IN THE COURT OF APPEAL
ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

ON THE 24TH DAY OF MARCH , 2023

BEFORE THEIR LORDSHIPS:

MUHAMMED L. SHUAIBU	JUSTICE COURT OF APPEAL
CORDELIA I. JOMBO-OFO	JUSTICE COURT OF APPEAL
JAMES. G. ABUNDAGA	JUSTICE COURT OF APPEAL

APPEAL NO.:CA/AK/EPT/GOV/01/2023

BETWEEN:

ADELEKE ADEMOLA JACKSON NURUDEEN ..... APPELLANT

AND

1. **ADEGBOYEGA ISIAKA OYETOLA**
2. **ALL PROGRESSIVE CONGRESS (APC)**
3. **INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**
4. **PEOPLES DEMOCRATIC PARTY (PDP)**

RESPONDENTS

JUDGMENT
(DELIVERED BY MUHAMMED L. SHUAIBU, JCA)

CERTIFIED TRUE COPY
COURT OF APPEAL ABUJA
OGUNFOWORA HASSANA (MRS)
ASST CHIEF REGISTRY OFFICER
Signature .....
Date 27/3/23

CTC ₦1,000.00
27-3-2023
Paid

The appellant and the 1st respondent contested for governorship of Osun State conducted by the 3rd respondent on 16th July, 2022 under the platforms of the 2nd and 4th respondents respectively. The Appellant was declared the winner of the said election and was returned elected being the person who has the majority of lawful votes cast at the election.

Being dissatisfied with the election and return of the appellant, the 1st and 2nd respondents filed a petition at the lower tribunal alleging that the appellant was at the time of the election not qualified to contest the election, he was not duly elected by majority of the lawful votes cast at the election and that the election was invalid by reason of non-compliance with the Provisions of the Electoral Act, 2022.

In response, the appellant filed his reply to the petition and thereafter, the matter proceeded to trial. At the conclusion of the trail and upon overruling the pre-emptory challenges to the competence of the petition by the appellant, the reliefs sought by the 1st and 2nd respondents were granted in the judgment delivered on 27/1/2023, signed by the chairman of the lower Tribunal and Member II. The excerpt of the said Judgment on page 11,996 of the record read as follows: -

"Consequently, the 2nd respondent did not score a majority of lawful votes cast at the election. The declaration and return is hereby declared null and void. The 2nd respondent "go lololo" and

"Buga won" as the duly elected governor of Osun State in the election conducted on 16th day of July, 2022. See KIZZ DANIEL SONG, BUGA, Rather, we hereby hold that, the 1st petitioner scored a majority of lawful votes in the said election and is hereby returned as such.

The 1st respondent is hereby directed to withdraw the certificate of return issue to the 2nd respondent and issue it to the 1st petitioner as the duly elected Governor of Osun State. Accordingly,reliefs 72c, d in 774 polling Units only e, f, g, h and i already reproduced in the judgment are hereby granted.

Having, granted the main reliefs, the alternative reliefs are hereby struck out."

Miffed with the above decision, appellant approached this court through a notice of appeal filed on 8/2/2023 containing thirty-one (31) grounds of appeal on pages 12,006 – 12,034 Vol. 16 of the record.

The appellant, the 1st and 2nd respondents filed and exchanged briefs in accordance with the Election Judicial Proceedings Practice Directions, 2022. At the hearing of the appeal on 13/3/2023, learned appellant`s counsel, Dr. Onyechi Ikpeazu SAN, leading other counsels adopted and relied on the appellant`s brief together with appellant's reply brief filed on 15/2/2023 and 24/2/2023 respectively. Learned counsel for the 1st and

2nd respondents,Prince Lateef O. Fagbemi, SAN also leading other counsels adopted and relied on 1st and 2nd respondents` brief, filed on 21/2/2023 in urging the court to dismiss the appeal.

In the appellant`s brief, the following nine (9) issues were formulated for the determination of the appeal:

1. Whether the judgment of the Tribunal in EPT/OS/GOV/01/2022: **ADELEKE ADEMOLA JACKSON NURUDEEN & ANR VS INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC) & ORS** delivered by Hon. Tertsea Aorga Kume J and signed by both his lordship and Rabi Bashir (chief Magistrate) is not a nullity.
2. Whether the Tribunal was not wrong when it refused the application to strike out the three grounds of the petition on the basis that they were incompetent.
3. Whether having regard to Section 104 of the Evidence Act, 2011 and the decision of the Supreme Court in **SOKOTO vs INEC (2022) 3 NWLR (pt. 1818) 577,** the Tribunal was not wrong in admitting and relying on Exhibits PUBL 1-3 and SCH1, SCH2, SCH3 and BVR with the receipts tendered for their payment, Exhibits RC1 and RC2 Post-dated their certification date.
4. Whether the Tribunal was not wrong in rejecting Exhibits 2R, RW4 and refusing to act on the decision of the Court of Appeal in

CA/A/362/2019 declaring the Appellant qualified and holding that appellant`s Form EC9, Exhibit EC9 was forged.

5. Whether having regard to the pleading in the petition that the accurate figure of accreditation is the record of accreditation in Bimodal Voter Accreditation System (BVAS) and the result transmitted directly from the polling unit, the Tribunal was not wrong in determining the number of accredited voters based on Exhibit BVR, contrary to the witness statements of PW1 and PW2.

6. Whether the Tribunal was not wrong in giving prominence and relying on Exhibit BVR, the BVAS report from the INEC back end server, as against the primary evidence of the accredited voters in the BVAS machines and data from the physical inspection, Exhibit RWC, extracted, with an order of the Tribunal and in holding that the 1st and 2nd respondents proved over-voting as alleged based on the evidence led and the provisions of section 47 (2) and 51 (2) of the Electoral Act, 2022.

7. Whether the Tribunal was not wrong in the application of Section 137 of the Electoral Act, 2022 and paragraph 46 of the First Schedule thereof and thereby relieved the 1st and 2nd respondents the burden to demonstrate or link the documents tendered in evidence to the oral evidence presented.

8. Whether the Tribunal was not wrong when it held that Exhibit R.BVR 1-129 and RWC were product of a physical inspection of the Bimodal Verification Accreditation System done by the Appellant based on his application to the Tribunal.
9. Whether the Tribunal was not wrong and did not Exhibit clear bias against the Appellant in holding that it was the 1st respondent not the appellant who scored a majority of the lawful voters cast at Osun State Governorship Election of 16th July, 2022 and hereby returning the 1st respondent as duly elected candidate contrary to the provision of Section 52 of the Electoral Act, 2022.

On the part of the 1st and 2nd respondents, eight (8) issues were formulated for the determination of the appeal and these are: -

1. Whether the majority decision of the Tribunal was validity rendered?
2. Whether the Tribunal rightly dismissed the objections to its jurisdiction to entertain and determine the petition?
3. Whether the tribunal rightly admitted and gave effect to certified true copies of documents tendered by the petitioners?
4. Whether the Tribunal rightly rejected Exhibit 2R, RW4 and rightly held that forgery was proved with regards to Form EC9 and file D?

5. Whether having regard to the subsisting regulations/law and the totality of oral and documentary evidence placed before the Tribunal, the tribunal rightly reached its conclusions that over-voting was proved thus entitling the petitioners to the reliefs sought in the petition?
6. Whether the appellant proved that Exhibits R-BVR, R.BVR 1-129, 2R.RW2, RBVM, RBVM, RBVM 1 series and other documentary evidence made by the respondent to the petition and issued during the subsistence of Exhibit BVR complied with oral evidence before the tribunal disproved the petitioners` case before the Tribunal?
7. Whether the Tribunal rightly gave effect to the contents of the tables presented by the petitioners whose contents were derived from evidence already placed before the Tribunal in terms of unchallenged documentary and oral evidence and rightly granted the reliefs of the petitioners?
8. Whether the appellants proved allegation of bias against the Tribunal?

I have considered the above formulations, alongside the record of appeal. The two sets of issues formulated by the respective parties are seemingly the same, even-though couched differently. I will nonetheless,

determine the appeal on the basis of the eight (8) issues formulated by the 1st and 2nd respondents, inview of their conciseness and brevity.

ISSUE 1

Whether the majority decision of the Tribunal was validity rendered.?

The contention of the appellant is that the judgment giving rise to this appeal is a nullity, reason being that it is captioned "JUDGMENT" (Delivered by Honourable Justice Terse Aorga Kume) though; it was also signed by Rabi Bashir Esq. who did not express any opinion either orally or in writing. It was the submission of the learned senior counsel for the Appellant that by virtue of section 294 (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) that where panels of judges adjudicate, each one of them is required to express and deliver his opinion in writing that he adopts the opinion of any other judge who delivered a written opinion as done in the Supreme Court and Court of Appeal. Thus, merely appending a signature in the opinion delivered by another cannot be an opinion. In aid, he referred to the cases of **NYESOM VS PETERSIDE (2018) 7 NWLR (PT. 1512) 452 @ 504, NASKO VS BELLO (2020) LPERL – 5230 (SC) AND SOKOTO STATE GOVERNMENT OF NIGERIAN VS KAMDEX (NIG)LTD. (2007)LPELR**

– **3093 9SC)** in contending that even though the provision of section 294 (1) & (2) of the Constitution aforesaid, refers specifically to Justices of the Supreme Court and the Court of Appeal, the principle is applicable to any court or Tribunal that sits in a Panel of two or more members.

Continuing, counsel submitted that effectively there are two Judgments and each delivered by two Judges on the panel. He relied on Section 285 (4) and (6) of the Constitution to the effect that there was no Judgment and also that no valid decision was delivered within the statutory period of 180 days.

The contention of the 1st and 2nd Respondents on the other hand, is that the requirement of individual Judge giving decision is only applicable to the Court of Appeal and the Supreme Court as clearly stated in Section 294 (1) and (2) of the Constitution. Learned counsel submitted that there is no requirement for a separate written opinion by individual members in respect of the Tribunal. Once the Judgment is signed by members of the Tribunal, such Judgment cannot be rendered invalid. Therefore, the majority judgment of the Tribunal, having been signed by both the chairman and a member became a joint opinion and valid in law. He placed reliance on the cases of **AMACHE & ANOR VS BAKO & ORS (2019) LPELR– 55316 (CA) and OJO VS INEC (2008) 13 NWLR (PT. 11050) 577 @ 606 – 607** to the effect that signing the Judgment individually along with the chairman of the Panel signified consent and co-

ownership of the Judgment, the signature also identifies the judgment as the act of the Person (s) who sign it.

Counsel further distinguished the cases of **NYESOM VS PETERSIDE, NASKO & ANR VS BELLO AND SOKOTO STATE VS KAMDEX (NIG) LTD. (SUPRA)** to contend that the pronouncement of Honourable Justice Kekere-Ekum, JSC, at pages 504-505 in the case of **NYESOM VS PETERSIDE (SUPRA)** on the Provision of Section 294 (1) and (2) of the Constitution is an obiter dictum and the case of **NASKO VS BELLO & ORS (SUPRA)**also did not offer any opinion on the said Provision of Section 294 (2) of the Constitution. The case of **SOKOTO STATE VS KAMDEX (NIG) LTD. (SUPRA)** according to counsel, is not apposite to the instant case because His Lordship who delivered the Judgment did not participate in the proceedings that led to the Judgment. Still in contention, he relied on the cases of **SAIDU VS ABUBAKAR (2008) 12 NWLR (PT. 1100) 201 @ 479 and BALONWU VS IKPEAZU (2005) 13 NWLR (PT. 942) 479 @ 530** to reiterate the point that members of Election Tribunal are not required to write separate judgment and such Judgment is valid where a member of the Tribunal write and authenticate the Judgment.

It was further submitted that the mere facts that the title of the majority judgment indicated the name of the chairman only shows that he was the one that delivered the majority Judgment and nothing else.

The issue that calls for consideration here relates to the extent and or the scope of the application of Section 294 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which explicitly provides as follows: -

1. *Every Court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.*
2. *Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion. Provided that it shall not be necessary for the Justices who heard a cause or matter to be present when Judgment is to be delivered and the opinion of Justice may be pronounced or read by any other justice whether or not he was present at the hearing.*

3. A decision of a court consisting of more than one Justice shall be determined by the opinion of the majority of its members.

What is discernible from the above particularly, in Sub-section (2) & (3) of the Constitution is that each Justice of the Supreme Court or the Court of Appeal shall express and deliver his opinion in writing or may state in writing, that he adopts the opinion of the any other who delivers a written opinion. Furthermore, a decision of a Court comprising of more than one Judge shall be determined by the opinion of the majority of its members.

As stated earlier that the contention of the parties in this appeal is that in view of the collegial nature of the Lower Tribunal, each of the members is required to express and deliver his opinion in writing. In **OJO VS INEC (SUPRA),**this Court was emphatic that a careful and analytical reading of section 294 (2) & (3) of the Constitution that only in the Supreme Court and the Court of Appeal that each Justice is required to express an opinion in writing, either in support of the opinion of another Justice or in dissent to that opinion. Thus in the case of any other court or tribunal consisting of more than one Judge, no such requirement of separate written opinion is necessary.

It was hitherto held in **SAIDU VS ABUBAKAR (SUPRA)** that an election tribunal is like pre-1979 Supreme Court, wherein members are not

required to write separate judgments. In effect, it is valid for a member of the tribunal to write and authenticate the judgment of the tribunal.

However, in **NYESOM VS PETERSIDE,** also following its earlier decision in **SOKOTO STATE GOVT. VS KAMDEX(NIG) LTD. (SUPRA),**the Supreme Court opined that though the Provision of Section 294 (1) & (2) of the Constitution refers specifically to Justice of the Supreme Court and of the Court of Appeal, the principle is applicable to any court or tribunal that sits in a panel of two or more members. Interestingly, the two decisions above have a common feature that is, the issue before the apex court was not on the need for individual judges to express and deliver separate opinion in writing. The main issue in the two cases was whether a judicial officer who did not participate in court proceedings in respect of a case has the legal right or capacity to write a judgment or opinion to determine the dispute between the parties to the case. Specifically, the apex Court has held in **SOKOTO STATE GOVT. VS KAMDEX (NIG) LTD (SUPRA)** that the judgment delivered by Galadima, JCA who did not sit with Panel of Justices that heard the appeal affected the competence of the court in the proceedings concluded in the delivery of the judgment which in law is part and parcel of the proceedings in the hearing and determination of the appeal. I therefore, cannot but agree with the submission of counsel to the 1st and 2nd respondents that the facts in these cases and that of the instant case are not mutually the same

and thus distinguishable. I also agree that the pronouncement of Honourable Justice Kekere-Ekum, JSC on the Provisions of Section 294 (1) & (2) of the Constitution in the case of **NYESOM VS PETERSIDE (SUPRA)** at pages 504 – 505 is an obiter dictum and hence not conclusive authority.

I have carefully and meticulously examined the Supreme Court decision in **NASKO VS BELLO (Supra)** being relied upon by counsels and my view is that since there was no appeal on the findings of the Court of Appeal on the requirement of each member of the tribunal to express his opinion separately and the Supreme Court did not offer any opinion on Section 294 (2)of the Constitution, it will also be safe to conclude that the said decision has no binding force. At any rate, the law is that express mention of one thing is to the exclusion of others (expression unius es exclusion alterius)

It was also the contention of the appellant that since the name of member 2 was not included on the title of the judgment, such judgment is not a majority judgment. Suffice to say that, the signature of the said member 2 was on the judgment delivered by Honourable Justice Tertsea Aorga Kume and that means that she concurred with the said judgment, more so that she is by law not required to express her written opinion separately. In **HADI SULE VS STATE (2017) LPELR– 47016 (SC) 33-**

34 it was held inter alia that since the appeal is not about substance of the judgment but about only the non-signing or sealing of the judgment and its non-dating, equity follows the law and takes as done which ought to be done. This is what Section 168 (1) of the Evidence Act, 2011 is about when it provides that any judicial Act shown to have been in a manner substantially regular, it is presumes that formal requisites for its validity were complied with. **Issue 1** is therefore resolved against the appellant.

ISSUE 2

Whether the Tribunal rightly dismiss the objections to its jurisdiction to entertain and determine the petition?

The appellant contention is that their two objections to the petition were not considered by the Tribunal on merit. It was submitted that the non-consideration of the objections amounted to a denial of the appellant of his right fair hearing, which invariably occasioned a miscarriage of Justice.

Counsel later proceeded to itemize the objections and contend that the Court of Appeal having duly heard the keenly contested appeal regarding the qualification of the appellant, same cannot be re-introduced into the petition. He submitted that a judgment of a court is valid until it is set aside. Thus, the appellant having been declared qualified by the same

documents pronounced on by the Court of Appeal in CA/A/362/2019 which were presented for the present election, cannot be disqualified by virtue of any other document. He continued, as long as the documents pronounced upon by the Court of Appeal are still part of the documents presented by the appellant in the present election, they are the bonafide documents presented by the appellant in order to secure his qualification.

Closely related to the above, counsel contend that same applied to EC9 submitted in 2021 and that matters relating to false information, are pre-election matters which ought to be initiated within 14days from the date of submission. And on that score, he argued that the complaint in the 1st ground of the petition are statute barred.

Respecting objection to 2nd ground of the petition, the petitioners according to learned counsel, pleaded that the appellant herein was not duly elected by majority of lawful votes cast at the election but the facts in support thereof were founded on non-compliance. He submitted that where the facts pleaded did not support the ground of the petition, the Court ought to strike out the said ground of the petition together with all the paragraphs relating to same. He referred **YUSUF VS INEC (2021) 3 NWLR (PT. 1764) 551, ELOHOR & ANOR VS INEC & ORS (2019) LPELR– 48801 (SC) @ 48-53 and GOLU & ANR VS GAGDI & ORS (2019) 2 LPELR– 48806 (CA) 36-47.**

CERTIFIED TRUE COPY

Finally, on objection to the 3rd ground, it was the appellant`s contention that no fresh facts were alleged in support thereof except using the facts in support of the second ground which if struck out on the earlier objection, it will no longer exist.

In their response, the 1st and 2nd respondents argued that the Tribunal was not only seized and conscious of the very item of jurisdiction raised but same were addressed and resolved appropriately in the judgement. The complaint of the appellant according to respondents' counsel is essentially on form and style adopted by the Tribunal rather than the substance of the tribunal`s determination. He referred to **ANDREW &ANR VS INEC & ORS (2017) LPELR– 48518 (SC)** to the effect that there is no dogmatic style in writing judgment and what is important is that the issue raised had been addressed and decided one way or the other. After all, the procedure adopted by the Tribunal in determining the preliminary objections did not cause any harm to the appellant.

The provision of Section 134 (1) of the Electoral Act, 2022 provides three grounds for questioning an election and thus election petition may be predicated on any of the following grounds: -

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

b. *The election was invalid by reason of corrupt practices or non-compliance with provisions of this Act, or*

c. *The respondent was not duly elected by majority of lawful votes cast at the election.*

In **YUSUF VS INEC (2021) 3 NWLR (pt. 1764) 551 @ 561**, it was held inter alia that each of the grounds of petition is separate, distinct and stands on its own. Thus, the set of facts offered to prove one of the grounds may not be employed to prove another grounds. Where for instance, a petition is predicted on the ground that a person was not elected by a majority of lawful votes cast at the election, all the evidence led relating to non-compliance with the provision of the Electoral Act goes to no issue, as they did not arise from the latter ground.

It is however instructive to note at this juncture that the contention of the appellant here is principally on the failure of the Tribunal to consider his preliminary objections and thereby breached the appellant`s right to fair hearing. Also worthy of note is the fact that the appellant has not appealed against the conclusion reached by the Tribunal in resolving the preliminary objections. But before embarking on the discovery on whether the lower tribunal has considered the appellant`s objections or not, it is also important to note that Section 285 (8) of the Constitution provides that a preliminary objection or any other interlocutory issue torching on the jurisdiction of the Tribunal or court in any pre-election matter or on

the competence of the petition itself is raised by a party, the tribunal shall suspend its ruling and deliver it at the stage of final judgment.

In the instant case, the findings of the tribunal on the appellant`s preliminary objections are at page 11,922 of the record and same read thus; -

> *"Besides, certain paragraphs of the petition which objections were raised against cannot be read independent of and in isolation from other paragraphs of the petition. The said paragraphs are interwoven with each other and would be read as a whole. To do otherwise, would amount to a denial of the rights of the petitioner to be held (sic) on vital issues which those paragraphs seeks to proof in the petition. The objection to the said paragraphs is also dismissed.*
>
> *Similarly, the several preliminary objections to the competence of the 1st petitioner as a candidate in the election and the jurisdiction of this Tribunal to determine the said petition are hereby dismissed. In otherwords, this tribunal has jurisdiction to determine the petition herein"*

Evidently, the tribunal infidelity to the extant Practice Directions suspended the ruling but outrightly dismissed of the objections without considering their merits. Granted, that every Judge has his style of judgment writing but in every ruling or judgment, the court must

demonstrate a full and dispassionate consideration of the issue properly raised and heard and must reflect the result of such an exercise. The purported ruling on the preliminary objections reproduced above, did not in my humble view, address the issues raised in the appellant's preliminary objections. It was certainly not a ruling on the merits as it neither determines the issue of law or fact raised by the parties. I unhesitantly resolved this issue in favour of the appellant.

ISSUE 3

Whether the tribunal rightly admitted and gave effect to certified true copies of documents tendered by the petitioners.?

The appellant`s contention is that Exhibits SCH1, SCH2, SCH3, as well as BVR and PUBL, 1-3 were not competent before the tribunal for its consideration, reason being that they did not disclose evidence of payment for their certification. And that Exhibit RC1 and RC2 which were receipts disclosed dates that were in disparity with the Exhibits admitted as SCH1, SCH2, SCH3, and BVR.Counsel referred to Section 104 of the Evidence, 2011 and the cases of **UDOM VS UMANA (NO.1) (2016) 12 NWLR (PT. 1526) 234, OMISORE VS AREGBESOLA& ORS (2015) 15 NWLR (PT. 1426) 205 AND NDAYAKO VS MUHAMMED (2006) 17 NWLR (PT. 10091) 676** to contend that the key word there is "*on payment of legal fees*" and not before payment of prescribed fees and

thus, any document that falls below the above mandatory threshold is inadmissible as a certified copy of a public document.

It was the appellant s further contention that the tribunal was wrong in electing to explain the disparity in dates by simply dismissing the authority in **SOKOTO VS INEC (2022) 3 NWLR (pt. 1818)577** and invoking the presumption of regularity in their favour. It was submitted that there was absolutely no nexus and propinquity in those dates and certification shall be effected upon payment of legal fees and not thereafter.

It was contented on behalf of the respondents that issuance of receipt is not mandatory requirement of Section 104 of the Evidence Act and therefore receipt cannot be used to determine the validity of certified true copy of a document. He referred to **UDOH VS ORTHOPEDIC HOISPITAL MANAGEMENT BOARD & ANR (1993) SCNJ 436 AND SANI VS PRESIDENT F. R. N. (2020) 15 NWLR** to the effect that the court cannot import into the provision of statute what has not been provided therein.

It was also submitted that since the 3rd respondent who issued the documents under challenge has not denied that payment were made, the contrary contention are mere academic issues. Furthermore, the stamp "paid" according to counsel is conclusive prove of the fact that payment

were made for the issuance of the certified copies of the relevant public documents.

The issue in contention as can be gathered from the respective submissions is whether exhibits SCH1, SCH2, SCH3, and BVR as well as PUBL, 1-3 tendered by the 1st and 2nd respondents at the Tribunal were admissible under section 104 (1) and (2) of the evidence Act, 2011. Put differently, whether the certification of the said public documents conforms with the requirement of the law. For the sake of clarity, the said exhibits SCH1, SCH2, SCH3, are Forms EC8A,EC8B, EC8C,EC8D and EC8E series certified by the 3rd respondent while Exhibit BVR is a report from the back end server of the 3rd respondent which contains facts in the ten (10)Local Government Areas of Osun State. The documents were certified between July and 2nd August 2022 but the receipt for payment of the legal fees for certification of the documents, exhibit RC1 and RC2 were issued on 3rdAugust, 2022 and 28th July, 2022 respectively. Similarly Exhibit PUBL, 1-3 which is a print out from the Atlanta metropolitan collage allegedly contain inscriptions which were introduced after the certification.

By virtue of Section 104 (1) and (2) of the Evidence Act, 2011 every public officer having custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of legal fees prescribed in that respect, together with a certificate written at the foot of such document or part of it as the case may be. The

certificate shall be dated and subscribe by such officer with his name and his official title and shall be sealed, whenever such officer is authorized by law to make use of a seal and such copies shall be called certified copies. In effect, any document which was not paid for and does not bear a certification written at the foot of such copy that it is a true copy, dated and subscribed by such officer with his name and official title does not qualify as a certified true copy of a public document, hence inadmissible. See **TABIK INVESTMENT LTD VS G.T BANK PLC (2011) 17 NWLR (PT. 1276) 240, NWABUOKU VS ONWORDI (2006) ALL FWLR (PT. 331) 1236 and UDOM VS UMANA (2001) (supra).**

While the appellant contend that the sole point is that the certification shall be effected upon payment of legal fees and not thereafter, the 1st and 2nd respondents maintained that what the law required is the payment of legal fees and did not make issuance of receipts mandatory.

A receipt is written acknowledgement that a specified article or sum of money has been received. A receipt generally is a document or a piece of paper which signifies that goods or service have been paid for. It is an evidence of payment. For a document to be receipt, it must be a document whereby the receipt or deposit or payment of money is acknowledged or expresses. In otherwords, the acknowledgement must be specific, clear and unambiguous.

It is beyond any preadventure that payment of legal fees and evidence of same is an integral part of the certification process and that the appellant in this case is not *ex facie* disputing the fact of payment of the legal fees but the fuss is mainly on the dates when the payments were made. What also stand out clearly, is the fact the 3rd respondent had never denied such payment as same was marked "paid". Thus, it is my view that what is required of the party that demands for a certification of public document is the payment of prescribed fees which was done in this case. The fact that the receipt for payment was only issued after the certification does not *ipso facto,* renders the said certified public documents inadmissible.

Learned appellant`s counsel has strenuously argued that the Tribunal should have discountenanced Exhibits SCH1,SCH2,SCH3, and BVR as done in the case of SOKOTO VS INEC (2022) 3 NWLR (PT. 1818) 577 on the ground that the receipts did not correspond with the certification dates of the Exhibits.

I have also examined the Supreme Court decision in SOKOTO SV INEC (Supra) where Exhibit P1-P14 were discountenanced, same having been found to have no date of certification. The same cannot be said of the Exhibits under consideration in this appeal. Apart from the fact that the 3rd respondent in the present case acknowledged payment for the certification, Exhibit RC1, on its face shows that, it is receipt issued for

BVR relating to Osun State Governorship Election of 16th July, 2022. Furthermore, Exhibit RC2 also discloses that it is for payment for the CTC of Electoral Forms EC8A of EC8B, EC8C, EC8D and EC8E series, and guidelines issued to the 2nd respondent. In effect, the facts of this case is not on all fours with that of SOKOTO VS INEC (Supra). I therefore agree with the respondents that the authority in that case is inapplicable. The lower Courts are severally admonished not to apply ratio of a case across board without regard to the facts of the case before them. See **EMEKA VS OKADIGBO(2012) 278 @ 311.** Issue 3 is resolved against the appellant.

ISSUE 4

Whether the Tribunal rightly rejected Exhibit 2R.RW4 and rightly held that forgery was proved with regards to Form EC9 and File D?

The appellant here reiterated his earlier argument in respect of issue 2 that the objection to the jurisdiction of the Tribunal ought to have succeeded as there was no need for the Tribunal to proceed with the hearing of the petition when the Court of Appeal had settled the point of the appellant`s qualification to contest the said election. Counsel contend that even when the reported citation was presented, his Lordship simply retorted in the judgment that the issue was one of the admissibility. He

cited and relied on Exhibit 2R.RW4 that is, the Court of Appeal decision in **ADELEKE VS RAHEEM (2019) LPELR- 28729 (CA)** wherein the court on matter of the same documents in Exhibit EC9 and file D held that "in so far as the contents therein relates to" Osun State based on the testimony of the school staff that is a mere error which may have been corrected. It was thus, submitted that it is a judicial impertinence for a trial Judge to overrule the Court of Appeal on a specific point on which the Court of Appeal has determined. Although, the judgment still declared the appellant qualified, counsel argued that the stigma attached to him on the premise that his documents were forged still pervade.

The contention of the respondents on the other hand is that the Tribunal was on very sure ground in holding that 1st and 2nd respondents had proved that the appellant presented forged or false certificates to INEC in Exhibit Ec9 and File D. It was further contended that the presentation by the appellant of his Form EC9 which contained the letter of attestation for the election of 16th July, 2022 and Form CF 001 containing the Testimonial to the 3rd respondent in 2018 where he declared in the two Exhibits that he had fulfilled all the requirements for qualification into the office he was seeking to be elected amounted to presenting a false certificate to INEC.

Counsel submitted that evidence given in a previous case can never be accepted as evidence by the court trying a later case except where

Sections 46 & 39 of the Evidence Act, 2011 apply. And at all times material to this case, the deponent in the said Exhibit A was not dead, nor could it be said that his presence could not be obtained without an amount of delay or expense which was unreasonable. He referred to **the case of AMINU VS HASSAN (2014) 5 NWLR (PT. 1400) 287 @ 306 and DADA VS BANKOLE (2008) 5 NWLR (PT. 1079) 26 @ 44-45** in contending that it is wrong and improper to treat the evidence given by a witness in a previous proceeding as one truth in subsequent or later proceeding.

Still in argument, counsel submitted that the plea of estoppel per rem judicatam predicated on the judgment of the Court of Appeal, Exhibit 2R.RW4 cannot apply because petitioners were not parties to Exhibit 2R.RW4, the dispute in that case being an internal affair of People's Democratic Party (PDP) on the issue of nomination and sponsorship of the appellant herein. Also the issue agitated in Exhibit 2R.RW4 were founded on Section 31(5) & (6) of the Electoral Act, and Section 177 (d) of the 1999 Constitution. The issue in the judgment according to counsel, were statement of result of Ede Muslim High School, Senior Secondary School Examination result of 1981 and WEAC & NECO results of 1981 submitted to INEC by the appellant. In the essence, the plea founded on Exhibit 2R.RW4, the judgement of the Court of Appeal in appeal No. CA/A/304/2019 is not made out and was rightly dismissed.

This issue pertains the propriety or otherwise of the decision of the Lower Tribunal in rejecting Exhibit 2R.RW4. It is therefore pertinent to state that at the Lower Tribunal, the 1st and 2nd respondents tendered Exhibits EC9, EC1-EC12, the particulars the appellant presented to INEC in relation to his qualification for the election of 16th July, 2022. The 1st and 2nd respondent also subpoenaed INEC and tendered its official FILE D in respect of the election conducted by INEC in 2018.

I have stated elsewhere in this judgment that the appellant mounted pre-emptory challenges to the grounds of the petition and in the first ground of the preliminary objection, the appellant contended that his qualification was inter alia, caught by final decision of the Court of Appeal in CA/A/362/2019 delivered on 30/1/2020. The Tribunal instead of determining the objections on merit, proceeded to hold that the said Exhibit 2R.RW4inadmissible and consequently rejected it.

The appellant`s contention is that the document which the Tribunal claimed told a lie, having been declared a mere mistake and genuine by the Court of Appeal, the matter was fully precluded and the Tribunal was bereft of vires to reopen same and make an adverse pronouncement.

Section 318 of the 1999 Constitution defines decision in relation to a Court, as any determination of that Court and includes Judgment, Act, Order, Correction, Sentence, or Recommendation. The provision of Section 46 (1) of the Evidence Act on the other hand, provides that evidence given

by a witness in a judicial proceeding or before any person authorized by law to take it, is admissible for the purpose of proving in subsequent judicial proceeding the truth of the facts which it states, when the witness cannot be called because he is dead, cannot be found, he is incapable of giving evidence or his attendance will cause delay or involve unreasonable expense.

The law is also settled that for the plea of estoppel per rem judicatam to apply, the parties must be the same, the decision relied upon to support the plea must be final and the same question must be for decision, in both proceedings that is, the current and earlier proceedings. See **AMINU VS HASSAN (SUPRA) and NWOSU VS UDEAJA (1990)1 NWLR (PT. 125) 188 @ 221.**

Worthy of noting here is that at the centre of the parties' argument, is the binding force of the Court of Appeal decision in the said Exhibit 2R.RW4 that is, Appeal No.CA/A/362/2019 which is the fulcrum of the appellant`s objection to ground I of the petition at the Lower tribunal. By time honoured doctrine of precedent as it operates in Nigeria and Common Law countries, the decision on a given issue of law handed down by the apex court which is Supreme Court, is not only Superior but binds subordinate Courts including all Courts exercising appellate jurisdiction. The same principle applies down the ladder. Thus, the law is that a decision of a Court of competent jurisdiction no matter that it seems

palpably null and void, unattractive or unsupportable, remains good law and uncompromisingly binding, until set aside by a superior Court of competent jurisdiction. See **BABA TUNDE & ANR VS OLATUNJI (2000)2 NWLR (PT. 646) 557 and EZEOKAFOR VS EZEILO (1999) 9 NWLR (PT. 619) 369.**

In the present cases, none of the parties argued against the binding force of the Court of Appeal decision in Appeal No. CA/A/362/2019 but the divergence is on the mode of placing the decision before the Lower Tribunal. The trite general principle is that no fact of which the court must take judicial notice need to be proved. In SARAKI VS KOTOYE (1990) 4 NWLR (PT.143) 144, it was held by the Supreme Court that judicial notice is the cognizance taken by the Court itself of certain matters which are notorious or clearly established, the evidence is deemed unnecessary. The provision of Section 122 (1) (m) of the Evidence Act, 2011 listed the course of proceeding and all rules of practice in force in any Court established by or under the Constitution as facts which Court must take judicial notice of.

Perhaps, it is also important to state that the duty of counsel who wants the court to use the authorities cited must provide and cite the case with clarity that is the name of the parties, the year of the case was delivered, if it is unreported, a certified true copy, where the case has been reported, the name of law-report, the year, volume and the page.

See **CHIDOKA & ANR VS FIRST CITY FINANCE CO. (2012) LPELR-9343 (SC).**

The documents tendered by the appellant, Exhibit 2R.RW4 (Judgment in CA/A/362/2019) were indeed certified and that same was reported as ADELEKE VS RAHEEM & ORS (2019) LPELR 48729 (CA). In the circumstance, the appellant`s counsel having acquitted himself of his duty to the Tribunal, it then behoves on the tribunal to not only take notice of the Judgment but abide by the pronouncements contained therein. I repeat, that issue transcend beyond the admissibility of the judgment but its binding force on the Tribunal based on the principle of stare decisis. Issue 4 is accordingly resolved in favour of the appellant.

ISSUE 5

Whether having regard to the subsisting regulations/law and the totality of oral and documentary evidence placed before the Tribunal, the Tribunal rightly reached its conclusion that over voting was proved thus entitling the petitioners to the reliefs sought in the petition.?

ISSUE 7

Whether the Tribunal rightly gave effect to the contents of the tables presented by the petitioners whose contents were derived from evidence already placed before the Tribunal in terms of

unchallenged documentary and oral evidence and rightly granted the reliefs of the petitioners?

The two issues above are intertwined and interwoven, as such the consideration of one will invariably affect the other. And inview of their oneness, they would be considered together.

Proffering argument on issue 5, counsel for the appellant contend that from the pleading the source of accreditation data was the physical BVAS device and that in order to determine if over voting occurred, there has to be a comparison between the accreditation figures in BVAS device and the total voters cast as recorded in Form EC8A. He also contend that the recording and transmission is done from polling unit was carried out with physical BVAS device not the back end server which was only meant to receive the data duly sent to it. Inspite of the 1st and 2nd respondents pleading that the accreditation figures in the FormEC8 did not tally with the number of accredited and verified voters on the record of the BVAS device in the disputed polling units, not even one of the device was tendered in order to established their case. And that PW1 was categorical that he never inspected or relied on the physical BVAS device in the preparation of their case. On this score, counsel submitted that the 1st and 2nd respondents made out a case at variance with their pleadings, relying on the authority in **ATANDA VS COMM. L. H. KWARA STATE (2018) 1**

NWLR (PT. 1599) 32 @ 58 in urging this Court to told that they failed to prove their case.

In further contention, appellant argued that the evidence led and the basis upon which the Tribunal allowed their petition was not that voting was permitted without accreditation in many disputed polling units. Exhibit BVR which they relied, accordingly to counsel showed that BVAS were generated in the 749 disputed polling units but a perusal of BVAS reveals that not even one polling unit had a nil accreditation by BVAS, as pleaded. He submitted that when Exhibit BVR is compared with the result sheets for the election, the member of voters Exhibit BVR purport were accredited by BVAS device in each of the 749 disputed polling units is probably less than the number of votes cast in those units.

On issue 7, appellant contend that in the judgment appealed against, the Judge improperly applied Section 137 of the Electoral Act and Paragraph 46 of the First Schedule thereof in unduly relieving the 1st and 2ndrespondents from discharging the burden of proving the allegation in the petition. It was also contended that there was failure to embark upon due evaluation of evidence and that what the judge did was simply retorting to the Table and then expressing that he believed the case of the 1st and 2nd respondents. Counsel submitted that due evaluation would have taken into account, the evidence of PW1 and PW2 under cross-examination to the effect that the BVAS machines were prone to human

factors such that if the button on same labelled "submit" is not engaged by staff of the 3rd respondent, the data embedded in the BVAS would not be uploaded. Likewise, the absence of network or discharge of battery on the device were factors which affected the upload of the captured data.

Counsel further contend that, in the judgment been appealed against the Judge unduly relieved the 1st and 2nd respondents of the burden of proving the allegations in the petition on the basis that the respondents made vital admission against interest which the appellant vehemently denied, insisting that the appellant`s case remained tenaciously glued to Exhibit RWC. He submitted that in a case of declaration, a petitioner must rest on the strength of his case not on weakness or even admission of the opponent relying on **ANDREW VS INEC (2017) LPELR – 48518 (SC).**

Arguing issues 5 and 7 together, learned counsel for the 1st and 2nd respondent contend that they demonstrated their case before the tribunal by showing that going through the record of accreditation as shown in Exhibit BVR and comparing same with the EC8A for each of the disputed polling unit, it is apparent that over-voting occurred in 744 polling units as the number of votes cast did not agree with the record of accreditation in each of these polling units as capture in Exhibit BVR. He submitted that the inescapable conclusion that can be reached, bearing in mind that by the provision of Section 47 (2) of the Electoral Act, 2022 accreditation of voters is done from start to finish by the BVAS machine in each polling unit

and that nobody could have voted without having been accredited by the BVAS machine.

Continuing, he contend that the Tribunal accorded maximum credibility to Exhibit BVR and came to right decision that: -

1. The total number of voters and accredited voters on the EC8A for the disputed polling units do not tally with the number of accreditation on the BVAS report issued by INEC for the election, and that the figures of votes/voters on the Form EC8As do not represent the accurate accreditation on the BVAS.
2. The total number of voters returned in 744 disputed polling units exceed the total number of accreditations.
3. There was no proper accreditation in the disputed polling units leading to over-voting and
4. Petitioners` relied on all the election results (Form EC8As-EC8D) and CTC of the BVAS report for the Osun State Governorship Election of 16th July, 2022 among other document.

It was thus, submitted that notwithstanding the tendering of Exhibits R. BVMS, R. BVR1-129, 2R.RW2 and particularly RWC by the appellant and other respondents, they were unable to dislodge and/or discredit BVR and all the EC8As tendered in respect of all the 744 disputed polling units.

In further argument, counsel submitted that Sections 51, 62, 64, 74, and 152 of the Electoral Act, 2022 do no grant leverage to INEC or anybody to synchronize the facts and/or figures of the election as the provision of Section 64 (4) & (5) of the Electoral Act, 2022 only requiresthe collation officer to receive and after been satisfied with the collation and transmission to declare the result of the election.

On the alleged non-evaluation of the evidence by the Tribunal, counsel submitted that the trail Tribunal had extensively evaluated the evidence of all the parties before it in arriving at its decision and that Section 137 of the Electoral Act, 2022 together with paragraph 46 of the First Schedule to the Electoral Act were properly and correctly applied by the tribunal.

The key issues here are the use of BVAS as integral part of election processes and the jurisprudential effect of section 137 of the Electoral Act, 2022. Before delving into the said issues, it is pertinent to know what is BVAS (Bimodal Voter Accreditation System). BVAS is a device used to register voters. It accredits voters before voting on election day and is used for transmitting results to INEC viewing portal after voting. Thus, it helps to scan the barcode or QR on the PVC or voters register before voting. Note that BVAS does not require internet connectivity during voting but it requires the internet when transmitting results to the INEC portal.

In the light of the foregoing; it is correct to say that there are dual mode of transmission of results under the extant Electoral Act, 2022. After close of poll at level of various units where the presiding officer would enter the scores of various political parties in Form EC8A (polling unit result) in which he sign that particular result and counter signed by party agents, the result will then be scanned and uploaded to INEC result viewing portal for public viewing. It is also at the point the accreditation data that has arises from that polling unit will also be uploaded, but the physical result, the BVAS result will also be taken to the Registration Area Collection Centre. At the collection centre, the collection officer will at this point have the benefit of seeing the original result and BVAS report as the accreditation data as transmitted and the result sheet from polling unit.

The appellant`s contention is that, his case is not founded on what was embedded in the 3rd respondent`s server but on the contrary, on what is still embedded in the BVAS machine themselves as shown in Exhibit RWC. Thus, due evaluation would have taken into account, the evidence given by PW1 and PW2 under cross-examination to the effect that the BVAS machines are prone to human factors. And that BVAS machines and Exhibit RWC were the only primary evidence before Tribunal as all others were mere reports from the back end server which

are secondary evidence of entries made from accreditation at respective polling units.

Least I forget, the provision of Sections 47 and 60 of the Electoral Act, 2022provides for procedures for accreditation of voters, voting and counting of votes. The issue to be resolved here is whether the 1st and 2nd respondents as petitioners had proved the allegations of over-voting as required by law. The substratum of their complaint in that respect is predicated on the averments in the paragraphs 38, 40 and 41 of the petition on pages 8-9 of the record which read as follows: -

38. In the counting of votes cast at the polling unit and the collation of the results of the election it is the number of accredited voters recorded and transmitted / directly from polling units and the votes or results recorded and transmitted directly from polling units that should be taken into account.

40. In particular, the Petitioners state that in 749 polling units across the following 10 Local Governments, that is: Ede North (101 polling Units); Ede South (91 polling unit): Egbedore (55 polling Units); Ejigbo (58 polling Units); Ila (56 polling unit); Ilesha West (67 polling Units); Irepodun (48 polling Units); Obokun (36 polling Units); Olorunda (103 polling Units); Osogbo (147 polling unit)

there was non-compliance with the Electoral Act by the election officials when they failed to limit themselves to the record of accreditation in the BVAS , and the results transmitted directly from polling units, which non-compliance substantially affected the results of the election in the 749 polling units particularized below.

41. The petitioners state that the total numbers of votes as well as number of accredited voters recorded in the respective Forms EC8A for those polling units on the one hand do not tally with the numbers of accredited and verified voters on the record of the Bimodal Voter Accreditation System (BVAS) for the same polling units.

In prove of the above, 1st and 2nd respondents paraded PW1 and PW2 and also relied on Exhibit BVR, the report from the back end server of the 3rd respondent. Now the question is, did the 1st and 2nd respondents led admissible evidence in support of their pleadings and/or was the evidence so presented, cogent enough to support the grant of the reliefs sought at the Tribunal.

It is settled based on plethora of judicial decisions that where an election petition is declaratory in nature, it is incumbent on the petitioner to prove his case and not rely on the absence of evidence by the

respondent. In effect, in a claim for declaration, the onus is always on the person who alleges to establish his case not to rely on the weakness of the defence. The petitioner must in such situation satisfy the Court with cogent and compelling evidence properly pleaded, that he is entitled to the declaration. Admissions by the defendant may not satisfy as proof. It is only after the petitioner has proved his case that the onus would shift to the respondent to establish that the result of the election was not so affected. See **GUNDIRI VS NYAKO (2014) 1 NWLR (PT. 1391) 211, C.P.C VS INEC (2011) 13 NWLR (PT.1317) 260 and OMISORE VS AREGBESOLA (SUPRA).**

The above in my view remains the law even on the face of Section 137 of the Electoral Act, 2022 that stipulate that a party alleging non-compliance with the provisions of the Electoral Act during the conduct of an election does not need to call oral evidence to prove the allegation if originals or certified true copies of documents manifestly disclose the non-compliance alleged. What the new Act seems to have done is to lighten the heavy burden on the petitioner to prove non-compliance with the Electoral Act.

In the present case, the 1st and 2nd respondents though relied on BVAS report obtained from INEC to prove over-voting but they nonetheless, called PW1 to speak to the report, Exhibit BVR.

In their pleadings, the 1st and 2nd respondents alleged that the results recorded and transmitted directly from the polling units were not taken into account and therefore the accredited voters recorded in Form EC8A from the disputed polling units do not tally with the number on the BVAS for the same polling units. Strangely, the tribunal in its judgment only relied on a table set out in an address of counsel to hold that over-voting occurred in the election. On page 11,995, the tribunal found as follows: -

> *"From the examination of the evidence in respect of issue and we find as a fact that, over-voting occurred in the election conducted on the 16th July, 2022 in the manner stated in the table in paragraph 6-9 of the petitioners' final written address, already reproduced in the judgment."*

In **ANDREW VS INEC (2018) 9 NWLR (PT.1625) 205 @ 558,** the Supreme Court inter alia held that document tendered must be subjected to the test of veracity and credibility. Where it involves mathematical calculations how the figures were arrived at must be demonstrated in open Court. Also the duty of a party tendering documents is to ensure that such documents qua exhibits are linked to the relevant aspect of the case to which they relate.

In the instant case, Exhibit BVR clearly is report from back end server of the 3rd respondent and not physical evidence of accreditation and

transmission of results in the disputed polling units. This is premised on the fact that BVAS transmissions are not done instantly from the polling units. The fact that PW1`s evidence was based on a report must necessarily be linked to the relevant aspect of the complaint in the petition which was not done. Furthermore, the Tribunal was wrong to have admitted and acted on the said evidence in isolation of the voter`s register for the disputed polling units.

On the allusion that Section 137 of the Electoral Act dispenses the obligation on the petitioners to call polling unit agents who operated the BVAS machines in the disputed polling units, my view is that it does not, in so long as the documents tendered are not such that manifestly disclosed the non-compliance alleged. In the instant case, the tribunal was wrong to have reached a conclusion on over-voting based on the contents of the table presented by the 1st and 2nd respondents and also on Exhibit BVR which requires demonstration in Open Court. I resolved issues 5 and 7 in favour of the appellant.

ISSUE 6

Whether the appellant proved that Exhibit R. BVR, RBVR1-129, 2R. RW2, RBVM, RBVM1 series and other documentary evidence made by the Respondents to the petition and issued during the

subsistence of Exhibit BVR complied with oral evidence before the tribunal to disproved the petitioners case before the tribunal.

The argument of the appellant in respect of the above are located in his issues 6 and 8 and the cumulative substance of which is that Exhibit BVR was at best a first draft and that the Tribunal ought not have relied on an incomplete/inchoate document to determine the rights and obligations of the parties.

The appellant also contend, that from the evidence of PW1 particularly during cross-examination, he claimed that his analysis were based on three different BVAS reports which evidently shows inconsistencies which the Tribunal ought to have discountenanced the reports. Also where as in the present case, the expert is a card carrying member of a political party in whose favour he is offering evidence, such evidence should be disregarded as he cannot be an unbiased expert. Counsel relied on section 83 (3) of the Evidence to contend that the evidence of PW1 suffered the fate of dismissal also for failure to present himself as an expert.

In further argument, counsel contend that PW1 and PW2 only succeeded in giving generic evidence covering 749 disputed polling units and who did not witness the making of Exhibit RWC. He submitted that instead of labelling Exhibit RWC a tempered document, the Tribunal should

have relied Exhibits BVR and R. BVR1-129 to resolve the conflict between the parties.

The contention of the 1st and 2nd respondents on the other hand is that they demonstrated their case before the tribunal by showing that going through the record of accreditation as shown in Exhibits BVR and comparing same with EC8As for each of the disputed polling units, apparent over-voting occurred in 744 polling units because the total number of votes cast do not agree with the record of accreditation in each of the disputed polling units as captured by Exhibit BVR. Counsel referred to section 47 (2) of the Electoral Act, 2022 to contend that a prospective voter who failed verification by the BVAS must not be allowed to vote. He thus, submitted that appellant having failed to provide any justification for synchronization of number of accredited voters with back end server after transmission of accredited voters Exhibit 2R. BVR1-129 are at best an afterthought.

The issue in contention between the parties here is that which of the Exhibits tendered attracted more probative value in the circumstances of their respective cases before the trial tribunal. It is significant to note that while the 1st and 2nd respondents who were petitioners relied solely on Exhibit BVR the back end server report, the appellant and other respondents relied heavily on Exhibit 2R. RW2 and RWC being the primary source of the accreditation data – the BVAS devices.

It is clear from my earlier analysis on BVAS that it accredits voters before voting on the election day and it is also used for transmission of result to INEC viewing portal. However, transmission of results are not instantaneous and thus human factors may affect its proper functioning. It is also apparent from the record that the success the appellants' election was truncated by the lower tribunal on ground of over-voting in the disputed polling units. In ABUBAKAR VS INEC (2020) 12 NWLR (pt. 1737) 37 @ 128, the Supreme Court had held that voters` register is the foundation of any competent election, without the voters` register, it will be difficult to determine the actual number of voters in an election. And if the number of registered voters is not known, the Court cannot determine whether the numbers of votes cast at the election are more than the voters registered to vote. Thus, to prove over-voting, the petitioner must tender the voters` register and Forms EC8As so as to work out the difference of excess votes easily.

Lastly on this point, where a petitioner complains of non-compliance with the provisions of the Electoral Act, he has a duty to prove it polling unit by polling unit, ward by ward and the standard required is proof on the balance of probabilities and not on minimal proof. He must show figures that the adverse party was credited with as a result of the non-compliance. He must as well establish that the non-compliance was

substantial and that it effected the election result. See **UDOM VS UMANA (NO.1) (SUPRA).**

I am however, not unmindful of the paradigm shift brought about in the arena of proof in Section 137 of the Electoral Act, 2022 but the fact remains that the initial burden of proving the allegations in the petition lies squarely on the petitioners (1st and 2nd respondents).

Although, the 1st and 2nd respondents relied on documentary evidence, Exhibit BVR, but PW1 gave oral evidence ostensibly to demonstrate over-voting from the report, Exhibit BVR. Apart from failing to tender the register of voters, they also did not tender the BVAS devices from which the data was extracted. There is therefore no denying the fact that both the voters` register, Forms EC8As together with BVAS machine formed the foundation of all that transpired at the polling units.

As regards the veracity of the evidence of PW1 who by an objective assessment, cannot be described as an expert. An expert is a person who through education or experience has developed skill or knowledge in a particular subject that he or she may form an opinion that will assist a fact finder. The law is that when a court has to form an opinion of a foreign law, or of science or art, or as to identify of handwriting or finger impression, the opinions upon that point of person specially skilled in such foreign law, science or art, or impressions are relevant facts. Such persons

are called expert. Thus, the evidence of such knowledgeable experts would be imperative. See **OMISORE VS AREGBESOLA (SUPRA).**

In the instant case, PW1 claimed to be an expert in the field of statistics but failed to proffer proof of his qualifications before the lower tribunal. Again, he did not denied his membership of the APC that commissioned him to give evidence on its behalf. The provision of Section 83 (3) of the Evidence Act,2011 is to the effect that evidence made by a person interested at the time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement must tend to establish is inadmissible.

On the strength of the above and considering the bareness of the evidence presented by the petitioners at the lower Court, it was inconceivable to assume as done in the judgment been appealed against that 1st and 2nd respondents` evidence attracted any probative value.

I have stated that the 1st and 2nd respondents` claims at the Tribunal were in the realm of declaratory reliefs, wherein they failed to discharge their burden of proof placed by the law. This invariably means that the burden had not shifted to the appellant and other respondents to establish that the result of the election was not so affected. That notwithstanding, the appellant and other respondents presumably out of abundance of caution, tendered Exhibit R. BVR1-129 which are BVAS devices tendered

by the 3rd respondent as well as the certified true copy of the report of physical inspection of the BVAS devices tendered by the appellant. Parties were *ad idem* on the conflicts between Exhibits BVR and 2R.BVR 1-129, and without calling oral evidence to resolve the conflicts, the Tribunal preferred Exhibit BVR. The reason for this preference is not far-fetched as encapsulated on page 11,994 of the record thus:

> *"The "synchronization" of the documents made by the 1st respondent and the physical inspection of same done by the 2nd and 3rd respondents, as shown in the table herein before reproduced run riot to the defences raised by each of the respondents to this petition in respect of issue 2 and 3 under consideration.*
>
> *The said "synchronization", rather than rhyme with each other are inconsistent and contradictory. The said exhibits tendered by the respondents have not rebutted the presumption of regularity in favour of exhibit BVR and other document tendered by the petitioners in this petition.*
>
> *Moreover, exhibit BVR has not been withdrawn by the 1st respondent who made and issued it. The petitioners relied on exhibit BVR in maintaining this petition, the respondents are*

hereby estopped from acting inconsistent with the import and tenor of exhibit BVR."

Evidently, the preference made to Exhibit BVR above as the basis of proving over-voting was wrong as the said Exhibit BVR lacks the required probative cogency. Had the Tribunal puts the evidence of both side on the imaginary scale, the evidence of the appellant and other respondents would weighs heavier. I also resolved issue 6 in favour of the appellant.

ISSUE 8

Whether the appellant proved allegation of bias against the Tribunal?

It was the appellant`s contention here that the Judge was carried away with reference to dancing proclivities of the appellant and failed to adhere to the clear provision of Section 54 of the Electoral Act, 2022 which set out the fundamental steps to be taken even upon a finding of over-voting. Counsel contend that where the number of votes cast in any polling unit exceed the number of accredited voters, the result shall be cancelled. And where the result is cancelled for over-voting, there shall be no return for election until another poll has taken placed. It is only if the result will not be affected by voting in the cancelled area that a return will be made. He referred to Section 51 (1) - (4) of the Electoral Act, 2022 in submitting that the Tribunal was bound to determine the number of voters

disenfranchised by the alleged over-voting and ascertain that it will not affect the margin between the parties, before making a return.

In further argument, counsel contend that it was most unfair to the appellant to make him an object of derision, Lampoon him on the dance at his inaugural event.

Contrariwise, the 1st and 2nd respondents contend that there is no real likelihood of bias in the circumstances of this appeal and that the decision of the tribunal was right that mere remarks "*go lo lo ld*" and *Buga wori*" as the elected Governor of Osun State in the election conducted on 16th day of July, 2022 as grounding bias against the tribunal is a metaphor, depicting the conclusion of the Tribunal that the appellant was not validly elected by the majority of lawful votes cast at the election.

Counsel submitted that a party who alleges judicial bias must show that the Judge expressed an opinion or feeling in favour of one side in a dispute or argument resulting in the likelihood that the Court so influenced will be unable to hold an even scale. It was thus, submitted that the appellant has not demonstrated how an allusion to a song suggest a strong likelihood of bias. He referred to **OJENGBEDE VS ESAN (2001) 18 NWLR (PT. 746) 783** to the effect that there must be cogent and reasonable evidence to satisfy the court that there was in fact bias or real likelihood of bias as alleged.

Bias is defined to mean a feeling in favour of one side of the dispute or argument resulting in the likelihood that the court so influenced will be unable to hold an even scale in the matter before it. See **KENON VS TEKAM (2001) 14 NWLR (PT. 732) 12 @ 14-42.**Also**in ADEBISI VS STATE (2014) LPELR – 22694 (SC),** the Supreme Court classified bias into three, namely (1). Peculiar bias as exhibited by a member of the Tribunal or Court having a peculiar interest in the subject matter of the dispute. (2). Personal bias- existance of those relationship between a member of the tribunal or court and one of the parties to the dispute and (3). Official bias- an abnormal desire or indication to pursue a predetermined line of action which would prevent an impartial adjudicator of the dispute between the parties. And it is also settled that in determining the likelihood of bias, the court looks at the impression which would be given to other people.

Now the key point is, whether the appellant had proved bias against the Judge by reference to the portion of the judgment which was reproduced earlier in this judgment. In otherwords, is there any cogent evidence to satisfy this court that there was in fact such bias or likelihood of bias? For an allegation of judicial bias against the person of a Judge to succeed, the accuser must establish his allegation on some extra judicial factors or reasons but where such factors or reasons are absent, such

"perceived" judicial bias is insufficient to justify disqualifying a judge from participating in a case which is properly brought before him for judgment.

In the instant case, there was no positive evidence that the judge was bias merely on the remarks "*go lo lo lo*" and Buga won". The said remarks though, unwarranted and condemnable but had in no way affect the conclusion reached by the tribunal. Similarly, the appellant has failed to demonstrate how the remarks cast aspersion on the credibility of the judgment under consideration. Issue 8 is however resolved against the appellant.

On the whole, the appeal is meritorious and it is hereby allowed. The judgment of the Lower Tribunal delivered on 27th January, 2023 is accordingly set aside. The appellant is perforce, entitled to costs which I assessed at N500,000.00 against the 1st and 2nd respondents.

MUHAMMED L. SHUAIBU

JUSTICE, COURT OF APPEAL.

CERTIFIED TRUE COPY
COURT OF APPEAL ABUJA
OGUNFUNMI (MRS)
ASST. CHIEF REGISTRAR
Signature .....
Date 27/3/23

APPEARANCES:

Dr. Onyechi Ikpeazu, SAN (with Kehinde Ogunwumiji, SAN, Tunde Afe-babalola, SAN, Dr. Obinna Onya, Julius Mba and Opemipo Osunleti Esq.): for the Appellant

Prince Lateef O. Fagbemi SAN (with chief Akinlolu Olujimi, SAN, Dr. Abiodun Layono, SAN, Professor Kayode Olatoke, SAN, Chief H. O. Afolabi, SAN, Chief Yomi Alliyu, SAN, Kunle Adegoke, SAN and Muhydeen Adeoye, Esq.): for the 1st and 2nd Respondent

Professor Paul C. Ananaba, SAN (with Emeka Okpoko, SAN, Chief Henry Akunebu, SAN, Olakunle Faokunla, Esq, Oluwole Jimi-Bada): for the 3rd Respondent.

Dr. Alex A. Izinyon, SAN (with N. O. O. OKe, SAN, Olurotimi Alli, Esq, C. S. Ekeocha, Esq and Alex Izinyon II, Esq): for the 4th Respondent.

APPEAL NO. CA/AK/EPT/GOV/01/2023

CORDELIA IFEOMA JOMBO-OFO, JCA

I had a preview of the Judgment just delivered by my learned brother, **MUHAMMED L. SHUAIBU, JCA** and I agree with the reasoning and conclusion reached in allowing the Cross-appeal.

I also allow the appeal and abide by the consequential orders contained in the leading judgment.

CORDELIA IFEOMA JOMBO-OFO, JCA

JUSTICE, COURT OF APPEAL

CERTIFIED TRUE COPY
COURT OF APPEAL ABUJA
OGUNFUWA HASSANA (MRS)
CHIEF REGISTRY OFFICER
Signature
Date 27/3/23

APPEAL NO. CA/AK/EPT/GOV/01/2023.

JAMES GAMBO ABUNDAGA, JCA.

I have been advanced a draft of the judgment delivered by my learned brother, **MUHAMMED LAWAL SHUAIBU, JCA**. I adopt the reasoning and conclusion reached therein as mine. Therefore, I allow the appeal, and in consequence abide by the consequential orders made in the judgment including order as to cost.

JAMES GAMBO ABUNDAGA,

Justice, Court of Appeal.