

**IN THE NATIONAL AND STATE HOUSES OF ASSEMBLY ELECTION**  
**PETITION TRIBUNAL HOLDEN AT AKURE**  
**BEFORE THEIR LORDSHIPS HON. JUSTICE G. O. IMADGEBELO, HON.**  
**JUSTICE I. O. HARRISON, HON. JUSTICE KADI S.W.A. YUSUF**  
**ON FRIDAY THE 23<sup>RD</sup> DAY OF OCTOBER, 2015**

PETITION NO: EPT/AK/HA/5/2015

**IN THE MATTER OF THE ELECTORAL ACT 2010, (AS AMENDED) IN THE**  
**ELECTION OF MEMBER OF ONDO STATE HOUSE OF ASSEMBLY IN**  
**AKURE SOUTH CONSTITUENCY I HELD ON 11<sup>TH</sup> APRIL, 2015**

**BETWEEN:**

1. FESTUS OLADAPO AREGBESOLA  
2. ALL PROGRESSIVES CONGRESS (APC) } ..... PETITIONERS

**AND**

1. ADESANYA KEMISOLA ADENIKE  
2. PEOPLES DEMOCRATIC PARTY (PDP)  
3. INDEPENDENT NATIONAL ELECTORAL  
COMMISSION (INEC) } ..... DEFENDANTS

**J U D G M E N T**

The Independent National Electoral Commission (3<sup>rd</sup> Respondent) conducted the membership of the Ondo State House of Assembly for Akure South Constituency I on the 11<sup>th</sup> day of April, 2015. Adesanya Kemisola Adenike of the Peoples Democratic Party (PDP) polled 13, 522 votes and was returned as winner. Festus Oladapo Aregbesola of the All Progressive Congress (A.P.C.) polled 13,037 votes. Being aggrieved by the declaration of the result, the Petitioners filed this petition dated the 30<sup>th</sup> April 2015 challenging the result of the election and declaration on the following grounds:

- (1) That the 1<sup>st</sup> Respondent was not duly elected by majority of lawful votes cast at the election to the membership of Ondo State House of Assembly Akure South Constituency I held on the 11<sup>th</sup> day of April 2015.
- (II) That the election to the membership of Ondo State House of Assembly Akure South Constituency I held on the 11<sup>th</sup> day of April 2015, specifically in wards and polling units/points complained of in this petition, was invalid by reason of corrupt practices and or non compliance with the provisions of the Electoral Act 2010 (as amended).

The Petitioner therefore prayed for the following reliefs:

- (I) That it may be determined that the said 1<sup>st</sup> Respondent, Adesanya Kemisola Adenike was not duly elected or returned by the lawful votes cast to the Ondo State House of Assembly for Akure South Constituency I held on 11<sup>th</sup> day of April 2015.
- (II) That it may be determined that the said election to membership of Ondo State House of Assembly Akure for Akure South Constituency I held on the 11<sup>th</sup> day of April 2015 was avoided by corrupt and sharp practices/non compliance with Electoral Act and manual for election official, 2015 specifically mentioned in this petition.
- (III) That it may be determined that going by the lawful votes cast at the said election, the 1<sup>st</sup> Petitioner ought to have been returned and should be returned as the elected member of Ondo State House of Assembly for Akure South Constituency I.

On the 15/9/2015, the Petitioners opened their case.

The Petitioners first four witnesses PW1 – PW4 adopted their statement on oath and stated that they voted in the election of 11th April, 2015 in different wards and polling units that when the result was collated the number of voters recorded was more than the number of ballot papers used in the polling unit. They further stated that in spite of the over voting the election was recorded for the various political parties and that it is in the interest of justice that the election

be cancelled as same is not a true reflection of votes cast. Under cross examination PW1 – PW4, stated that they were accredited, they voted and that INEC officials, security officials and party agents were present at their respective polling booths. They also stated that they did not write their statement on oath together and are not aware that it is the same. PW1, PW2 and PW4 confirmed that they were party agents and that they do not have in their possession the ballot papers that did not add up since they were not INEC officials but PW4 stated he has the records. PW1 stated that he signed the result sheet while PW2 stated that he could not sign the result sheet as there was a problem at the collation centre. PW4 stated that he witnessed the collation.

PW5 Sola Ajisafe stated that he is a legal practitioner and one of those who carried out the inspection of the election materials in this case pursuant to order of court dated 9<sup>th</sup> June, 2015, he adopted his statement on oath and stated that 16 units/voting points in Akure South Constituency I are in dispute and that pursuant to the inspection carried out over voting and inexplicable discrepancies were noticed, in the figures entered in the result sheets and contrary to the provisions of the Act and manual, the said results were collated without any explanation or report from the presiding officers from 14 units and that results from 2 units were not recorded at all and that details of the said finding are contained in Report A – Exhibit KI.

PW5 also stated that INEC Headquarters Abuja also made available Certified True Copy of computer generated evidence of the records of accreditation of voters carried out by smart card Reader and same is annexed in Report B Exhibit K2 i.e. Exhibit L. PW 5 also stated that the smart card reader figures of accredited voters is different from what was recorded as the total number of accredited voters i.e. the total number of accredited numbers in the smart card reader and the number in the result sheets are different and details are contained in Report B appendix I Exhibit K2.

PW5 further stated that the results in polling units in which there was non compliance should have been cancelled by INEC and the two polling units where votes were not compiled should have been added to the final result and if the said is done, the Petitioner will have 12,239 votes while the 1<sup>st</sup> Respondent

will have 11,871 votes, he also identified Exhibits A – H as the documents he utilized and referred to in his deposition.

Under cross examination PW5 stated that he is neither an Accountant/Statistician nor an INEC official – presiding officer or poll clerk. He stated that the inspection was done in the presence of the Respondent and their counsel at Alagbaka, Akure Ondo State and that he did not conduct any inspection in Abuja INEC Headquarters. He is not the operator of the computer. The computer could not have been used in the conduct of the election.

PW6 Kabiru Ayinla Omosanya the Administrative Secretary of INEC Ondo State tendered documents in respect of 2015 election for Akure South Constituency I pursuant to subpoena duces tecum. PW6 tendered Manual for Election officials 2015, marked Exhibit 'N'. Original 18 copies of forms EC8A, marked Exhibits 'O1' – O18 EC8B (6) copies marked as Exhibit P1 – P6, EC8C marked as Exhibit "Q", Voters Register 14 folders in six packs, admitted and marked as Exhibits R1 – R2, S, T1 – T3, U, V1 – V4 and W1 – W3. and he stated that CTC of card reader receipt could not be produced as it can only be generated from the INEC Headquarters, Abuja.

He was not cross examined.

PW7 Festus Oladapo Aregbesola, the 1<sup>st</sup> Petitioner herein adopted his statement of oath and stated therein as follows that after the election the result was made available to him and it was discovered that over voting was recorded in some polling units while some election results were not recorded.

He further stated that the addition of omitted results as well as nullification of over voting units results will make him score the highest number of lawful votes i.e. 12,239 votes as against the 1<sup>st</sup> Respondent's 11,871 votes. He urged the tribunal to grant his reliefs that the tribunal should declare him the winner having scored the highest number of valid votes.

Under cross examination he confirmed that INEC Officials, security agents and party agents were at his unit, he was duly accredited and he voted. He also stated that his trusted party agents were at all the 157 polling units in which he

contested the election in his constituency and that they are still alive. He stated that he is complaining about a number of polling units which his party agents complained about to him.

Under cross-examination he stated “that his complaint is not that what was in the ballot boxes is different from the figures recorded for him” and that his complaint is that in the said polling units “the ballot papers issued out and the unused ballot papers and the votes cast supersede the ballot papers issued and in some units our votes were not appropriately collated in the collating centers and in some proper accreditation was not done. PW7 stated that he received the above information from his agents and also from the pink copy of form EC8A which was not in agreement.

The 1<sup>st</sup> Respondent called 4 witnesses, DW1, DW2, and DW3 stated that they are registered voters and on the day of the election they went to their various polling units, they were accredited with the use of the card reader machine along with other voters and they voted without any disturbance or undue influence. DW1 also stated that there was no incidence of malpractice, disorderliness or interference with the election process to the best of his knowledge.

Under cross examination DW1, DW2 and DW3 stated that since they were mere voters and not party agents nor INEC Officials they could not read any of the INEC result sheets that were put to them by the Petitioner’s Counsel in respect of the number of accredited voters i.e. Exhibits A6, A3 E13 in comparison to Exhibit L.

DW4 is Kemisola Adenike Adesanya the 1<sup>st</sup> Respondent and she stated that even the Petitioners agree that on election day there was due accreditation, there was voting in all the polling units inclusive of the ones in which the Petitioner complained of. She also stated that the Petitioner was picking/fishing for human errors in the entries on the election result forms EC8A (1) in a bid to utilize same to close the narrow margin of votes between the two candidates.

The 1<sup>st</sup> Respondent also stated that the purported errors in which the Petitioner based his charge of electoral non-compliance was a calculated attempt to subvert the electoral will of the electorate of Akure South constituency I.

Under cross-examination the 1<sup>st</sup> Respondent stated that the election were free, fair and peaceful, she was accredited manually as the card reader had a problem and an incident form was filled. She also stated when confronted with the “discrepancy” in Exhibit F7 and Exhibit L that 17 people voted without card reader accreditation that, it is only INEC that can confirm or verify same.

On the 23/9/2015, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their final written addresses. The Petitioners filed their address on the 1/10/2015.

The 1<sup>st</sup> Respondent in final address distilled the following issues for determination.

1. Whether paragraphs 76,77,78,79 and 80 of the petition ought not to be struck out for being vague, imprecise, omnibus, generic, unspecific and general.
2. if issue 1 is answered in the affirmative, whether the entire petition ought not be struck out for want of cause of action or for being bereft of and destitute of substance.
3. Whether the grounds of the petition are not invalid in the manner in which they are couched and for being in conflict with the facts in support as well as the relief sought thus rendering the petition incompetent.
4. Having regard to the facts of this case, whether the 1<sup>st</sup> Respondent was not validly returned as the winner of the majority of the lawful votes cast in the House of Assembly election Akure South Constituency 1 of 11<sup>th</sup> April, 2015.

On issue 1 to 3 Mrs. Adeoti Adejuyigbe submitted that these issues have been dealt with in the 1<sup>st</sup> Respondent’s Notice of Preliminary objection dated 29/5/2015 and filed 1/6/2015.

On issue 4 Counsel relied on **Okoreaffia V Agwu (2012) 1 NWLR )pt.1282) 425 at 431.** Where the outcome of an election is challenged on the grounds that the winner did not have the majority of lawful votes, the task of the tribunal is to

determine the actual votes and add them up. The Petitioner is praying the tribunal to declare him the person duly elected as member representing Akure South. It is settled law that election petition relief is in the nature of declaratory relief. Consequently, the onus is on the petitioner to prove and establish his claims on his own evidence without relying on the weakness of the case of the Respondent. **Ucha V Elechi (2012) 13 NWLR (pt.1317) 330.** A claim for relief of declaration cannot even be established by the admission of a Respondent or defendant. **Aregbesola V Oyinlola (2011) 9 NWLR (pt.1253) 458, 594; CPC V INEC (2011) 18 NWLR (pt.1279) 493, 560.** That the Petitioners have not been able to discharge the burden of proof placed on them by law.

Counsel submitted further that a petitioner who alleges that the declared winner of an election was not duly elected by the majority of lawful votes and is asking to be returned as the person who won the majority of lawful votes, must plead and lead evidence of the particulars of the result of polling stations which he would want the tribunal or court to nullify out of the votes attributed to the declared winner. **Nadabo V Dubai (2011) 7 NWLR (pt.1245) 155 at 177.** The 1<sup>st</sup> Petitioner is under a duty to show that he is the winner of the majority of votes cast at the elections.

Counsel further submitted that the return of Respondent, as confirmed by the petitioners enjoys a presumption of regularity. **Ajasin V Omoboriowo (1981 – 1990) LREC 332 at 353.** The purported result stated by pw7, remains a hopeless allegation of fact in respect of which no evidence was produced at the trial. No results was validly submitted to the tribunal by the petitioners in respect of election being challenged. Exhibits tendered as election results without any evidence to demonstrate same cannot form the basis of any judicial enquiry. The law has laid down what a petitioner contesting lawfulness of votes must prove. **Abubakar V Yar’Adua (2008) 199 NWLR 1 170; INEC V Anthony (2010) 7 NWLR (pt.1245) 1 18-19; Onoyom V Egari (1999) 5 NWLR (pt.603) 416 425.**

Counsel further submitted that where a petitioner is challenging an election on ground of acts of non-compliance and he is praying the tribunal or court to void the entire election as contained in paragraph 30(ii) of the petition he must in addition to establishing the non-compliance complained of, further prove that,

when the votes affected by the acts of non-compliance are nullified the electorate have not been allowed to elect their representative or governor or president as the case may be. **Buhari V Obasanjo (2009) 13 NWLR (pt.941) 1, 308 -309; CPC V INEC (2011) 18 NWLR (pt.1279) 493, 571; Oke V Mimiko (2014) 1 NWLR (pt.1388) 332, 395 -396.** That the evidence of PW7, the Petitioner amounted to hearsay evidence, The Petitioners allegation that elections were marred by non accreditation, irreconcilable, fictitious and contradictory, fictitious concocted or arbitrary votes, inability to account for ballot papers, allocation of votes and various other allegations were not proven before the tribunal. The Petitioners evidence concerns all the polling units. The Petitioners are duty bound to call at least one witness from each of the polling units the allegation is made. **Chime V Ezea (2009) 2 NWLR (pt.1125) 263, 357-358.** That statement on oath of PW7 sworn to on 30/4/2015 is a bundle of primary and documentary hearsay. **Buhari V Obasanjo (2005) 13 NWLR (pt.941) 1 at 315.** Hearsay evidence does not fall within the category of credible evidence. **CPC V INEC(2011) 18 NWLR (pt.1279) 493 at 544.**

Counsel further submitted that 1<sup>st</sup> Petitioner did not specifically tie the exhibits to his pleadings. The Exhibits were dumped on the tribunal without stating the purpose for which they were tendered. It would be inappropriate for the tribunal to remove the heaps of documents tendered and proceed to fix them to some aspects of the petitioners' case when he failed to do so. **Iniama V Akpabio (2008) 17 NWLR (pt.116) 225 at 299.** On the relief claimed Counsel submitted that where the relief does not reflect the cause of action and the available evidence, a court of law will throw out the matter. **Uzoukwu V Ezeonu (1991) 6 NWLR (pt.200) 700 at 783 – 785; CPC V INEC (supra); Section 139 (1) Electoral Act 2010 (as amended).**

Learned Counsel for the 2<sup>nd</sup> Respondent Aderemi Olatubora Esq. formulated 4 issues which are identical to issues formulated by the 1<sup>st</sup> Respondent.

On Issue 4 Counsel submitted that the testimonies of PW1, PW2, PW3, PW4 PW5, PW6 and PW7 are bereft of substances. PW1, PW2, PW3 and PW4 chorused the testimony of one another. The Supreme Court and the Court of Appeal have held and warned trial courts to beware of situations where what a witness does is to chorus what another witness has said. **Esangbedo V State**

**(1989) 4 NWLR (pt.113) 57 at 83; Ajadi V Ajibola (2004) 16 NWLR (pt.898) 91, 201.** Counsel urged the court to discountenance the testimonies of PW5, PW6 and PW7 as unreliable and improbable. That PW7 the Petitioner, his evidence is composed of primary and secondary hearsay, Counsel referred to paragraph 5 of his statement on oath. That it is clear that pw7 did not have a first hand or personal knowledge of what he testified upon and did not personally witness the conduct of the election in any of the 157 polling units. Similarly the testimonies of PW5 and PW6 are basically documentary hearsay. Pw5 who is one of the counsel to the petitioners claimed to have carried out analysis on form EC8A (1) and data he got for ICT in INEC Headquarters at Abuja. The data he relied upon was from a computer printout Exhibits K1, K2 and L report of PW5 are a bundle of documentary hearsay as the conclusions are based on documents got at INEC office Alagbaka Akure which were made by third parties such as presiding officers, poll clerks and party agents. The Petitioners did not plead or show the impracticability of bringing the makers of the document but relied upon PW7 for his analysis. PW5 admitted under cross examination that he did not participate as an agent or INEC Official in the election, his evidence or analysis constitute inadmissible evidence under Section 83 of the Evidence Act.

Counsel further submitted that all the documents tendered in evidence by PW6 (the INEC officer brought to court by subpoena duces tacum) constitute primary documentary hearsay which the tribunal cannot look into as doing so would amount to doing cloistered justice. On the quality of evidence to prove electoral non compliance, Counsel relied on the cases of **Buhari V obasanjo (2005) 13 NWLR (pt.941) 1 at 315; Adewale V Olaifa (2012) 17 NWLR (pt.1330) 478, 479; Buhari V INEC (2008) 19 NWLR (pt.1120) 246, 414 -415.**

Counsel further submitted that all documents tendered from the bar, through PW5 and PW6, Exhibit A1-A6, B5; C1 – C3, D, E1 – E13, F1 – F7, G1 –G6, H, K1 K2, L, O1 – O18, P1 – P6, Q, R1 – R2, S, T1 – T3, U, V1 – V4 and W1 –W3 were ;merely dumped on the tribunal. The Supreme Court and court of Appeal has consistently held that to prove electoral malpractices in disputed polling units, a petitioner must put in evidence the documents used in respect of each of such disputed polling units and call on witnesses who are the makers of the documents e.g. party agents who signed appropriate columns in election result forms or the INEC officers who conducted election in such polling units to shed

light on the alleged non compliance. Abubakar V Yar'Adua (2008) 9 NWLR (pt.1120) at pg.1 173; Chime V Ezea (2009) 2 NWLR (pt.1125) 263, 357-358; Buhari V Obasanjo (2005) 13 NWLR (PT.941) 1 299; Doma V INEC (2012) 13 NWLR (pt.1317) 297 at 321.

Counsel further submitted that Exhibit 'L' in which PW5 intend to fault the entries in form EC8A(1) used in the disputed polling units in addition to being inadmissible documentary hearsay is also inadmissible, it was neither listed nor pleaded in the petitioners list of documents. The Petitioners pleaded "Card reader machine used for Akure South Constituency 1 election." The computer printout in Exhibit L that forms the basis of Exhibit K2 was not pleaded or listed. That the content of Exhibit L and K in addition to being hearsay are at variance with the pleadings. Therefore a trial court or tribunal has a duty to reject any evidence which is contrary to the pleadings. NIPC Ltd. V Thompson Organisation Ltd (1969) 1 NMLR 99; Iwuoha V Nipost Ltd (2003) 15 NWLR pt.843) 352; Ajadi V Ajibola (2004) 16 NWLR (pt.898) 91. The decision of the Court of Appeal Akure Division Appeal NO. CA/AK/EPT/HR/85/2015, the decision of the Court of Appeal Lagos Division in Appeal NO. CA/L/EP/GPV//751A/2015 APC V Agbaje & Ors.

Counsel further submitted that the PW1, PW2, PW3 and PW4 did not testify on the heaps of documents dumped on the tribunal, other witnesses such as PW5 PW6 and PW7 placed before the tribunal inadmissible hearsay. That all the Exhibits tendered by learned Senior Counsel for the Petitioners from the bar enjoys the presumption of regularity and genuiness which can only be rebutted by direct cogent and probable evidence. Nwobodo V Onoh (1984) 1SCNLR 1 at 32; Buhari V INEC 19 NWLR (pt.1120) 246. The PW6 also dumped on the tribunal results forms, voters register. All the documents tendered from the bar and heaps of documents were not demonstrated by any admissible evidence to link them to the relevant aspects of the petition. ACN V Nyako (2013) All FWLR (pt. 686) 424. 477; Belgore V Ahmed (2013) NWLR (pt.1355) 60, 100; That it is not the duty of the tribunal to enquire into the case outside the open court. Ucha V Elechi (2012) All FWLR (pt.625) 237, 259. On over voting Counsel submitted that it is provable by providing the ballot boxes containing ballot papers, voters register and the statement of result. Audu V INEC (No.2) (2010) 13 NWLR (pt.1212) 456, 547; Kalgo V Kalgo (1999) 6 NWLR (pt.608)

**639 at 644; Haruna V Modibo (2004) 16 NWLR (pt.900) 487; CPC V INEC (2012) 2 – 3 SC 1, 32 -33.**

On inflation of votes Counsel submitted that the prove of inflation of votes was not attained in the evidence before the tribunal. **Adun V Osunde (2003) 16 NWLR (pt.847) 643 at 672; Ajadi v Ajibola (2004) 16 NWLR 847) 643 at 672; Ajadi v Ajibola (2004) 16 NWLR (pt.898) 91.** On incorrect negative and inaccurate subtraction of votes, Counsel relied on **Adun V Osunde (2003) 16 NWLR (pt.847) 643 at 666; Sam V Ekpelu (2000) 1NWLR (pt.642) 582 at 596.** There was nothing placed before the tribunal to require the 2<sup>nd</sup> Respondent to lead evidence as the petition fails totally for want of proof. **Aregbesola V Oyinlola (2011) 9 NWLR (pt.1253) 458 at 594.**

Learned Counsel for the 3<sup>rd</sup> Respondent Nnenna Onyeama formulated three issues for determination.

1. Whether the 3<sup>rd</sup> Respondent did not follow the law and all due process in the conduct of the elections complained about by the petitioners. The rules of the electoral Act, and the material for election in validly returning the 1<sup>st</sup> Respondent as the winner of the Ondo State House of Assembly election, Akure South Constituency 1.
2. Whether the allegation contained in paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 of the petition are not futile.
3. Whether the petition ought not be struck out.

On Issue 1 Counsel submitted that the evidence of PW1, PW2, PW3, PW4 and PW7 attest to the fact that elections were held by the 3<sup>rd</sup> Respondent in their various wards and polling units was peaceful. The DW1, DW2, DW3 and DW4 testified on the peaceful and orderly conduct of the elections. All these witnesses testimony is that they were all accredited and voted without any disturbance or nuisance. **Ndabu V Dubai (2011) 7 NWLR pt. 1245.**

On Issue II Counsel submitted that the evidence of PW1 – PW4 was choreographed in their statement on oath, and they danced the same steps.

Based on their evidence the tribunal is asked to nullify the election un units they deposed. **Ajadi V Ajibola (2004) 14 NWLR (pt.898) 91, 201 CA.**

Counsel further submitted that the testimonies of PW5 and PW7 are unreliable. PW5 tendered forms EC8A(1) and other data. He admitted he was neither a party agent nor an official of INEC. His evidence and analysis cannot be admitted by virtue of S.83 of the Act. S. 83 (2) **Buhari V Obasanjo 2005 (13 NWLR) (pt.941) at 315 S.C.**

Counsel further submitted that all the documents tendered by PW5 and PW6 were dumped on the tribunal without resort to calling their makers to testify on them. **Adewale V Olaifa (2012) 17 NWLR (pt.1330) 478, 479; Abubakar V Yar'Adua (2008) NWLR (pt.1120) 1 at 173.** On Issue 3 Counsel submitted that the petitioner did not call the eye witness and the makers of the exhibits. **Chime V Ezea (2009) 2 NWLR (pt.1125) 263, 357 -358 CA.**

On allegation of inflation with non existent votes Counsel relied on the case of **Adun V Osunde (2003) 16 NWLR (pt.847) 643 at 672 CA;**

Oluwarotimi Akeredolu SAN of learned Counsel for the Petitioners in his final address formulated three issues for determination.

1. Whether the 1<sup>st</sup> Respondent was duly elected or returned by the majority of lawful votes cast during the election held for the membership of the Ondo State House of Assembly for Akure South Constituency I on the 11<sup>th</sup> of April 2015.
2. Whether the return of the 1<sup>st</sup> Respondent as winner of the election for membership of the Ondo State House of Assembly for Akure South Constituency 1 was void, based on non-compliance with Electoral Act 2010 (as amended) and manual for election officials 2015 in the units complained by the Petitioners in this petition.
3. Whether the 1<sup>st</sup> Petitioner ought to have been returned as elected member of the Ondo state House of Assembly for Akure south Constituency 1 in the election held on 11<sup>th</sup> of April 2015.

On Issue one, two and three Counsel argued jointly. The main issue is if there is compliance with the electoral act. Counsel relied on Section 139(1) of Electoral Act and the case of **Fayemi V Oni 17 NWLR (pt.1222) at pg. 326.** From the above authority a valid election/substantial compliance with electoral Act must include the following:-

1. There must be accreditation
2. Voting
3. Collation of result
4. Recording of all relevant forms
5. Declaration of result.

The Petitioners case affects

1. Accreditation
2. Collation of result
3. Recording of voting on relevant forms.

On non accreditation Counsel submitted that paragraphs 2.4.1. to 2.6.14 (pages 34 -43) of the manual for election offices Exhibit “J” for the procedure of accreditation of voters with the smart card reader. That only voters accredited with the smart card reader can vote. The 3<sup>rd</sup> Respondent did not comply with these regulation as Exhibit ‘K2’ established there are actual variations of figures of voters accredited by smart card reader and voters register accreditation number recorded into the result sheet. That there are 11 units affected by the failure to comply with the use of accreditation through the card reader. The Petitioner tendered in the evidence card reader data printed out by INEC Exhibit ‘L’, total number of accredited voters in result sheets Exhibits A1 to F7’ compared with the total accredited voters confirmed the report of inspection of the inspection as contained in Exhibit ‘K2”. Based on this we were urged to cancel the election. **Fayemi V Oni (2009) 7 NWLR (pt.1140) 223 at 291; Ajadi V Ajibola (2004) 16 NWLR (pt.898) 1 at 182 – 183; Hon. John O. Fayemi V Olusengun Oni & Ors (2009) 7 NWLR (pt.1140) 223 at 285, 286, 387; Osunbor V Oshiomole Supra; INEC V Ray supra; Aondoaka V Ayo (1991) 5 NWLR (pt.602) 206.**

The Respondents did not challenge the content of the forms EC8A election sheets, the report of card reader date, inspection of voters accreditation as produced by INEC. The oral evidence of the 1<sup>st</sup> Respondent's witness as to accreditation in four units cannot contradict or vary the content of all these documentary evidence. Owoeye V oyinlola (2012) 15 NWLR (pt.1322) 84 at 122 para C.; Bongo V Governor of Adamawa State (2013) 2 NWLR (pt.1339) 403 at 410; Olagbenro V Olayiwola (2014) 17 NWLR (PT. 1436) 313 AT 334 CA; Ogwuche V BSCSC (2014) 7 NWLR (pt.1406) 374 CA; Chukwuma V INEC & Anor (2006) All FWLR PT.302, 121. The tribunal can evaluate these documentary evidence tendered before it. CPC V Ombugadu (2013) All FWLR at 706 at 406 p.457 -458 paras G – A.

The 3<sup>rd</sup> Respondent did not make any explanations on the non compliance of the use of card reader. The implication is that the non compliance with the accreditation as detected by the card reader is uncontroverted. Okpoko Comm. Bank V Igwe (2013) 15 NWLR pt. 1376 That none of the Respondents tendered any documentary evidence to contradict the petitioners documentary evidence. Buhari V Obasanjo (2005) 13 NWLR (pt.941) 1 at 122. That the burden of proof shifted to the Respondents to defend the petitioners' claim as to non compliance with the rules of accreditation.

On non-compliance with the electoral Act in respect of collation of result in Akure South Constituency learned Counsel relied on provisions of paragraph 3.0. at page 55 of the manual of election officials 2015. From the wording, the word "shall" made it mandatory for collation officers to review figures against the reports. The 3<sup>rd</sup> Respondent's collation officers did not review any of the units results where there were discrepancies.. Counsel relied on Chukwuma V INEC & Anor supra. Counsel enjoined the tribunal to suo moto look at the result sheets of contested polling units. The evidence of Sola Ajisafe Inspection documents and result sheets were not controverted by any of the Respondents. The uncontroverted oral and documentary evidence of the Petitioners are deemed admitted. Lawson V Afani Continental Co. Nig. Ltd. (2002) FWLR pt. 109 1736 at 1740; Okpoko Com. Bank V Igwe (2013) 15 NWLR pt.1376 167; Oduola V Coker (1981) 3 S.C. 197; Omoregbe V Lawani (1981) 3 S.C. 108; Adegoke V Adibi (1992) 5 NWLR (pt.242) 410.

The Respondents' pleading on denial of documentary evidence as to non collation, over voting are deemed to have been abandoned. The 3<sup>rd</sup> Respondent failed to call any evidence to rebut the claim of the Petitioner and is deemed to have abandoned her reply. **Okpoko Comm. Bank V Igwe (supra)**. On non collation of polling units election result at ward collation centre Counsel submitted that the Petitioner tendered Exhibits result sheets in respect of the wards 5 and 8 and called on the tribunal to collate appropriately for all parties in this petition the votes contained in the polling unit result sheets which were omitted from the ward collation result sheet.

The Petitioner in reply to Respondents' final address submitted that the Petitioners witnesses were credible. The tribunal ordered that documents be taken as read during trial. No document was dumped on the tribunal. That the content of the card reader was pleaded at paragraphs 12 – 19 of the petition that there was no strict adherence to the use of card reader. The electronic card reader was listed by the Petitioner in paragraph 52 of the petition. The listing of these facts renders the computer printout of the recording of the recording of card reader admissible. **Monler Construction V Azubike (1990) 3 NWLR (pt.136); Ogu V Manid (2010) LPELR 4690**.

On the 5<sup>th</sup> of September 2015, the tribunal granted leave to the petitioner to file and rely on the INEC computer printout of the smart card reader in line with paragraph 41(8) of the first schedule to the electoral Act. The petitioners did not appeal the ruling they cannot by way of final address urge the tribunal to overrule itself. That proper foundation was laid for the admissibility of the INEC computer printout. That the documents were not dumped on the tribunal. That the comments of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents about the petitioners witnesses were made in futile effort to discredit the petitioners witnesses when such comment is not rooted in cross-examination. **Aondoakaa V Ajo (1990) 5 NWLR pg.602, 206 at 22 para C – E**. The presence of a polling clerk is not necessary in the addition and subtraction of figures result sheets and the INEC documents. It is provided in case law that function can be performed by the tribunal itself. **Chukwuma V INEC & Anor supra**.

On reply on points of law, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents replies are identical. Learned Counsels for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that non accreditation cannot be proved by inadmissible evidence in the manner the petitioners have prosecuted this petition. The Petitioners pleaded “card reader machines used for Akure South Constituency 1 election to prove non accreditation but at hearing relied on unpleaded document Exhibit ‘L’ being data got from INEC server. Evidence which is at variance with a pleading goes to no issue. **Lucky Orimison Ayedatiwa & Anor V Akinjo Kolade Victor & Ors CA/L/EPT/HR/85/2015.** Exhibits K1 and K2 are based on inadmissible exhibit L cannot be a basis of proving non-accreditation. That attempts by Counsel to the petitioner to explain certain documents in his address constitute inadmissible documentary hearsay. **ANPP V Usman (2008) 12 NWLR (pt.1100) 1 at 89.** The Petitioners inferences of admission to the document tendered by the Administrative Secretary of INEC because he was not cross-examined by Respondents Counsel, they submitted that cross-examination of a witness who is not a maker of document amounts to an exercise in futility. **Buhari V INEC (2008) 19 NWLR (pt.1120) 246 414 – 415;; Ugwu V Ararume (2007) 12 NWLR (pt.1048) 367 at 454.**

The onus does not shift from a petitioner to a Respondent where what the petitioner has done is to dump documents in the tribunal and adduce documentary hearsay as in the instant case. **Dinyadi V Wamako (2008) 17 NWLR (pt.1116) 393 at 386 – 387; Aregbesola V Oyinlola (2000) All FWLR (pt.472) 1174 at 1189; CPC V INEC (supra)**

We have examined the evidence led and submissions of Counsel, the crux of the petition is that the Respondent was not validly returned as the winner of the majority of lawful votes cast in the election.

The Petitioners called seven witnesses. PW1 –PW4 testimonies in written depositions are the same word for word were they said as follows:-

1. That I was one of the registered voters and participated in the election to Ondo State House of Assembly held in Akure Ondo State on 11<sup>th</sup> April, 2015.

2. I know as fact that I cast my vote at ward (-) unit (-) on the said 11<sup>th</sup> day of April, 2015
3. After the exercise, I know as fact that when the result of the unit was collated the number of voters recorded was more than the number of ballot papers used in the polling unit.
4. I equally know as fact that in spite of over voting at the polling unit, the said election was recorded for various parties.
5. it is therefore in the interest of justice to cancel the election of that unit as same was not a true reflection of votes cast.
6. I depose to this statement on oath in good faith, conscientiously believing same to be true and in accordance with the provisions of the oaths Act.

Based on the uniform account in the testimonies of these witnesses, we are of the view that their testimonies have been tailored, tutored and doctored. In actual life there is bound to be minor variation in the account of truthful witnesses. **Esangbedo V State (1989) 4 NWLR (pt.113) 57 at 83; Ajadi V Ajibola (2004) 16 NWLR (pt.898) 91 201.**

PW5 admitted under cross-examination that he was not the maker of the documents he analysed.

PW6 is on subpoena to tender documents and was not cross examined. Other documents were tendered by the bar. The documents tendered were not tendered by the makers of the documents. The Petitioners did not plead nor show the impracticability of bringing the makers of the documents relied upon. **Buhari V Obasanjo (2005) 13 NWLR (pt.941) 1 at 315; Iniama V akpabio (2008) 17 NWLR (pt.1116) pg. 225 at 233 para A-B**

The Supreme Court held in **Buhari V Obasanjo (2005) 13 NWLR (pt. 941) 1 at 315:**

*“The position of the law regarding the type of evidence which must be led in support of allegations in which figures or scores of the candidates at an election are being challenged should come direct from the officers who were on the field where the votes were counted and or collated. The State party agents, such as Bisi Lawal (PW1), received the figures he gave in evidence in court in this case from his party’s agents who were not called as witnesses. Such evidence is therefore inadmissible as it is hearsay.”*

PW5 did not play any role in the election his analysis is based on INEC result forms he obtained from INEC which was earlier collected from the presiding officers. It is the presiding officers, party agents who were present at the polling units that are competent to testify. Polling stations are the concrete foundation on which the pyramid of an election process is built. It is important that evidence of what transpired there is adduced. **Ekpo V Kanu 2012 LPELR C.A.** Entries in electoral forms alone do not constitute proof of disputed scores unless there is evidence from a person privy or conversant with the entries to shed light on them before such allegation may be proved. **Adewale V Olaifa (2012) 17 NWLR (pt.1330) 478 479.** Entries in the forms alone do not constitute proof of disputed scores, there must be evidence from a person privy to or conversant with the entries to shed light on them **Alao V Akano (2005) 22 NSCQR pg. 11 at 884.**

PW5 carried out analysis, this does not cure the lacuna as the tribunal has been deprived of evidence of what actually transpired in the 14 polling units. The evidence should be tendered through the field agents or electoral officers manning the affected units to show the nexus, it is not the duty of court to go fishing for evidence from the parties. **Adewale V Olaifa 2012 CA 1 EPT NA/18/2011.** To prove electoral malpractice, the petitioner must produce documents used in respect of each polling unit, and call witnesses who are the makers of these documents e.g. party agents who signed appropriate columns in election result forms or the INEC officers who conducted election in such polling units. The witnesses are those who saw it on that day. **Abubakar V Yar’Adua (2008) 9 NWLR (pt.1120) at 173; Buhari V Obasanjo (2005) 13 NWLR (pt. 941) 1, 299; Doma V INEC (2012) 13 NWLR (pt.1317) 297 at 321; Chime V Ezea (2009) 2 NWLR (pt.1125) 263, 357 - 358**

The evidence of PW5 and PW6 are tantamount to hearsay evidence they are not party agents of presiding officers. PW7 gave hearsay evidence of facts he got from other sources.

The Petitioner tendered the following documents from the bar, through PW5 and PW6. Exhibits A-A6, B1-B5, C1-C3, D, E1-E13, F1-F7, G1-G6, HK, K1, L2, L, O1-O18, P1-P6, Q, R1-R2, S, T1-T3, U, V1-V4, W1-W3. No evidence was led by these witnesses to link the documents to the specific areas of the petition. It is not the duty of the tribunal to remove the heaps of documents and proceed to fix them to their specific units. **Iniama V Akpabio (2008) 17 NWLR (pt.1116) 225 at 331 paras F-G; Tunji V Bamidele 2012 LPELR C.A. 11 EPT.SH/15/2011.** In **Ucha V Elechi (2012) 13 NWLR pt 1317 pg. 330 at pg. 360 paras. F-G** it was held

*“I cannot agree more with the above, when a party decides to rely on documents to prove its case, there must be a link between the documents and the specific areas of his case for which the document was tendered. On no account must Counsel dump documents on a trial court. No court would spend precious judicial time linking documents to specific areas of a party’s case”*

The documents can therefore not speak for themselves as no evidence was led on them contrary to the submissions of learned Counsel for the petitioner in his address that PW5 linked the documents in his evidence. PW5 said “I can identify exhibit A to H which I referred to in paragraphs 6 and 7 of my deposition.” Learned Counsel for the Petitioners urged the tribunal to look at these documents, this in our humble view we can not do. It was held by the Supreme Court in the case of **Omisore V Aregbesola (2015) Vol. 246 LRCN pg. 44 at pg. 133 paras JJ.**

*“It has long been settled that a Judge is not permitted to embark on an inquisitorial examination of documents outside the court room. Worse still, he is not allowed to act on what he discovered in such a document in relation to an issue when that was not supported by evidence or was not brought to the notice of the parties to be agitated in the usual adversarial procedure.”*

The learned Counsel for the petitioners, in his address tried to link up the documents with the witnesses. It is trite law that addresses of Counsel no matter how brilliant cannot take the place of evidence. **Adua V Essien (2010) 14 NWLR (pt.1213) 141 at 167; Ajamah V Eboside (2010) All FWLR (pt.516) 1925 at 1939.**

Learned Counsel for the petitioners, submitted that the tribunal gave directives that documents be tendered in bulk and taken as read, which we ordered. With due respect to Counsel the tribunal did not direct that documents should not be linked to specific facts of the case.

On submissions of Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the admissibility of exhibit L the certification by INEC and Exhibit K and K2 the content being not pleaded. In paragraph 28 the petitioners pleaded “The Electronic card reader machine” In item 26 of the list of documents what is listed is “Card reader machine used for Akure South Constituency 1 election”. The essence of pleadings is to narrow down the case of the parties and to eliminate surprises at the trial. Thus where a party in any proceeding, specifically pleaded certain documents to establish his case, he cannot be allowed during the trial to rely on other documents different from those specifically pleaded. **Hashidu V Goje (2003) 15 NWLR (pt.843) pg. 352 at 359.**

A trial court has a duty to reject any evidence which is contrary to the pleading. **Hashidu V Goje supra at pg. 360** . Where a petitioner fails to accompany its petition with copies or list of every document to be relied on at the hearing of the petition, in line with the requirements of paragraph 4 (5) (c) and 41 (8) of the 1<sup>st</sup> schedule to the electoral Act 2010 which result in refusal of the trial tribunal to admit the documents in evidence, no complaint of denial of fair hearing at all shall arise from the refusal to admit the documents in evidence. **ACN V Lamido (2012) 8 NWLR (pt.1303) pg.560 at 568**

We have perused the exhibits, Exhibit L is the certification by INEC, Exhibit K2 is the print out data from the data base at Abuja. We have examined the pleadings filed by the petitioner. The Petitioners Counsel urged that the

petitioners listed the smart card reader and printout by the smart card reader machine. We find as fact that in the list of documents item 26 is listed as “card reader machines used for Akure South Constituency 1 election. In paragraph 28 of the petition. It is pleaded “your petitioners hereby plead the electronic card reader machine and voters register of the units contained in paragraph 12 of this petition.”

The above mentioned paragraphs speak for themselves, as to what was listed and pleaded. Exhibit L is not listed nor pleaded. Exhibit K2 is not listed nor pleaded and is at variance with the pleadings. It is the duty of parties to confine themselves to their pleadings. The Supreme Court held in **Buhari V Obasanjo (2005) 13 NWLR pt.941 1 at pg. 255 para G-H**

*“A court is bound to confine its decision within the limits of the scope of inquiry before it. In other words a court has no competence to determine an issue beyond the scope of what was put in issue by the parties in their pleading.”*

Consequently, Exhibits L and K2 are accordingly rejected. Exhibit K was pleaded and brought pursuant to an order of the tribunal for inspection. No evidence was linked to this document by the petitioners witnesses.

The Court of Appeal Lagos Division Appeal NO CAL/EP/GOV751A/2015 between APC V Agbaje & Ors held:

“The evolution of the concept of smart card reader is a familiar one. It came into being during the last general elections held in March and April 2015 in Nigeria. On this score it is a nascent procedure injected into our infant and fledgling electoral system to ensure credible and transparent election. Specifically, it is aimed to concretise our fragile process of accreditation. The keystone of any suffrage. The concept, owing to its recent invention by INEC, a non legislative body traces its paternity to the manual for election officials chapter 2, pages 35-42. Put the other was round the extant electoral Act, 2010, as amended which predates the concept, is not its parent or progenitor. Since it is not the progeny of the electoral Act, a ground in a petition fronting it as a ground to challenge any election does not have its blessing, nay section 138(1) of it. Put simply, a

petitioner cannot project the non-presence or improper use of smart card reader as a ground for questioning any election it does not qualify as one.”

In order to prove over voting, the tendering of register of voters ballot boxes containing ballot papers and statement of result from the affected polling stations are sine qua non in cases of this nature. **Audu V INEC (No.2) (2010) 13 NWLR (pt.1212) 456, 547.; C.P.C. V INEC (2012) 2-3 SC 1, 32 – 33**

In the instant case, the ballot papers were not tendered before the tribunal.

On the inflation of votes, a petitioner alleging inflation of figures must prove his allegation by giving particulars of the inflated figures and by showing that if the inflated figures were taken from the votes credited his opponent, the result would change in his favour. **Ajadi V Ajibola (2004) 16 NWLR (pt.898) 91.** The Petitioners were unable to prove over voting, inflation of votes, incorrect negative and inaccurate subtraction of votes, they failed to discharge the onus on them. The Supreme Court held in the case of: **Gunduri V Nyako (2014) 2 NWLR (pt.1391) 221 at 25;**

*“In a Claim for declaration, the onus is on the plaintiff or petitioner to establish his case on the strength of his case and not on the weakness of the case of the defendant. In this case, the success of the appellants case was not dependent as whether the Respondents called witnesses or not, but squarely rested on the applicants to prove the declaratory reliefs sought. “*

See the following cases **Ucha V Elechi (2012) 13 NWLR pt. 1317 pg. 330 at 365;** **Iniaya V Akpabio (2003) 17 NWLR pt. 1116 pg. 225 at 30 paras A-E;** **Buhari V Obasanjo (2005) 13 NWLR pt. 941 pg. 1 at 122.** We are of the humble view that the burden of proof has not shifted.

On the reliefs sought by the Petitioners we are of the humble view that the relief being sought in an election petition constitutes its bedrock, its foundation where the relief does not reflect the cause of action and the available evidence, a court of law will not grant same. We shall reproduce the reliefs:

- I “May it be determined that the said 1<sup>st</sup> Respondent Adesanya Kemisola Adenike was not duly elected or returned by the lawful votes cast to the Ondo State House Assembly for Akure South Constituency 1 held on 11<sup>th</sup> day of April 2015.
- II. That it may be determined that the said election to membership of Ondo State House of Assembly for Akure South Constituency 1 held on the 11<sup>th</sup> day of April 2015 was avoided by corrupt and other sharp practices/non compliance with electoral Act and manual for election official, 2015 specifically mentioned in this petition.
- III That it may be determined that going by the lawful votes cast at the said election, your 1<sup>st</sup> Petitioner ought to have been returned and should be returned as the elected member of Ondo State House of Assembly for Akure South Constituency I

From the evidence relief 1 is not proved. Relief II was not established, there was no evidence before the tribunal to establish non-compliance or corrupt practices. Reliefs 1 and II are the principal reliefs which if granted will constitute the condition precedent to the grant of relief III.

On the whole, we are of the firm but humble view that this Petition is lacking in merit. Consequently it is hereby dismissed in its entirety.

**HON. JUSTICE G. O. IMADEGBELO  
CHAIRMAN**

**HON. JUSTICE I. O. HARRISON  
MEMBER**

**HON. JUSTICE KADI S.W.A. YUSUF  
MEMBER**