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An Appraisal of the Grounds and Burden of Proof in Election Petition in Nigeria

Sunny Mene PIATE[1] and Ima-Obong EFFIONG[2]
[1]Department of Political Science, Akwa Ibom State University, Obio Akpa Campus, Uyo, NIGERIA
[2]Akwa Ibom Water Company Limited, Uyo, NIGERIA

Abstract
The paper appraised the grounds and burden of proof in election petition in Nigeria. The objective of the study was to examine the various statutory grounds under which an election petition may be brought, the requirement of proof of each ground and an in-depth analysis of the various tests-cum-standards evolved by election tribunal and the reason and rationale behind those yardsticks. The paper adopts a doctrinal method, relevant legislations, textbooks, literature and particularly case laws were explored for a good understanding of the burden of proof under the Electoral Act 2010. Findings from the study revealed among other things, that the adherence to technicalities over and above substantial justice appears to have made court and tribunals shut their eyes at whatever injustice that may be occasioned by their strict adherence to the wordings of the statutes thereby making it to dish out ruling that do not correspond in most cases with the general aspirations and yearning of the electorate. The study recommended among other things that technical justice must not be allowed to defeat the essence of ensuring only people with genuine mandate get the return tickets as winners of election.
Keywords: Burden of proof, Election petition.

Introduction

The 1999 Constitution provides that the Federal Republic of Nigeria shall be state based on the principles of democracy and social justice (Section 14 [1]). Democracy is government by the people in which the supreme power is vested in the people and exercised directly by them or by the elected agents under a free electoral system. In the phrase of Abraham Lincoln, democracy is government of the people, by the people, and for the people (Arora, 2011). The pillars of democracy includes: guarantee of basic human rights, free and fair elections, equality before the law and due process of law. Social justice on its own is a political and philosophical concept which holds that all people should have equal access to wealth, health, wellbeing, justice and opportunity.

The Electoral Act defines General Election thus, "an election held in the Federal at large which may be at all levels, and at regular intervals to select officers to serve after the

expiration of the full terms of their predecessors" (Section 156). In Ogboru v. Uduagham, the court describes election process "as ranges from accreditation, voting, collation to recording on all relevant INEC Forms and declaration of result". An election petition has been defined as "an originating process by which an unsuccessful candidate in an election and/or his political party question the return of a successful candidate at an election" (Stanley-Idum and Agaba, 2020, Uche, 2014). It is the only medium recognized by law for challenging or questioning a concluded election (Section 133[1]) Electoral Act 2010 as amended). It is a petition challenging the validity of an election or the return of a candidate or claiming the return of a candidate. Election petition as a procedure is *sui generis* (Buhari v. Yusuf and Abubakar v. Yar'Adua), that is, it is a special procedure before a special court governed by a law made specially to regulate its proceedings (Ugba v. Suswam).

The applicable laws currently guiding election petition in Nigeria are as follows: The Electoral Act 2010 (as amended), the 1999 Constitution (as amended), the Election Tribunal and Court Practice Direction, 2011 and the Federal High Court (Civil Procedure) Rules 2019 subject to the Electoral Act, while the Courts and Tribunals vested with jurisdiction to hear election petitions are the Court of Appeal, National Assembly and State House of Assembly Election Tribunal, Governorship Election Tribunal, Area Council Election Tribunal, Local Government Election Tribunal and Area Council Election Appeal Tribunal. An election petition is commenced by filing a petition at the registry of the relevant Court or Tribunal in accordance with Section 133(1) of the Electoral Act 2010 and the persons entitle to present a petition are: A candidate at an election (Section 137(1) Electoral Act 2010), A Political Party which participated in the Election (Section 137(1) Electoral Act, 2010) and A candidate nominated by his party and cleared to contest, but wrongfully excluded from contesting (Section 138(1) (d) Electoral Act 2010). Under the current Electoral Act 2010, there are only two grounds on which a substitution can be made as provided in section 33 of the Act as follows: Death of the candidate and Withdrawal of the candidate, not less than 45 days before the election in accordance with Section 35 of the Electoral Act 2010. An election petition is to be presented within 21 days of the declaration of the results of the election (Section 285(5), CFRN, Section 134 Electoral Act 2010). There is no extension of time within which to file an election petition. If a petition is filed outside the prescribed time limit, it will be incompetent and struck out. A petitioner who fails to file within time losses his right to relief (Kamba v. Bawa). The Respondent is expected to file his reply within 14 days from the service of the petition, specifying in it which facts as alleged in the election petition he admits and which he denies, and setting out the facts on which he relies in opposition to election petition (paragraph 12 of the 1st Schedule to the Electoral Act, 2012).

The statutory contents of an election petition are as follows:- Names of the Parties interested in the election, the right of the petitioner to present the election petition, the holding of the election, the scores of the candidates and the person returned as winner of the election, facts of the election petition and grounds upon which the petition is based, Reliefs or Prayers sought by the Petitioner, signature of the petitioner or his solicitor named

at the foot of the petition and address for service (paragraph 4 of the 1st Schedule to the Electoral Act, 2010). Paragraph 4(2) of the 1st Schedule further provides that the election petition shall be divided into paragraphs and each paragraph shall be confined to a distinct issue or major facts of the petition and each shall be numbered consecutively.

The grounds forming the basis of an election petition must be one of those recognized under the Electoral Act or the Constitution and must be related to or must have arisen out of acts or omissions that were contemporaneous with the conduct of the election, meaning that election tribunal has no power to investigate matters which took place before the conduct of election (Aderemi, 2006). This grounds are statutorily enshrined in Section 138(1) of the Electoral Act 2010 as follows, that: (a) The 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 the provision of the Act. (c) The respondents was not duly elected by majority of lawful votes cast at the election. (d) The petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

Since 1999 that heralded the beginning of the Fourth Republic, there was hardly any state in Nigeria were one election or the other was not annulled and bye-election held or the winner is replaced with another person by the tribunal. The issue is captured rather dramatically by Emewu (2010), thus: "if there have been 2000 electoral contests since 1999, there have been at least 4000 disputes arising therefrom. In some cases, one election has up to four petitions from cheated/defeated opponents". He further laments that whatever electoral results declared becomes disputed and subsequently gets resolved or is further muddled up in court after long adjudication. Accordingly, he derisively dismisses Nigeria's Fourth Republic as "Court-dependent democracy", a brand of democracy where elections are rarely decided at the pools, but in the court room. The range of electoral malpractice or the methods of perpetrating them is extensive. Lopez-Pinto (2010) disaggregated such behaviours and built a typology of malpractice based on two broad categorization of material and or psychological in nature. For him, material mechanism encompasses direct tampering with the physical aspects of election (like voter lists, ballot papers, vote tallies, and communication equipment) vote buying, operational impediments that deny minorities, people with disabilities, the poor, women and youth from exercising their franchise, as well as control of electoral agencies to facilitate electoral victory by the incumbent government. Others he argued, are tampering in the form of employment offers or threats of termination, payment of commissions on services rendered, commitments (oral or in writing) on future governmental contracts, offers of petty cash or food, violence against opposition, deployment of security agencies etc.

Election disputes are highly sensitive and controversial so much that the process of disposing them seems as if the judiciary itself is on trial. Indeed, of recent the Nigerian Judiciary has come under severe attack for their handling (or mishandling) of election petitions. A substantial number of Nigerians have questioned the role of the judiciary as a

true arbiter in electoral matters because to them, election petition is aimed to open a window of justice to the petitioner and uphold and strengthen the democratic enterprise. They equally wonder why in spite of the apparent and manifest cases of electoral malpractices and non-compliances, the courts-cum-election tribunals have continued to throw out election petition cases for want of proof. While some scholars attribute the sorry state of the petitioners to the almost impossible requirements of proof evolved by the court and the Electoral Act, others view it as the problem of legal practitioners who have poor appreciation of the dynamics of proof in election petition particularly the extent of proof and evidential burden. This trend of event now gaining grounds if not checked is capable of threatening Nigeria's nascent democratic institutions and eroding the confidence of the electorate in post-election judicial process. It is against this background that this paper seeks to examine-cum- appraise the various statutory grounds under which an election petition may be brought and the requirement of proof of each ground.

Theoretical Explication of the Discourse

The Marxist theory is adopted to provide the theoretical underpinning of this discourse. The theory arose in reaction to the Western liberal theory of the state which contends that the state is an independent force and a neutral observer that cater for the interest of every member of the society. According to the theory, the state is the product and a manifestation of the irreconcilability of class antagonism. As Engels (1842) succinctly put it:

> The state is a product of society at a certain stage of development; it is the entangled in an insoluble contradiction with itself that it has split into irreconcilable antagonisms which it is powerless to dispel. But in order that these antagonisms might not consume themselves and society in fruitless struggle, it becomes necessary to have power, seemingly standing above society, that would alleviate the conflict and keep it within the bounds of "order" and this power, arisen out from it, is the state.

The Marxist theory of law is generally identified with the following three underlying assumptions: that law is a product of evolving economic forces; that law is a tool used by a ruling class to maintain its power over the lower classes; that in the communist society of the future law as an instrument of social control will wither away and finally disappear (Aguda, 1992). As noted by the Marxists, the state is an instrument in the hands of the ruling class. Thus, its capture becomes inevitable. State capture here mean shaping the formation of the basic rules of the game (i.e. laws, rules, decrees and regulations) through illicit and non-transparent private payment to public officials. Essentially, the Marxist contention is anchored on the dialectical-materialist thesis of Karl Marx which places premium on economic conditions of society as the base upon which other superstructure of society, including the political and legal system rest (Ake, 1981).

The utility of this theory to the paper is that the approach helps to illuminate and highlights the fact that the dominant privileged group dominants both the economy and the polity (and by extension the legal system) and that the fierce struggle to win and control state power and use same for the personal economic advantage of politicians that is at the root of all electoral frauds and malpractice in Nigeria and equally the *casus beli* of the legal tussles that follow most elections. This position is corroborated by Kawu (2008) who opined that "the Court is one of the main pillars of a class society, and when the chips are down, they would retreat into the mode which aids the survival of their class project." The import of the Marxist orientation is that those who hold the levers of power and dominate other superstructures of society (including the judiciary) are likely to capture or procure favourable judgments and rulings for themselves or their group.

The Ground and Burden of Proof and Challenges Associated with Discharging that Burden in Election Petition

Section 138 of the Electoral Act 2010 set out the various grounds for questioning an election, which must be by way of petition. Save for petitions founded on grounds of non-qualification, there is a consensus of opinion that the burden placed on the shoulder of petitioners in election matter is too heavy, making it practically impossible for them to discharge the required *onus probandi*. This accounts for the high failure rate of election petitions that has emboldened politicians to brazenly indulge in electoral malpractices, knowing full well that the legal process is impotent to bring them to book. As things stand now, practically every electoral infraction can be pigeon holed within the narrow confines of criminality. In Ojukwu v. INEC the Court held that case of malpractices constitute allegation of commission of criminal activities in an election petition which petitioner has the burden of proving beyond reasonable doubt; but what constitute electoral malpractices has become so broad that it encompasses virtually every allegation of irregularities and non-compliance with the Electoral Act (Ukpong v Etuk). The tentacles of criminality have been extended to covers an allegation that no electoral material were distributed to the relevant polling units (Ojukwu v INEC), or that election did not take place but results were declared (Bollantyne v Ayi). Given the criminal standard of proof, how a petitioner could possible prove such allegations beyond reasonable doubt in circumstances where the police neither effected any arrest nor conduct any investigation. Thus, most election petitions are doomed to fail for dearth of the type of strong, cogent and credible evidence that would be required to substantiate such criminal allegation beyond reasonable doubt.

a. **Proof of Qualification and Disqualification of Candidate** That a person whose election is questioned (that is, the Respondent) was at the time of the election not qualified to contest the election. A petitioner who challenges an election on this ground will have to prove that the Respondent has fallen short of the requirements prescribed by the 1999 Constitution as amended such as Sections 131 and 137 (For presidential election) Sections 177 and 182

(Governorship election) Sections 9, 65 and 66 (National Assembly election) and Sections 106 and 107 (House of Assembly election). Generally, the qualification and disqualification criteria prescribed by the above Sections of the Constitution are the same for all candidates seeking any elective office, except as regards age (Standley-Idum and Agaba, 2020). For them, the general criteria are as follows: 1. The candidate must be a Nigerian citizen; 2. He must be educated up to school certificate level or its equivalent; 3. He must note be adjudged a lunatic or of unsound mind; 4. He must not be under dishonesty or fraud; 5. He must not be an undischarged bankrupt; 6. He must not have been convicted and sentenced for dishonesty or found guilty of contravention of Code of Conduct less than 10 years before the date of the election; 7. He must not be employed by State or Federal Public Service within 30 days immediately before the date of the election (the candidate ought to have resigned, withdrawn, or retired from such service in accordance with the relevant conditions of service 30 days before the date of election); 8. He must not be a member of any secret society (Section 318 of the 1999 Constitution); 9. A candidate must be at least: a. 40 years of age for Presidential election; b. 35 years for Governorship and Senate elections; and c. 30 years of age for House of Representative and House of Assembly elections. 10. A candidate must be a member of a political party and sponsored by that political party. 11. A candidate for Presidential and Governorship elections, should not have been elected to such office at any two previous occasions.

With respect to the first criteria, that is a candidate must be a Nigerian citizen, Section 28 of the 1999 Constitution is to the effect that a person losses his citizenship, if not being a citizen of Nigeria by birth, he acquires the citizenship or nationality of another country other than Nigeria of which he is not a citizen by birth. The various provisions on the criteria for disqualification for the offices of President, Governor or the National and State Houses of Assembly seats prohibit contesting election if a person has voluntarily acquired the citizenship of another country and has made a declaration of allegiance to that country (Babai and Dewan, 2020). Therefore, to succeed on this ground, there must be evidence that the Respondent renounced his citizenship, usually by a Certificate of Renounciation or by tendering a signed Oath of Allegiance of that other country. However, in Ogbeide v. Osula, it was held that a citizen by birth or parentage cannot be disqualified from contesting an election by reason that he has acquired the citizenship of another country. It should be noted that by Section 131(a) and 177(a) 1999 CFRN, only citizen of Nigeria by birth can contest election to the office of the President or Governor of a State.

On the issue that the candidate must have been educated up to School Certificate level or its equivalent as envisaged by Sections 131(d), 65(2) (a), 177 (c) and 106(c) 1999 CRFN (as amended), S. 318(a-d) 1999 CFRN define school certificate. In effect a candidate may rely on any of those grounds in (a) – (d) to contest an election and only ground "(c)" needs to comply with paragraphs (i) – (iii) as was held in Bayo v Najidda. On how to prove educational qualification in respect of "(a)" and ((c)", a certificate may be necessary, but in

case of "(b)", the proof of attendance of school and not 11 necessarily the production of a certificate suffices as was held in Arebi v Gbabyo (Bobai and Dewan, 2020).

In Atiku v INEC, it was held that evidence of having been educated up to secondary school level may be established by production of photographs, an affidavit or testimonials. On who has the burden to establish educational qualification where the facts in the petitioner's pleadings is in the negative on qualification of the Respondent and the Respondent's pleadings is in the affirmative, the Court in Agagu v Mimiko held that the Respondent should have the burden of proof. This is because the evidential burden in civil cases is not static, but determined by the state of pleadings. On the issue that a candidate must not have presented a forged certificate to the Electoral Commission, this ground of disq1ualification, can be canvassed as a pre-election matter by virtue of Section 31(5) Electoral Act 2010 which empowers any person who has reasonable grounds to believe that a candidate has submitted false information or documents to INEC in an affidavit to approach the Federal High Court or a High Court of a State seeking a declaration that the information is false. It is also a ground for challenging an election (Adudu v INEC).

On the issue that a candidate must not have been sentence to death or imprisonment or fine for an offence involving dishonesty or fraud, previously, a candidate may be disqualified if he has been inducted for embezzlement or fraud by a judicial or administrative panel of inquiry and the report was accepted by the government. However, in Amaechi v INEC, the Supreme Court held that an indictment is not sufficient to deny a citizen eligibility to the office of Governor until he is afterwards prosecuted in a court of law and found guilty (Action Congress v INEC). The erstwhile constitutional provisions which disqualified persons from contesting elections on account of indictment by a tribunal or a commission of inquiry set-up by law has been deleted by the Constitution (First Alteration) Act 2011. In Daggash v 12 Bulama, the Supreme Court held that a petitioner who desires to use indictment for fraud or embezzlement – as a ground for challenging a candidate qualification must prove that the indictments has been made a basis of criminal action before a competent court and the Respondent was convicted thereafter. On the sixth criteria which borders on conviction, there are two conditions, first is the fact of conviction for dishonesty and secondly that the conviction or sentence must have been less than ten years from the date of the election. By Section 137(1) (e) 1999 CFRN, a candidate who has been convicted and sentenced for an offence involving dishonesty or fraud is constitutionally disqualified from contesting any elective office in Nigeria for a period of ten (10) years after such conviction was passed. Meaning that it is note very conviction that disqualifies a candidate except it borders on dishonesty or fraud. For Ogunjinmi (1997) the categories of offence that involve "dishonesty or fraud" include: offences against the administration of law, justice and public authority, corruption and abuse of office, stealing and trafficking in public offices, offences relating to property and contract, extortion by threat, burglary, house breaking, obtaining property by false pretense, cheating and fraud by trustees and officers of companies or corporation and false accounting. Where a party

challenge an election on this ground, he has the burden of producing before the Court/or Tribunal a Court Order or Certificate of Conviction signed by the Registrar in whose custody is the record of conviction or proved by the production of Certified True Copy of the Judgment of the Court or Copy of the entire record of the proceedings (Asikpo Vokene, Lawan v Yama, Section 248-250 Evidence Act, 2011). Where a person who was previously convicted of an offence is granted pardon by the President under the Constitution, he is no more disqualified from contesting an election (Falae v Obasanjo).

On employment and dismissal from public service, Section 18(1) of the Interpretation Act defines who a public officer is. Section 137(1) 1999 CRFN provides 13 that a public officer who has not resigned, withdraw or retired from employment in public service within a stipulated period of 30 days before the date of election is constitutionally disqualified from contesting any election in Nigeria. Section 11(1) public officer (Special Provisions) Act provides that a public officer can only be dismissed on the following grounds: inefficiency in the performance of duties, corrupt practices or act incompatible with public policy of the government or establishment. However, a person whose appointment was terminate cannot be held to be disqualified from contesting election as that does not amount to dismissal (UNCP V DPN). The same position equally applied where a person is retrenched from service (Aondoaka v Ajo). A petition in order to succeed on this ground must show from the pleadings and evidence that the Respondent or the person returned has not disengaged. This can be proved by showing that the Respondent was still receiving salary from the employment less than thirty days before the election or indeed after the election. However, where the respondent shows that he has resigned, the petition will be dismissed (Mufutau v Muideen). A resignation letter takes effect from the date the letter was received by the employer or his agent, not when it was signed or approved or accepted (WAEC v Oshianeba). A person on the leave of absence is still in the employment of his employer (Mabukurta v Abbo).

On the issue that a candidate must not be a member of a secret society, in Registered Trustee of AMORC v Awoniyi, the Supreme Court held that any organization that practices occult, uses secret signs, secret passwords, secret hand claps is not only a secret society but also a satanic society. Membership of a secret society is criminal in nature as such the standard of proof is beyond reasonable doubt (Odion v Barigba Amuje (No. 2) and Falaye v Obasanjo). On age requirement, it is proved by documentary evidence through the production of the birth certificate of the respondent or oral evidence, for instance by 14 calling the evidence of parents or persons who know the time of birth of the respondent. In Kumusuonyo v Yuosuo, it was held that where it is successfully proved in an election petition that the person declared as a winner is under-aged, the election should be mollified and a fresh election ordered.

b. **Proof of Corrupt Practices/or Non-compliance with the Provisions of the Electoral Act**

In Yusuf v Obasnajo, Pat-Acholonu JSC defined corrupt practices as embracing "certain

perfidious in debauched activities which are really felonious in character being redolent in their depravity and want of ethics, they become hallmark of a decayed nature lacking in conscience and principles". Allegations such as multiple thumb printing, ballot box snatching and stuffing, undue influence, intimidation of petitioner's supporter etc, have been held to constitute corrupt practices. For Nwabueze (1985) and Nnodum (1996), it is any act or conduct which is transgression of the relevant statutory provisions for the particular election aimed at impeding a free and fair election exercise. In order to successfully prove corrupt practice, a petitioner must not only demonstrate that the corrupt practices occurred, but also that the said corrupt practices were perpetuated either by the Respondent or by his agents with his knowledge and consent and/or authority. He must equally show that the said corrupt practice affected the election. The court will hold that the alleged corrupt practice did not take place where the petitioner fails to establish any of their constituent elements (Oyebode v Gabriel). The type of documents a petitioner is required to tender in proof of allegations of irregularities in any election petition is another area of significant difficulty. For instance, a petitioner who is challenging the legality of votes cast and the result of the election released by the electoral body is required to tender all the forms and other necessary documents used in the election. Even where a petitioner alleges that there was no voting and yet results were declared, he must tender the voter's registers for the polling units in question.

Another example is disenfranchisement and over-voting. In case of disenfranchisement, the petitioner must tender the voter register and voter must equally tender his voter's card and testify as to the disenfranchisement and show that his name was not ticked in the register (Audu v INEC). Over voting is defined by Section 53(1) and (2) of the Electoral Act to mean casting more than one vote for a candidate or voting for more than one candidate at any one election. It means a situation where the votes cast in an election exceeds the number of registered voters. In order to prove over voting, the register of voters needs to be tendered as well as the result of the election in order to show the difference (Lawal v Mogaji). Where over-voting is established, the election is nullified and no return shall be made until polls have been conducted in the affected areas. However, if over-voting is not substantial, a return may be made (Section 53(3) and (4) Electoral Act, 2010). Note that the card reader cannot replace the voter register as was held in Nyesom Wike v Peterside where the Court held that its function is to authenticate voters card and to prevent multiple voting and not to replace voters register or statement of results. On violence and intimidation of voters, nexus must be established between the thugs and the returned candidate (Audu v INEC) and proof of violence and intimidation of voters is beyond reasonable doubt (Ogu v Ekweramadu). It must be shown that the intimidation indeed affected the outcome of the election. The ground of substantiality also applied to allotment of votes. In case of allotment, the petitioner must plead the votes scored by the parties and the particulars of the votes allotted.

Non-compliance is that conduct of an election contrary to the prescribed mode under the Act or rules and regulation made there under. Where a petitioner rely on this ground as a basis or foundation of his case, he has a duty to show to the tribunal/or court cogent and compelling evidence that the alleged noncompliance is of such a nature as to affect the result of the election. This is because Section 139(1) Electoral Act 2010 provides thus:- An election shall not be invalidated by reason of noncompliance with the provision of this Act, if it appears to the election tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the noncompliance did not affect substantially the result of the election.

The purport of this provision is that for an election to be upheld by the Court as a valid election, it must have been conducted in substantial compliance with the law as the reverse would be held to have been conducted in substantial noncompliance with the law and therefore must be voided. In Nwole v Iwuagwu, the Court of Appeal held that noncompliance with the Electoral Act is not restricted to only a breach of the Act but extend to all acts capable of placing obstacle or obstructing willing voters and candidates. The conditions in Section 139 (1) Electoral Act 2010 are conjunctive, thus, a petitioner relying on noncompliance has the herculean burden of proving not only that substantial non-compliance complained of, but also that it substantially affected the result. Affen (2019) in his paper, describe the principles imbedded in Section 139(1) of the Electoral Act as "the jeopardy of double substantiality". For him, the deluge of otherwise meritorious election petition that have failed owing to inability to establish the double substantiality suggest that it may be easier for a camel to pass through the eye of a needle than for a petitioner to successfully challenge an election on the basis of infractions in the actual conduct of the election.

An election shown not to have been conducted in substantial compliance with applicable laws ought not to upheld but the court under the guise that it did not substantially affect the outcome as it merely paints an ominous spectre of legal justice triumphant and electoral justice prostrate, hence scholars like Omenmo *et al* (2017) opined that this clause is "a giant jurisprudence step backwards" which lends support 17 to existing literature that the court is an insurance policy to protected the dominant class in the society. Be that as it may, the interpretation of Section 139(1) of the Electoral Act by the Nigerian Courts is almost engraved in stone and a departure from that position appears extremely unlikely anytime soon.

c. **Proof of Majority of Lawful Votes and Unlawful Exclusion** By community reading of Ogunjun (1997) and Yar'adua v Barda shows that a complaint questioning the return of the respondent for not being duly elected by majority of lawful votes cast may arise on either of the following: i. Where the votes cast at the election were not correctly added up or counted; ii. Where votes cast at a number of polling stations exceed the total number of persons accredited to vote at those polling stations; iii. Where votes were inflated or

deflated; and iv. Where invalid votes were added. Where any of the above position is the basis for challenging an election under this ground, regard is normally given to either Forms EC8AI (Statement of Result) or Forms EC8B1 (Summary of Results from Polling Stations) in the determination of lawfulness or otherwise of the votes cast at the election.

This ground challenges the scores of the candidates and is related in a way to a complaint of malpractice, because malpractice depletes the votes of the party returned. It must be specifically pleaded by the petitioner in other to succeed. The petitioner should plead the votes that was recorded as well as the figures that was added or affected, the votes recoded and subsequently declared which will assist the court in the deduction of the unlawful votes from the total recoded votes for the returned candidate (Aregbesola v Oyinlola). After the deduction, the candidate with the highest number of votes is returned as elected. In Iniama v Akpabio, the Court held if there is an allegation challenging the scores of candidates at an election, the evidence adduced in support of the allegation should come directly from the officers who were on the field where the votes were counted and collated. This in effect means that the collation officers who counted the vote cast should be brought to testify in Court as to the allegation. Evidence from a person who received the figures or scores from officers who were present at the counting and/or collation of the votes is inadmissible as hearsay.

With respect to unlawful exclusion, Section 31 and 87 Electoral Act 2010 provides for when a candidate is said to be validly nominated to justify his being unlawfully excluded. An election can be challenged under this head where a party nominates a candidate and he is excluded by Independent National Electoral Commission (INEC) (Nige v Obi). In Okon v Bob, it was held that in such cases, only the candidate cannot file the petition. The political party that nominated him must be joined as a party. But if the candidate is unlawfully excluded by his own party, his redress in the ordinary court as a pre-election matter. It is not expected that a validly conducted election would be set aside due to the internal wrangling of a political party. In Amaechi v INEC supra, Counsel to PDP had asked the Supreme Court to order a fresh election, as it would be a negation of democracy to declare Amaechi, who was unlawfully substituted by his party, PDP; and did not contest an election, the winner of the election. The Court observed:

If this court falls into the rap of ordering a new election, a dangerous precedent would have been created that whenever a candidate is improperly substituted by a political party, the court must order a fresh election even if the candidate put up by the party does not win the election. The Court must shut its mind to the fact that a party wins or loses an election. The duty of the Court is to answer the question which of two contending candidates was the validly nominated candidate for the election. It is purely an irrelevant matter whether the candidate in the election who was improperly allowed to contest wins or loses. The candidate that wins the case on the judgment of the Court simply steps into the shoes of his invalidly nominated opponent whether or loser or winner. Where, however, a political party unlawfully excludes or substitutes a candidate in such circumstances that the

candidate is unable to seek redress in Court as a pre-election matter, until the election has been held; he may legally challenge the exclusion in an election tribunal. In Wambai v Donatus, the Supreme Court as per Onnoghen held: After the conduct of an election, if a person wishes to challenge the result of the election on the ground of nomination/pre-election matter; he can legally do so before an election tribunal under Section 138(1)(a) of the Electoral Act 2010; … it is not a correct statement of the law that in all cases a pre-election matter must be instituted and heard and determined by the High Court as that principle admits of exceptions one of which is where the pre-election matter is filed after the conduct and conclusion of an election, it is the relevant election tribunal that has the jurisdiction to hear and determine it.

His Lordship Onnoghen also observed that where the pre-election matter was however filed before the election at the High Court, the jurisdiction of the High Court continues even after the election on the doctrine of Lis Pendens (Efevwerhan, 2018). A petitioner challenging unlawful exclusion from an election must show that he was excluded from all the stages of the electoral process or that his exclusion from some stages substantially affected the outcome of the election. He must show clearly that there was an election, the name of the contestants and their respective parties, that the election was held and concluded, that he was duly nominated by his party to contest the election and his party is a registered party in Nigeria, and a written letter sent to him by INEC deleting his name from the list of the contestants for the election inspite of the fact that the petitioner was validly nominated by his party for the election (Stanley-dum and Agaba, 2020).

Analysis of Major Findings

From the evaluation of the discourse and the subsequent analysis of judicial authority, the paper find out that: 1. That insistence of our election petition Tribunal/Court that proof of criminal allegations in election petitions must be proved beyond reasonable doubt base on the provisions of Section 135(1) of the Evidence Act, 2011, is reading into the section what is not there. This is because the provisions clearly qualified any proceedings where allegation of crime is made to Civil and Criminal Proceedings, it excludes election petition which our Courts in a long line of cases, held to be neither civil nor criminal but sui generis. The wordings of the Act ought and should be given their ordinary, simple and grammatical meaning, which is the proper thing to do. The function of the Court is to declare and not to give the law. If there is a Lacuna in the law, it is for the legislature to fill the gap and not for the court to take it upon itself the added responsibility of legislating. The Court is to explain the law as it stands and to leave the remedy to others. 2. Adherence to technicalities over and above substantial justice appears to has made tribunals/courts shut their eyes at whatever injustices that may be occasioned by their strict adherence to the wordings of the statutes thereby making tribunals/court judges to dished out rulings/judgements that do not correspond in most cases with the general aspirations and yearnings of the electorate.

3. The new legal regime of time limit for hearing and determination of election petition although appeared to have cured the mischief hitherto occasioned by long and protracted litigation has now become a conduit pipe for denial of fair hearing. 4. The principle that where a petitioner found his petition on noncompliance with the relevant provision of the Electoral Act must prove not only that the non-compliance was substantial but also that the it substantially affected the result of the election appears too rigid and pose a serious obstacle to proof of election petition founded on noncompliance. 5. Contradictory verdicts given by judges especially on cases with similar facts and circumstances tends to create uncertainties in the jurisprudence of election petition and by extension suggesting corruption and compromise on the part of the Judges.

Conclusion

The paper appraised the grounds-cum-burden of proof in election petitions in Nigeria and concludes that the failure of the electoral process to instill confidence has practically converted the Tribunals/Courts into another electoral ombudsman. Election jurisprudence is founded on the presumption of regularity of election results declared by the electoral umpire which implies that the law takes for granted that a credible election has been conducted which is why election tribunals/courts insist upon that presumption. This in the language of Affen, tends to lend judicial validity to the view that challenging the outcome of an election through the legal process is a mere formality. The invidious consequence of undue judicial subsidization of the presumed winner of an election and the electoral umpire to the detriment of the petitioner is that legal justice can scarcely redress electoral injustice. The way forward is that while post-election cases should continue to be the exclusive preserve of election tribunals/courts, technical justice must not be allowed to defeat the essence of ensuring only people with genuine mandate get the return tickets as winners of election. 22

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Biographical Note

Sunny Mene PIATE, *PhD*, is a Lecturer in the Department of Political Science, Akwa Ibom State University Obio Akpa Campus, Uyo, NIGERIA. E-mail: sunnymenepiate@mail.com

Ima-obong EFFIONG is a Barrister and staff of Akwa Ibom Water Company Limited, Uyo, NIGERIA. E-mail: mimazee01@gmail.com