be entertained.

The question that readily comes to mind is what is the status of the date of declaration of result, public holiday, Saturday and Sunday in the computation of time-for the purpose of election of petition? To answer this question recourse must be made to the Interpretation Act as the Constitution and Electoral Act are all silent about same. S 1 of the Interpretation Act[45] provides thus: "*This Act shall apply to the provisions of any enactment except in so far as the contrary intention appears in this Act or the enactment in question"*

[44](1982) 4 S.C.I.
[45] Cap I 23 LFN 2004

Equally worthy of note is section 15 (2) (9) of the Interpretation Act which provides thus: *"A reference in an enactment to a period of days shall be construed where the period is reckoned from a particular event as excluding the day on which an event occurs".*

Juxtaposing section 134 (1) of the Electoral Act 2010 as amended with the above reproduced section of the Interpretation Act would mean that the date of declaration of result is excluded in the computation of time being the day the event occurs. This interpretation has received judicial blessings in plethora of judicial authorities including the celebrated case of **YUSUF V. OBASANJO**[46] wherein the Supreme Court rightly observed that in computing time for the purpose of election petition, the date of the declaration of result is excluded in determining the time within which to file an election petition.

One would have expected that in line with our cherished doctrines of hierarchy of courts and principle of *stare decisis*, the issue of computation of time is settled by the Supreme Court but that is not to be as the Court of Appeal in most of its judgments has continued to hold the view that the date of declaration of result is included in computation of time and therefore must be reckoned with.

In the case of **ALATAHA V ASIN**[47]**, SALAMI JCA** observed as follows:

> *The time therefore began to run in this case on 7th December, 1998 when Exhibit 1 or R1 was issued declaring the 1st respondent as being the winner of the election" the time to sue was up on that day because from that date the petitioners could present their petition against the respondents and that all materials and facts required by them to prove their case had happened. Since the appellant had only 14 days from the return date to present their petition by virtue of section 82 of Decree 36 of 1998, the petition*

[46] (2004) 9 NWLR (pt 877) P. 144

[47] (1999)5 NWLR (Pt601) P.32

> *must be presented any day between, 7th December, 1998 and 21st December, 1998 otherwise they are out. The petition presented on the 22nd December, 1998 is out of time or statute barred*

More recently the Court of Appeal in its continued recalcitrance and utter disregard to the doctrine of *stare decisis* and hierarchy of court further opined in the case of **SULE V. KABIR**[48] thus:

> *"The Electoral Act which is the relevant statute of limitation in respect of time limit within which an election petition may be presented, filed or brought before an election tribunal provides in S 141 thereof that an election petition shall be brought within 30 days from the date the result of the election is declared. The above provisions are clear and unambiguous such that there is no need for resort to any external aid in their interpretation the 30 days provided in the provision of S. 141 of the Electoral Act, 2006 within which an election may be presented would be computed from the date the result of the election in question was declared. In other word time would start to run for the purpose of computing period of time prescribed or limited by the section from the date the result of the election was officially declared by the Electoral body".*

In what appear to be a confusion within one untied house, the Court of Appeal Calabar Division in the recent case of IMERH V OKON[49] while citing the case of AKEREDOLU V AKINYEMI opined in essence that the date of the happening of an event i.e declaration of result must be excluded in computing the time within which to file a petition.

Although this recalcitrance has created confusion amongst most election petition practitioners as to who to follow or which computation to use as previously not all appeal get to the Supreme Court. However following the amendment to the 1999 Constitution, section 233 of the Constitution appeared to have made Supreme Court the final court for both Presidential and

[48] (2010) 2 WRN p. 21
[49](2012) 3 WRN pg 179 at 181 R 2.

Gubernatorial Elections while the wordings of section 141 of the Electoral Act 2006 has been amended and reworded in section 134 (1) of the Electoral Act 2010 as amended which makes it less likely for any confusion. Section 134(1) provides that *an election petition shall be filled within 21 days after the date of the declaration of results of the elections*.

2.5.4 PLACEMENT OF PUBLIC HOLIDAY, SUNDAY AND SATURDAY ON COMPUTATION OF TIME

Section 15 (3) of the Interpretation Act appears to have provided a clue on the placement of public holidays in computation of time. It provides thus: *"Where by an enactment any act is authorized or required to be done on a particular day and that day is a public holiday, it shall be deemed to be duly done if it is done on the next following day which is not a holiday"*.

Section 15 (5) of the Interpretation Act, defined the term public holiday to mean: *"A day which is Sunday or public holiday"*. It is noteworthy that the term "public holiday" has a wider meaning under the public Holidays Act[50] to include:*" Any day declared as a work free day"*.

The days mentioned in the schedule to the public Holidays Act set to be kept as public holiday throughout Nigeria include[51]:

a) New year day

b) Good Friday

c) Easter Monday

d) Worker's day (1st May)

e) Democracy day(29th May)

f) National Day (1st October)

[50]S.2(3) ***Public Holidays Act*** CAP. P40 VOL 14 LFN 2004
[51] Id

g) Christmas day

h) Such day as the minister may declare to be a public holiday in celebration of the Muslim festival of Idel Fitr.

i) Such day as the minister may declare as public holiday in celebration of the Muslim festival of Idel Kabir

j) Such day as the minister may deem to be a public holiday in celebration of Prophet Mohammed Idel Maulud.

In addition to the days mentioned in the scheduled to the public Holidays Act, the President of the Federal Republic of Nigeria may appoint special day to be a public holiday either throughout Nigeria or in any part thereof[52]. Also the Governor of a State in Nigeria may appoint special day to be kept as a public holiday in the state concerned or in any part thereof[53].

It is evidently clear from the provisions of Interpretation Act and public Holidays Act that where the last appointed day for doing an act falls on a Sunday or public holiday, the day following the public holiday shall become the last day.

The Interpretation Act and public Holidays Act are all silent on the status of Saturday in computation of time as none of the Acts expressly include same as a public day or a work free day. However judicial authorities are bound on the placement of Saturday in computation of time. In **KAIGAMA V. INEC**[54], Achike JCA (as he then was) had this to say:

> *Sundays and public holidays having been expressly mentioned as holidays i.e. non dies, it follows that the other days in the week including Saturday are excluded from the terminology of a holiday. Consequently the provisions of sub-section 15 cannot operate in*

[52] Section 2 (1) Public Holidays Act
[53] Section 2 (2); ibid
[54] (1993) 3 NWLR (pt 284) 681 AT 710

favour of the tribunal to deliver its judgment on Monday, 5th October, 1992. That judgment has expired on 3rd October, 1992, Saturday.

In **BALOGUN V. ODUMOSUS**[55], the Court of Appeal considered the issue whether Saturday, 19th December 1998 is a public holiday under section 15 (5) of the Interpretation Act and section 1 of the public Holidays Act for the purpose of taking procedural steps in election petition proceedings and held per IGE J.C.A. as follows: *"Saturday under the enabling laws in respect of election petition is neither a public holiday nor a work-free day. The petition ought to have been filed latest by Saturday the 19th December, 1998 and not Monday 21st December, 1998".*

It can therefore be submitted that Saturday is not a public holiday and in computation of time is normally reckoned with. Consequently a petitioner who treats Saturday otherwise would have himself to be blamed as the petition may be statute barred.[56]

It must be borne in mind that the issue of exclusion of Sunday or public holiday is only relevant where the last day falls on either of those days. However in computing the days allotted for a tribunal or appellate court, Sunday, public holiday and even court vacation are computed in ascertaining whether or not the time allotted has expired or otherwise.[57] It is advocated that it is not fair to include public holidays and court vacations in the computation of time same being work free days.

[55] (1999) 2 NWLR (pt 592) P. 590 at 597
[56] Id.
[57] PDP V CPC (2012) 4 WRN pg 1

2.6 CONTENTS OF A PETITION

An election petition being "sui generis" in its nature, the contents of the process of the court differs from that of an ordinary writ filed before a regular court meant to initiate an ordinary civil suit. The contents of an election petition had been provided under the various Laws and Decrees that governed the previous elections. The contents and grounds of election petition have remained almost the same with few differences, that is to say the provisions of the legislations in terms of what the election petition should contain has been similar and also the wordings are almost identical.

Paragraph 4 of the 1st schedule to the Electoral Act, 2010 as amended provides:

a. An election petition under this act shall:

i. Specify the parties interested in the election;

ii. Specify the right of the petitioner to present the election petition;

iii. State the holding of the election; the scores of the candidates and

iv. State clearly the facts of the election petition and the grounds on which the petition is based and the relief sought by the petitioner.

b. The election petition shall be divided into paragraphs each of which shall be confined to a distinct issue or major facts of the election petition; and every paragraph shall be numbered consecutively.

c. The election petition shall further-

a) Conclude with a prayer or prayers; as for instance, that the petitioner or one of the petitioner be declared validly elected or returned, having polled the highest number of lawful votes cast at the election or that the election may be nullified; as the case may be; and

b) Be signed by the petitioner or all petitioners or by the solicitor, if any, named at the foot of the election petition.

d. At the foot of the election petition there shall be stated an address of the petitioner for service at which address documents intended for the petitioner may be left and its occupier.

1. (i) The election petition shall be accompanied by:

a) A list of the witnesses that the petitioner intends to call in proof of the petition.

b) Written statement on oath of the witnesses; and

c) Copies or list of every document to be relied on at the hearing of the petition;

(ii) A petition which fails to comply with sub-paragraph (i) of this paragraph shall not be accepted for filing by the secretary.

2. An election petition, which does not comply with, sub paragraph (5) of this paragraph or any provision of that sub paragraph is defective and may be struck out by the tribunal or court.

Some courts have held that strict compliance with the provisions of the above quoted law was mandatory and failure to comply with it, could render the petition incompetent and liable to be struck out. In the case of KHALIL V YAR'ADUA[58], it was held that although some of the requirements may be dispensed with; there are other requirements that could not be dispensed with e.g. scores of the candidates, the person returned as the winner.

[58] (2003) 16 NWLR (pt 847) 446 at P. 486 – 488 Paragraphs D – A

It should be noted that sometimes the effects of the provisions may have to do with the facts and circumstances of each case, for example where the scores are not in issue then the failure to state the scores may not necessarily affect the competence of the petition[59].

However, this argument has been laid to rest in the case of BUHARI V YUSUF[60], as the Supreme Court clearly held that, the only mandatory requirement of scores of the persons to be stated in the petition are, the scores of the petitioner and the winner, who was sued as the respondent.

Therefore, all competent election petitions must contain the following:

(a) The parties in the petition;

(b) The right of the petitioner to present the petition.

(c) The holding of election

(d) The scores of the candidates and the person returned as the winner

(e) State clearly the facts of the election petition

(f) The grounds upon which the petition is based

(g) the prayer(s) or relief(s) sought by the petitioner

(h) The paragraphs of the petition must be numbered consecutively

(i) The petition must be signed at the foot of the petition by the petitioner or his solicitor.

(j) The petitioner shall state his address of service within the judicial division where the court Registry is situated.

[59]OWURU VS INEC (1999) 10 NWLR (pt 622) P. 201
[60] (2003) NWLR (pt 841) P. 446

Needless to state that, failure to comply with the above stated provisions; which are conditions precedent to proper and valid presentation of a petition will render the petition a nullity. In EFFION V IKPEWE[61], the court further held that where a petitioner failed to comply with the mandatory provision of paragraph 5 of schedule 5 to Decree 36 of 1998 (now paragraph 4 of schedule 1 of Electoral Act 2010 as amended) the petition becomes void and therefore a nullity and every proceeding which is founded on it is incurably defective.

It is instructive to note that any petition which fails to specify any of the mandatory matters cannot be amended once an omission of any of the mandatory requirements has been raised in a legal challenge with the aim of establishing the incompetence[62]. It simply means that once the defect is put to test before the Tribunal, the petitioner would not be allowed the luxury to amend his petition.

However, before such an objection is raised in a court or tribunal, the court or Tribunal may allow an amendment sought on those mandatory requirements provided the application is brought within the time limit allowed for amendment. This was the view of the court in EZEOBI V NZEKA[63]

2.7 GROUNDS FOR CHALLENGING AN ELECTION

This is the backbone of the entire election petition; it is the bedrock for the hearing, sustenance and determination of the complaint made by a person who has the locus to institute an action challenging any election. In a more concise term, the grounds for petition are the series of complaints or allegations to be advanced by a petitioner before an election Tribunal/Court

[61] (1999) 6 NWLR (pt 606) P. 260
[62] ABIMBOLA V ADEROJU (1999) 5 NWLR (pt 601) P. 100 (Case No. 105)
[63] (1989) 1 NWLR (pt 98) P. 478 at P. 487.

challenging the conduct of an election or the return of a candidate in an election[64]. It is pertinent to state here that, the ground(s) of filing an election petition must be one of those recognized by the Electoral Act or the Constitution and must be related to or must have arisen out of acts or omissions that were contemporaneous with the conduct of an election[65]. Where the grounds have not fallen within the stipulated ground(s) recognized by the Electoral Act or Constitution, the entire petition will be incompetent and therefore liable to be struck out.

By virtue of 138 (1) of the Electoral Act, 2010 as amended, an election may be questioned on any of the following grounds:

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 provision 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 unlawfully excluded from the election.

In addition to the four grounds of petition listed in S 138(1) of the electoral Act, 2010 as amended, the Supreme Court in OBASANJO V YUSUF[66] has stated that the provisions of sections 239(1) (a) and 285(1)(a) and (2) of the 1999 Constitution as Amended has created additional respective ground for questioning the election of the President or the Vice-President,

[64] OGUNJINMI A, A (1997) **Practical Approach to Election Petition Procedure in Nigeria**, Ogunniyi Printing Works, Ogbomoso Vol. 1 pg 47
[65] ADEREMI O, (2006) **Electoral Law and Practice in Nigeria**, Aderemi Olatubora& Co, Akure, P. 84.
[66] (2004) 9 NWLR (pt 877) 144

Member of National Assembly, or Governor or Deputy or Member of any state House of Assembly. The relevant provisions of the Constitution are as follows:

239 (1) *Subject to the provisions of this Constitution the Court of Appeal shall, to the exclusion of any other Court of law in Nigeria have original jurisdiction to hear and determine any question as to whether:*

(a) Any person has been validly elected to the office of the President or Vice President under this Constitution; or

285 (1) There shall be established for the federation one or more election tribunals to be known as the National Assembly Election Tribunals which shall to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether:

(a) Any person has been validly elected as a member of the National Assembly;

(b) ……..

(2) There shall be established in each state of the federation one or more election tribunals to be known as Governorship and legislative Houses Election tribunal which shall, to the exclusion of any other Court or Tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of the Governor or Deputy Governor or as a Member of any legislative House.

In OBASANJO V YUSUF; the principal relief out of the four claimed by the petitioner read: *"IT MAY BE DETERMINED that the 1st respondent was not duly or validly elected and or returned as the president of the federal Republic of Nigeria pursuant to the election held on 19th April, 2003".*

The Supreme Court held that the ground stated above fell entirely within the scope of section 239(1)(a) of the Constitution and was completely outside the 4 grounds stipulated under section 134(1) of Electoral Act, 2002 (now section 138 (1) of Electoral Act, 2010 as amended). Furthermore, the court noted that it was an act of good draftsmanship that the Electoral Act, 2002 did not attempt to repeal the provisions of section 239 (1) (a) of the Constitution, because if it had done so, it would have been declared inoperative, null and void[67].

It therefore follows that in view of the above decision, a petitioner may choose to either come under the grounds stipulated in the Constitution or under S 138 of the Electoral Act 2010 as amended. For a complaint against a return or election to be competent, it must be a complaint cognizable either under relevant provisions of the Constitution or the Electoral Act[68].

In OGBORU V IBORI[69] it was held that section 134 of the Electoral Act, 2002 the equivalent of section 138(1), of the Electoral Act, 2010 as amended did not make "irregularities" one of the grounds for challenging an election. The word "irregularities" was in that case stated not to be in any sense synonymous with corrupt practices or non-compliance which was one of the specific grounds set out in that section. Thus paragraph 4 of the petition in that case questioned the election on the ground of "irregularities" was held to be unknown to the Electoral Act, 2002 and

[67] Ibid P. 182
[68] ADEREMI O. (2006**) Electoral Law and Practice in Nigeria**, AderemiOlatubora& Co, Akure at page 86.
[69] (2004) 7 NWLR (pt 871) P. 192

consequently struck out. It is the writer's opinion that anyone who desires to make irregularities as an issue in election petition must bring it in context of either non compliances or corrupt practices.

For the purpose of convenience and ease of reference, the statutory grounds as discussed above can be classified into two viz:

(a) The ground complaining of the "undue election"

(b) The ground complaining of the "undue return"

The grounds complaining of undue election can be sub-classified into:

i. Grounds touching on non-compliance with the relevant provision of the electoral law/irregularities.

ii. Grounds touching on corrupt practices/offences against relevant electoral law; and

iii. Grounds touching on the exclusion of a candidate validly nominated from contesting an election.

The grounds complaining of the undue return can be classified into:

i. Grounds touching on the qualification and disqualification of a candidate; and

ii. Grounds asserting that the respondent was not duly elected by majority of lawful votes at the election[70].

[70] OGUNJINMI A, A. (1997) **Practical Approach to Election Petition Procedure in Nigeria**, Ogunniyi Printing Works, Ogbomoso, Vol 1. P. 48 - 49

2.8 CONCLUSION

It is hoped that this chapter has laid down a formidable foundation for appreciating the theme of this research to wit: An Appraisal of the Requirements of Proof in the Hearing and Determination of Election Petition in Nigeria. There is no gainsaying that, there has to be a competent petition before a competent Tribunal/Court before any step could be taken in proof of such grounds of election petition as are discussed in chapters 3, 4 and 5 of this thesis. As preliminary and simple as they items discussed under this chapter may appear, they have cost many election petition cases that would have made a difference to our electoral jurisprudence and post-election judicial process.

CHAPTER THREE

PROOF OF NON COMPLIANCE AND CORRUPT PRACTICES

3.1 INTRODUCTION

One of the grounds for challenging an election by way of election petition as encapsulated in section 138 (1) of Electoral Act, 2010 as amended is that "the election was invalid by reasons of corrupt practices or noncompliance with the provision of this Act". There is no gainsaying that allegation of noncompliance with the Electoral Act or of corrupt practices in connection with an election will, almost invariably, if proved or established, lead to the return of invalid votes.

Needless to equally state at this juncture that, the whole essence of the Electoral Act is to ensure conduct of an election based on democratic principle with all the dramatic personae playing their roles in accordance with that law, with the political parties presenting qualified candidates and the election properly conducted by the Electoral officers in accordance with the applicable law and regulations so that good governance at that level thereafter can be ensured to avoid wasteful cancellation of election and fresh election occasioned by any misconduct or malpractices of the electoral officers in charge[1].

To successfully prove any of the grounds of challenging an election petition under section 138 of the Electoral Act 2010 as amended the concepts of burden and standard of proof need to be understood and appreciated. Burden and standard of proof are twin expressions in the adjectival law of proof in evidence. In their twin relationship they both jointly enhance proof of cases in court.

[1] OGUNJINMI A, A. (1997) ***Practical Approach to Election Petition Procedure in Nigeria***, Ogunniyi Printing Works, Ogbomoso, Vol 1. P. 50

The party on whom the burden of proof lies has the obligation to persuade the court in the best tradition of advocacy of the veracity or authenticity of the fact he relies upon. In order to satisfy or discharge the obligation he must adduce enough evidence to push the pendulum to his side[2].

This automatically raises the fundamental question of weight or quality of the evidence. The weight and quality is the standard or quantum of proof[3]. From the point of view of court's role of evaluation of evidence, this is what is akin to what the court called imaginary scale in Mogaji v Odofin[4]

The question that necessarily arises at this juncture is what is 'proof'? In the case of AGBALLAH V. CHIME[5] the Court of Appeal sees proof as: *"denoting the establishment or refutation of an alleged fact by evidence; the evidence that determines the judgment of a court. Proof also means a process by which the existence of facts is duly established or disproved to the ultimate satisfaction of the court or tribunal*"

In this chapter we shall embark on a detail analysis of these two grounds merged together as one ground with a view to ascertaining how they can be proved for the purpose of succeeding or defending an election petition cases in Nigeria.

3.2 NON COMPLIANCE

The term "noncompliance" has not been defined in any part of the Electoral Act and this has left us with no choice than to look for its meaning outside the Act. Noncompliance with the Electoral Act in relation to an election may be defined as the conduct of an election contrary to the

[2] BABALOLA A(2007) Law and Practice of Evidence in Nigeria, Sibon Books ltd, Ibadan P.275
[3] Id
[4] (1978) 3sc p.91
[5] (2009) 1 NWLR (pt.1122) p.384

prescribed mode under the Act or rules and regulation made there under. Noncompliance may result not only from the degree of, but also from the nature of the complaint; and the question in every case is, whether or not in view of the findings, the constituency or state as such was allowed to elect its representative[6]

In the case of OJUKWU V. YAR'ADUA[7] the Supreme Court defines compliance thus:

> *Compliance, ordinarily, is an act of complying or acting in accordance with the wishes, requests, demands, requirements, conditions or orders. It is an act of yielding or conforming to the requirements or order. It is also an act of submission, obedience and conformance. On the other hand, noncompliance is a reversal of all what compliance is*

The Electoral Act, 2010 as amended for instance in PART IV provides for the rules for the conduct of election in what it terms "**procedure at election**". The rules address inter alia; the hour of poll[8], issue of ballot paper[9],mode of queuing[10], conduct of poll by open secret ballot[11], one man one vote[12], ballot not to be marked by voter for identification[13]; conduct at polling station[14]; closing of poll[15]; counting of votes and entering of scores in prescribed forms"[16], recount, collation of result[17,] rejection of ballot paper without mark[18], endorsement on rejected ballot[19], declaration of result[20] among other procedures. It is required that these rules and

[6] NWOLE V IWVAGWU (2004) 15 NWLR (pt 895) P. 61
[7](2008) ALL FWLR (Pt 408) p. 1409.
[8] S. 47
[9] S. 49
[10] S. 51
[11] S. 52
[12] S. 53 (1)
[13] S. 54
[14] S. 61
[15] S. 62
[16] S. 63
[17] S. 64
[18] S. 65
[19] S. 66

regulations should be complied with. Failure to comply with or deliberate disregard of any of these rules would constitute an instance of noncompliance with the Electoral Act and therefore likely to be a basis for an election petition founded on non compliance.

Generally, where in an election petition a petitioner makes an allegation of noncompliance with the Electoral Act; as a basis or foundation of his case, he has a duty and heavy one for that matter to show the tribunal cogent and compelling evidence that the alleged noncompliance is of such a nature as to affect the result of the election. This is the net effect of S 139(1) of the Electoral Act, 2010 as amended which is hereunder reproduced for proper appreciation viz:

> 139 (1) *An election shall not be invalidated by reason of noncompliance with the provisions of this Act, if it appears to the Election tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the noncompliance did not affect substantially the result of the election.*

The implication of the above provision of the Act is that for an election to be upheld by the court as a valid election, it must have been conducted in substantial compliance with the law. If it is not thus conducted, the election would be held to have been conducted in substantial non compliance with the law and therefore must be voided. To determine whether an election was conducted in substantial compliance or substantial non compliance, the requirements of substantial compliance must first of all be determined. It is when they are so determined that a challenged election would be squared against the requirements it must meet before it is upheld as validly conducted. If it is thus squared and it meets the requirements, it was an election conducted in substantial compliance with the law and therefore must be upheld as valid and if

[20] S. 69

vice versa, then it is an election conducted in substantial non compliance with the law and therefore must be voided[21]

The question that naturally follows is, what misconduct or noncompliance will a court or an election tribunal regard as amounting to substantial in relation to an election? Worst still, "substantial noncompliance and what substantially affects the result of an election" are not defined or explained in the Act. These have indeed made them not capable of clear and precise definitions.

The court in the case of VICTOR MIERE V HELEN SALAMI & ORS[22] appreciating the difficulty as highlighted above postulated that, it is an issue of fact to be determined by the facts and circumstance of each individual case and not that, it is capable of any ascertainable gauge. This is what the court had to say:

> *They can only as issues of fact be taken from the sum totality of direct and inferential evidence from the circumstance of any particular case, including state of pleadings, the credibility of the petitioners/appellant's position, the nature of the substance of the allegation in the petition, the attitude of the election functionaries, assessed objectively and where their omissions and commissions were deliberately designed to reflect the true course of the election in support of a preferred candidate, the attitude and discipline of the electors, including the politics and preferences, should be taken into account in determining whether or not the election was conducted in substantial compliance with the Decree and with the schedule rules.*

[21] Usman A .K: Buhari V. Obasanjo: Law and Justice on the Cross. Ahmadu Bello University, Zaria, Journal of Public and International Law. P.147
[22] (1989) 2 NEPLR, 131 at pg 161

In the case of BASHEER V SAME[23], the Court of Appeal held that the non-compliance complained of was not only substantial but also affected the results of the election as to warrant its nullification. ADIO JCA (as he then was) put the point succinctly:

> *In this case the electoral officers who were bound by the provisions of Decree No. 50 of 1991 to accept copies of the result in the nine polling stations aforesaid and to include the votes recorded for each candidate therein in the determination of the final result, unjustifiably and unlawfully rejected the aforesaid results from the said nine polling stations. The votes recorded in the aforesaid results in the nine polling stations showed that majority of the electors who voted did so in favour of the petitioner but the failure by him to secure a majority of valid votes was due to the aforesaid noncompliance with the relevant provisions of Decree No.50 of 1991 in the part of the electoral officers, for that reason, the election in question in this petition is bad, it is invalid and is hereby nullified.*

It must be stressed that the failure to hold a poll in a polling station may invalidate election in an entire constituency; if the failure would substantially affect the result of the election. This will be so, for instance, if the majority votes of the respondent in the results declared is likely to be upset by the number of registered voters in the areas where no voting has taken place[24]. Also, the courts will not hesitate to declare an election invalid if the name of a candidate who has withdrawn is included on the ballot paper and the number of votes given to the candidate might affect the results[25]. However, failure to open or close the poll at a polling station at the correct time will not invalidate an election if it can be shown that the result was not affected[26].

[23] (1992) 4 NWLR (pt 236) 491 at P. 505 - 506
[24]OPUTEH V ISHIDA (1993) 3 NWLR (pt 279) P. 34
[25]WILSON V. INGHAM (1895) 64 L.J.Q.B. P. 775 DC
[26] AFE BABALOLA (2007) ***Election Law and Practice,*** Emmanuel Chambers, Ibadan Vol. 1 P. 431

In ENGR ALHAJI MOGAJI ABDULLAHI V ALHAJI KABIR IBRAHIM GAYA & 2 ORS[27] it was held that *"The court or tribunal must consider the effect of irregularity, breach or any other infraction as to whether it has defeated the principle of fairness and regularity in the election according to the law applicable".*

Although noncompliance with Electoral law or rules simpliciter would not invalidate an election, the court would not hesitate to declare an election invalid where there is a serious violation of electoral rules. In the case of NGWU V MBA[28,] where the results of an election were announced before the records showing the votes scored by the candidate reached the place where the results were announced, the Court of Appeal affirmed the decision of the lower court nullifying the election. FABILYI JCA who delivered the leading judgment stated;

> *I am at one with the learned senior counsel submission where he pointedly remarked as follow: the results of an election were announced before the record showing the votes scored by the candidate reached the place where the result were announced is such a serious violation of the rules of conduct of an election that no reasonable tribunal can adopt a course of action, other than nullifying the election.*

It appears now that noncompliance with the Electoral Act is not restricted to only a breach of the Act, but will extend to all acts capable of placing obstacles on the way of obstructing willing voters. This is the view of the court of Appeal in NWOLE V IWUAGWU[29], where the court of Appeal held that it is not only the breach of Electoral Act that constitutes noncompliance. All acts capable of placing obstacles on the way or obstructing willing voters and candidates are acts of noncompliance.

[27] (1992) 2 N.E.P.A.R. 214 at P. 255
[28] (1999) 3 NWLR (pt 595) P. 400
[29] (2004) 15 NWLR (pt 895) 61

ABDULLAHI, P.J.A in BUHARI V OBASANJO[30] brilliantly and scholarly summarized the principle guiding nullification of election on ground of noncompliance with the Electoral Act when he opined:

> *That an election ought not be voided by reason of transgressions of the law committed without any corrupt motive by the electoral officials if the tribunal is satisfied that notwithstanding those transgressions, an election was really and in substance conducted under the electoral law, and the result of the election was not and could not have been affected by the transgressions. If on the other hand the tribunal sees that the effect of the transgressions was such that an election was not really conducted under the existing election laws, or it is open to reasonable doubt whether those transgressions may not have affected the results, and it is uncertain whether the candidate who has been returned has really been elected by majority of persons voting in accordance with the laws in force relating to elections, the tribunal is then bound to declare the election void*.

In other words, if at the end of the case of the petitioner in an election petition, a case of noncompliance is established which may or may not affect the result of the election and it is impossible for the tribunal to say whether or not the results were affected by the noncompliance established unless there is evidence on behalf of the respondent that such noncompliance as found could not and did not affect the result of the election, then the petitioner will be entitled to succeed on the simple ground that civil cases are proved by a preponderance of accepted evidence.

It must be noted that the principle that unless the result of an election is materially affected by an irregularity would not be set aside is not peculiar to Nigeria alone. In the United States, "a successful challenge must prove that the irregularities changed the result of the election"[31]

[30] (2005) 2 NWLR (pt 910) P. 241
[31] Weinberg, B. H. (2006) ***The Resolution of Election Disputes***, IFES, Washington DC P. 17

3.3 BURDEN OF PROOF OF NON COMPLIANCE

The burden of proof in an election petition is on anyone questioning the results of an election to establish his claim. Thus a petitioner in an election petition who alleges in his petition a particular noncompliance must satisfy the court/tribunal that the noncompliance is substantial and affects substantially the result of the election. The position is based on evidential principle that he who assert must prove.[32]

In BUHARI V OBASANJO[33] the Supreme court held that, where an allegation of non compliance with the electoral law is made, the onus lies on the petitioner firstly to establish the substantial noncompliance; and secondly that the non compliance did or could have affected the result of the election. The onus will only shift after the petitioner has established the noncompliance, to the respondent whose election is challenged to establish that, the result was not affected after all. The Supreme Court further opined that where a petitioner makes noncompliance the foundation of his complaint he is fixed with a heavy burden to prove before the tribunal by cogent and compelling evidence *"that the noncompliance is of such nature as to affect the result of the election"*.

In UGHAMADU V NDIBE,[34] the court observed thus:

> The onus is on the petitioner who is alleging noncompliance with a particular provision of the law to prove his case. He is expected to establish the following:
>
> *i. That there was noncompliance with the provisions of the Electoral law. He must state the provision of the law and the noncompliance therefore.*

[32] S 131 of the ***Evidence Act***, 2011.
[33] (2005) 50 WRN P. 1
[34] (2010) 46 WRN pg 55

ii. *That the noncompliance complained of affected substantially, the result of the election. That is, he must state that if not for the noncompliance the petitioner would have won the election. Also he must state that the noncompliance have deprived the petitioner of valuable votes that could have accrued to him in the election.*

In the case of MASKA V IBRAHIM[35], where the petitioner alleged inter alia that the vice-chairman elect of a local government was an ex convict; the Court of Appeal held;

> *A person who alleges must prove the substance of his allegation. In the instant case, since the identity of the 2nd respondent vis-à-vis the vice chairman elect is put in issue, it is the duty of the appellant to prove same on the balance of probabilities. The appellant have failed to discharge this duty to show that the vice-chairman elect is the same person as Shehu Maska, who was established on the record to have been convicted.*

Also in the case of AONDOAKA V AJO[36] where the respondent alleged that PW1 is an impersonator but did not put the question to him under cross examination, the court of Appeal held that the respondents failed to discharge the onus put on them under the law.

The view of Mohammed J.C.A in the case of ABBA V JUMARE[37] on the issue of onus of proof of an allegation is very instructive. The learned justice of the Court of Appeal posited thus:

> *The trite law is that where there is an allegation of the existence of a particular fact, it is the duty of the person who alleges to prove his allegation. S. 135 (1) of the Evidence Act States: whoever desires any court to give judgment to any legal right or liability dependent on the existence of the facts which he assert must prove that those facts exist.*
> *Thus since the appellants asserted non compliance with the provisions of section 11(1) (f) of the Decree, they ought to have*

[35] (1999) 4 NWLR (pt 599) p.415
[36] (1999) 5 NWLR (pt 602) 206
[37](1999) 5 NWLR (pt 602) p.270

> *proved payment of salary in lieu of resignation 30 days before the election date. I agree with the tribunal that the non production of the receipt PW3 stated in his evidence in chief he issued to the 1st respondent on 23/11/1998, as exhibit at the trial is indeed fatal to the petition. Further, where a party refused to produce evidence that is material which is required to prove certain facts which are within the knowledge of a witness as is the case here, it is presumed that such evidence if adduced will be unfavourable to the person withholding it.*

Similarly, BELGORE JSC (as he then was) appeared to have summarized the applicable principles when the court or tribunal is confronted with the question of burden of proof in election petition cases. Justice Belgore in interpreting section 135 (1), Electoral Act 2002 (which is *impari materia* with section 139 (1) of the Electoral Act, 2010 as amended) in BUHARI V OBASANJO[38] opined as follows:

> *It is manifest that an election by virtue of section 135 (1) of the Act shall not be invalidated by mere reason it was not conducted substantially in accordance with the provisions of the Act, it must be shown clearly by evidence that the noncompliance substantiality has affected the result of the election. Election and its victory, is like soccer and goals scored. The petitioner must not only show substantial noncompliance but also the figures. i.e. votes that compliance attracted or omitted. The elementary evidential burden of "the person asserting must prove has not been derogated from by S. 135(1). The petitioners must not only assert but must satisfy the court the noncompliance has affected the election result to justify nullification. The onus has not by any means shifted from the time honoured law on evidence that the person who assert a situation must prove. The burden on petitioner to prove that noncompliance has not only taken place but also substantially affected the result must be fulfilled. There must be clear evidence of noncompliance, then that noncompliance has substantially affected the election.*

The net effect of the highlighted dictum of eminent justices of Court of Appeal and Supreme Court is that a person challenging the return at an election on ground of noncompliance with the

[38] (2005) 13 NWLR (pt 941) P. 1

provisions of the Electoral Act has the singular onus of proving not only the substantial noncompliance but must go further to show how the alleged substantial noncompliance affected the result of the election.

It must be appreciated that although the chain of cases cited above seem to suggest that onus of proof is always on the petitioner and never shift, however there are exceptions to this evidential principle as there are instances in which the onus would shift. Once a petitioner establish noncompliance, and the court cannot say whether or not the result of the election could have been affected by the noncompliance, the onus shifts to the respondents to show that the noncompliance did not affect the result of the election[39].

From the discourse above it is evidently clear that a return to an election will not be avoided if it appears to any court hearing the petition which challenges the return that there was substantial compliance with the law governing the conduct of the election. It must be noted that substantial compliance as used in the Act and restated in judicial authorities does not mean absolute compliance but "considerable compliance"[40]

3.4 STANDARD OF PROOF OF NON COMPLIANCE

The standard of proof required of a petitioner who rooted or founded his petition on ground of noncompliance is the preponderance of accepted evidence[41]. This is so because an election petition being specie of a civil suit is only required to be proved on balance of probabilities. All the petitioner needs to establish is that his story is more likely to be true than the respondents[42].

[39]SWEN V DZUNGWE (1966) NMLR P. 297 and ABUBAKAR V YAR'ADUA (2008) 19 NWLR (pt 1120) p.1
[40]ANGBAZO V. EBYE (1993) 1 NWLR (pt 268) P. 133.
[41] SWEN DZUNWE (supra)
[42] AFE BABALOLA,(2007) ***Election Law and Practice*****,** Emmanuel Chambers, Ibadan Vol. 1 P 439

In the case of MOGAJI & ORS V MADAM RALIATU ODOFIN[43] the Supreme Court laid down the approach to be adopted by the Courts in deciding where the balance of probabilities lies:

> *The judge should first of all put the totality of the testimony adduced by both parties on an imaginary scale; he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weight them together. He will then see which is heavier not by the number of witnesses called by each party but the quality of probative value of the testimony of those witnesses. In determining which is heavier the judge will usually have regard to whether the evidence is admissible, relevant, credible, conclusive and more probable than that given by the other party.*

3.5 ELECTORAL MALPRACTICES/CORRUPT PRACTICES

Corrupt practices alternates with noncompliance as a ground for election petition. The Electoral Act, 2010 as amended does not specifically defined what it means by corrupt practices but there are sections in the Act where acts amounting to corrupt practices are set out[44]. It is instructive to note that under the Electoral Act, electoral malpractices constitute criminal offences and accordingly punishable under the Act.

Conduct amounting to electoral malpractices/corrupt practices and therefore punishable under the Act include: plural voting, forgery or unauthorized printing, manufacture, importation or use of ballot papers and ballot boxes; unlawful voting by a person not qualified to do so; bringing into a polling station a ballot paper issued to another person; voting in the name of some other person, whether such name is that of a person living or dead or of a fictitious person and other forms of impersonation; treating or the use of money after the date of an election has been announced to influence persons to vote or not to vote; undue influence or threat to use force,

[43](1978) 4 SC P. 94.
[44]Part viii section 117 – 131 of the ***Electoral Ac***t, 2010 as Amended

violence or other restraint or the infliction of injury; damage, harm or loss upon a person in order to induce or compel him not stand as a candidate or not to vote or otherwise impeded or prevent the free use of the vote by a voter, intimidation of voters through the possession of an offensive weapon or the wearing of an intimidating dress or decoration in a polling station or within 300 metres of it; bribery or the giving or promise of money (whether as a gift or loan), office, employment, other patronage or valuable thing in order to induce a voter to vote or not to vote or on account of his having voted or refrained from voting; canvassing for votes in a polling station or within 300 metres of it; disorderly conduct at an election or incitement of it for the purpose of preventing or obstructing the conduct of the election and host of others[45].

Needless to observe from the above instances that the phrase *"Electoral malpractices"* is not capable of a precise definition as it has a very wide connotation or an "elastic coverage". Professor Ben Nwabueze defines electoral malpractices as deliberate illegalities committed with a corrupt, fraudulent or sinister intention to influence an election in favour of a candidate or candidates by means such as illegal voting, bribery, treating and undue influence, intimidation and other acts of coercion exerted on voters, falsification of results, writing of results without election, snatching of electoral materials etc[46]. Similarly J.T.V. Nnodum defines election malpractice as any act or conduct which is a transgression of the relevant statutory provisions for the particular election aimed at impeding a free and fair election exercise[47].

The above two definitions are similar. The common elements in the two definitions are that electoral malpractices have an objective of unduly influencing the outcome of an election and they are always committed deliberately with this objective in view.

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[45] Id

[46] NWABUEZE, B. O., (1985) **Nigerians Presidential Constitution** (1979 – 83) The Second Experiment in Constitutional Democracy, Longman, London, P. 401

[47] NNODUM, J. T. U., (1996) ***Election petitions: Law and Practice***, James Alice Services Ltd, Lagos P. 88.

In YUSUF V OBASANJO[48], PATS- ACHOLONU JSC, opined that "*corrupt practices connotes and embrace certain perfidious and debauched activities which are really felonious in character being redolent in their depravity and want of ethics. They become the hallmark of a decayed nature lacking in conscience and principles".*

It is worthy of note that some of the earlier electoral statutes specifically defined "corrupt practice for example S 61(3) of the Local Government (Constitutional Transition) provisions Decree No. 36 of 1998 defined corrupt practice to mean the offences of:

i. *Personation;*
ii. *Treating;*
iii. *Undue influence; or*
iv. *Bribery*
v. *Aiding, abetting, counseling or procuring the commission of any of the offences in paragraph a – d.*

Notwithstanding the fact that Electoral Act, 2010 as amended has not specifically defined "corrupt practices" it is clear from the import and purport of the provisions of section 117 – 131 that acts of personating, treating, undue influence, and bribery will come within the wordings of these sections.

Aside from the offences that come within the meaning of corrupt practices, all other electoral offences that are capable of undermining the result or outcome of an election, though not punishable as crimes, are also, if proved beyond reasonable doubt, capable of giving rise to the

[48] (2003) 16 NWLR (pt 847) P. 554

nullification of the result of an election. Commission of offences amounting to corrupt practices and other electoral offences are instances of noncompliance with the Electoral Act[49].

3.6 ELECTORAL MALPRACTICES AND ELECTORAL IRREGULARITIES

Electoral irregularities, according Professor Ben Nwabueze, relate to noncompliance with prescribed procedure for an election. It may or may not be an offence. Example of Electoral irregularities include: polling outside the statutorily stipulated time, late delivery or shortage of electoral materials, failure to provide them. Professor Nwabueze postulates that in great majority of cases electoral irregularities are not deliberately committed. This is one factor which distinguishes electoral irregularities from electoral malpractices. He also made another distinction between electoral irregularities and electoral malpractices. To him, the legal consequences of electoral irregularities and electoral malpractices differ, whilst the latter do not, in general, invalidate an election, the former emphatically do[50].

The Longman dictionary of contemporary English defines the word "irregular" as "not obeying the usually accepted legal or moral rules"[51] in essence contrary to rules or what is normal or established. Applied to the electoral laws, electoral irregularities are those acts or omissions which are contrary to the electoral laws or rules. In this sense, electoral irregularities will include electoral malpractices since all malpractices are invariably contrary to rules.

It is however, suggested that where an act or omission is contrary to the electoral law or rule and is either deliberate or with a motive to cheat, such act or omission should be regarded as electoral

[49] ADEREMI O. (2006) **Election Law and Practice in Nigeria**, AderemiOlatubora& Co, Akure, P. 113
[50] NWABUEZE, B. O., (1985) ***Nigerians Presidential Constitution (1979 – 83) The Second Experiment in Constitutional Democracy***, Longman, London, P. 401
[51] ***The Living Dictionary***, Longman Nigeria Plc. (2000) P. 860

malpractice. On the other hand, where the failure to follow the electoral law or rules is neither deliberate nor activated by a motive to cheat, it should be characterized as electoral irregularity[52].

It is pertinent to mention that majority of judicial authorities do not support the proposition of Professor Nwabueze that electoral irregularity does not generally invalidate an election while electoral malpractice emphatically does. The courts have treated both irregularities and electoral malpractices as noncompliance with the electoral laws. The effect of which depends on whether it affect the result of the election[53]

3.7 CATEGORIES OF ELECTORAL MALPRACTICES/CORRUPT PRACTICES

The categories of acts or conduct that constitute "electoral malpractices" are not closed. Thus to determine whether an act or conduct amount to "electoral malpractices" or "irregularity", the court will have to look at the nature of the act or conduct complained of vis a vis the provisions of the Electoral Laws and regulations.

Recognizing the fact that the term "electoral malpractices" have many connotations, the courts have been content to explain situations that give rise to corrupt practices rather than attempt a precise definition of the term. This was the approach followed by Rowland JCA in the case of ALHAJI IBRAHIM SAIDU MALUMFASHI V ALHAJI USMAN YABA & 3 ORS[54] where he stated: *"Electoral malpractice can occur in a situation where the votes scored by the parties exceed the number of accredited voters"*.

[52]LADAN M. T. AND KIRU A. I, (2005) ***Election Violence in Nigeria***, Afstrag – Nigeria P. 20
[53]WUAM V AKO (1999) 5 NWLR (pt 601) 150 at 152 and ALALADE V AWODOYIN (1999) 5 NWLR (pt 604) P. 529
[54] (1999) 4 NWLR (pt 598) P. 230

Drawing clue from the above dictum, efforts will now be made to examine cases or situations taken to constitute a form of electoral malpractices rather than attempting to define it.

3.7.1 BRIBERY

Bribery remains one of the most obnoxious corrupt practices. It could take the form of patronage, cash payment, gift of valuable items such as motor cars, food items, promise or offer of loan and a host of others. The Electoral Act forbids the giving of money or any valuable thing or making promises to give such in order to make a person vote or not to vote or to obtain the election of a person as a result of what is given or promised[55].

According to the Learned Editors of *Halsburry's* Laws of England, the following acts could amount to bribery, that is:

a. Excessive payment
b. Gift or promise of refreshment
c. Payment to a voter of his travelling expenses on condition that he would vote for a particular candidate
d. Employment of any person to render valueless services[56].

It is important to note that for bribery to be established in electoral process it must be made very clear that the gift, loan, offer and promises were made for the purpose of inducing any voter to vote or refrain from voting at any election.

[55] S 124 of the Electoral Act, 2010 as Amended
[56] AFE BABALOLA, (2007**) Election Law and Practice**, Emmanuel Chambers, Ibadan Vol. 1 P. 450

3.7.2 UNDUE INFLUENCE AND THREATENING

Undue influence and threatening are offences under the Electoral Act[57]. In this Act unlike the previous legislations, undue influence is given a narrow scope to cover cases of corruptly given or receiving money with a view to inducing a voter to vote or refrain from voting at such election. While the offences of threatening involve the threatened use of force directly or indirectly on opposing candidate or voters, abduction of the opposing party polling agents, prevention of access to media or anything that prevents the free use of vote by a voter.[58]

To vitiate an election, the undue influence complained of must have been perpetrated against individual voters. Once it is established that there is a threat, it is immaterial that the person using it has no power to carry it out but the threat must be intended to influence the voter. However what is important is not whether a threat is serious or not but the effect on the person threatened.[59].

If an employer dismisses an employee for political reasons or a tenant is influenced to vote for a particular candidate due to threat of eviction, such act would constitute undue influence/threatening and therefore actionable as a case of corrupt practice[60]

3.7.3 TREATING

Treating involves the provision of any food, drink, entertainment etc. to any person for the purpose of corruptly influencing that person to vote for a particular candidate or refrain from voting. Afe Babalola seem to opine that treating would not apply to mutual provision between

[57] S 130 and 131 of the **Electoral Act**, 2010 as Amended
[58] id
[59]MAIGORO V ALHAJI SAIDU & ANOR (1965) All NLR P. 561.
[60]Ogunjinmi O. (1997), ***A practical Approach to Election Petition in Nigeria***, Ogunniyi Printing Works, Ogbomoso P. 62.

equals or treating in connection with business matter[61]. However it applies to treating of an inferior by a superior, otherwise than in return for services rendered with a view to securing good will of the particular person treated and influencing the vote.

It is crucial to point out that the offence of treating has over the years been part and parcel of our electoral law. To the extent of our limited data, no candidate has been tried and no election has been voided on grounds of treating. Yet treating flourishes before, during and after election. Worse, still, the Electoral Act, 2010 as amended is silent on this electoral malpractice as no provision is made or likened to it under the Act. It is the writer' humble view that this neglected offence ought to be included in the Electoral Act given its prevalence and recurrence to serve as deterrence and ensure a level playing ground for all.

3.7.4 IMPERSONATING AND VOTING WHEN NOT QUALIFIED

The Electoral Act, 2010 as amended classify the offences of impersonating and underage voting as an offence. The offence of impersonating is committed when a person applied for a ballot paper in the name of another person or applies for another ballot paper having voted earlier. The Act also prohibits voting or attempting to vote when one knows that he or she is not qualified to vote. It is important to note that to convict a person for impersonation there must be evidence of at least two witnesses against him or her. The section 122(3) of the Electoral Act 2010 as amended provides thus: *No person charged with the offense of impersonation shall be convicted except on the evidence of at least two witnesses*

[61] AfeBabalola, (2007) ***Election Law and Practice***, Emanuel Chambers, Ibadan Vol 1. P. 451.

3.7.5 RIGGING OR OVER VOTING

This is the most notorious form of electoral malpractice in Nigeria. It is a criminal conduct of subverting an entire electoral process through massive organized fraud with the active participation of officials of the electoral body. Election rigging takes place in three (3) phases: before, during and after election. Experience has shown that rigging can take many forms: it could be by stuffing of the ballot box with fake ballot papers before the Election Day or on the Election Day, falsification of results and forgery of figures both at polling units and collation centres, voting by unregistered person and publication of false statement of withdrawal of candidate, snatching of ballot boxes between polling booths and counting centres and abduction of returning officers[62].

In SERIKI V ARE[63] commenting on the nature and severity of rigging, per Aderemi JCA (as he then was) had this to say:

> *Rigging or over voting is a serious electoral malpractice. It is the most disgraceful and dishonest act that should be condemned in all its ramification, it is an illegal act. And no person involved in any form of immoral or illegal act or transaction shall be allowed to come to the court to seek redress. No polluted hands shall touch the pure foundation of justice.*

Similarly the court of Appeal commenting on the nature of victory achieved through election malpractice in the case of NGWU V MBA[64] stated thus: *"A victory achieved through the instrumentality of election rigging is a farce and pyrrhic one. Such victory is often created as in the instant case by electoral officers who should not be trusted with serious assignment relating to electoral process"*

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[62]LADAN M. T. AND KIRU A. I, (2005) ***Election Violence in Nigeria***, Afstrag – Nigeria P. 44
[63] (1999) 3 NWLR (pt 595)p. 469
[64](1999) 3 NWLR (pt 595) p.400 .

It must be noted that an elected candidate cannot have his election nullified on the ground of corrupt practices or any other illegality committed in the process of election unless it can be proved that candidate expressly authorized the illegality or directly linked to him[65].

Similarly an election will not be nullified for malpractices if the malpractices complained of did not substantially affect the result of the election, for instance when the votes found to have been corruptly obtained could not have tilted the result of the election[66].

3.7.6 FICTITIOUS OR UNAUTHORIZED POLLING STATION

Sometimes politicians in a bid to attain undeserved victory at the polls may resort to different unwholesome trick such as creating additional booths or stations that do not have the recognition or blessing of the electoral commission. Consequently a petitioner challenging an election on the ground that election has taken place in unauthorized polling stations or booths must show that he did not participate in the election in the unauthorized polling stations as the law may not be on his side once it is shown that he received votes in or posted his agent to the unauthorized polling stations. In ETUK V ISEMIN[67] where the Court of Appeal held that having received votes in an unauthorized polling station, the petitioner is estopped from complaining and he would be taken to have acquiesced. ONU JCA (as he then was) put the position thus:

[65]EMESIN V NWACHUKWU (1996) 6 NWLR (pt 605) p. 155
[66]BADAWI V ADAMU (1999) 3 NWLR (pt 594) p. 303
[67] (1992) 4 NWLR (pt 236) p. 402

The additional 532 polling booths added to the existing 8000 units were well known to the appellant and the 1st & 2nd respondents who were privy to it. Indeed the appellant never complained that he did not participate in election in those additional polling booths and indeed testified that he had his agents posted to all the booths and collation centres during that time. The appellant is therefore stopped from complaining about the additional polling booths.

3.7.7 OTHER FORMS OF CORRUPT PRACTICES

It is interesting to note that the Electoral Act. 2010 as amended, has widen the scope of corrupt practices by given instances of act that may amount to corrupt practices as against the previous legislations which attempted to limit corrupt practices to only certain scenarios. Of great interest is the attitude of Courts in this regard which has equally adopted the approach of situations rather than closing the gate. It is in the light of the above, that conducts like, disorderly conduct at election, snatching of ballot papers, thuggery, soliciting for votes within 300 metres on the Election Day and host of others may qualify as an incidence of corrupt practice, which if sufficiently proved could void an election[68].

3.8 BURDEN OF PROOF OF CORRUPT PRACTICE/ELECTORAL MALPRACTICES

Where a petitioner in an election petition alleges electoral malpractice, the onus of proof rest squarely on that petitioner to prove the malpractice alleged and to show how such malpractice has affected the result of the election.

It has been held in plethora of judicial authorities that the burden of proving criminal offence in an election petition is on the petitioner. In UGHAMADU V NDIBE[69] the Court held that "*an allegation of corrupt practices during an election amounts to an allegation of a criminal act;*

[68] Part viii, section 117-131 of the ***Electoral Act***, 2010 as amended
[69] (2010) 46 WRN P. 55

and the petitioner who makes such allegation has the onus to prove the allegation beyond reasonable doubt as provided under section 138 of the Evidence Act".

In EZE V OKOLOAGU[70] the court reiterated the principle of evidential burden thus:

> *The petitioner must not only prove the alleged corrupt practices and malpractices, but he must show that same was committed in favour of the winner of the election with his knowledge or consent by person acting under his general or special authority, this is because no one can be punished for the crime of another.*

In FALAE V OBASANJO[71] the Supreme Court went extreme when it held that;*"The law is that even if a political party engaged in criminal activities which would disqualify a candidate it cannot affect the candidate unless is shown that the candidate authorized or ratified the offending conduct".* This decision in the writer's opinion is unreasonable and unhelpful to the principle of requirements of proof in election. What more does the court need in proof when the candidate is not an independent candidate and relies on the party to contest election.

Similarly in BUHARI V OBASANJO[72], the Supreme Court further opined thus:

> *Irregularities at an election which are neither act of a candidate nor link to him cannot affect his election. Therefore an elected candidate cannot have his election voided on the basis of corrupt practices or any other irregularity committed in the process of the election unless it can be proved that the candidate expressly authorized the illegality.*

In a simple language therefore, for a petitioner to succeed in a petition founded on corrupt practices, he has the onus of proving the following beyond reasonable doubt:

[70](2010) 3 NWLR (pt 1180) p. 183
[71] (1999) 4 NWLR (pt 599) P. 476
[72] (2005) 13 NWLR (pt 941) P. 1

(a) That the respondent personally committed the corrupt act or aided, abetted, counseled or procured the commission of the alleged act of corrupt practice.

(b) Where the alleged act was committed through an agent, that the agent was authorized to act in the capacity or granted general authority.

(c) That the alleged corrupt practice had an effect on the outcome of the election, that if the votes scored through the acts of corrupt practices are deducted from the votes scored by the respondent, the result of the election would have changed.

Worse still the Supreme Court appeared to be positing that where a petitioner alleges corrupt practices by soldiers, police or thugs, the petitioner must be able to identify and even join them in the petition. This is what the Supreme Court had to say:

> *The allegation made against unidentified policemen and soldiers are criminal in nature, as well as the alleged thugs of the 3rd respondent whom the petitioners also tried to incriminate, have also not been identified; also of all the witnesses called by the petitioners none of them specifically identified any police officer or soldiers; accordingly no allegation of crime can be established with the scenario painted by the petitioners*[73]

It is evident from the chain of judicial authorities cited above that it is very herculeonous and uphill task having to prove an offence of corrupt practice so as to nullify an election. It is the writer's humble view that the posture assumed and maintained by Courts/Tribunals is rather too strict so much that it can be said to encourage the electoral malpractices. It is suggested that a dispassionate and fair position should be adopted when treating cases of electoral malpractices ie once irregularities are established and sufficient to void an election, the Tribunal/Court should discountenance with the requirement that it must be perpetuated by the respondent or aided or sanctioned by him.

[73] BUHARI V INEC (2008) ALL FWLR (PT437) P. 58

3.9 STANDARD OF PROOF FOR CORRUPT PRACTICES/ ELECTORAL MALPRACTICES

In an election petition where the petitioner makes allegation of crime against a respondent and he makes the commission of crime as the basis of his petition, section 135 (1) of the Evidenced Act, 2011, imposes a strict burden on the petitioner to prove the crime beyond reasonable doubt. If the petitioner fails to discharge this burden of proving the crime beyond reasonable doubt, his petition must fail[74].

The question that readily comes to mind at this juncture is "what amounts to proof beyond reasonable doubt?" in the case of KWARRA V INNOCENT[75] the court defines proof beyond reasonable doubt to mean:

> *The proof that precludes every reasonable hypothesis except that which it tends to support and it is a proof that is consistent with the guilt of the accused person against whom the allegation has been made. For evidence to attain the height that could bring about a conviction it must exclude beyond reasonable doubt, every other hypothesis or conjecture or proposition or presumption except that of the guilt of the accused. If the evidence is wobbly, themative or vague or is compatible with both innocence and guilt, then it cannot be described as being beyond reasonable doubt.*

Having appreciated the meaning or purport of proof beyond reasonable doubt, the research will proceed to study the attitude of courts/tribunals in relation to standard of proof where it borders on corrupt practices.

In the case of EBOH V OGUJIOFOR[76] where an election was challenged on ground that the result was falsified as there were many mutilations, cancellations and arithmetical error by the Returning Officer in one of the wards, the court of Appeal affirming the decision of the lower

[74]EZE V. OKOLOAGU (2010) 3 NWLR (pt 1180) p. 183
[75] (2009) 1 NWLR (pt 1121) p. 179
[76] (1999) 3 NWLR (pt 595) p. 419

Court nullifying the election stated; *"The allegations of incidents of fraudulent acts, falsifications, mutilations and cancellation of election result is criminal in nature of which the evidence require in proof of such allegations must be clear and unequivocal".*

In EDET V EYO[77] the claim was that, the respondent who was declared the winner of the election, seized the electoral materials in a ward only to return with fictitious result crediting him with 6, 194 votes and 126 in favour of the petitioner. It was also alleged that his thugs disrupted the election in another ward after which a total of 500 votes were recorded in his favour in one of the polling stations, while the petitioner was said to have scored zero. Affirming the decision of the lower Court dismissing the petition on the ground that the allegations were not proved, the Court of Appeal declared:

> *The law is settled that in an election petition where the petitioner makes an allegation of crime as in this case, against a respondent and he makes the commission of the crime as the basis of his petition, section 138 (1) of the Evidence Act, 1990 imposes strict burden on the petitioner to prove the crime beyond reasonable doubt. If the petitioner fails to discharge the burden, his petition must fail.*

In UDEAGHA V OMEGARA[78] the Court opined that; *"Where a petitioner relies on allegation of crime like forgery and massive thumb printing of ballot papers in his petition, the allegation being criminal offences must be proved beyond reasonable doubt".*

In the case of BUHARI V OBASANJO[79], the supreme court as per Pats Acholonu JSC (as he then was) seemed to have evolved an impossible standard of proof for a petitioner alleging corrupt practices in a Presidential Election when he opined thus: *"The very big obstacle that*

[77](1999) 6 NWLR (pt 605) P. 18
[78](2010) 11 NWLR (pt 1204) P. 168
[79] (2005)13 NWLR (pt 941) P.1

anyone who seeks to have election of the president or Governor upturned is the very large of number of witnesses he must call due to the size of the respective constituency. In a country like our own he may have to call about 250,000 -300,000 witnesses…"

With utmost respect to the learned Justice of the Supreme Court, the above dictum does not seem to be in agreement with evidential principle of quality and not quantity of witnesses. It is an elementary principle of law that winning or losing a case does not depend on the number of witnesses called by a party but on the probative value of their evidence. This was the ration in the case of OGUNYOMBO V OKOYA[80]

The attitude of our courts on standard of proof in election particularly where it concerns imputation of crime with all due respect is not helping or assisting the democratic process instead it is compounding an otherwise complex matter for the following reasons:

(a) Under Nigerian law it is the Attorney General or his representative that is legally competent to institute criminal legal action or where any other person wishes to prosecute such person has to obtain the Attorney General's fiat.

(b) A petitioner in an election petition is not seeking the court to punish the respondent(s) for committing a crime as provided under the Electoral Act, Penal Code or Criminal Code.

(c) A petitioner is simply making a case of violation of electoral process or guidelines which if proved will only lead to the nullification of the result of that voting unit.

[80] (2002)16NWLR (pt 793) P.224

(d) An election petition case where it succeeds will not hinder the Attorney General from prosecuting the person or persons who might have committed any crime during the electoral process[81].

It should be noted that, the proof of an election malpractice or irregularities or misconduct depends on the nature of the conduct complained of. Where the allegation is simply, that of some wrong doing its proof, would be on preponderance of evidence. Where the allegation borders on criminality, the standard of proof is beyond reasonable doubt.

3.10 CONCLUSION

It is clear from the discourse in this chapter and the cases cited that, it is one thing that an election is marred by malpractices and noncompliance but it is quite another point to prove it before a court or tribunal. Whereas the petitioner who founded his case on noncompliance is only required to prove his petition on the balance of probabilities, the position is not so with a petitioner who rooted his petition on corrupt practices of criminal nature as he must prove his case beyond reasonable doubt. The position of the petitioner is not an envious one, as he must prove such allegation through an eye witness account and not by hear say which is not admissible. It therefore follows that where a petitioner alleges wide spread irregularities or corrupt practices; he will equally assemble as many eye witnesses as possible, which is a herculean task.

[81] B.Y IBRAHIM (2006) Election Petitions in Nigeria: Buhari vs Obasanjo in perspective, Ahmadu Bello University Law Journal , Vol 24-2 5 pg 12.

Worse still, the eye witnesses required must be disinterested person, for their evidence to be credible and acceptable to the court. These and many more requirements have made almost an impossible task to dislodge an election of a candidate once returned. It is the writer's humble view that this hard posture although a reflection of our criminal justice system must be handled with some elasticity if continuous recourse to our post-election judicial system is to be guaranteed.

This is so because election petition matters are purely civil in nature and the petitioner does not seek the court to punish the respondent by way of indictment, imprisonment or in other manner. More so that the annulment of the election on the ground that the votes cast were altered in favour of the respondent probably by INEC officials will not prejudice a criminal action against such INEC officials for any criminal offence committed during an election.

CHAPTER FOUR

PROOF OF QUALIFICATION AND DISQUALIFICATION OF CANDIDATE

4.1 INTRODUCTION

This is one of the grounds upon which an election may be challenged under the Electoral Act 2010 as amended. Section 138(1)(a) of the Electoral Act 2010 as amended provides that an election may be questioned on the premised *that 'a person whose election was, at the time of the election, not qualified to contest the election*' It is a basic principle of our electoral law that, an unqualified or disqualified person ought not to be elected.[1]

Needles to observe at the onset, that there is a marked difference between "disqualification" and "non qualification" although they are seen as synonymous to each other. A person is "disqualified" when he is banned or prohibited from contesting an election. On the other hand, a person is "not qualified" to contest an election, although not banned or prohibited by law but there are circumstances which prevent him from contesting[2].

It is noteworthy that by virtue of section 140(2) of the Electoral Act, 2010 as amended, where a tribunal or court nullifies an election on the ground that the person who obtained the highest votes at the election was not qualified to contest the election, the only order it can make is to order a fresh election and not to declare a candidate with next highest number of votes as duly elected.

The 1999 Constitution as amended provides for the qualifications of persons seeking election to the offices of the President, Vice-President and Member of the national Assembly, Governor,

[1] OGUNJIMI A. A.(1997) ***Practical Approach to Election Petition Procedure in Nigeria***, Ogunniyi Printing Works, Ogbomoso Vol. 1 P. 73
[2] Ibid

Deputy Governor and Member of the State Assembly. Section 65 and 66 specify the qualifications and disqualifications for membership of the Senate and House of Representative. Section 106 and 107 stipulate the qualification and disqualifications for the membership of the House of Assembly. Sections 131 and 137 provide for the qualifications and disqualifications of the President and the Vice President and Section 177 and 182 stipulate the qualifications and disqualifications of the offices of the Governor and the Deputy Governor.

4.2 JURISDICTION

Jurisdiction refers to the competence of a Court or Tribunal to entertain a matter brought before it and make pronouncement thereon. It could be in terms of the subject matter, its composition or its territorial coverage. Jurisdiction is the fundamental prerequisite in the adjudication of any matter. It is the life wire of all suits. A court that is bereft of jurisdiction to entertain a suit will have its proceedings, however well conducted, to be declared a nullity[3].

Under most of the electoral laws under which elections have been conducted in Nigeria, election petition tribunals were established to adjudicate in respect of election disputes. There has however been a raging controversy as to whether an election petition tribunal has jurisdiction to determine issues relating to qualifications and disqualifications leading to conflicting pronouncements by different panels of the Court of Appeal.

The controversy started in the case of ENAGI V INUWA[4] where the Court of Appeal construing the provision of section 91 (1) of State Government (Basic Constitutional and Transitional Provisions) Decree No. 50 of 1991 and paragraph 5(3) of schedules 5 of the Decree held that though section 91(1) provides that an election may be questioned on the ground that a respondent

[3] AJADI V AJIBOLA (2004) 16 NWLR (pt 898) P. 91
[4] (1992) 3 NWLR (pt 231) P. 549

was at the time of the election not qualified or was disqualified from being elected into office, the proviso to the section limits the question of the qualification of a candidate to a determination by the Chief electoral officer of the Federation or any officer delegated by him on that behalf.

The purport and import of the court of Appeal decision in this Enagi's Case is that once a decision is reached by the Chief Electoral officer of the Federation or any officer delegated by him by virtue of paragraph 5(3) of schedules 5 to the Decree, the qualification or disqualification of a candidate to an election is final and cannot be a ground in a petition to question the result of an election. Although subsequent Court of Appeal decisions relied on the ratio in Enagi's case; years later, the Court of Appeal observed that the decision was reached per *incuriam* and therefore no longer relevant.[5].

The Court of Appeal made a distinction between nomination as referred to under schedule 5, paragraph 6(3) of the Decree No. 3 of 1999 which is similar to paragraph 5(3) of schedules 5 of Decree No. 50 of 1991 and qualification for election under section 134 (1) (a) of the State Government (Basic Constitutional and Transitional Provisions) Decree No. 3 of 1999 which is (except for the provision in the 1991 Decree) similar to section 91 (1) of Decree No. 50 of 1991 and held that paragraph 6(3) of the schedule 5 talks about nomination while 134 (1) (a) talks about qualification for election. These provisions were held to deal with different matters[6].

Similarly in the case of TSOHO V YAHAYA[7] the Court of Appeal critically examined the provision of section 134(1) (a) and paragraph 6(3) of schedule 4 of the State Government (Basic Constitutional and Transitional provisions) Decree No. 3 of 1999. The Court considered the

[5]PETERS V DAVID (1999) 5 NWLR (pt 603) P. 486
[6] Id
[7](1999) 4 NWLR (pt 600) P. 657

meaning of "nomination" as used under the paragraph 6(3) of schedule 5 and held that nomination is an act of suggesting or proposing a person by name to an election body as a candidate for an elective post. This is part of the preliminary matters before the actual election is conducted. The court also held that the provision of paragraph 6(3) of the schedule 5 of Decree No. 3 of 1999 deals with nomination of a candidate to contest an election and has nothing to do with whether or not a candidate is qualified to contest for an election.

The Court further stated that where an Electoral Officer declares that a candidate is validly nominated to contest an election, his decision as it affects the validity of the nomination cannot be challenged by way of presentation of a petition claiming that the candidate was not validly nominated. However, a petition can be presented after the election to challenge the qualification of a candidate to contest election even if he was validly nominated[8].

In BALEWA V MUAZU[9] the Governorship and legislative Houses of Assembly Election Tribunal held inter alia that it had no jurisdiction to entertain the grounds of the petition challenging the nomination and qualification of a candidate for election. On appeal to the Court of Appeal, the court held that by virtue of the provisions of section 134 of the State Government (Basic Constitutional and Transitional Provisions) Decree No. 3 of 1999 and paragraph 6 (3) of schedule 5 to the said Decree, the Election tribunal has jurisdiction to entertain an election petition based on qualification or non qualification for the person whose election is questioned. The Court of Appeal therefore overruled the decision of the Election tribunal.

[8] Id
[9] (1999) 5 NWLR (pt 604) P. 636

To cap it all a full panel of the Court of Appeal in FALAE V OBASANJO[10] considering section 51 (1) (a) and paragraph 6(3) of schedule 3 of the Transitional Election (Basic Constitutional and Transitional provisions) Decree No. 6 of 1999 which is similar to the provisions of Decree No. 3 of 1999 held that questions as to the eligibility of a candidate cannot be entertained by the court or tribunal before the holding of an election. Once the Electoral Commission has cleared a candidate for election he cannot be prevented from contesting the election. However after the election questions as to his eligibility can be entertained at the appropriate venue.

It is to be noted that by virtue of section 31 (5), (6) and(7) of the Electoral Act 2010 as amended, INEC has no powers to disqualify and refuse nomination of a candidate once there is compliance with the provisions of section 31 and 87 of the Electoral Act 2010 as amended. Any person who strongly feels that information as contained in the affidavit advanced to INEC is false or is the validly nominated candidate of his party can approach the State or Federal High Court for redress. However if a person feels a candidate is not eligible or disqualified to contest an election he can wait for the election to be conducted and thereafter ventilate his grievances at the Election Tribunal.

4.3 WHEN TO CHALLENGE THE QUALIFICATION OF A CONTESTANT

It is clear from the judicial decisions validating the authority of the tribunal to entertain an election petition on the grounds of qualification or disqualification of a candidate for election that it can only be raised by a party after the election. This is so because the decision of the Electoral Commission or its officers as the case may be, is final in respect of nominations.

[10] (1999) 4 NWLR (pt 599) P. 476

However, after the election, a party challenging the election of another can validly raise the issue of qualification or disqualification.

It equally follows that the decision in ONIFADE V OYEDEMI[11], cannot therefore be the position of the law. In that case, the Court of Appeal held that when a petitioner wants to challenge the respondent's eligibility to contest the election on the ground of nonpayment of tax as and when due, he should do so during the screening exercise. It was further held that failure to do so during the exercise would mean that he has forfeited or waived his right and he cannot raise it after he has lost the election.

As earlier observed, the decision of the commission or its officers as to the validity of nomination is final and this is only in respect of nomination alone. However, parties are not barred from raising the issue of qualification or disqualification at the election tribunal. The right to do so is provided for in section 134 (1) of the Electoral Act, 2010 as amended, which provides that "*an election petition shall be filed within 21 days after the date of the declaration of results of the elections"*.

In the recent case of IMAM V SHERIF[12], the Court of Appeal rightly held that it is not the law that the decision of INEC as to qualification is conclusive and cannot be questioned. The proper time to challenge the qualification of a candidate to contest an election according to the Court is after the election as the process of election is not complete until the election tribunal gives its decision and it is affirmed by the appellate court, where the election is contested or subject of litigation.

[11] (1999) 5 NWLR (pt 601) P. 54
[12] (2005) 4 NWLR (pt 914) P. 80

4.4 FORMS OF DISQUALIFICATION AND QUALIFICATION

It is important to bear in mind that the question as to whether a person is qualified or not qualified to contest an election can only be resolved by leading evidence at the hearing. The qualification and disqualification for elections are governed by the provisions of the Constitution or relevant Electoral Laws. From the totality of these provisions, what constitutes or amounts to qualification and disqualification for election have been variously contested and judicially pronounced as follows:

4.4.1 CONVICTION

A candidate who has been convicted and sentenced for an offence involving dishonesty or fraud is constitutionally disqualified for contesting any elective office in Nigeria for a period of ten (10) years after such conviction is passed[13]. It must be noted that it is not every conviction that disqualifies a candidate except it borders on dishonesty or fraud.

The question that therefore follows is what are the categories of offences that involve "dishonesty" or "fraud"? it is submitted that the categories of offences involving "dishonesty" or fraud may include the following[14]

(a) Offences against the administration of law, justice and public authority

(b) Corruption and abuse of office

(c) Selling and trafficking in public offices

(d) Offences relating to property and contract

(e) Offences analoguos to stealing

(f) Stealing with violence, extortion by threat

[13] S. 137 (i) (e), of the 1999 ***Constitution*** of the Federal Republic of Nigeria as amended.
[14] OGUNJINMI A. A,(1997). ***Practical Approach to Election Petition Procedure in Nigeria*****,** Ogunniyi Printing Works, Ogbomoso P. 87 – 88

(g) Burglary, house breaking and like offences

(h) Obtaining property by false pretense; cheating

(i) Fraud by trustees and officers of companies and cooperation; false accounting etc.

Where a party challenge an election on the ground that the candidate was disqualified under the relevant law by reason of being an ex-convict, he has the burden of producing before a court, a court order or certificate of conviction from the prison where the candidate served, if no such evidence is produced the court or tribunal will discountenance the ground[15].

In SANYAOLU V INEC[16], it was held that previous conviction is proved in judicial proceedings by the certificate of conviction signed by the registrar or other officer of the court in whose custody is the record of conviction. Equally in the case of LAWAN V. YAMA[17], the Court of Appeal observed that previous conviction can be proved by the production of a certified true copy of the judgement of the court or the production of a certified true copy of the entire record of proceedings or part thereof in so far as the conviction is apparent. Interestingly S 248-250 of the Evidence Act, 2011 has clearly provided a guide in proof of evidence of previous conviction.

It must be noted that where a person who was previously convicted of an offence is granted pardon by the President under the constitution, he is no more disqualified from contesting an election. In FALAE V OBASANJO[18] (N02) the 1st respondent was convicted of treason and was later pardoned by the Head of State. The petitioner challenged his election inter alia, on the ground that, he is an ex-convict who has only been granted "pardon" and not "full pardon". The

[15] ASIKPO V OKENE (1999) 5 NWLR (pt 604) P. 578
[16] (1999) 7 NWLR (pt 612) P. 600
[17] (2004) 9 NWLR (pt.877) p. 117
[18] (1999) 4 NWLR (pt 599) P. 476

Court of Appeal disagreeing with the line of submission of the Appellant posited per Mustapher JCA (as he then was) as follows:

> *"In my view, under the Nigerian law a "pardon" and "full pardon"* have no distinction. A pardon is an act of grace by the appropriate authority which mitigates or obliterate the punishment the law demands for the offence and restores the right and privileges forfeited on account of the offence……the effect of a pardon is to make the offender a new man (novus homo) to acquit him of all corporal penalties……

4.4.2 EMPLOYMENT AND DISMISSAL FROM PUBLIC SERVICE

A public officer who has not resigned, withdrawn or returned from employment in the public service within a stipulated period of 30 days before the date of the election is constitutionally disqualified from contesting any election in Nigeria[19]. Section 18 (1) of the Interpretation Act defines 'Public Officer' to mean '*a member of the public service of the federation within the meaning of the Constitution of the Federal Republic of Nigeria or of the public service of a state'*.

Therefore any public officer either in the public service of the federation or that of a state or in the service of a local government under the appropriate Local Government Law must effectively disengage from his service within the period required by the relevant law before he is qualified to contest any elective office.

It must be emphasized that resignation from employment is by giving of the required length of notice or payment in lieu of notice. Resignation dates from the date the notice is received. There is absolute power to resign and no discretion to refuse to accept the notice. If resignation will only become effective after acceptance, then payment of salary in lieu of notice at resignation for

[19] S. 137 (1) (g) of ***the Constitution*** of the Federal Republic of Nigeria. 1999 as amended

the stated months will only be effective resignation after the expiration of the month for which the salary in lieu was paid which is not the case[20].

Political office holders such as President, Vice-president, Governors and their Deputies, Local Government Chairmen and their Deputies, Ministers etc are not captured by the definition of public servants within the meaning of provision of section 318 (1) of the Constitution.

Equally worthy of note is that, a person dismissed from public service cannot be eligible to contest any election. Public office is a position of trust. A person dismissed from public service therefore is not a fit and proper person to be entrusted with public functions[21].

Since a dismissed public officer may be prohibited permanently from contesting an election, the appropriate authorities having power of dismissal must exercise such power in accordance with the laid down regulation and procedure. Consequently by section 11 (1) of Public Officers (Special Provisions) Act, a public officer can only be dismissed on the following grounds:

a. Inefficiency in the performance of duties; or
b. Corrupt practices; or
c. Act incompatible with public policy of the government or establishment.

In DANIEL V AJADI[22], the petitioner contested for a councillorship post with three other contestants in the Igo Ward of Ofu Local Government council of Kogi State. The 1st respondent was declared winner of the election. At the trial before the election tribunal, the petitioner produced documents indicating that the 1st respondent was employed by National Electric Power

[20] ADEFEMI V ABEGUNDE (2004)15 NWLR (pt 895) P. 1
[21] OGUNJINMI A. A,(1997). ***Practical Approach to Election Petition Procedure in Nigeria***, Ogunniyi Printing Works, Ogbomoso P. 90
[22] (1998) 1 NWLR (pt 574) P. 524

Authority Sokoto in February 1982 and dismissed in December 1999. The trial tribunal in its judgment declared the election of the 1st respondent null and void because he was dismissed from public service and therefore disqualified from contesting the election.

However, a person whose appointment was terminated cannot be held to be disqualified from contesting the election as that does not amount to dismissal[23]. The same position equally applies where a person is retrenched from service[24].

4.4.3 INDICTMENT FOR EMBEZZLEMENT OR FRAUD

By virtue of section 66(1) (a) of the 1999 Constitution[25] as amended, a person shall not be qualified for election to the Senate or House of Representatives if he has been indicted for embezzlement or fraud by a judicial commission of inquiry or administrative panel of inquiry or a tribunal set up under the Tribunal of Inquiry Act, a Tribunal of Inquiry Law or any other law by the federal or State Government which indictment has been accepted by the federal or the State Government respectively.

In DAGGASH V BULAMA[26], the report of panel of inquiry set up by the Government of Borno State to investigate a Local Government Council in which the 1st respondent was a councilor, indicted the 1st respondent for fraud and embezzlement of public money and the Borno State Government accepted the indictment in its white paper. In the circumstance it was held that the 1st respondent was clearly caught by the provisions of section 66 (1) (h) of 1999 Constitution as amended, that she was not qualified for election to the Senate or House of Representatives.

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[23]UNCP V DPN (1998) 8 NWLR (pt 560) P. 90
[24]AONDOAKA V AJO (1999) 5 NWLR (pt 602) P. 206
[25] See Section 107 (i) (h), 137 (1) (ii) and 182 (1) (i) of the ***1999 Constitution*** of the Federal Republic of Nigeria as amended
[26](2004) 14 NWLR (pt 892) P. 144.

The court of Appeal further stated in the case that, by virtue of section 66(1) (h) and 285(1) of the 1999 Constitution as amended, an Election Tribunal had no jurisdiction to inquire into how the panel of inquiry referred to under section 66(1) (h) of the 1999 Constitution as amended arrived at its decisions or recommendations; or to review the proceedings or decision of such panel of inquiry. All that the Constitution requires is proof that a panel of inquiry set up by the relevant government indicted a contestant in an election for fraud or embezzlement and that the indictment was accepted by the government.

However in the case of AC V. INEC[27], the Supreme Court emphatically maintained a position that mere indictment is not sufficient unless such indictment is tested in court. The Supreme Court in that case voided the disqualification of Action Congress Presidential Candidate (Atiku Abubakar) by INEC on the premise of indictment. The Supreme Court had this to say:

> *Conviction for offences and imposition of penalties and punishment are matters appertaining exclusively to judicial power. An indictment is no more than an accusation. Once a person is accused of a criminal offence, he must be tried in a court of law where the complaints of his accusers can be ventilated in public and where he would be sure of getting fair hearing. No other tribunal, investigating panel or committee will do. The jurisdiction and authority of the court of this country cannot be usurped by either the executive or the legislative branch of the federal or state government under any guise or pretext whatsoever*

The above position of the Supreme Court has modified the indictment principle as posited in the earlier cited case of DAGGASH V BULAMA. Therefore a petitioner who desires to use indictment for fraud or embezzlement as a ground for challenging a candidate's qualification must prove that the indictment has been made a basis of criminal action before a competent Court and the respondent was convicted thereafter

[27] (2007)ALLFWLR (pt.378) p.1025-1026

4.4.4 REQUISITE EDUCATIONAL QUALIFICATION

A person shall not be qualified to contest an election unless he possesses the requisite educational qualification as required under the law. The minimum requirement of educational qualification to all offices is "School certificate or its equivalent". By virtue of section 318 of 1999 Constitution as amended, "School certificate or its equivalent" is define as:

a. A secondary school certificate or its equivalent or Grade II Teachers certificate, the City and Guild's Certificate; or
b. Education up to Secondary School certificate level; or
c. Primary Six School Leaving certificate or its equivalent and:-
    i. Service in the public or private sector in the federation in any capacity acceptable to the Independent National Electoral Commission for a minimum of ten years; and
    ii. Attendance of courses and training in such institutions as may be acceptable to the Independent National Electoral Commission for periods totaling up to a minimum of one year; and
    iii. The ability to read, write, understand and communicate in the English Language to the satisfaction of the Independent National Electoral Commission; and
d. Any other qualification acceptable by the Independent National Electoral Commission.

In the case of BAYO V NJIDDA[28] the Court of Appeal held that section 106 (1)(c) of the 1999 Constitution provides that a person shall not be qualified for election as a Member of a House of Assembly if he has not been educated up to at least the School certificate level or its equivalent. Unlike the provision in section 318 (c) of the Constitution which requires a candidate to obtain or possess a Primary Six School Leaving Certificate or its equivalent, S 318 (b) does not require the equivalent of the Secondary School Certificate Level. In other words, as regards a Secondary School Certificate Level, a candidate needs not to have passed the Secondary School Certificate Examination. It is sufficient that he attended a secondary School and read up to the Secondary School Certificate Level that is even without passing and obtaining the Certificate. But by section 318 (c), the candidate must have passed and obtained the Primary Six School Leaving Certificate.

4.4.5 CITIZENSHIP

Any person seeking any elective office in Nigeria must show that he is a citizen of Nigeria. Citizenship in Nigeria can be acquired by birth, naturalization or registration[29]. It must be emphasized that a person cannot contest an election into the office of President or Governor unless he is a citizen of Nigeria by birth[30]. In other words persons who acquired Nigerian citizenship by registration or naturalization are not eligible to contest election into the office of Governor or President of the federation of Nigeria.

28(1999) 4 NWLR (pt 599) p.320
[29] S. 25, 26 and 27 of ***1999 Constitution*** as Amended
[30] S. 131 (a) and 177 (a) of the 1999 Constitution as amended

By the combine effect sections of 28 and 66 of 1999 Constitution as amended, a person cannot be disqualified from contesting election for the Membership of the National Assembly on the ground of dual citizenship, if he is a Nigerian by birth[31].

4.4.6 NON PAYMENT OF TAX

In the past evidence of payment of tax or production of tax certificate is a requirement for qualification to contest an election. Under section 44(11) (b) of the National Assembly (Basic Constitutional and Transitional provisions) Decree No. 5 of 1999 for example, it is provided as follows:

> *44(1) A person shall not be qualified as a candidate to contest the National Assembly unless he presents evidence of payment of tax as and when due for a period of three years immediately preceding the year of the election or exempted from tax payment.*

A party who alleges that a person failed to pay tax as and when due must however prove:

i. That the person earned a taxable income during the period in question

ii. That there was a proper assessment of the tax covering that period

iii. That notice of assessment was served on the person to pay his tax and he defaulted; and

iv. That the person failed to pay assessed tax within two months after the service of the notice of assessment[32]

[31] OGBEIDE V. OSULA (2004) 12 NWLR (pt 886) P. 86
[32] LANTO V WOWO (1999) 7 NWLR (pt 610) P. 227

It must be stated quickly that notwithstanding the principle relating to nonpayment of tax stated above, the present state of the law is that nonpayment of tax as at when due is no longer a ground for disqualifying a candidate. Under the provision of the 1999 Constitution as amended and the Electoral Act, 2010 as amended, nonpayment of tax is not made a ground for disqualification.

In RIMI V INEC[33], where one of the issues contended before the Court of Appeal was whether having regards to the facts of the case, the decision of the election tribunal was not in error when it held that appellant failed to establish his case, the Court of Appeal held inter-alia that by virtue of Section 134 of the Electoral Act, 2002, the grounds recognized for nullification of an election did not include nonpayment of tax. In other words, that nonpayment of tax is not a ground for the nullification of election. The court concluded that although the allegation by the appellant that the 2nd respondent has defaulted to pay tax is weighty, it is not a ground for nullification of the 2nd respondent election.

4.4.7 CONTRAVENTION OF THE CODE OF CONDUCT

It is a ground for disqualification under the constitution if, within a period of less than ten years before election, a candidate has been found guilty of a contravention of the Code of Conduct by the Code of Conduct Tribunal[34]. It must however be noted that an Election Tribunal is not vested with power to embark on any collateral proceeding of enquiry into whether a candidate is in breach of the Code of Conduct by failure to declare his assets to the Code of Conduct Bureau.

[33] (2005) 6 NWLR (pt 920) P. 56
[34] Section 137 (1) (e) of the 1999 **Constitution** as amended

It is to be appreciated that while failure by a person to declare his asset in the circumstances of his previous public service may amount to breach of Code of Conduct, such a breach *per se* does not furnish a ground for disqualification from contesting an election under the Constitution. There must be proof that the breach has been made the subject of complaint before the competent Tribunal and that the person to be disqualified for the breach had been convicted for the breach[35].

4.4.8 OTHER FORMS OF DISQUALIFICATION

Other grounds for disqualification which featured in various Electoral Laws in Nigeria but which do not receive much judicial blessings so far are:

a. For the purpose of Presidential and Governorship elections, where a person has been elected to such office at any two previous elections[36].
b. Where a candidate does not attain the requisite constitutional age to vie for any elective post.
c. Where under the law in any part of Nigeria a person has been adjudged to be a lunatic or declared to be of unsound mind.
d. Where a person is under a sentence of death imposed by any competent Court of law or Tribunal in Nigeria or a sentence of imprisonment for any offence involving dishonesty or fraud by whatever name called or any other offences imposed on him by any court or tribunal or substituted by a competent authority for any other sentence imposed on him by such a court or tribunal;
e. Where a person is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in Nigeria;

[35] SANYAOLU V INEC (1999) 7 NWLR (pt 612) P. 600
[36] BUHARI V. OBASANJO (2005) 13 NWLR (pt 941) P. 1

f. Where a person is a member of any secret society;

g. Where a person has presented a forged certificate to the electoral body.

It must be noted that where a person has been adjudged to be a lunatic or declared to be of unsound mind or sentenced to death or imprisonment or adjudged or declared bankrupt and such a person has appealed against a decision he will not be disqualified for election until such appeal is finally determined or the appeal lapses or abandoned[37].

4.5 BURDEN OF PROOF

A petitioner who files a petition challenging the qualifications or disqualification of a candidate in an election has the burden of proving such ground. This is so because he is the party alleging and he has a duty to prove the affirmative. He is the party who will lose if no evidence is given on the ground. This view is in line with our evidential principle of him who assert must prove[38].

It therefore follows that any petitioner challenging or seeking to challenge the election of a candidate on any of the constituents of disqualification or qualification as contained in the Constitution or relevant electoral laws has the onus of adducing cogent and compelling evidence to substantiate such claim else, the whole action collapses.

It must be appreciated that by section 133 of the Evidence Act, 2011, the burden of proof is not static. It fluctuates between the parties. Subsection (1) places the first burden on the party who against whom the court will give judgment if no evidence is adduced on either side. In other words, the onus *probandi*is on the party who will fail if no evidence is given in the case. Thereafter, the second burden goes to the adverse party by virtue of subsection (2). And so the

[37] Section 66 (2), 107 (2), 137 (2) and 181 (2) of the ***1999 Constitution*** as amended
[38] Section 131 of the *Evidence Act*, 2011

burden changes places almost like the colour of a chameleon until all the issues in the petition have been dealt with[39].

4.6 STANDARD OF PROOF

Civil cases to which election petition belongs are decided on preponderance of evidence and the balance of probabilities. To put it in another way, the standard of proof required in civil cases (election petition inclusive) is that of preponderance of evidence only[40]. Therefore a petitioner who founded his petition on the ground that respondent was at the time of the election not qualified to contest the election must prove his case on the balance of probabilities or preponderances of evidence.

However a caveat must be sounded here that where the constituting element of non-qualification borders on allegation of criminality such as forgery or secret society, it must be proved beyond reasonable doubt[41].

4.7 CONCLUSION

It is evidently clear from the discourse in this chapter and chain of judicial authorities considered that the requirement of proof where it concern qualification and disqualification is not as problematic as it is where it concerns noncompliance or corrupt practice. More apparently too is that, it is now settled that whereas issues of who is the validly nominated candidate of a political party can be settled through a court of competent jurisdiction by way of pre election matter, it is not so when it borders on qualification or disqualification as that is the exclusive preserve of Election Petition Tribunal.

[39]BUHARI V INEC (2008) 19 NWLR (pt 1120) P. 246
[40]KWARA V INNOCENT (2009) 1 NWLR (pt 1121) P. 179
[41]ODON V BARIGHA AMANGE (2010) 12 NWLR (pt 1207) P. 13

CHAPTER FIVE

PROOF OF UNLAWFUL EXCLUSION AND MAJORITY OF LAWFUL VOTES

5.1 INTRODUCTION

In this chapter attempt shall be made to critically discuss with a view to establishing the requirements of proof in the determination of the two remaining statutory grounds contained in section 138(1) of the Electoral Act, 2010 as amended, for challenging or questioning an election viz:

- That the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.
- That the respondent was not duly elected by majority of lawful votes cast at the election.

The writer decided to treat the above grounds together under one chapter although under different sub-headings because not much is expected of a petitioner in terms of proof where the election petition is founded on either of the two grounds.

5.2 UNLAWFUL EXCLUSION

Whether the preclusion of a political party or its candidate validly nominated from contesting an election is a ground for questioning an election is a matter within the province of the relevant Electoral Law. Under section 138(1) (d) of the Electoral Act, 2010 as amended, an election may be questioned on the ground that the petitioner or its candidate was validly nominated but unlawfully excluded from the election. In other words, where it can be established that a political party or its candidate validly nominated to contest an election was excluded or precluded from doing so, it can be a ground for challenging such election.

There is no gainsaying that, the spirit behind the enactment of this statutory ground is to checkmate the excesses of the electoral commission from unjustifiably and unlawfully excluding a political party or its candidate nominated from contesting an election in spite of complying with the laid down rules and regulations.

The pertinent question at this juncture is, when is a candidate said to be validly nominated? Section 31 of the Electoral Act, 2010 as amended provides thus:

31(1) *every political party shall not later than 60 days before the date appointed for a general election under the provisions of this Act, submit to the commission in the prescribed forms the list of the candidate the party proposes to sponsor at the elections.*

(2) The list or information submitted by each candidate shall be accompanied by an affidavit sworn to by the candidate at the High Court of a state, indicating that he has fulfilled all the constitutional requirements for election into that office.

(3) The commission within 7 days of the receipt of the personal particular of the candidate, publish same in the constituency where the candidate intends to contest the election……

(7) A candidate for an election shall at the time of submitting the prescribed form, furnish the commission with an identifiable address in the state where he intends to contest the election at which address all document s and court processes from either the commission or any other person shall be served on him.

S 87 of the Electoral Act, 2010 as amended is instructive and of great importance in relations to valid nominati*on* and is herein reproduced:

S. 87 (1) *A Political party seeking to nominate a candidate for election under this Act shall hold primaries for aspirants to all elective positions*

(2) *The procedure for the nomination of candidates by the political parties for the various elective positions shall be by direct or indirect primaries*

(3) *A political party that adopts the direct primaries procedure shall ensure that all parties are given equal opportunity of being voted for by members of the party.*

(4) *A political party that adopts the system of indirect primaries for the choice of its candidate shall adopt the procedure outlined below:*

(a) *In the case of nominations to the position of presidential candidate, a political party shall:*

i. *Hold special conventions in each of the 36 states of the federation and FCT where delegates shall vote in each state capital on specified date,*

ii. *A National Convention shall be held for the ratification of the candidate with the highest number of votes.*

iii. *The aspirant with the highest number of votes at the end of voting in the 36 state of the federation and the FCT, shall be declared the winner of the presidential primaries of the party and the aspirant's name shall be forwarded to the Independent National Electoral*

Commission as the candidate of the party after ratification by the national convention.

The net effect of S 31 and 87 of the Electoral Act reproduced above is that where a political party has been shown to have complied with the provisions by conducting party primaries for elective posts it intends to contest and forwarded the names of the candidate it intends to sponsor within the statutory period in line with the Act, then a valid nomination is deemed to have been made and failure to include such political party or its candidate(s) in the contest of an election, may be a ground for challenging the election which if proved may be very costly for the said election.

In the case of PPA V. INEC[1], the court opined that for a nomination to be valid it must meet the statutory procedure and mere proposal of a person to INEC through a letter is insufficient and does not amount to a valid nomination. In the instant case no nomination form was filed, neither was the nomination carried out within the statutory period

The previous electoral legislations in Nigeria excluding the Electoral Act, 2006, appeared to have invested the Electoral Commission with the powers to disqualify a candidate. However it is interesting to note that no such provision exist under the Electoral Act, 2010 as amended, as the power to do is now transferred and vested on the court[2]. Consequently where an Electoral Commission decides to disqualify a candidate before an election and proceed to preclude or exclude such candidate or his party in the contest, such can be good ground for challenging an election under this statutory ground[3]. In the case of ATIKU V INEC[4] the Supreme Court held

[1] (2010)12NWLR (pt.1203) p. 98
[2] S. 31 (5), (6) and (8) ***Electoral Act***, 2010 as amended
[3] ATIKU V INEC (2007) ALL FWLR (pt 353) P. 3.

that INEC no longer has power to disqualify a candidate. In this case, INEC sought to disqualify the presidential candidate (ATIKU ABUBAKAR) of Action Congress on the premised of indictment.

It is noteworthy that, where an issue or grouse border on wrongful substitution or nomination of a candidate by his political party, such complaint cannot be accommodated by way of election petition via this ground. However any aggrieved candidate by virtue of S 87 (10) of the Electoral Act may ventilate his grievance through the Federal High Court or the High Court of State, for redress.

In AMAECHI V INEC,[5]Amaechi having won his party's primaries and his name forwarded to INEC was sought to be substituted by Celestine Omehia, who never participated in the primaries, the Supreme Court held that a candidate validly nominated cannot have his name substituted unless cogent and verifiable reasons are shown and the proper venue is federal or state high court.

Similarly where there is a dispute between an intending candidate and his party as to his whether he was a member of that party or whether he was the one nominated by his said party or who won the party's primaries before the general election is conducted by the Electoral Commission, it is only in the state or federal high court that such issues can be entertained and determined because at that time, no general election had taken place[6]

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[4] id
[5](2007) 18 NWLR (pt 1065) P. 105
[6] CPC V UMAR(2012)12 NWLR(pt.1325) p.609

It has been held in plethora of election petition cases that failure by Electoral Commission whether deliberate or accidental to reflect a political party logo on a ballot paper for a designated election thereby making it impossible for such candidate of the omitted political party logo to be voted is a classic case of exclusion therefore actionable under this ground[7].

5.3 BURDEN OF PROOF OF UNLAWFUL EXCLUSION

The burden of proof for unlawful exclusion just like our previous discussions on the other chapters lies squarely on the petitioner who asserts such unlawful exclusion. This is in line with our much cherished evidential principle as captured in section 131 of the Evidence Act, 2011 and reiterated in plethora of judicial authorities[8]. Consequently a petitioner alleging unlawful exclusion must prove the following by credible evidence:

- That election was conducted and a winner declared
- That he was validly nominated by a political party which is registered under the Electoral Act
- That his political party has conducted primaries which led to his emergence in line with S. 87 of the Act and forwarded his name not later than 60 days as required in S. 31 of the Electoral Act
- That the logos of his party or his picture whichever is applicable was omitted in the ballot paper making it impossible for his supporters to vote for him.

[7] INEC V. AC(2009)2 NWLR (pt.1126) p. 544
[8]KWARA V INNOCENT (2009) 1 NWLR (pt 1121) P. 179 &AGAGU V MIMIKO (2009) 7 NWLR (pt 1140) P. 343 etc.

Once a petitioner has been able to establish the above requirement, he would be deemed to have discharged the onus of proof placed on him. In the case of AC V. INEC[9] the court observed that the omission of the results of a candidate in an election in the final result without explanation from the person that conducted the election constitutes without more conclusive evidence of exclusion. In the case instant the INEC after accepting the nomination of Action Congress Gubernatorial Candidate for Adamawa State and even included it in the ballot papers somersaulted and disqualified them on the eve of the election and on the day of the election directed that the Action Congress's logo be struck out on the ballot paper

5.4 STANDARD OF PROOF FOR UNLAWFUL EXCLUSION

The standard of proof required of a petitioner who founded his petition on unlawful exclusion is proof upon balance of probabilities or the preponderance of evidence. The petitioner is not required to show whether his exclusion has affected or would have affected the outcome of the election. Once it is established upon balance of probabilities that a petitioner or his political party logo is excluded from the ballot paper in spite of complying with the laid down rules and regulations that would have guaranteed their inclusion is sufficient proof

5.5 MAJORITY OF LAWFUL VOTES CAST AT AN ELECTION

This is last statutory ground under which an election may be presented under the Electoral Act, 2010 as amended[10]. The theory of avoidance of election on the ground that the respondent was

[9] (2009)2 NWLR (pt. 1126) pg 544
[10] Section 138 (1) c, **Electoral Ac**t, 2010 as amended

not duly elected by the majority of lawful votes cast at the election is based on the principle that only lawful votes should elect a candidate[11].

A complaint questioning the return of the respondent for not being duly elected by majority of lawful votes cast may arise on either of the below listed occasions:

a. Where the votes cast at the election were not correctly added up or counted[12]
b. Where votes cast at a number of polling stations exceeded the total number of persons accredited to vote at those polling stations[13]
c. Where votes were inflated or deflated[14] and
d. Where invalid votes were added.

It is pertinent to state that, on any of the above scenarios where it is the basis for challenging an election under this ground, regard is normally given to either FORMS EC8A1(Statement of Result) or FORMS EC8B1 (Summary of Result from polling Stations) in the determination of lawfulness or otherwise of the votes cast at the election[15].

In the case of ALHAJI UMAR MUSA YAR'ADUA V ALHAJI SAIDU BARDA[16]the court opined thus: *"the only way one can question the lawfulness of some votes cast at the election is to tender in evidence all the forms used and call witnesses to testify to the misapplication of the votes scored by individuals"*.

[11]OGUNJIMI A, A (1997) ***Practical Approach to Election Petition Procedure in Nigeria***. Ogunniyi Printing Works, Ogbomoso Vol. 1 P. 97
[12] M. H. OKUNLOLA V. D. OGUNDIRAN AND 1 OR (1962) 1 NLR (pt 1) P. 83
[13] ABBA GANA TERAB V MAINA MA'AJI LAWAN (1992) 2 NEPAR P. 214
[14] ENGR. ALHAJI MAGAJI ABDULLAHI V ALHAJI KABIR IBRAHIM GAYA AND 2 ORS (1992) 2 LRECN P. 144
[15] KURFI V MOHAMMED (1993) 2 NWLR (pt 277) P. 602
[16] (1992) 3 NWLR (pt 231) P. 628

Where a tribunal/court is convinced that a candidate returned as elected was not duly elected on the basis that he did not score majority of lawful votes cast at the election, the only appropriate order a tribunal or court can make is to declare as elected a candidate who scored majority of lawful votes cast at such election[17].

5.6 BURDEN OF PROOF OF MAJORITY OF LAWFUL VOTES CAST

Where a petitioner in an election petition contends that the respondent did not score majority of lawful votes cast at an election, the onus of proof lies on the petitioner to show on balance of probabilities how unlawful were the votes of the respondent and how lawful were his votes and further to show how if the unlawful votes of the respondent is discounted, he will win by reason of the lawful majority of votes cast. The Courts/Tribunals have treated this ground as that of an invitation to compare and contrast figures.

In the case of ENGR. ALHAJI MAGAJI ABDULLAHI V ALHAJI KABIR IBRAHIM GAYA[18] the court held that, where in the election petition, a party contends that he scored the highest number of lawful votes and complains of inflation and deflation of votes, his argument smacks of facts. It is a matter of arithmetic, a simple question of plus or minus. It is for the party to satisfy the court that after subtracting the inflated votes or adding the deflated votes to the lawful votes of the appellant that in the end of the arithmetical exercise, he scored higher number of lawful votes.

[17] GE V. AKINYEMI (1998) 7 NWLR (pt 557) P. 281
[18] (1992) 2 L.R.E.C.N. P. 144

Similarly in CHIMA ANOZIE V DR KEN OBICHERE & ORS[19] the Court of Appeal held thus:

> *A complaint that a candidate did not score majority of lawful votes cast at an election is an invitation to compare and contrast figures. To establish the complaint, there must be a proper tabulation of the registered voters, the total number of votes cast and the votes scored by each candidate. A party in an election, who alleges that he was entitled to more votes at an election than he was credited with or that his opponent scored lesser votes; must:*
>
> a. *Obtain leave of court to file head of votes*
> b. *File the list of such votes to support his complaint that his own votes was short counted or given to his opponent*
> c. *Show that those votes when added to his own would have tilted the election in his favour.*

In essence therefore a petitioner who rooted or founded his case on majority of lawful votes cast must be armed ready to prove lawful votes or inflated figures and must also show that if the unlawful votes or inflated figures were deducted from the votes credited to his opponent, the result would change in his favour.

5.7 STANDARD OF PROOF OF MAJORITY OF LAWFUL VOTES CAST

The standard of proof required of a petitioner under this ground is dependent on the fact and circumstance of each individual case. Where complaint borders on miscalculation or inflation of votes, the standard of proof is proof upon balance of probabilities or of mathematical exactitude. However where the allegation borders on imputation of crime such as manipulation or alteration of result sheets, mutilation of result etc such must be proved beyond reasonable doubt[20]. It is the writer's view that proof beyond reasonable doubt in this context should be seen as proof slightly above balance of probabilities. By this the writer humbly suggests that mere proof of manipulation or alteration of results should be sufficient without requiring more.

[19] (2006) 8 NWLR (pt 981) 140
[20] EZE V OKOLOAGU (2010) 3 NWLR (pt 1180) P. 183

5.8 CONCLUSION

Sequel to our discussion on this chapter, one fact that is discernable from the chain of judicial authorities and attitude of election petition judges as observed in this chapter is that proof in an election petition founded on unlawful exclusion and majority of lawful votes cast at an election is less challenging or problematic and more achievable. It is also evident that whereas in the case of unlawful exclusion if established or proven will invalidate an election it is not so with prove of majority of lawful votes cast as the consequence is not nullification but a candidate with the lawful majority of votes cast is declared the winner.

CHAPTER SIX

SUMMARY, CONCLUSION AND RECOMMENDATIONS

6.1 SUMMARY

Election petition is an originating process by which an unsuccessful candidate at an election or his political party or any other person vested with statutory locus seeks to question the return of a successful candidate at an election as undue, either as a result of noncompliance with the electoral law or that the person who has been returned was not at the time of the election qualified to stand for the election or that the election in which the winner was declared is invalid or because the petitioner was validly nominated for the election but was unlawfully excluded from the election.

Interestingly section 133 of the Electoral Act, 2010 as amended recognized only election petition as the only legitimate means to challenge a conduct of an election in Nigeria. Consequently any person who is aggrieved with the conduct of an election and has the requisite statutory locus as captured in section 137 of the Electoral Act, 2010 as amended, may ventilate his grievance before the Election Tribunal by reference to any of the Statutory grounds provided in section 138 of the Electoral Act.

Needless to state that only persons with the requisite statutory locus are allowed to present an election petition which must be founded on all or any of the statutory grounds no more no less. However it must be quickly added that, apart from the grounds as contained in section 138 of the Electoral Act, the supreme Court appeared to have created a fifth constitutional ground to wit:

whether a person has been validly elected under the constitution in the case of YUSUF V OBASANJO[1].

Generally for a petition to be competent it must specify the interested parties and the petitioner's right to present the petition, the holding of an election, the votes scored if they are in issue, the person declared as the winner, the votes scored as well as the ground of the petition and the relief sought. The failure of the petitioner to specify the above items has been held to be fatal to the competence of the petition[2].

Election petition can only be resolved by calling witnesses and leading evidence at the hearing of such petition. Therefore a person who founded his grouse or complain on any of the statutory grounds must lead credible, cogent and compelling evidence before the tribunal if he desires any verdict in his favour.

Generally, the standard of proof required of a petitioner in an election petition is proof on the balance of probabilities or preponderance of evidence. However where the petition borders on imputation of crimes or corrupt practices, the standard of proof is higher as such alleged crime or corrupt practices must be proved beyond reasonable doubt.

6.2 CONCLUSION

In view of the discourse in this thesis and the various decisions of Courts/Tribunals expounded and analyzed in this research, the following observations are apparent:

i. The standard of proof on cases of corrupt practices appeared to be impossible to prove. The requirement that allegations of corrupt practices must be proved by cogent

[1] (2004) 9 NWLR (pt 887) p. 14
[2] EFFION V IKPE (1999) 6 NWLR (pt 606) p. 260

and compelling evidences of eye witnesses who must also be disinterested persons before any petitioner can be said to have proved his cases beyond reasonable doubt is to say the least nearly impossible to satisfy particularly gubernatorial and presidential election petitions.

ii. Unnecessary adherence to technicalities over and above substantial justice. Our tribunals and courts appeared to have shut their eyes at whatever injustice that may be occasioned by their strict adherence to the wordings of the statutes. The tribunal judges appeared to have detached themselves from the society and dishing out rulings/judgments that do not correspond with the general aspirations and yearnings of the electorate.

iii. Owing to the difficulty in establishing corrupt practices before our tribunals and courts most people have resorted to using all fraudulent means to earn election victory instead of canvassing for votes from the electorates. The principle/requirement that rigging or corrupt practices must have been perpetuated by the respondent or directly authorized by him before his election can be voided by such corrupt practices is to say the least an encouragement to desperate politicians to hide under the guise of those persons i.e. political thugs to rig election in their favour.

iv. The new legal regime of time limit for hearing and determination of election petition although appeared to have cured the mischief hitherto occasioned by long and protracted litigation, has now become a conduit pipe for denial of fair hearing. The recent judicial pronouncements in gubernatorial election petitions from Benue and Borno State where petitions without being heard and for no fault of the petitioners are

dismissed as statute barred is unhealthy for our democratic experiment and a Constitutional breach of right to fair hearing[3].

v. Judges appeared to be given contradictory verdicts thereby creating uncertainties in the jurisprudence of election petition. Cases with similar facts and circumstances ended up being decided differently by different panels of one court thereby suggesting corruption and compromise of judges. A classic example is the various conflicting verdict of the various panels of the court of appeal on the exclusion or otherwise of the day of declaration in computation of time[4].

vi. The principle that where a petitioner founded his petition on noncompliance with the relevant provision of the Electoral Act must prove not only that the noncompliance was substantial but also that it substantially affected the result of the election appears too rigid and pose a serious obstacle to proof of election petition founded on noncompliance.

vii. The Electoral Act 2010 as amended has omitted to define what it meant by certain key terms such as non compliance, compliance, substantial non compliance, substantial compliance and corrupt practices.

viii. The Courts/Tribunals appear to be visiting the sin of the registry on the, litigants. The view that where delay in filing of a petition is occasioned by administrative lapse/fault is no excuse for late filing is to punish a litigant for a fault that is not his and cannot be of help in remedying such fault. The case of MALLA V KACHALA[5] readily comes to mind.

[3]Supra at p. 44
[4]Supra at p. 44 – 46
[5] (1999) 3 NWLR (pt 594) p. 309

ix. The Constitution appears to have vested the powers of selection and subsequent appointment of election petition judges for gubernatorial and national assembly tribunal across the country on the president of the court of appeal although in consultation with the chief judges of states. This discretion or powers appears unfettered and likely to be an object of abuse.

6.3 RECOMMENDATIONS

This study makes the following recommendations**:**

1. The requirement of proof beyond reasonable doubt on petition that relates to corrupt practices or imputation of crime should be reviewed and a middle course approach should be adopted. By mid-course approach, here the mean, the mere fact that it can be established that an election is ridiculed by corrupt practices should be sufficient to void such an election without necessarily establishing the link between the respondent and the persons who carried out the corrupt practices.
2. Election petition being sui generis in nature should have its unique standard of proof rather than applying the conventional standard in a scenario that has different consequences. The justification for proof beyond reasonable doubt in our conventional court has been largely to protect the liberty of the Accused person which is not the case in election petition. The petitioner does not desire the court to punish the respondent nor does he intend to take or initiate criminal action against them as that is the prerogative of the Attorney General and not even the spirit behind election petition. No fear should be expressed on the need to protect the peoples mandate as the court or tribunal is the bastion of hope for the common man.

3. Section 140 of the Electoral Act 2010 as amended providing for substantial noncompliance and which must have substantially affected the result of the election should be amended to make it disjunctive or alternative rather than the present conjunctive construction. In this wise the word "and" as used in that section be replaced with the word "or" so that a petitioner may either be required to prove substantial noncompliance with the relevant provisions of the Electoral Act or that the noncompliance has substantially affected the result of the election.
4. The Electoral Act should equally be amended to include in its interpretation section the meaning of concepts such as compliance, non compliance, substantial compliance, substantial non compliance and corrupt practices. It is hoped that such definition will bring to the fore in clear and unambiguous manner the intendment of the legislature for providing for such terminologies in the Act.
5. It is over a decade now since the Supreme Court made a declaration that the days of technicalities are over. In spite this declaration technicality still flourish from Supreme Court down to election tribunals. Our courts must look at the intendment and spirit behind legislation rather than adhering to the wordings of statute even when it is manifestly occasioning injustice. Cases should be determined on their substance and merit rather than on technicalities. An Election Petition Tribunal should be reflective of the worthiness of a tribunal for instance, it should be Flexible in the conduct of proceedings as opposed to strict legal approach and to maintain the need for speedy and cheap justice.
6. The court must try to balance speed with the desire to do substantial justice. Although the area of time limit for hearing and determination of petition or appeal is encouraging, the

tribunal/ court of appeal must allocate and manage the limited time judicially and fairly so that one party does not interfere with the time of another while equally ensuring all parties are given adequate time and opportunity to present their case on its merit. In this wise, it is hereby recommended that all election petition cases be given accelerated hearing.

7. The Constitution and Electoral Act which introduced this legal regime of time limit should be amended again to allow for extension of time where an appellate court ordered for retrial *denovo* so that this legal regime does not become another instrument for denial of fair hearing.
8. Continuous and intensive seminar/work shop should be organized for practitioners and judges of election petition by the Nigerian Bar Association (NBA) and National Judicial Institute (NJI) respectively with a view to updating them on the state of the Electoral Law and equipping them with skills and tact for election petition. It is no longer news that from 1999 till date, we have experienced different electoral legislations. Virtually all the election we had, each had her own electoral law. Needless to state, that each of these legislations had its own unique challenges which call for continuous study. Equally disciplinary mechanism should be put in place to checkmate and sanction lawyers and judges that may be professionally wanting in the fair handling of election petition.
9. A more transparent approach should be adopted in the selection and subsequent appointment of election petition judges. Only judges who have distinguished themselves in terms of qualitative and sound judgment in their respective jurisdiction and who have demonstrated good moral content that should be appointed.

10. The principle that a sin of registry or administrative slips should not be visited on a litigant should be made applicable to Election Petition. Where it can be established that, the delay in filing is purely administrative, a litigant be allowed extension of time while slamming a heavy sanction on the erring registrar or registry staff.
11. The Court of Appeal should continue to be a one united house while upholding our cherished revered doctrines of judicial precedent and hierarchy of Courts by showing example in her approach to the decision of the Supreme Court.

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