

Judicial Excellence:

Essays in Honour of

Hon. Justice Anthony I. Iguh J.S.C., C.O.N.



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Chapter Twelve

PROBLEMS OF PROOF UNDER THE ELECTORAL ACT 2002

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Introduction

After more than sixteen years of Military dictatorship, constitutional Democracy was restored in Nigeria on 29th May, 1999. The President, Vice President, State Governors and Deputy Governors swore to their oaths of offices on 29th May 1999. The National Assembly and the State Houses of Assembly were also subsequently inaugurated. The President, State Governors and Legislators contested elections and were elected by the electorates.

Election is the corner stone of Democracy. A free and fair election gives the assurance that those who emerge as rulers are the elected representatives of the people.

An election is primarily a contest for the votes of the electorate by the aspirants to political office. Except in cases where an aspirant is returned unopposed, there will usually be at least two contestants to elective posts. Rules and regulations are normally put in place, for the conduct of free and fair elections. The Electoral Act No. 108 of 2002 is the Law which currently regulates elections in Nigeria.

Nigerians will periodically go to the polls, to elect members of the Executive and Legislators who will be responsible for governance at Local, State and Federal Government levels. The result of some elections has to be acceptable to contestants. In

some cases, the results will be unacceptable to the losers. Such losers will likely challenge the results of the election through election petitions. These petitions will be determined by Tribunals and appellate courts assisted by counsel engaged by the parties. Unless Judges, and Lawyers who will be key players in election petitions are alive to their responsibilities, (by ensuring prompt and just determination of cases), aggrieved losers may resort to self help and violence in order to redress perceived or actual wrongs. It is evident, that the Tribunals, the appellate courts and lawyers have great responsibilities to discharge during election petitions.

Rose E. Bird rightly contends:

*"The courts hold a unique position among democratic institutions. In a sense, they represent one of our last bastions of participatory democracy in which disputants go directly before a Judge or Jury to resolve an issue. In no other governmental context does an individual have the opportunity to take a problem to a decision maker who represents the full force and power of that particular branch of government. This direct interchange between the individual and the State is the heart of democratic process.... We must protect this unique heritage and strive to preserve the values it represents."*¹

Electoral Act No. 108 of 2002

The Electoral Act of 2002 is the basic law regulating elections in Nigeria. It contains the basic provisions on National Register of Voters, Voters Registration, procedure at election, political parties, Electoral Offences and determination of election petitions arising out of Elections. It also has miscellaneous provisions which deal with the disqualification of persons from acting as Electoral Officers, loss of registration cards, secrecy of ballot, prosecution of offences disclosed at election. Other provisions of the Act include trial of offences, Inspection of

¹ Rose E. Bird, American Jurist, Chief Justice Supreme Court of California Los Angeles Times Nov.16; 1977.

Documents, Custody of Documents, Regulations and the repeal of the Electoral Act of 2001.

It is not my intention to present a conspectus of the provisions of the Act. The exercise below is confined to issues on the law of evidence which are likely to emerge in the election petitions, which election Tribunals and the appellate courts will be called upon to adjudicate. The focus of this paper is on how to prove or disprove allegations raised in an election petition.

The exercise is prompted by the desire to provide proper guidance to legal practitioners, election Tribunals and appellate courts on some of these vital evidentiary issues.

Two areas of where issues of proof, are likely to emerge, in election petitions, are in cases where allegations of electoral offences and irregularities in conduct of elections are raised. In both cases, the primary issues for consideration, are who has the burden of proof and what is the standard of proof to be attained by the party who shoulders the burden of proof?

These questions are examined below, against the backdrop of provisions of the Evidence Act and previous decisions of appellate courts on these issues.

Burden of Proof

Burden of proof has two basic meanings. First, it is the Legal or Persuasive burden. This is the burden, which a party who desires judgment to be entered in his favour by a court or Tribunal, shoulders. Such a party has the legal burden of persuading the court to enter judgment in his favour.

In an election petition, a petitioner who prays the Tribunal to be declared the winner of the election, has the burden of proving that he scored majority of the lawful votes cast in the election. Where a respondent files a cross petition, such respondent shoulders the responsibility of persuading the court, to enter judgment in his favour in line with the cross-petition.

The second sense in which Burden of proof is used is where a party, has the evidential burden of proving a particular fact in issue.

Unlike the legal or persuasive burden, a party with evidential burden has a limited duty of proving the particular fact in issue. Once the particular fact in issue is proved the burden is discharged.

In discharging the burden of proof, the burden shouldered by parties to election petitions is not higher than that shouldered by parties in civil proceedings. Decided cases, however, indicate that election petitions are different from civil cases.

A related preliminary issue, is the applicable standard of proof in election cases. Generally, where the petition does not allege commission of a crime by a party the applicable standard of proof, is proof on the balance of probability or on the preponderance of evidence. Where allegation of crime is directly in issue, the expected standard is proof of such allegation, is proof beyond reasonable doubt. It is therefore evident, that notwithstanding the peculiar nature of election petitions, the provisions of the Evidence Act, together with judicial decisions of the Act apply to election petitions.

The relevant provisions of the Evidence Act are Sections 135, 136, 138 and 139 of the Evidence Act. They read as follows:

Section 135 (1) "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

136 The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all was given on either side.

138(1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.

(2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provisions of Section 141 of this Act, on the person who asserts it, whether the commission of such crime is or is not directly in issue.

Electoral Act and Election Petition

The Electoral Act recognizes election petitions as the appropriate method of challenging the validity of elections. Section 133 of the Electoral Act for example, accords standing to a candidate at an election and a political party which participated at the election to present an election petition. Under Section 134 of the Act, an election may be questioned on the ground that the candidate whose election is being challenged was at the time of the election not qualified to contest the election; that the election was invalid by reason of corrupt practices or non compliance with the provisions of the Act, or that the respondent was not duly elected by majority of lawful votes cast at the election or that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

It is trite that election petitions are neither criminal nor civil cases. On the ground of public policy, election petitions are regarded as unique and therefore, accorded special treatment. In the case of *Ohasunya v. Babafemi*,² the Court of Appeal held that Election petitions basically complain about elections or conduct of elections. Election petitions do not deal with civil rights and obligations of parties as to justify the intervention of High Courts. In *Orubu v INEC*,³ it was further held that election petitions are peculiar in nature, and because of their peculiar nature, and importance to the well being of a democratic society they are "regarded with an aura that places them over and above normal day

² (2000) 15NWLR pt. 689 p. 1.

³ (1988) 5 NWLR pt. 94 p.323 at 347.

to day transaction between individuals which give rise to ordinary claims in court."⁴

The view was also expressed by Oguntade JCA in *Abdulah v Elayo*,⁵ that "It must be borne in mind that an election petition is not always to be treated as the ordinary civil suits in court. An election petition creates special jurisdiction and the ordinary rules of procedure in civil cases do not always serve to effectuate its purpose."⁶

The effect of the special nature of election petitions are basically two fold. First, is that unless specifically conferred, High Courts lack jurisdiction over election petitions. Secondly, the civil rights recognized by the constitution and African Charter on Human and Peoples Rights, (which the courts are enjoined to apply) do not apply to election petitions.⁷

As rightly pointed out by Galadima JCA in *Obasanya v Babafemi*⁸ election petition matters which "basically complaints about election or conduct of election do not deal with civil rights and obligation which entitles the High Court to entertain jurisdiction."

It was similarly held in *Samano v Anka*,⁹ that election petitions, are not like ordinary civil proceedings. "In an election petition the rules creating the rights to file the petition, the categories of complaints and format of the petition are contained in the status which also creates the tribunal to preside over are clearly set out in the decree. It is a misconception to compare the proceedings created in the Decree No. 5 of 1999 with ordinary proceedings."¹⁰

Notwithstanding, the peculiar nature of election petitions, it is evident, that the provisions of the Evidence Act and other rules of evidence, apply to election petitions.

The case of *Oji v Ndu*,¹¹ is the authority for the proposition that oral evidence is required to prove election petitions and Affidavit evidence is an insufficient method of proving serious allegations in an election petition. Parties are at liberty to call their witnesses in proof or disproof of issues in an election petition. The Tribunal is also empowered to summon witnesses. As rightly observed, "The Tribunal may also summon witnesses to appear before it and give evidence connected with the election. Where the tribunal summons a witness, the parties may be examined by the tribunal. When this happens, all parties to the petition will be given adequate opportunity to cross examine the witness."¹²

Electoral Malpractices and Discharge of Burden

Allegations which normally form the basis of election petitions include non compliance with the Electoral Law and Electoral Malpractices. Treating, cheating, corruption, falsification of results, and rigging are ready examples of electoral malpractices. Experience has shown that some parties regard elections as do or die affairs. Hence they raise serious allegations which they find difficult to prove.

As rightly observed by Ndoma Egba JCA in *Okoroji v. Ngwu*,¹³ "It now appears as a matter of general knowledge that defeated candidate in some elections are unwilling to concede defeat. They take the opportunity even on sliding stones to fight on until they drown. If some of them had the courage to acknowledge the success of their opponents, the transitional arrangements would have clinched and the country set on the path of "true greatness unity and prosperity."¹⁴

⁴ *ibid.*
⁵ (1993) 9NWLR pt 268 p. 171 at 197.
⁶ *ibid.*

⁷ See *Falae v. Obasanjo* (1999) 6 NWLR pt. 606 p. 283 at 290.
⁸ *Supra* at p. 3

⁹ (2000) NWLR pt. 640 at p. 283
¹⁰ *ibid.*

¹¹ (1993) 1 NWLR pt. 268 at p 235.

¹² (Afe Babalola *Election Law & Practice* 2003, Intec Printers p. 262).

¹³ (1992) 9 NWLR pt. 263 p. 113 at 128.

¹⁴ *ibid.*

Honourable Justice Pats-Acholona JCA also had cause to worry about the habits of politicians who rush to file election petitions. In the case of *Ume v. Eneli*,¹⁵ he said:

*"It is most unfortunate that our people have now formed the ungainly habit of rushing to the court when they are defeated in an election contest. In many cases, the parties indulge in rigging but one who is outrigged challenges the result of the election. In accusing the other and his Minions of distortions he forgets to remove the beam in his eyes."*¹⁶

From the above, it is evident that rigging or over voting is the most popular of the electoral malpractices in Nigeria. Rigging is synonymous with falsification of election results. It is consequently treated as an allegation of crime, the judicial approach is to treat rigging as a serious electoral malpractice such that "no person involved in any form of immoral or illegal act or transaction shall be allowed to come to court to seek redress. No polluted hand shall touch the pure fountain of justice."¹⁷

In view of the seriousness of the allegation of rigging and over voting, the right approach, is to treat allegation of rigging or over voting as an allegation of falsification of election results and consequently as an allegation of crime. Similarly, allegations of mutilations and cancellation of election results are treated as allegations of crime.

Where the petitioner makes falsification of election results the corner stone of his petition, he is expected to plead and prove the existence of two sets of results, namely the false and the correct results. These two sets of results are expected to be produced before the tribunal for comparison. A petitioner who fails to place the two results before the Election Tribunal, is likely to have his

petition dismissed, unless there are other grounds in the petition which support the petition.

It was rightly held in *Ume v Eneli*,¹⁸ which followed the decision in *Sabiya v. Tukur*,¹⁹ that to prove falsification there ought to be two results. One which is stigmatize and the other which is genuine. While the decision in the case of *Ojo v Esotie*,²⁰ supports the view that in a petition alleging falsification of election result, the party alleging the falsity of the result needs to tender the authentic and the false results. The decision in *Oji v Ndu*²¹ supports the proposition that proving election malpractice through Affidavit evidence is unacceptable. A party alleging election malpractice, must therefore, call necessary witnesses to prove the allegation.

Documents such as original election results, carbon copy of election results, certificate of returns issued and signed by the appropriate officers and delivered to agents of parties and in some cases, ballot papers are admissible to prove facts in issue in an election petition.²²

The decision of the Supreme Court in *Torti v Ukpabi*²³ is the authority for the proposition, that copies of election results given to a party's agent will be admissible in evidence notwithstanding that it was not produced by the maker of the document. According to the Supreme Court, the basic test for admissibility is not the production of documents from proper custody but the relevance of the document to the issues at stake before the court. Section 147 of the Electoral Act 2002, makes the Chief National Electoral Officer custodian of documents by any other person.

¹⁸ (1999) 4 NWLR pt 600 p. 680.

¹⁹ (1983) 11 SC 109.

²⁰ (1999) 5 NWLR pt 603 at 444

²¹ (1993) 1 NWLR pt 268 at p 235.

²² See *Anyaegebu v. Ozor* (1999) 4 NWLR pt 598 p. 184. *Omoboriwo v. Ajasin* (1984) 1 AS NLR p. 103. *Iyinbano v. Uso* (1999) 4 NWLR 597 p. 41.

²³ (1984) 1 S. C. 270.

¹⁵ (1999) 4 NWLR pt 600 at p. 680-681.

¹⁶ *ibid.*

¹⁷ *Id per Aderemi JCA. in Seriki v. Are* (1993) 3 NWLR pt 469 at p. 480.

By virtue of Sections 115, 148 and 149 of the Evidence Act, an election result enjoys a presumption of regularity. The results declared by the electoral body are presumed as correct. The presumption is however, a rebuttable one. The effect of the presumption, is that the respondent needs not offer any evidence at the hearing of the petition. It is the petitioner that has the burden of rebutting the presumption. In the case of *Onye v. Kema*,²⁴ it was held that the onus is on the party challenging the correctness and authenticity of the election result to offer rebutting evidence. The standard/quality of rebutting evidence to be offered to displace the presumption, will depend on whether the denial of the result is based on allegation of crimes or non compliance with the Electoral Act.

In the case of the latter the rebutting evidence is on the preponderance of evidence. In cases of allegations of crime, the rebutting evidence, must rebut the result of the election beyond reasonable doubt. According to Bello JSC (as he then was) in *Nwobodo v. Onoh*,²⁵ said:

"There is in law a rebuttable presumption that the result of any election declared by FEDECO is correct and authentic and the onus is on the person who denies its correctness and authenticity to rebut the presumption."

In my view, where such denial is based on allegation of crime against FEDECO officials responsible for the declaration of the results the rebuttal must be proved beyond reasonable doubt.²⁶

Corruption and corrupt practices are recognized grounds, under the Electoral Act, for voiding an election. Corruption is a crime and also an electoral offence. A party whose petition is based solely on corruption has the burden of proving same beyond reasonable doubt. Allegation of corruption usually involves acts of

bribery of the electorate by the respondent and/his agents. In *Anazodo v. Audu*,²⁷ the allegation was that the respondent engaged in corrupt practices by distributing salt to voters. There was evidence that salt was distributed to voters, but there was no conclusive proof of salt being distributed at the instance or with the permission of the respondent. Accordingly, the court held that the allegation was not proved. In other words of Mustapha JCA, (as he then was) "clear and unequivocal proof is required before a petitioner can establish a case of bribery. Suspicion, however strong is not sufficient and the mere fact that somebody else committed the crime and briefed others to vote for a particular candidate is not enough nor is it conclusive. It has to be shown that the candidate who is alleged to have bribed the voters or his acknowledged agent or he authorized what was done or subsequently ratified it. A candidate in an election cannot be held responsible for what other people did in the form of unsolicited aid which he or his acknowledged agent was ignorant. To be guilty of corrupt practices during election, it must be proved that the contestant did so by himself or any other person either before or during or after an election directly or indirectly. The petitioner must prove beyond reasonable doubt that the respondent personally committed the corrupt act or aided, abetted, counseled or procured the commission of the corrupt Act."²⁸

Similar approach was adopted in *Falae v. Obasanjo*²⁹ where allegations of bribery of electorate with rice, flour, beans and food items were not proved.

In all cases where the petition is based on electoral malpractices and such malpractice disclose the commission of an offence by the party to a suit, the person relying on such allegation, is expected to prove the allegation beyond reasonable doubt. Failure to discharge the burden beyond reasonable doubt, will result in the petition being dismissed, unless the allegation of crime

²⁴ (1999) 4NWLR pt 598 p. 198.

²⁵ (1984) 1 ALL NLR p. 1 at 21.

²⁶ *ibid.*

²⁷ (1999) 4NWLR pt 600 p. 550.

²⁸ *ibid.*

²⁹ (No. 1) (1994) 4 NWLR pt. 599 p. 435.

can be separated from non criminal allegation and the petitioner, proves the latter, on the preponderance of evidence or on the balance of probability.

In *Omoboriowo v Ajasin*,³⁰ the petitioner had two distinct allegations. The first allegation was that the respondent and his agents, falsified the election results. The second allegation, was that he (the petitioner) scored majority of the lawful votes cast in the election. The first allegation was evidently criminal in nature while the latter was non criminal. The petitioner failed to prove the criminal allegation beyond reasonable doubt. But he proved the latter on the preponderance of evidence. The Supreme Court applied the doctrine of severance, to hold that the petitioner should succeed on the latter allegation, notwithstanding the petitioner's failure to prove the former allegation of crime.

Regarding the discharge of his burden of proving beyond reasonable doubt, the law is that "If at the end of the whole case there is reasonable doubt created by the evidence given either by the prosecution, the prosecution has not made out its case and the prisoner is entitled to an acquittal."³¹

The point should also be made, that proof beyond reasonable doubt does not mean that the allegation of crime must be proved beyond all doubt as rightly stated by Denning J. (as he then was) in *Miller v Minister of Pensions*.³²

"The degree is well settled, it need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence against a person is so strong as to leave only a remote possibility in his favour which can be dismissed with a sentence 'of course it is possible but not in the least probable'

³⁰ (1984) 1 SCNLR 108.

³¹ *ibid.*

³² (1947) 2 ALL E. R. 372.

*the case is proved beyond reasonable doubt, but nothing short of that will suffice."*³³

Allegation of Non Compliance with the Electoral Law

Apart from electoral malpractices, non compliance with electoral law is a ground for petition to the election tribunal. Examples of non compliance include failure to count ballot papers, failure to hold a poll in a polling station and declaring the candidate with the lower vote as the winner of the election.

Non compliance with the provisions of the electoral law simpliciter does not automatically void an election. There is the additional burden on the petitioner to demonstrate how the non compliance substantially affected his fortune in the election. This is the effect of Section 135(1) of the Act which is to the effect "An Election shall not be liable to be invalidated by reason of non compliance with the provisions of this Act if it appears to the Election tribunal or Court that the election was conducted substantially in accordance with the principles of this Act and that the non compliance did not affect substantially the result of the election."

Njiki Tobi JCA, (as he then was) in interpreting a similar provision - Decree No. 50 of 1991 in the case of *Basheer v Sani*³⁴ said:

"The word is used twice in the subsection. In the first limb of the subsection, an election will not be invalidated for non compliance if it was conducted substantially in accordance with the principles of the Decree. In the second limb, an election will not be invalidated for non compliance if the non compliance did not substantially affect the result of the election. In my view the two limbs are distinct. In other words, election may be invalidated if the reverse situation anticipated in either limb of the section occurs. That is to say (1) an election may be invalidated if the conduct of the election was not in substantial compliance with the principle of the Decree

³³ *ibid.*

³⁴ (1992) 4 NWLR pt. 236 p. 491.

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OR (2) if the non-compliance substantially affects the result of the election." ³⁵

Where for example, the petition alleges that election was not held in some polling stations he has a duty to prove how the absence of result of the stations had adversely affected his electoral fortune. He will discharge the burden against the backdrop of the number of voters in these stations and his political strength in the polling stations.

The case of *Imar v Malarima*³⁶ is the authority for the proposition, that in deciding on whether an election is void the primary question for consideration is whether the infringement substantially affects the result of the election. The court further held, that the mere fact that a section of the constituency is disenfranchised will not nullify the election. To nullify election, there must be proof of the number of polling units in each of the affected wards, the number of polling units affected and the number of voters in those units. The petitioner must also prove the substantial effect of the malpractice in the affected wards on the election results.

In the case of *Agbazo v. Ebye*,³⁷ the petitioner alleged certain misconduct in the election. He was however unable to prove how the misconduct affected his electoral fortunes. The Court of Appeal consequently upheld the election result. The court reasoned thus:

"In the instant case the situation was that of misconduct. Votes were recorded in the four polling stations when in fact no voting had taken place in those stations. The misconduct however did not substantially affect the result of the election as the appellant could not show the majority of those who voted in the four polling stations voted in his favour, there was also no evidence to show that the area concerned is the stronghold of the appellant and also the appellant did not

show that misconduct caused his failure to secure majority of the votes." ³⁸

Contrary decision was arrived at in *Basheer v. Sani*³⁹ where the petitioner proved that there was substantial non compliance with the provisions of the relevant Decree and the non compliance substantially affected the results of the election. This was how Adio JCA (as he then was) tackled the problem:

".... The electoral officers who were bound by the provisions of the Decree No. 50 of 1991 to accept the copies of the results in the nine polling stations aforesaid and to include the votes recorded for each candidate therein in the determination of the final results, unjustifiably and unlawfully rejected the aforesaid results from the said nine polling stations. The votes recorded in the aforesaid results in the nine polling stations showed that majority of the electorates who voted, did so in favour of the petitioner but the failure by him to secure a majority of the valid votes was due to the aforesaid non compliance with the relevant provisions of Decree No. 50 of 1991 on the part of the electoral officers for that reasons, the election in question in this petition is bad; it is invalid and is hereby nullified." ⁴⁰

Conclusion

An attempt has been made above to examine some of the problems of proof which our Tribunals and appellate courts are likely to be called upon to decide in various election petitions. What emerges from the above exercise, is that in spite of perceived non civil, and special nature of election petitions, rules of evidence are applicable to election petitions. The time tested rule of "He who asserts must prove," applies to election petitions. In effect, a

³⁵ *ibid.*

³⁶ (1999) 3 NWLR pt 596 p. 545.

³⁷ (1992) 1 NWLR pt 268 p. 133 at p. 144.

³⁸ *ibid.*

³⁹ (1992) 4 NWLR pt 236 p. 491 at 505-506.

⁴⁰ *ibid.*

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petitioner or a cross petitioner has the burden of proving the allegations set out in the petition and cross petition.

In discharging the burden, documentary and oral evidence are admissible. Allegations of rigging, falsification of election results, bribery and other electoral offences must be proved beyond reasonable doubt. A party alleging non compliance with the provisions of the Act, must further prove how and why the alleged non compliance substantially affected his results in the election.

The standard of proof in cases of non compliance with the provisions of the Electorate Act is proof on the preponderance of evidence or on the balance of probability. The burden which the petitioners shoulders, is discharged, if he shows that his case is likely to be more probable than the respondent's case. As Dr. Aguda of blessed memory rightly noted "It is not enough for a party to a case who has the onus of establishing a particular fact to say that his own evidence is just as good as that of his opponent; for what the law says that he must do to discharge the onus of proof on him is to prove by evidence which convinces the court or tribunal of the probability of his case rather than that of his opponent on the point in issue."⁴¹

⁴¹ *ibid.*