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ELECTORAL PROCESS LAW & JUSTICE

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Foreword

I count it a rare privilege to be requested to write the foreword to this compendium of well researched essays edited by learned Professor Wahab Egbewole, SAN and Akin Olawale Oluwadayisi Esq titled Electoral Process, Law and Justice.

Generally, every four years, there is change in government which is made possible by the electoral process, the law and court adjudication. However, there appears few academic works of this kind that Judges, Lawyers and even our electoral institutions such as Independent National Electoral Commission can consult on issues bordering on their responsibilities. Again, in Nigeria election is to hold in respect of 36 states governorships, 360 members of House of Representatives, 109 members of the Senate and the FCT, and 774 Local Governments during election cycle. Coincidentally, Nigeria is presently going through another series of electoral process and transition at the time this book is published and I believe it has addressed some of the issues that may likely arise out of the exercise.

A careful perusal of the publication clearly depicts that the chapters were written by senior lecturers, professors and Jurists on different aspects of our electoral process, electoral law and electoral justice. I am also fascinated with the fact that the writers of the various contributions were drawn from different geo-political zones making up the country. The book is divided into three broad parts. Electoral Process which is Part A consists of interesting and well considered topics such as Disenfranchisement as an Albatross to Credible Electoral Process, Election Petitions in Nigeria: Questioning the Standards of Proofs of Criminal Allegations, Electoral Laws in Nigeria and its Implementation towards Conducting Free and Fair Election and Disability Rights and Electoral Processes in Nigeria: A Calculated Disenfranchisement.

Electoral Law as Part B takes care of topical issues such as Electoral Law, Justice and Good Governance in Nigeria, Electronic Voting as a Development on Election in Nigeria and the Challenges of Executive Legislative Approval, Legal Responsibilities of Independent National Electoral Commission (INEC) under the Electoral (Amendment) Act, 2010, the Role of Laws and Institutions in Addressing Laundered Money by Politically Exposed Persons to Finance Elections in Nigeria, Introspection into the Electoral Amendment Act, its Proposals and Efforts by the National

Chapter - 11

Election Petitions in Nigeria: Questioning the Standards of Proofs of Criminal Allegations

Ikenga KE Oraegbunam and Ifeoma Miriam Erondu

Abstract

This study seeks to examine the treatment of criminal allegation made in election petition in Nigeria. It engages the rationale for the requirement that criminal allegations must be proved beyond reasonable doubt and argues that such is incongruous with election petition and other variants of civil proceedings. Instructively the singular rationale for the requirement of proof beyond reasonable doubt was grounded in the social justice imperative of averting the possible tragedies of making innocents suffer often irreparably from state administered punishment over crimes they did not commit. The proof beyond reasonable doubt was therefore created for nothing other than ensuring that only guilty persons are convicted by the state. The logic of its continued application to criminal proceedings is faultless but the extension of the same stringent standard of proof to criminal allegations made in election petitions suggests a gross legislative misconception of the core essence of the proof beyond reasonable doubt. Election petitions are sui generis in nature which means 'of its own kind and class'. In essence proceedings in an election petition are special proceedings, completely divorced and separate from other civil proceedings. Election petitions only strive to determine whether the sovereign will of the people prevailed or was subverted in an electoral process. Compensatory damages, injunctions, declarations, restorative reliefs, and so on, are sought and not a criminal conviction of the electoral offenders. There is absolutely no basis to require that the standard of proof for conviction-seeking proceedings, be introduced into election petition proceedings seeking different outcomes. Content analysis methodology was employed in this work. The study resorted to text books, journals, relevant statutes, case laws, articles on the internet to give an in-depth analysis of this topic. A reversal of the current law through concerted legislative and jurisprudential rethinking is highly desirable. It is therefore recommended that if the standard of proof in criminal allegations

in election petitions is to remain beyond reasonable doubt then the provision of the Act under reference should be amended to reflect that 'in any proceedings' before a court of law where the commission of a crime is alleged, proof is beyond reasonable doubt as opposed to what exist today under the Act. It should replace the existing wordings 'in any proceedings civil or criminal'. The legislature may also consider enacting another phrase such as 'highly probable' to become statutorily sufficient to determine the standard of proof in criminal allegations made in election petitions.

1. Introduction

Free and fair elections are the corner stone of every democracy and the primary mechanism for exercising popular sovereignty. Through such elections, citizens participate in the governance of their country by choosing those who govern in the quest for development. Democracy and, therefore, elections are grounded in the right of citizens to effectively participate in their government. This right encompasses both the right of Nigerian citizens over the age of 18 to vote and the right of qualified Nigerians to be duly elected to public office. In Nigeria, however, elections have historically been akin to organized crime. This is because during Nigerian elections, multiple actors pursue predetermined outcomes through common enterprise rather than allowing the people's vote to determine the country's political leadership. Politicians have become more desperate and daring in taking and retaining political power, more reckless and greedy in their use and abuse of power and more intolerant of opposition, criticism and efforts at replacing them [504]. This behaviour is unlawful, criminal and unconstitutional. Such enterprise violates the constitutional rights of Nigerian citizens to participate in their government and to determine who governs them by casting their individual ballot. The factors responsible for this state of affairs include among others, the character of the Nigerian state as the arena of electoral contests, the existence of weak democratic institution and processes, negative political culture, weak legal/political framework and lack of independence of and capacity of the relevant electoral bodies. Historical evidence confirms that most political actors have often contested electoral outcomes from the first election petition of the 1950's to date. The judiciary has always provided a last port of call when out of court settlement could not resolve post-election challenges.

In Nigeria, like other jurisdictions, election petition is widely known and acceptable legal means of expressing contestant's dissatisfaction with an election result as declared. It is in law the major means of overturning a flawed victory in an election. Not only may an election result be challenged by petition, flawed processes of nomination of a candidate for an election can also lead to replacement of a wrongly filed candidate with the right one. The case of Rotimi Chibuike Amaechi the former governor of River State of Nigeria is highly instructive [505]. These post-election challenges come in the form of election petitions made to the appropriate constitutionally established tribunals and courts challenging the results and outcomes of conducted elections. These petitions only strive to determine whether the sovereign will of the people prevailed or was subverted in the electoral process.

There is indeed a heavy dose of public policy content involved in election petition and that is also why both the Constitution and the Electoral Act have made elaborate provisions to ensure that those who harbour criminal tendencies are not only excluded but if discovered, prosecuted for even daring at all to pollute the system and steal the people's mandate. It is not sufficient for him to simply drop the mandate and scamper off, the law and the society must still call him to account for his alleged criminality, if any.

This paper examines the nature and grounds of election petitions in Nigeria. It also discusses the electoral offences and focuses on the need to rethink the jurisprudence of demanding 'proof-beyond-reasonable' standards in relation to criminal allegations in election petitions.

2. Election Petition in Nigeria

There appears to be no statutory definition in both the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the Electoral Act 2010 (as amended) of the term 'election'. Even the courts did not give such precise definition. What the courts did was to describe the concept of election as opposed to defining it. The court in the case of *Attorney General of Federation v A.N.P.P* [506] acknowledged the lack of a proper statutory definition of the word election. Be that as it may, election is the process of selecting a person to occupy an office, usually a public office, membership or award or other title or status [507]. It is also the process of choosing a person or group of people for a position especially a political position by voting [508]. In another vein, Election means 'any election under the Electoral Act to which an election petition relates' [509]. A bye-election is an election held to fill a vacant post. The difference between general election and bye election is that a general election involves an election at regular intervals to fill the seat available in the entire constituency whereas a bye-election refers

to an election to fill a particular vacant seat or position created either by death, resignation or impeachment.

In Nigeria like other jurisdictions, election petition is the only known legal means of challenging a declaration in an election and it is a complaint by the petitioner against an undue election or return of a successful candidate at an election [510]. It is a suit instituted for the purpose of challenging the validity of an election or disputing the due return of a candidate or claiming the return of a candidate on the grounds of lack of qualification, corrupt practices and irregularity or otherwise. An election petition presupposes that an election has been held and the result has been announced [511]. The courts in a long line of cases continuously declare that election petition is a proceeding that is neither civil nor criminal but one that is *sui generis*. One of such cases is *Abubakar v INEC* where the court on reiterating the *sui generis* characteristic of election petition held thus: 'Election petition and the rules applicable to it and its proceedings are unique. It is the reason why election petition are described as 'sui generis'. They are different from other proceedings. They are neither allied to civil nor criminal proceedings. They stand on their own and bound by their rules made under the enabling law.' In *Uduma v Arunsi* [512] the court clearly stated that election petitions are *sui generis*. Their very nature makes them peculiar. Sometimes the general statement of the law applicable in ordinary civil litigation may not be justice in election proceedings.

Procedure inherent in election petitions is special and distinct. It was decided in the case of *Yahaya v Aminu* [513] that election petition is *sui generis* in nature. They are special proceedings, separate from other civil proceedings so much that strict compliance with the Electoral Act is imperative with respect thereto. Election petitions demand special understanding of the law guiding the procedure of election petition matters such that the petitioners and their legal practitioners will not mess up their good cases for lack of knowledge. This is extended to election petition appeal cases. Section 145 (1) of Electoral Act provides that the rules of procedure to be adopted for election petitions and appeal arising there from shall be as set out in the First Schedule to this Act. The First Schedule to the Act is no more than rules of procedure to be adopted for election petitions and appeals arising there from. Nevertheless, paragraph 4 (1) of the First Schedule to the Electoral Act provides that: 'An Election petition under this act shall: (a) Specify the parties interested in the election petition (b) Specify the right of the petitioner to present the election petition (c) State the holding of the election, the scores of the candidates and the person returned as the

winner of the election; and (d) State clearly the facts of the election petition and the grounds on which the petition is based and the relief sought by the petitioner.' Compliance with paragraph 4 (1) of the First Schedule to the Electoral Act is mandatory. Paragraph 4 (6) of the First Schedule states that, 'an election petition which does not conform with sub-paragraph is defective and may be struck out. At the foot of the election petition there shall also be stated an address of the petitioner for service at which address documents intended for the petition may be left for its occupier' [514]. The election petition shall be accompanied by '(a) List of the witnesses that the petitioner intends to call in proof of the petition (b) Written statements on oath of the witnesses and (c) Copies or list of every document to be received on at the hearing of the petition.

Another requirement on the procedure of instituting election petition is to the effect that the petitioner shall give security for all costs which may become payable by him to a witness summoned on his behalf or to a respondent. This amount shall not be less than five thousand naira and if this amount is not given as required, there shall be no further proceedings on the election petition [515]. It is also required under the Electoral Act that the presentation of an election petition shall be made by the person or by his solicitor, if any, named at the foot of the election petition to the secretary and the secretary shall give a receipt [516]. The petitioner or his solicitor as a matter of procedure is required at the time of presenting the petition, pay the fees for the service and the publication of the petition and for certifying the copies and in default of the payment, election petition shall be deemed not to have been received unless the tribunal or court otherwise orders [517]. An election petition shall be filed within 21 days after the date of the declaration of results of the elections [518]. The trait of all laws relating to election petition is that time is of the essence. The spirit of the law is that election petitions are given expeditious adjudication to enable the parties know their status. The election tribunal is incurably robbed of jurisdiction if the statutory time within which the petition is to be filed is not complied with. It cannot be extended by any tribunal [519]. The court in the case of *Bassey Imerh v Ime Bassey Okon* on time within which to file an election petition held that by virtue of section 285 (5) of the 1999 Constitution, an election petition shall be filed within 21 days after the date of the declaration of result of the election. On the effect of filing petition out of time, if a petition is filed out of time, the tribunal lacks the necessary jurisdiction to deal with the petition filed outside the mandatory 21 days, it being statute barred. In the instant case, the petition was statute barred as it was presented one clear day out of time and was therefore dismissed. The election petition is also

required to specify the parties interested in the election, their rights, their scores and the person returned as the winner of the election. It should also state clearly the facts of the election petition and the ground or grounds on which the petition is based and the relief sought by the petitioner. The address of the petitioner is also required for service. If the address for service is not stated accordingly, the petition shall be deemed not to have been filed unless the tribunal or court otherwise orders. It is therefore imperative to state that an election petition which does not conform to the contents of election petition as stipulated under the Act is defective and may be struck out by the tribunal or court.

However, it has been provided by the Act that an election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition and an appeal from a decision of an election tribunal or court shall be heard and disposed of within 90 days from the date of the delivery of judgment of the tribunal [520].

It is the Electoral Act that determines persons entitled to present election petitions and the respondents to such petitions. In determining who is a necessary party to election petition recourse must be had to both the petition and the Electoral Act. Necessary parties are those who are not only interested in the subject matter of the proceedings but also who in their absence, the proceedings could not be fairly dealt with. In *Bwacha v Ikenya* [521], an election petition may be presented by one or more of the following persons: (a) A candidate in an election (b) A political party which participated in the election. A person whose election is complained of is in the Act referred to as the respondent. If the petitioner complains of the conduct of an Electoral Officer, a presiding or returning officer, it shall not be necessary to join such officers or persons notwithstanding the nature of the complaint and the Electoral Commission shall in this instance be: (a) Made a respondent (b) Deemed to be defending the petition for itself and on behalf of its officers or such other persons [522]. For a political party to qualify as a petitioner in the instance above, it only needs to participate at an election and no more, and participation simply means taking part not in any specified way. This may include participation by the political party itself or through its authorized agent. This principle was also clearly illustrated in the case of *Buhari v Obasanjo* [523]. The court was of the view that: 'Necessary parties are those who are not only interested in the subject matter of the proceedings but also who in their absence, the proceedings could not be fairly dealt with. In other words, the question to be settled in the action between the existing parties must be a question which cannot be properly settled unless they are parties to the action instituted by the plaintiff.'

For any election petition to be competent and therefore entertainable before any tribunal in Nigeria, it must be predicated on any of the grounds in section 138 (1) of the Electoral Act 2010. In other words, whatsoever that is sought to be challenged which cannot fit into any of the grounds in the above section of the Act will not sustain an election petition no matter how grievous or reprehensible or pitiable it may be. In *Nwabuchi v Gift* [524], the petitioner was recorded to have scored the highest number of votes but that notwithstanding, the 1st respondent was declared elected instead of the petitioner on the ground that the petitioner was disqualified by the 2nd respondent i.e. the electoral body two days before the election. The petitioner said that he had no notice of the disqualification and contended that the disqualification was invalid. The tribunal struck out the petition and held that none of the grounds applies to the case. On appeal, the Court of Appeal held that as the law stood then, the petition did not fall into any of the grounds stated in the relevant section of the Electoral Act with regard to grounds for election petition. However, a single ground of election petition is sufficient and sustainable. In *Ojukwu v Yar'Adua* [525], it was held that ground of his petition is a competent ground which alone can sustain the petition. There is need also for grounds of election petition to be concise and direct devoid of vagueness. In *Ojukwu v Yar'Adua*, the learned judge said that: 'The wording of the ground is not only bogus but also vague, generic and nebulous. What does the appellant mean by minimal requirement of electoral democracy and the law and the Electoral Act? More importantly what does the appellant mean by electoral democracy?' In other words, the election petitions should be devoid of all ambiguity, precise and concise in its wordings. The following grounds are relevant:

That the Person whose Election is Questioned was, at the Time of the Election, not Qualified or was Disqualified from Being Elected

Qualifications and disqualifications of candidates are as constitutionally prescribed for each elective office. The said constitution prescribed in unequivocal terms, the qualifications and disqualifications of candidates for elective offices upon which a petition could be grounded [526]. In *Hon Mohammed Salisu AAlwa'U & Ors v Abbas M. Yakubu & Ors* [527], the 1st respondent did not resign in accordance with the provisions of regulation 44 of the Bamali Polytechnic Staff Regulations. The appellant consequently prayed the Tribunal to hold that the 1st respondent is disqualified outright from contesting the election for flagrant contravention of the Constitution and breach of the Electoral Act as he did not resign, withdraw or retire from

his employment with Nuhu Bamali Polytechnic thirty days before the day of the election. At the conclusion of trial, the tribunal dismissed the appellant's petition. The appellant appealed to the Court of Appeal. Allowing the appeal, the Court of Appeal held that the 1st respondent was not qualified to contest the election for his failure to comply with the provisions of the section (107) (f) of the 1999 Constitution because he was still an employee of the polytechnic from where he neither retired, withdrew nor resigned before contesting the election. Salami JCA in the above case held: 'The votes cast for the 1st respondent are presumed valid until it is otherwise proved. It can be shown that they are void if it is established that the electors went ahead intentionally to waste their votes, in spite of their knowledge of his disqualification, by voting for him.' But in *Alwa'u v Yakubu* [528] the petitioners could not prove that voters were aware of the circumstances of the 1st respondent's disqualification not to talk of proving that the electorate stubbornly proceeded to vote for him in spite of their knowledge. The Electoral Act 2010 provides that where an election 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 election tribunal or court shall not declare the person with the second highest votes as elected but shall order a fresh election [529].

That the Election was Invalid by Reason of Corrupt Practices or Non-Compliance with the Provisions of this Act.

This ground has two limbs. The first is that the election was voided by corrupt practices of officers and (ii) that the election was voided by the non-compliance with the provisions of the law. A petitioner may ground his action on any two. Neither the 1999 Constitution nor the Electoral Act defines 'corrupt practices'. The Supreme Court of Nigeria in *Alhaji Yusuf & Ors v Obasanjo & Ors* [530] per Pats – Acholonu JSC in his judgement held inter alia: 'I believe that the term 'corrupt practices' denotes or can be said to connote 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 will suffice therefore to define 'Corrupt Practices' as a generic term representing the summation of all offences prescribed in the Electoral Act or the enabling electoral statute which offend and threaten the electoral process [531]. In other words, corrupt practices are criminal manipulations of unconscionable politicians to sway electoral results unduly to their favour and advantage. Corrupt practices are criminal. Allegations questioning the propriety of elections versed on criminal acts must be proved

beyond reasonable doubt. Proof beyond reasonable doubt is proof that precludes every reasonable hypothesis except that which it tends to support. It is proof that is consistent with the guilt of the accused person or against whom the allegation has been made. Therefore, an elected candidate cannot have his election nullified on the ground 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 *Chief Emesin v Hon CalistaNwachukwu* [532], the Enugu Division of the Court of Appeal stated that an elected candidate cannot have his election nullified on the ground of corrupt practices or any other illegality committed in the process of the election unless it can be proved that the candidate expressly authorized the illegality.

In respect of the second limb of this ground, it must be pointed out that an election will not be invalidated by reason of non-compliance with the provisions of the law if, among other things, the non-compliance did not affect substantially the result of the election. In other words, if the election was conducted substantially in accordance with the principles of the Electoral Act, the election will not be invalidated. In *Buhari v Obasanjo* [533], The Supreme Court listed five instances of non-compliance with the Electoral Act as canvassed by the appellant's counsel some of which according to the apex court, were not proved. The court still came to the conclusion that the election was conducted substantially in accordance with the principles of the Electoral Act. In determining whether an election was conducted substantially in accordance with the Electoral Act, the court will look at the circumstances of the case, including the state of the pleadings especially the credibility of the petitioner's position, nature and substance of the complaint of the petitioner, the attitude of the functionaries charged with the conduct of the election and whether the omission and commission complained of by the petitioner even of proved actually, substantially affected the true course of free and fair election [534]. The onus is therefore on the petitioner to adduce sufficient evidence of non-compliance and then show that the non-compliance did in fact substantially affect the results of the election [535]

That the Respondent was not duly elected by Majority of Lawful Votes at the Election

Where a candidate was declared elected otherwise than by majority of lawful votes cast at the election, his opponent can question the election on the ground that he was not duly elected by majority of lawful votes cast at the election. A petitioner that is challenging the lawfulness of votes cast

during an election must give evidence by himself and by other credible witnesses of all forms used in the election and also lead evidence of misapplication of votes scored by the candidates. In *Onmeje v Otokpa* [536], the appellant tendered ballot papers as exhibits in an effort to prove over-voting or other irregularities but he failed to lead evidence as to the use to be made of them. Failing to discharge that, the tribunal refused to examine them. The Court of Appeal held that the only way one can question the lawfulness of some votes cast at the election was to tender in evidence in all the forms used and call witnesses to testify to the misapplication of the vote scored by the candidates. Where an election tribunal finds that a candidate who was returned as validly elected, did not score the majority or valid votes cast at the election, the tribunal will declare as elected the candidate who scored the majority of votes cast at the election [537]. An election petition based on the only complaint that the respondent who won the election was not duly elected by a majority of lawful votes cast at the election under the Electoral Act 2010 but which failed to plead the scores of the candidates at the election is fundamentally defective and therefore, not competent to proceed to hearing [538]. This is because without pleading the scores of the candidates at the election, the very foundation upon which the ground of the petition is founded namely that the respondent was not elected by majority of lawful votes cast at the election [539], would have been completely absent. In this situation the hearing of the petition in the absence of scores of the candidates becomes a futile exercise because of the absence of vital facts in the pleadings upon which evidence could be led to support the relief being sought.

That the Petitioner or its Candidate was Validly Nominated but was unlawfully excluded from the Election

Under this ground, any person who has been duly and validly nominated but was unlawfully excluded from an election could challenge the result of the election through election petition. The onus of proof of valid nomination by his political party and unlawful exclusion from the election lies on the petitioner. To discharge the burden, the petitioner must plead and prove that he was validly nominated by his political party, that the election was conducted and concluded and a winner declared and that his name was not included as one of the contestants [540]. Under the Electoral Act, it is only the political party that has a right to present the petition where the name of the person nominated was unlawfully excluded. The person alone lacks the locus standi to present an election petition. In *Wasinya and Ors v INEC &Ors* [541] the petitioners/appellants were members of the All Progressive Grand Alliance (APGA) in Cross River State. They believed they were the nominated candidates of the party in the gubernatorial election fixed for 9th April 2003. On the Election Day, they discovered that the Independent National Electoral Commission (INEC) had other names as the party's candidate for the election. Being aggrieved by this discovery, they filed an election petition on the 16th May 2003 complaining that they were unlawfully excluded from the election. However, their party (APGA) was not joined as a party to the petition. The respondents filed an objection to the petition challenging the standing of the petitioners to file the petition. The motion was heard. The tribunal in striking out the petition held that the petitioners had no locus standi. It is against this decision that the appellants filed an appeal. The Court of Appeal considered the provisions of section 133 (1) of the Electoral Act 2002 which provide that an election petition may be presented by one or more of the following persons –(a) a candidate at the election; (b) a political party which participated at the election. Dismissing the appeal, the Court of Appeal held that the All Progressive Grand Alliance (APGA) having not presented any petition that its candidates were unlawfully excluded from contesting the elections puts the petition brought by the appellants in the realm of intra-party disputes which lies within the domestic domain of the party. In his judgement, Olagunju JCA stated: 'Section 133 (1) of the Electoral Act 2002 is explicit on the matter that only a candidate at an election or a political party which participated in the election can present an election petition. The petitioners having admitted sub-paragraph 3 (h) of their petition that they did not participate in the gubernatorial election of 19/4/2003, there is no basis in law upon which they can anchor a supposed right which does not satisfy the requirements of the statutory provisions creating the right.'

Two major principles govern the process of determination of election petition in Nigeria. These are the doctrines of substantiality and of severance. They will be discussed seriatim. There is no doubt that unintended shortcomings and other faults feature in human interactions. Because of this, an action ought not to be vitiated or invalidated if performance level is not exactly one hundred per cent. It will suffice in such circumstance if compliance is substantial. Elections are also fields of human endeavour where the inadequacies of humanity, particularly because of mass involvement of people of diverse interest exposure and status are very manifest. Most electoral enactments the world over make room for substantial compliance. The act provides that an election shall not be liable to the invalidated by reason of non-compliance with the provisions of this Act if it appears to the Electoral Tribunal or court that the election was

conducted substantially in accordance with the provision of this Act and that the non-compliance did not affect the result of the election [542]. Substantial non-compliance and what substantially affects the result of an election are not defined or explained by either the 2006 or 2010 Electoral Act. These are indeed not capable of clear definitions; they can only as issues of fact be taken from the state of the pleadings, the totality of direct and inferential evidence from the circumstance of any particular case. From the provisions of any sections of the Electoral Act, it follows that any election not conducted substantially in accordance with the provisions of the Act shall be invalidated for non-compliance. In *Nowole v Iwuagwu* [543], the Court of Appeal held that where breaches of election rules, although trivial, have affected the result, that in itself is enough to compel the court to declare the election void even though it has been conducted substantially in accordance with the laws governing elections. Conversely, if an election was conducted so badly that it was not substantially in accordance with the law or electoral statute, the election is invalid, irrespective of whether the result was affected or not.

The main objective of this doctrine is to ensure that not every minor non-compliance or minor breach of the provisions of electoral legislations should vitiate an election. An election tribunal or court entertaining an election petition is to decide from the evidence tendered before it in each case whether an alleged non-compliance is substantial enough to warrant nullification. In *Muhammadu Buhari & Ors v Olusegun Obasanjo & Ors*, the petitioner/appellants referred to and laboured to prove non-compliance with sections 17 (2), 1, 19, 40 (1) and 67 (3) all of the Electoral Act 2002 in a presidential election petitions trial. In his concurring judgement, Akintan J.S.C stated: 'In the absence of any credible evidence led to show that any of the alleged breach of the provisions of the Act substantially affected the outcome of the election, no court could grant a request for nullification. The appellants totally failed to realize that the aim of the provisions of section 135 (1) of the Act is to save an election from being nullified on frivolous grounds premised on allegations of minor breaches of the provisions of the Act.' The issues raised in the aforementioned appeal were mainly querying instances of alleged breaches of the provisions of the Act. They failed to prove the effect of such breaches on the outcome of the election. By the doctrine of non-compliance, they are bound to fail. It must be shown clearly by evidence that the non-compliance has affected the result of the election. The petitioner must not only show substantial non-compliance but also the figures, that is, the votes that the non-compliance attracted or omitted. The elementary evidential burden of 'the person asserting must prove' has not derogated from the doctrine. The petitioner must not only assert but must satisfy that the non-compliance has so affected the election result to justify nullification. Belgore J.S.C (as he then was) in his judgement in *Buhari v Obasanjo* held: 'The onus has not by any means shifted from the time honoured law on evidence that the person who asserts a situation must prove. The burden on petitioners to prove that non-compliance has not only taken place but has also substantially affected the result was not fulfilled. There must be clear evidence of non-compliance, then that than non-compliance has substantially affected the election.' The onus of proof does not shift very easily. The SC per Ejiwunmi JSC has held that onus lies on the appellants to establish first, substantial non-compliance and secondary that it did or could have affected the result of the election.

In *Akeredolu & Anor v Mimiko & Ors* [544] the court held that section 138(1) (b) literarily has to be read subject to section 139(1) respectively of the Electoral Act, must be read conjunctively to achieve the law maker's intention. In this regard an election cannot be vitiated for non-compliance unless and until the non-compliance has also substantially affected the result of the election. In other words the appellants have to establish that but for the non-compliance, they would otherwise have scored majority of the lawful votes over the number of votes cast for the first respondent. The summation of this doctrine and its main objective is to ensure that not every minor non-compliance or minor breaches of the provisions of the Act should vitiate an election. An election tribunal or a court entertaining an election petition is to decide from the evidence tendered before it in each case whether an alleged non-compliance is substantial enough to warrant nullification of an election.

The second is the doctrine of Severance is 'the act of cutting off, the state of being cut off' [545]. Severance is a principle of procedure which permits the survival of a pleading upon the excision of some averments for any reason whatsoever to secure the continuance of an action. The pronouncement of the court in *Arab Bank Ltd v Ross* [546] encapsulates the essence of the doctrine: 'Under the rules of pleading, as I have always understood them, an applicant who has pleaded more than he strictly need have done can always disregard the unnecessary or surplus averments and rely simply on the more limited ones.' It is a doctrine where on the constitutional right of access to the court finds expression when drafting errors or other considerations introduce hurdles that may defeat justice. The doctrine of severance operates to leave actions devoid of criminal imputations to tried. In *Military Governor of Imo State &Ors v Chief B.A. E Nwauwa* [547], the apex court stated that when a plaintiff makes an allegation

of crime in his pleadings but nevertheless can succeed in his claim without proving the crime, it cannot then be said that the alleged crime was a fact in issue or directly an issue. Iguh JSC put it succinctly when he held that: 'The law is settled that where a plaintiff makes an allegation of crime in his pleadings but nonetheless can succeed in his claim without proving the crime, it cannot be said that the alleged crime was in issue or directly in issue.'

Doctrine of severance was pre-eminent in the case of *Chief Akin Omoboriowo & Ors* v *Chief Michael Ajasin* [548]. The summation of this doctrine is that if averments alleging crime are severable and if after such severance there still remains in the pleadings of the petitioner's sufficient averments which disclose a cause of action which is devoid of criminal imputation against any party to the proceedings then the burden of proof upon the petitioner or plaintiff is to establish his case within the preponderance of evidence. It does operate to save a petition, if the surviving averments can sustain the petition.

In other words, it does not revive a dead petition, a petition that is incurably bad upon which no hearing can be sustained. These days, it is usually taken to be sacrificing justice at the altar of technicality to refuse to severe unwanted or unnecessary paragraphs of pleadings and save the action by allowing evidence to be taken on surviving paragraphs [549]. The doctrine of severance calls for carefulness in drafting of pleadings. Therefore, it is important to point out that the doctrine of severance seems only useful where there are other pleadings devoid of criminal imputations. To therefore argue that the concept of severance of pleadings has cured whatever injustice the proof beyond reasonable doubt doctrine introduced into election petitions would be another fatal misconception.

3. Electoral Offences

The 1999 Constitution does not define 'Offence'. It is not therefore a misadventure to search for the meaning of 'offence' elsewhere. Black defines 'offence' as a felony or misdemeanour, a breach of the criminal laws, violation of law for which penalty is prescribed, an act clearly prohibited by the lawful authority of the state, providing notice through published laws [550]. The Criminal Procedure Act summarizes by defining offence as 'an offence against any enactment in force in a state'. This means there is a written code of prohibited transgression which attracts penal sanction by appropriate penal institutions or authorities [551]. Accordingly, any act or omission which is not provided for in the Electoral Act cannot constitute an electoral offence. The Act provides for the following offences:

Offences in Relation to Registration [552]

It is an offence for anyone who without authority destroys, mutilates, defaces or removes or makes any alteration in any notice or document required for the purpose of registration this Act. It is an offence under the Electoral Act for any person to knowingly give false information or make a false statement with reference to any application for registration of his name or with reference to any objection to the retention of the name of a person in the register of voters. Any person who presents himself to be or does any act whereby he is by whatever name or description howsoever, included in the register of voters for a constituency in which he is not entitled to be registered or causes himself to be registered in more than one registration or revision centre commits an offence. Any person who commits any of the aforementioned offences shall be liable on conviction to a fine of One Hundred Thousand Naira or to twelve months imprisonment or both. The provision does not criminalize refusal to register nor does it penalize political and civil docility. Section 14 (1) (c) of the 1999 Constitution provides 'that the participation by the people in the government shall be ensured in accordance with the provisions of this constitution'. Since there is no compulsive strength in this section against political nonchalance, it does appear that it only applies to erring participation in governance as civic obligation. Experience has shown that some political candidates and indeed top government functionaries are major perpetrators of electoral offences on registration of voters. They use it as a stepping stone to rig elections. Concerted efforts should be made to fully enforce the provisions of section 117 of the Act against any culprit no matter his or her status.

Offences in Relation to Nomination [553]

The act provides for offences in respect of nomination. Nomination means the act of proposing a person for election or appointment [554]. Nomination exercises form part of the preliminary matters before actual election is conducted. Therefore, a person nominated still has the herculean task of contesting the election. He is subject to petition before the tribunal on any ground for which an election petition can be filed. A person commits an offence if he forges any nomination paper, or wilfully defaces or destroys any nomination paper or delivers to electoral officers any nomination paper knowing it to be forged or signs a nomination paper as a candidate in more than one constituency at the same election. It is an offence under this section to forge any ballot paper or official mark on any ballot paper or any certificate of return. It is prohibited also to wilfully destroy any ballot paper or official mark on any ballot paper or any certificate of return. The Act

subsequently provides that any person who commits an offence under these subsections is liable on conviction to a fine of N500, 000 or to imprisonment for five years or both. Any attempt to commit any of the said offences shall be punishable in the same manner as the offence itself. So it is immaterial that the offence was not consummated before the person was arrested and charged. Regrettably, political considerations have adversely affected or frustrated the enforcement of these provisions of the Act. Security agencies have often demonstrated overbearing partisanship to the advantage of ruling parties or incumbent candidates.

Disorderly Behaviour at Political Meetings [555]

Any person who at a political meeting held after the date for an election has been announced, acts or incites another to act in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was convened or has in his possession an offensive weapon or missiles commits an offence. Upon conviction, such a person is liable to a fine of N100, 000 or imprisonment for twelve months or both. *Black's Law Dictionary*[556] defines 'disorder' as a public disturbance or riot. It is a conduct that tends to disturb public peace or decorum to scandalize the community or shock the public sense of morality. It is perceived that these actions when election dates have been announced are open and direct threats to democratic principles and practices particularly as regards the smooth conduct of the election.

Improper use of Voter's Card [557]

This section provides that any person who being entitled to voters card, gives it to some other person for use at an election other than an officer appointed and acting in the cause of his duty under the Act commits an offence. It is also wrong in law for any person who, not being an officer acting in the course of his duty under the Act receives any voter's card in the name of some other person for use at an election, uses it fraudulently or without lawful excuse or has in his possession more than one registration card, or buys, sells, procures or deals with a voters card otherwise than as provided in the Act commits an offence. Upon conviction, such a person shall be liable to a fine of N100, 000 or imprisonment for twelve months or both.

Improper Use of Vehicles [558]

No person shall provide for the purpose of any other person to a registration office or to a polling station any government vehicle or boat belonging to a public corporation except in respect of a person who is

ordinarily entitled to use such vehicle or boat and in emergency in respect of an electoral officer. Any person who contravenes the provisions of the section commits an offence and is liable on conviction to a fine of N50, 000 or to imprisonment for six month or to both. Government in this provision includes the government of the federation, of a state or a local Government Area or Area council or any person or organ exercising power or authority on its behalf [559]. 'Vehicle' or 'boats' are not defined in the Act but it is understandable that their ordinary dictionary meanings apply.

Impersonation and voting when not qualified [560]

Any person who applies under the Act to be included in any list of voters in the name of some other person, whether such name is that of a person living or dead or of a fictitious person commits an offence. It is also a contravention of the Electoral Act if one, having once to his knowledge been properly included in a list of voters under the Act as a voter entitled to vote at any election, applies, except as authorized by the Act, to be included in any other list of voters prepared for any constituency as a voter of an election. It is wrong in law to apply for a Ballot paper in the name of some other person, whether such name is that of a person living or dead or of a fictitious person. Contravention of this provision attracts, on conviction, a fine of N100, 000 or 12 months imprisonment or both. This provision criminalize under-age voting but the Electoral Act does not make any special procedure for the trial of Juvenile electoral offenders or persons under the age of 18 or other persons who are disqualified to register in the National voter Registration and who are armed with their legitimately procured cards to vote. No person charged with the offence of impersonation shall be convicted except on the evidence of at least two witnesses. In other words, the evidence requires corroboration.

Dereliction of Duty [561]

Any officer appointed for electoral purposes, who without lawful excuse commits any act or omits to act in breach of his official duty commits an offence and is liable on conviction to a fine of N100, 000 or 12 months imprisonment or both. Any polling officer who fails to report promptly at his polling station on Election Day without lawful excuse commits an offence of dereliction of duty and, on conviction, is liable to a fine of N100, 000 or 12 months imprisonment or both. Any polling officer who fails to discharge his lawful duties at his polling station without lawful excuse commit an offence of dereliction of duty and on conviction is liable to a fine of N100, 000 or 12 months imprisonment or both. Offences of announcing or publishing returns

of result, or delivering or causing to be delivered a false certificate prescribed under this section, can only be committed by electoral officials as they are the ones charged with such duties. Therefore this provision is designed to put a check on the activities of such officials.

Bribery and Conspiracy [562]

This section of Electoral Act clearly abhors bribery and every form of electoral conspiracy. Though some of the offences appear difficult to prove, they are necessary in order to shield the electoral process from contamination of bribery. Any person who commits the offence of bribery is liable on conviction to a fine of N100, 000 or imprisonment for twelve months or both. Bribery at an election maybe implied from the circumstances of the case. Clear and unequivocal proof beyond reasonable doubt is required before a case of bribery can be held to have been established. It is necessary to observe that under this provision both the giver and the receiver of any bribe are equally guilty.

Violation of the requirement of secrecy in voting [563]

This provision is very necessary as it ensures non-interference in the electoral process where people exercise their franchise without any manner of intimidation or inducement. It goes to encourage citizen to participate in the democratic process by casting their votes according to the dictates of their conscience. The subsection shields voters from reprisals, vindication or harassment by reason of the unencumbered exercise of their franchise. Any person who goes contrary to the provisions of the provisions of this section commits an offence and is liable upon conviction to a fine of N50, 000 or to imprisonment for six months or both.

Wrongful voting and False Statement [564]

Any person who votes at an election or induces or procures any person to vote at an election, knowing that he or such person is prohibited from voting thereat, or before or during an election, publishes any statement of the withdrawal of a candidate at such election knowing it to be false or reckless as to its truth or falsity commits an offence. It is also an offence for any person who before or during an election publishes any statement as to the personal character or conduct of a candidate calculated to prejudice the chance of election of the candidate or to promote or procure the election of another candidate and such statement is false and was published without reasonable grounds for belief by the person publishing it that the statement was true. On conviction, an offender under this section is liable to a fine of N50, 000 or imprisonment for a term of six month or both.

Voting by Unregistered Person [565]

It is an offence for any person to knowingly vote or attempt to vote in a constituency in respect of which his name is not on the register of voters. Such a person is liable on conviction to a fine of N50, 000 or to imprisonment for six months or both.

Disorderly Conduct at Elections [566]

Black's Law Dictionary [567] defines disorder as a public disturbance or riot. Disorderly conduct was not defined by the Electoral Act but it suffices to say that it is a riotous, unlawful action assigned to derail in the circumstances, the voting process; such actions that could threaten public peace during elections are offences under this section.

Offences on Election Day [568]

The most outstanding day in the electoral process is the Election Day. Grandiose pre-election arrangements will amount to nothing if on the day of election, voting does not take place for one thing or the other. Accordingly, section 129 of the Electoral Act anticipates some of the events that can negatively affect voting and constitutes them as offences. Any person who contravenes any of the provisions of this section commits an offence and is liable on conviction to a fine of N50, 000 or imprisonment for six months for every such offence. These no doubt, are significant checks to abort infractions from the law and transparent electoral process. Accordingly, subsection (4) of this provision states that any person who snatches or destroys any election materials commits an offence and is liable on conviction to 24 months imprisonment. To show the seriousness of the offence, no option of fine is allowed.

Undue Influence [569]

The Electoral Act does not explain undue influence but Henry Campbell defines it as: 'Persuasion, pressure or influence short of actual force but stronger than mere advice, that so overpowers the dominated party's free will or judgement that he or she cannot act intelligently and voluntarily but acts instead, subject to the will or purposes of the dominating party.' In summation, undue influence amounts to improper use of power or trust in a way that deprives a person of free will and substitutes another's objectives [570]. When used in the electoral context, it means an illegitimate application of pressure on voters to compel them to exercise their franchise in a particular manner and to the benefit of a particular candidate. It must be emphasized that mere proof of influence is insufficient. To make that

influence undue, it must be emphasized that mere proof of influence is insufficient. To make that influence undue, it must be established that the dominant party has used that position to obtain an unfair advantage. Undue influence corrupts the electoral process and leaves same with a shadow of the genuine democratic principles.

The implications of the consequent artificiality are very devastating. The elements of undue influence are clearly stated in section 130 of the Electoral Act. In *Ojukwu v Dr Onwudiwe&ors* [571] it was held that mere political ranting will not suffice as undue influence. In *Dickson Ojieghe & Ors v Marcus W. Ubani* [572], the appellant alleged undue influence because the 1st respondent had threatened that failure to vote to his party will result to closure of roads, non-appointment of chiefs, dissolution of rural district councils, less of school grants and scholarship awards as well as deprivation of social amenities. The trial court examined the background of the petitioner's witnesses as well as the evidence and dismissed the petition. On appeal this was also dismissed as being insufficient to be taken as undue influence.

4. The Burden of Proof and Standard of Proof in Criminal Allegations in Election Petition

'Burden' is simply defined by the *New Webster's Dictionary* [573] as 'a heavy load, heavy moral obligation'. In legal context, it means the onus or responsibility upon a party to procure evidence and to prove same to the satisfaction of the court. In every trial, the most crucial question which arises and whereon the ultimate verdict of the court depends is on whom the burden of proof lies. If a party on whom the burden lies is unable to discharge same, he may lose the case on this ground. Because of its importance, the law makes sufficient provisions in respect thereof, so that litigants who seek justice should supply the requisite proof by evidence.

The Evidence Act provides thus: 'Whoever desires any court to give judgment as to any legal right or liability dependent the existence of facts which he asserts must prove that those facts exist. It further provides that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person' [574] It is discernible from the provisions of the Evidence Act reproduced above that the burden of proof refers to the duty of 'producing evidence whether at the beginning of a case or any other later moment throughout the trial'. This is the burden of proof of certain facts. This is also called evidential burden. On the burden of proof in election petitions, it is necessary to emphasize that it is an elementary principle of law that the burden is on him who asserts to adduce evidence in proof of that assertion.

When the Electoral Commission declares a result, there is a presumption that the result is correct. This presumption is rebuttable and the onus is on the petitioner to disprove or prove and rebut the presumption. In other words, the burden is on the person who denies the correctness and authenticity of the return of a candidate to rebut the presumption of correctness in favour of the return [575]. An election petition in appropriate cases requires the same quality of burden of proof as in civil matters. The burden placed on the petitioner is as laid down in section 131 to 133 of the Evidence Act. The petitioner must succeed by credible and satisfactory evidence. He must succeed on the strength of his own case and not on the weakness of the respondent's case. The exception is that where the evidence of the respondent supports the case of the petitioner, he can rely on that piece of evidence which supports his case to prove his petition [576]. The rule that evidence of accomplices must be corroborated applies to election matters and a tribunal or court will be in error if after considering certain witnesses as accomplices. It proceeds to hold that corroboration is not essential and that all the court needs to do is to warn itself. It is trite law that the evidence of one accomplice cannot corroborate that of another [577]. The corroboration must be by an independent witness and not by another accomplice [578].

In law, a distinction is drawn between 'burden of proof' of a case which as an inflexible rule, rests on the plaintiff in civil matters and 'evidential burden' which places the onus of proof on one making a specific assertion over a particular point essential to his stand on that matter. This is regardless of whether the person making the assertion is the defendant. As a doctrine of the law of evidence, evidential burden imports that where a given assertion whether affirmative or negative forms as essential part of a party's case, the onus of proof of such allegation rests on him. As must have been noted, the peculiar nature of election petition trials notwithstanding, the burden of proof created in the Evidence Act for civil proceedings applies in hearing of election petitions. In election petition proceedings, the law places the burden of proof on the petitioner and the standard of proof is that of balance of probabilities. A petitioner must succeed on the preponderance of the evidence led and on the strength of his own case, not on the weakness of the respondent's defence, unless he finds in the evidence of the respondent facts which strengthen his case [579].

It is not enough to devise burden of proof without prescribing what will suffice in determining appropriate marks of compliance in discharging the

duty to prove a given set of facts. Standard of proof provides the answer. Standard means a criterion for measuring acceptability, quality or accuracy of burden of proof to entitle a claimant to the judgment of the court or tribunal. It is 'the degree or level of proof demanded in a specific cause such as beyond a reasonable doubt or by preponderance of the evidence [580]. Proof of facts in election petitions is on the preponderance of evidence but when there is no evidence to put on one side of the scale, minimum evidence on the other side tilts the scale in satisfaction of the requirement. Quoting Black's Law Dictionary [581], it defined 'minimum' to mean the smallest acceptable or possible quantity in a given case. A respondent not having given evidence either in support of his statement of defence or in challenge of the evidence of the petitioner must be taken to have accepted the facts averred by the respondent notwithstanding the general traverse contained in the statement of defence. A respondent must lend such credible evidence in order to tilt the scale in his favour if he is to avert judgment being given to the other party. The standard of proof where allegations of crime are made, the standard of proof required of the person who asserts the commission of the crime is proof beyond reasonable doubt. This is in compliance with the provisions of the Evidence Act which provides that if the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.

It is necessary to look at the meaning of 'Proof beyond reasonable doubt'. It does mean 'proof to the hilt' to use the words of Lord Denning. It does not mean proof beyond all iota or shreds of doubt. It must not be stretched beyond reasonable limit as most criminal law practitioners do. This principle has also become part of the laws that govern election petition proceedings in Nigeria. In *Muhammadu Buhari & Anor v Chief Olusegun Obasanjo,* [582] Pats-Acholonu JSC citing an earlier Supreme Court decision [583] stated that allegations questioning the propriety of elections predicated on criminal acts must be proved beyond reasonable doubt. According to the learned law Lord, proof beyond reasonable doubt means:

Proof that precludes every reasonable hypothesis except that which it tends to support and verily it is proof that is consistent with the guilt of the accused person or against whom the allegation has been made. Therefore it can be said that for evidence to attain the height that could bring about a conviction, it must exclude beyond reasonable doubt every other hypothesis or conjecture or preposition or presumption except that of the guilt of the accused.

Same was also the decision of the Court of Appeal in Amos *Gombi*

Goyol v INEC [584]. Here, the court held that where the allegation made against a respondent is one of committing an electoral offence contrary to the Electoral Act 2010 (as amended), the standard of proof is raised to proof beyond reasonable doubt. Same was also the decision of the Court of Appeal in *Chibuzo Azike Ziggy v Ifeanyi Ararume & Ors* [585].

5. A Critique of the Standard of Proof in Criminal Allegations in Election Petitions in Nigeria

In election petition where there are criminal allegations, the courts require that they be proved beyond reasonable doubt. However, a close examination of the language of section 135 (1) of the Evidence Act unambiguously reveals that the requirement of proving any criminal allegation beyond reasonable doubt is in any proceeding, civil or criminal. The language of the above section of the Act and the way it is constructed did not say 'in any proceedings where a criminal allegation is made' which could include *sui generis* proceedings like election petitions. The section after saying 'if the commission of a crime by a party to any proceedings is directly in issue' went ahead to qualify 'any proceedings' by particularly stating the proceedings to be either 'civil or criminal'. But the Nigerian courts always invoke the above provisions or rather requirement of proving beyond reasonable doubt in criminal allegations in elections which the same courts have always maintained to be a proceeding that is neither civil nor criminal. In fact the courts are unanimous that election petition is *sui generis*. It is neither allied to criminal nor civil proceedings. Unless a different interpretation is given to either the word 'civil' or 'criminal' proceedings in the above provision of the Act, it is therefore wrong to extend the application of the said section to include election petition. Holding otherwise is tantamount to introducing words in the Act that are not there. This is more so when no ambiguity has been shown to exist which may warrant introducing such extraneous constructions in aid of clarifying the ambiguity.

The cardinal rule of interpreting statutes is to accord to it its literal interpretation where from the language of the statute it is clear and direct. In fact the function and role of the court is only to interpret a statute in the light of the language used. A court of law cannot go beyond the language used in a statute to examine the possible effect of the application of a statute particularly when the language is clear and not stressed to accommodate possible or likely effect of the statute and not its likely consequences. This was approved by the court in *AG Federation v Guardian Newspaper Ltd* [586]. The court in this case opined that:

Where the words used in the provisions of any law are clear and unambiguous they must be given their ordinary meaning unless this would lead to absurdity or be in conflict with other provisions of that law. Thus a court is not to ascribe meanings to the clear, plain and unambiguous provisions of a statute in order to make such provisions conform with the court's own view of their meaning or of what they ought to be in accordance with the tenets of sound social policy.

More clearly, the court in *Ehuwa v OSIEC* [587] stated the proper approach in the interpretation of statutes with clear and unambiguous words in the following words: 'The proper approach to the interpretation of clear words of a statute to follow them in their simple, grammatical and ordinary meaning rather than look further because that is what prima facie gives them their reliable meaning.'

Again, the rule of construction of statutes is 'to intend that the legislature meant what they have actually expressed' [588]. With all the above pronouncements, election petition tribunals and courts in Nigeria, in interpreting the provisions of section 138 of the repealed Evidence Act (now section 135 of the Act) in election petitions, do not keep to the wordings of the section which are clear and direct. By the wordings of the section, the standard of proving a criminal allegation beyond reasonable doubt is 'in any proceeding civil or criminal'. The words 'civil or criminal' should be given their literal meaning. The wordings should not be extended to include special and distinct proceedings like election petitions which are sui generis. This is because where by the use of the clear and unequivocal language capable of only one meaning anything is enacted by the legislature, it must be enforced however harsh and absurd or contrary to common sense the result may be [589]. The interpretation of statutes is not to be collected from any notions which may be entertained by the court as to what is just and expedient. The duty of the court is to expound the law as it stands and to leave the remedy to others [590]. The Court of Appeal in *Action Congress v JANG* [591] recently demonstrated the need for courts to keep to the wordings of statutes where they are clear like the wordings of the provisions of section 135 of the Act which qualify proceedings to civil and criminal proceedings. In this case, the Court refused to read into the provision of the section 141 of the Electoral Act 2006 the definition of a day as a period of 24 hours as defined by the Interpretation Act. The court opined that the thirty day period for the purposes of filing an election petition includes 'the whole or part of the first and last days it is the opinion of the court that it cannot import the idea of 'whole day' into the provision of the Electoral Act. Doing so, held the court,

amounts to an abandonment of the court's adjudicatory function to embark on an exercise of judicial legislating. Unfortunately, tribunals and courts in Nigeria appear to be doing exactly the above in their interpretation of section 135 of the Act dealing with standard of proving criminal allegation in election petitions filed before them. This is because the courts appear to always extend such standard requirement of proving beyond reasonable doubt criminal allegations to election petition which is undoubtedly and settled by the same courts as neither civil nor criminal but a proceeding that is *sui generis*.

Again, if we apply the Latin maxim '*expressio unius est exclusioalterius*' meaning expression of one thing is the exclusion of another, we can conveniently say that the express mention of any proceeding civil or criminal' in the section under consideration, excludes election petition which is *sui generis*. The same conclusion would be reached if the Latin maxim '*inclusio unius est exclusion alterius*' which means the expression of one thing, is the exclusion of another is applied [592]. Thus the express mention of civil and criminal proceedings excludes election petition which is neither of the two. In the construction of statutory provisions, where a statute mentions specific things or persons, the intention is that those not mentioned are not intended to be included.

Criminal trials presuppose filing of charges or information, indictment or complaint depending on the level of court jurisdictions. The accused is then staged in the dock and a charge read to him, his plea is thereafter taken and the prosecution then proceeds to lead evidence to convince the court of trial beyond reasonable doubt that the accused is truly guilty. The accused is not to be automatically punished until he is allowed to defend himself. This is in addition to his constitutional right to cross-examine the prosecution witnesses with the view to discrediting them [593] He equally has the right to available defenses. This provision is in contrast to what is obtainable in election petition which are primarily proceedings purposely challenging the validity of an election or the undue return of a candidate no more no less. It is a proceeding where the respondents against whom the petition is filed are not put in the dock with a view to finding their guilt and sub-sequent punishment. Most of the criminal allegations in election petitions only go to show the extent of non-compliance with the basic electoral laws and rules of fair conduct of elections. Even where the court finds the commission of a crime proved by the petitioner, the highest the tribunal can do is to recommend to the office of the Attorney General for the probable prosecution of the identified electoral offenders. No more, no less! The

tribunal cannot sentence the identified electoral offenders whose pleas were not taken nor given the opportunity to cross examine the witnesses that indicted them talk less of being allowed to present their defenses to each of the allegations leveled against them. They must be subjected to the rigors of our criminal justice as accused persons before being punished. If that is the case, it is a misplacement of principles to require that any allegation of crime in election petition be proved beyond reasonable doubt. The position taken by Court of Appeal in *Seikegba v Penewou* [596] is highly commendable. In this case, the court in rejecting the submission that the standard of proving falsification of election result is beyond reasonable doubt held thus:

The standard of proof of allegation of falsification of election is not as high as that required for an allegation of crime. It is instead based on balance of probabilities. Therefore the counsel for the 2nd to 6th respondents was wrong to have argued that it was a proof beyond reasonable doubt.

In fact, no election petition tribunal is competent to try a criminal offence. In the case of *Agomuo v Ogwuegbe*, [595] the Court of Appeal held a tribunal wrong, when the tribunal indicted some of the respondents for corrupt practices. In fact, it set aside the verdict of criminal liability the tribunal imposed on the respondents. Although the elections tribunals are not competent to try electoral offences, it is submitted that electoral offenders and fraudsters should be brought to book before the regular courts. In Nigeria such prosecutions are hardly heard of; perhaps that could be the reason why electoral offences go on unabated.

It is a settled law that he who asserts must prove. It is also trite that the burden of proof in criminal matters lies with the prosecution and does not shift, save for few exceptions and the standard of proof is beyond reasonable doubt. Any lingering doubt, no matter how slight, is usually resolved in favour of the accused. However, with due respect, this critique is based on the rule that in any proceeding civil or criminal where there is an allegation of crime, it must be proved beyond reasonable doubt [598]. The rationale behind the proof beyond reasonable doubt standard is to ensure that only guilty persons are convicted by the state.

This issue is very relevant in election petitions where in most cases, the applicant lost the election and he alleges that his opponent stole the election through voter fraud. Basically election rigging no matter the method is criminal. That being the case, when the applicant claims that such criminal activities were involved, which swung the election in favour of his opponent, the rule mandates the applicant to prove his case beyond reasonable doubt

and not on the balance of probabilities. This is a heavy burden on the applicant. In criminal matters, it is the states' duty to prove the case against the accused beyond reasonable doubt to be able to win conviction. The state has the resources to make that happen. The state would use the agent of the state like police detectives, forensic experts and handwriting and fingerprint experts as the case maybe to prove the case against the accused. The state has unlimited resources to ground their conviction. However, it becomes more untenable when it is considered that such claimant or petitioner hardly ever possesses the supportive privileges and investigative infrastructure available often exclusively to the state. Though the state has unlimited resources to put away the criminal if it could prove its case beyond reasonable doubt, the state in some cases falls short and the criminal gets away with the crime. So if the state could not prove the guilt of the accused despite its unlimited resources, why does the law expect a private individual in an election petition to prove his case beyond reasonable doubt for the court to nullify an election that was rigged?

It must be adequately realized that election petitions are unique proceedings that strive to determine whether the sovereign will of the people prevailed or was subverted in an election petition and certainly not the criminal conviction of so called electoral offenders but the broader determination of whether the declared outcome of an electoral contest was wholly reflective of the majority's votes or otherwise. This is more so when it is realized that an election petition proceeding is never equal to a criminal trial. The petitioner can never thus assume a state prosecutor's role nor can any respondent be deemed an accused person standing criminal trial before the election tribunal. As such, the evidential complexities required of a criminal trial ought never to have found accommodation in election petition proceedings. To demand that a petitioner should prove the commission of a crime beyond reasonable doubt is tantamount to making the law operate in denial of the limitation imposed on lawful private entities against the possession and deployment of the sophisticated infrastructure needed for arrests, investigation, confiscation, legitimate violence, and so on, in quests to unravel the thorough details of so-called crimes. This is a domain exclusive to the state and it is such exclusivity that makes it easier for the state to unravel and prove the commission of crimes beyond reasonable doubt for the purpose of securing convictions of persons responsible. The private entity can hardly access the infrastructure of that exclusivity without daunting fetters. Therefore, the law ought not to be blind to these contradictions. Petitioners lack the exclusive prosecutorial infrastructure of the state and should be allowed to pursue their claims within the limits of the

feeble powers conceded to them by the law. The law should accordingly stop the treacherous assumptions of an equality of strength between the state and its subjects. Such assumptions are amplified through the incongruous insistence that petitioners prove crime with the same dexterity expected from the state when it is obvious there is unequal power between the state and the petitioners competing for claims within it.

More befuddling is that it is obvious that the outcomes sought by petitioners competing for claims are often fundamentally parallel and different from what the state seeks when it conducts a criminal trial against its subjects. Placing that heavy standard on the applicant will perpetuate rigging and give the impression that it's alright to rig an election and get away with it since the aggrieved party cannot easily nullify an election due to the strict standard of proof [597]. The respondent against whom an election petition is brought is not on criminal trial. There are many good candidates whose elections were stolen but had no resource to discharge the heavy burden and standard of proving beyond reasonable doubt. Therefore, requiring the petitioner to prove his case beyond reasonable doubt could amount to a voyage of impossibility.

Election petition is time bound. Time is indeed of essence in election petition. The centrality of time to the presentation of election petition and the respondent's filing of reply after service underscores the time factor requirement in election petition. The centrality of time in election petition is traceable to the public interest or public policy demands that there should be an end to litigation. Thus having regard to the special pedestal which election matters occupy, indeed time is of the essence. This is the rationale for speedy disposal of electoral disputes. Speedy trial is a veritable ingredient of fair hearing. In election petition the expectation of the public is that the adjudication and determination of disputes arising from an election should be expeditiously concluded and the duty on the court to live up to expectation is high. The Court of Appeal has re-affirmed this cardinal principle in *Bounwe v R.E.C Delta State* [598].

It was Held

It is the right of the electorate to know within a reasonable time frame who of the contending parties is their elected representative. This knowledge however becomes merely academic at the expiration of the term for which the election was held. The time frame within which to appeal and apply to amend process introducing substantial factors to the petition or reply is based on public policy the principle of which is to protect public interest and reject

whatever is injurious to the public welfare or is against the public good.

It is important to state from the onset that the time for presentation of election petition that was hitherto stipulated in the Electoral Act has been incorporated in the constitution. The singular act of prescribing time for filing election petitions in the Constitution captured the essence of time in election petitions. It is also a welcome development for prescribing the time frame for determining of the Electoral disputes. The Electoral Act section 134 (a) –(c) provides that:

a) An election petition shall be filed within 21 days after the date of the declaration of results of the elections

b) An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of election

c) An appeal from decision of an election tribunal or court shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal.

The time frame for determination of election petition is a clarion call on all stakeholders to work assiduously to achieve this lofty goal. It is also a response to the dictate of justice in view of the protracted period of adjudication in electoral disputes ranging from two years to three and half years as manifested in *Peter Obi v INEC*, has become a reference point in the analysis of the problems and challenges of electoral dispute resolution. Peter Obi the then governorship candidate of the All Progressive Grand Alliance (APGA) filed his case on the 16th day of May 2003 challenging the declaration of Dr Chris Ngige as the winner of the election. The tribunal took more than two years to hear all the witnesses and delivered judgment on the 12th day of August 2005. The appeal came up for hearing on the 23rd day of January, 2006 and judgment was delivered on the 15th day of March, 2006. The petitioner waited for 35 months to receive justice out of a mandate of 4 years. The south-west has also had its share of delayed resolution of electoral disputes in *Fayemi v Oni* [599]. In election matters time is of the essence. This is because it will do no one any good if the political system is kept heated up for months or even years after an election without giving those sworn in the peace of mind to steer the ship of the state in the right direction or fail in the process. The imposition of this strict standard of proof i.e. the proof beyond reasonable doubt standard of proof in criminal allegations in election petitions by the law defeats the time essence of election petitions. Proof beyond reasonable doubt is not one which someone can achieve with so little a time. We know how long criminal trials take before the proof beyond

reasonable doubt is achieved and judgment is given. Such strict standard imposed on election petitions is incongruous to the whole nature of election petitions. The requirement of this strict standard of proof has posed a very big challenge in the easy disposal of election petitions. The Peter Obi's case is a case in point. This strict standard has led to election proceedings being dragged inordinately and this will create disenchantment with the judicial process. Justice delayed, they say, is justice denied, and the Constitution gives to every person the right to have his civil rights and obligations determined by a court after a fair hearing and within a reasonable time [600]. The strict requirement by the law that criminal allegations in election petitions shall be proved beyond reasonable doubt like criminal proceedings is incongruous with the whole nature of election petitions which are sui generis (of its own kind and class). It defeats the whole essence of time in election petitions and is tantamount to the law giving with one hand and taking back with the another hand.

6. Conclusion and Recommendations

This paper argues that the insistence of our election petition tribunals and courts that proof of criminal allegations in election petitions must be proved beyond reasonable doubt relying on the provisions of section 135 of the Evidence Act is reading into the section what is not there. This is because the provisions of the Act clearly qualified any proceedings where allegation of crime is made to civil and criminal proceedings. It excludes election petitions which our courts on a long line of cases held to be neither civil nor criminal but sui generis. In *Abdulahi v Elayo* [601], Oguntade JCA said that it must be born in mind that an election petition is not always to be treated as ordinary civil suits in court. An election petition creates special jurisdiction and the ordinary rules of procedure in civil cases do not always serve to effectuate its purpose. The wordings of the Act ought and should be given their ordinary, simple and grammatical meaning. This is the proper thing to do. The function of the court is to declare and not to give the law. If there is a lacuna in the law, it is for the legislature to fill the gap and not for the court to take upon itself the added responsibility of legislating. The court is to expound the law as it stands. As has been argued and for the reasons adduced, there is absolutely no basis to require that the standard of proof for conviction-seeking proceedings, be introduced into election petition proceedings seeking different outcomes such as compensatory damages, injunctive/restorative reliefs, declarations etc. The proof beyond reasonable doubt standard is a law operating in denial of practical realities, a law tempting petitioners to illegitimately invade the infrastructural exclusiveness of the state, a clog in the democratic wheel, an antithesis of the doctrine's essence and origination.

It is therefore recommended that if the standard of proof is to remain beyond reasonable doubt, then the provision of the Act under reference should be amended to reflect that 'in any proceedings' before a court of law where the commission of a crime is alleged, proof is beyond reasonable doubt as opposed to what exist today under the Act. It should replace the existing wordings 'in any proceedings civil or criminal'. Equally, it is submitted that such insistence on proof beyond reasonable doubt when no one is on trial is a promotion of technical justice against the wish of electorates who should be represented by only people who went to polls and contested in the election in accordance with the minimum standards of conducting election. This technical justice is what the courts have frowned at in many occasions and which it is recommended must not be allowed to defeat the essence of ensuring only people with genuine mandate get the return tickets as winners of election. The case of *Inter-Ocean oil corp. Nig. v Fadeyi* [602] is one of the occasions where the court made a case for substantial justice as opposed to technical justice. The court held that 'the attitude of Nigerian courts these days is to do substantial justice between parties and discard technicalities or technical justice'.

It is equally argued that the non-prosecution of electoral offenders is the cause of the unabated commission of electoral offences. It is the reason why politicians do all sort of criminalities at the poll knowing fully well the standard placed on the petitioner of proving any such criminal allegation is beyond reasonable doubt. Since the essence of highlighting electoral offences in petitions is to show to the tribunal that the election falls short of the rules of free conduct of election, the standard of proof at best be on the balance of probabilities. This would go a long way in ensuring that the winners of election did not commit criminality to obtain a return against the wishes of the electorate. It would equally install more confidence on the side of electorates in our electoral process. Moving forward, the legislature may consider enacting another phrase such as 'highly probable' to become statutorily sufficient to determine the standard of proof in criminal allegations made in election petitions.

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