DOI: https://doi.org/10.67203/abulj.2006.0mhzy634

ELECTION PETITIONS IN NIGERIA: BUHARI v. OBASANJO[1] IN PERSPECTIVE

By **B.Y. Ibrahim***

> *"The truth is that the allegations of election irregularities, under the existing laws, could not be easily substantiated by credible evidence"*[2].

At independence in 1960, Nigeria was set on the path of democracy and the rule of law, an important aspect of which is a periodic election. Elections are the only means by which a legitimate government can be formed in any democratic country, the world over, Nigeria inclusive.

A prominent feature of Nigeria's democratic bottleneck seems to be the outcome of every elections, since 1966. Such outcome has been the popular dissatisfaction with the way and manner elections were conducted in the country. Such dissatisfaction has given birth to numerous election petitions and at times violence in large scale.

The main thrust of this article is election petitions. Of the three arms of government, the judiciary is saddled with the main responsibility of tackling election petitions. The work of such election petitions often produce "wonders", in the sense that the ordinary citizen, the educated layman and a times even learned legal minds are more often than not puzzled by such decisions. The situation of the sordid state of affairs exhibited by the decision of the election petition tribunals was aptly captured thus;

> *No matter the way it goes, the decision of a tribunal often creates ill-feelings, rob somebody of a perceived victory, deny a section of the society what they perceive to be an opportunity to take a bite at the 'national cake'. It is more painful if the aggrieved party has waited for long to win the election or has held power for long and would not want to let go. The decision of a tribunal would of course enhance or put an end to those ambitions. The effect would now depend on whether the people on losing side are civil or matured enough to stomach a judicial defeat. But*

1 (2005)13 NWLR 1.

* Lecturer HOD Department of Public Law, Faculty of Law, A.B.U, Zaria

2 Oluyede, P.A. (1988) Nigerian Administrative Law, p. 281.

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FOLARIN SAMIRA SAL
FACULTY OF LAW
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A B U. ZARIA

how many of such people play politics in the Nigeria of today[3].

The assumption from the above quotation is simply that the decisions of the election petition tribunals merely confirm the robbery of success from the actual election winner and the defeat of the latter is "a judicial defeat". In other words, the perception is that the election petition tribunals are part and parcel of the electoral fraud or malpractice in Nigeria.

An attempt will be made to examine the nature of the election petition tribunals, the electoral laws and a critical assessment of the electoral rules and regulations as are interpreted by the judiciary. The most recent case or locus classicus is of course, the celebrated case of Buhari v. Obasanjo (supra). The analysis, it is hoped will shed light on the electoral rules, guidelines, and principles. An important aspect of this write up would be what is wrong or problem with the procedure adopted by the election petition tribunals?

Election Petition Tribunals

Tribunals are essentially adjudicatory bodies set up by statute to deal with disputes arising either under the statute or other statutes in the same broad subject area.

As a general rule disputes are normally settled or vested for determination in the courts, however, where special consideration demands, as an exception to the general rule, resort to tribunals may be apt. Four points have been summarized as important elements for the special consideration as are outlined below[4]:

i) *Specialized/Expert Jurisdiction*

Tribunals are created and vested with particular jurisdiction. In most cases they have one statutory scheme, unlike the courts which are vested with general jurisdictions only. Tribunals have very broad specialism. Experts in that particular specialization are often appointed as adjudicators for obvious reasons of their specialized knowledge on the subject matter or that hearing similar cases has given them familiarity with the law and issues involved.

3 Agbakoba O. et al (2003) Manual on Election Petition in Nigeria. Huri Laws, ppp. 1-2.
4 Leyland P. et al (1994), Textbook on Administrative Law, Blackstone Press Ltd., pp. 78-83.

ii) *Flexible approach*

Courts of law adopt strict legal approach in consideration of cases with particular reference to evidence, statutory interpretation, and binding precedents thereby making their conduct in proceedings very rigid. This type of strict legal approach have been found unsuitable for the conduct of proceedings in tribunals. A flexible approach in the conduct of proceeding is expected of a tribunal.

iii) *Inquisitorial rather than adversarial approach.*

General issues dealt with by tribunals are not to be viewed as *lis inter partes*, a contest between two opposing sides. However, it is understood that the tribunal should maintain its independence and impartiality if it has to maintain public confidence. In this respect the tribunal is expected to maintain a healthy balance between the two adjudicatory processes.

iv) *The need for speedy, informal and cheap justice*

Speedy justice has always been one of the main aims of the tribunal system. The same applies to its informal process. It is still hoped that in due course a degree of uniformity and simplification of the many differing rules may be evolved to become the tribunal procedure. The rules of procedure are by no means expected to be as strict as those which apply in the court of law so as to make the tribunal become user friendly. In the area of cheap justice, tribunal could adjudicate issues presently by any party before it without the necessity for a counsel's representation. This could be with less cost to the litigant.

In Nigeria, its constitution sought to remove the election petition matters from the normal judicial process as provided in section 6 of the 1999 Constitution. Election petition tribunals have been given prominence by the Constitution. What then is the status of the election petition tribunals in Nigeria's judicial system?

The Election Petition Tribunals

The constitution has made provision for election petition tribunals[5]. These consists of the National Assembly Election Petition Tribunal, The Governorship and Legislative Houses Election Tribunal, and the Presidential Election Petition Tribunal. The National Assembly Election Tribunal, Governorship and legislative Houses election tribunal shall consist of a chairman and four other members. A judge of the High Court

5 See Sections 285 (1), (2), 239, 271, 276, and the Six Schedule of the 1999 Constitution.

is to be appointed the chairman of the tribunal while other members could be appointed from, Judges of the High Court, Kadis of Shariah Court of Appeal, Judges of Customary Court of Appeal or other members of the judiciary who are not below the rank of a Chief Magistrate. The President of the Court of Appeal is empowered to appoint the chairman and members of the tribunal in consultation with the Chief Judge of the State, the Grand Kadi of the Shariah Court of Appeal of the State or the President of the Customary Court of Appeal. Exclusive and original jurisdiction has been vested in the Court of Appeal to hear and determine presidential election. Section 239(1) of the 1999 Constitution provides that:

> *Subject to the provisions of this constitution the Court of Appeal shall, to the exclusion of any other court of law in Nigeria, have original jurisdiction to hear and determine any question as to whether*
>
> *a) any person has been validly elected to the Office of president or Vice-President under this constitution; or*
>
> *b) the term of office of the President or Vice-President has ceased; or*
>
> *c) the Office of President or Vice-President has become vacant*

The interpretation of section 239(1) of the 1999 Constitution came squarely before the Court of Appeal in the celebrated and historic case of Alhaji Atiku Abubakar (Vice President, Federal Republic of Nigeria) v. Attorney General of the Federation and others[6]. The President of the Federal Republic of Nigeria (Chief Olusegun Obasanjo) declared the Office of the Vice President vacant, hence the cause of this action. The plaintiff brought this action seeking the court to determine among other things; whether having regard to the provisions of sections 142, 143, 144, and 146 of the Constitution of the Federal Republic of Nigeria or any other Law, the President can declare vacant the office of the plaintiff as Vice President.

The defendant contended that the plaintiff by declaring for another rival political party, denounced and condemned the sponsoring political party has breached his obligation of mindedness, mutual trust, confidence and good faith, and has therefore constructively resigned from the office of the Vice President.

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6 See CA/A/23/2007

The court held inter-alia:

> *That the President has no power under the Constitution or any other law to declare the office or seat of the plaintiff as Vice-President vacant, and*
>
> *That the purported declaration by the President of the Office of the Vice President as vacant is unconstitutional, illegal, null and void and of no effect whatsoever.*

The Appellate Process

Appeal from the Governorship, State Legislative Houses, and national Assembly Petition Tribunals shall lie to the Court of Appeal. Section 246(1) provides that the decisions of the National Election Tribunals shall lie as of right to the Court of Appeal on any question as to whether -

i) any person has been validly elected as a member of the National Assembly or of a House of Assembly of a State under this Constitution;

ii) any person has been validly elected to the Office of Governor or Deputy Governor; or

iii) the term of office of any person has ceased or the seat of any such person has become vacant.

It should be noted that the decision of the Court of Appeal while exercising its appellate jurisdiction over the Governorship and legislative assembly election petition matters is considered final. There will not be further appeal to the Supreme Court on such matters. However, the Court of Appeal has original jurisdiction on presidential election. The Supreme Court of Nigeria exercises appellate jurisdiction from the Court of Appeal on presidential election. Similarly, the Electoral Act reiterated the constitutional provision on election petition thus

> *"No election and return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an election) presented to the competent tribunal or court in accordance with the provisions of the constitution or of this Act, and in which the person elected or returned is joined as a party"*[7].

7 See S. 140(1) Electoral Act, 2006.

Who may petition on election matters?

An election petition may be presented by one or more of the following persons:

a) a candidate in an election

b) a political party which participated in an election[8].

In the case of *Buhari v. Obasanjo* (No. 4)[9] the Supreme Court interpreted section 133 (1) electoral Act 2001 which is in parimateria with section 141 (1) 143 (1) Electoral Act 2006 per Kalgo JSC thus:

> *Under this subsection, an election petition can be filed by the candidate (who lost the election) or by any political party who participated at the election or the two of them jointly. This subsection statutorily makes a political party a petitioner alone or jointly with its candidate at the election. Here for a political party to qualify as a petitioner it only needs to participate at the election and not more, and participation simply means taking part not in any specified way. This may include participation by the political party itself or through its authorised agent.*

It now becomes obvious that no other person or persons outside those expressly mentioned in s. 144 (1) (a and b) Electoral Act 2006 may present an election petition. Ordinary voters at an election or some activist group/voters who would have wished for a fair election in the name of NGO, Labour Union, etc are statutorily barred from taking part in an election petition cases. Similarly the following persons may be made respondent in an election petition cases:

1) The person whose election is complained of. This is the candidate at the election who happens to be the successful candidate at the election;

2) Independent National Electoral Commission (INEC) staff whose conduct in the election is complained of. For instance the Electoral officer, a Presiding Officer, a Returning Officer;

3) Other persons who took part in the conduct of the election[10].

The third category outlined above seems to be very wide in its scope. However, the provisor to s. 144 (2) of the Constitution need to be mentioned here. Where such other officer or person is shown to have

8 See S. 144(1), ibid.

9 (2004)2 WRN p.1 at pp. 35-36.

10 See S. 144(2) Electoral Act, 2006.

acted as an agent of the Commission, his non-joinder will not operate to void the petition if the Commission is made a party.
Rules of procedure for election petitions underscored the issue of joinder of parties as respondent in an election petition in paragraph 47(1) of the Electoral Act 2006. It says:

Where an election petitioner complains of the conduct of an electoral officer, a presiding officer, returning officer or any other official of the Commission he shall for all purposes be deemed to be a respondent and joined in the election petition as a necessary party.

The non-joinder of the necessary parties to an election petition have resulted in the declaration of such petition as a nullity by the courts[11]. However, it is apt to point out that it is not all parties who participated in an election that must be joined as necessary parties to the election petition. In the case of *Buhari v. Yusuf*[12], the Supreme Court per Tobi JSC stated,

> *I would like to look at section 133(2) in three limbs. The first limb is the expression 'the person whose election is complained of'. This limb, in my humble view, means the person who was declared winner of the election. And that person in the language of the subsection is the respondent. The second limb of the subsection enumerates other persons who will be deemed as respondents, if the petition complains of their conduct in an election. These are the officials involved in the conduct of the election. The third limb of the subsection is covered by the expression "or any other person who took part in the conduct of an election". The third limb, as the expression implies, anticipates any other person who participated in the conduct of the election, other than an electoral officer, a presiding officer or a returning officer--- a person who is a candidate cannot at the same-time be a person who can or should conduct the election. That is not within the tenor and spirit of the Electoral Act as it is clearly against the natural justice rule and public policy. Neither the S. 133 (2) nor any other section of the Electoral Act anticipates such a situation.*

It is only the parties who are involved in the conduct of the election that are proper parties to be joined in an election petition, whose non-joinder will be fatal to the petitioners case.

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11 Ojukwu v. Obasanjo (2004)12 NWLR (pt 886) 169
12 (2003)14 NWLR 446 at p. 534.

Grounds For Petition

A petitioner may challenge the outcome or result of an election on some of the following grounds provided by the electoral law or the constitution. Section 145 of the Electoral Act 2006 provides that an election may be petitioned on some or any of the following grounds:

i) That a contestant was not qualified to stand for such an election.;
ii) Corrupt practices or non-compliance with the Electoral Law;
iii) The winner of an election was not duly elected by lawful votes cast;
iv) Exclusion of the petitioner from the election.

Constitutional grounds for an election petition includes but are not limited to:

i) Voluntary acquisition of citizenship of another country.
ii) Adjudged to be a lunatic or unsound mind.
iii) Sentence of death by a court or tribunal.
iv) Conviction involving dishonesty or contravention of code of conduct tribunal in the last previous 10 years;
v) An adjudged bankrupt;
vi) A member of a secret society;
vii) Being indicted for embezzlement or fraud by a Commission of inquiry or an administrative panel of inquiry which has been gazetted;
viii) Forgery of a certificate presented to Independent National Electoral Commission; and
ix) For executive president, or Governor having been elected twice previously[13].

In addition, section 239 of the Constitution empowers a petitioner of the Constitution to file a petition to the court of appeal for it to determine whether:

a) any person has been validly elected to the office of President or Vice-President under this constitution; or
b) the term of office of the President or Vice-President has ceased, or
c) the office of President or Vice-President has become vacant.

Similarly, section 285 of the Constitution confers on the National Assembly Election Tribunals the jurisdiction to determine whether or not:

a) any person has been validly elected as a member of the National Assembly;
b) the term of office of any person under this Constitution has ceased;

13 See section 137(1), 1999 Constitution

c) The seat of a member of the Senate or a member of the House of Representative has become vacant;
d) a question or petition brought before the Election Tribunal has been properly or improperly brought.

The same rule applies to the election of Governors, Deputy Governors and members of State House of Assembly.

Decisions of Election petition Tribunal

Upon hearing both parties by an election petition tribunal, the tribunal is naturally expected to arrive at a decision based on whether or not the petitioner has proven his case or that the respondent has successfully defended the petition against him. The Electoral Act has given direction on how an election petition tribunal would arrive at its decision. According to the Act, a tribunal would not invalidate an election" if it appears ... the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect the result of the election"[14].

Decision to be made by the tribunal on whether or not to uphold the petition in an election is purely subjective and absolutely based on the thought of the tribunal. The tribunal has to base it decision on what appears to it, whether or not the election was conducted substantially in accordance with the principles of the Act or that in case it is of the opinion that the election has contravened the Act but that such contravention in its view did not affect the result of the election. It may equally nullify the election if in its opinion it 'does not conform' with the electoral law.

The pertinent question here is what yardstick should the tribunal apply, in arriving at such decision? None has been provided by the Act or perhaps any other law. Going by the presumption of regularity in an election, in other words, every election is presumed to have been conducted substantially in accordance with the principles of the electoral Act and that the result of such election is not affected by some tolerable or minor discrepancies, it could certainly be an herculean task to prove otherwise.

Arguably, the import of this section seems to be simply that an election petition should not succeed merely on inconsequential non-compliance

14 Section 146(1), Electoral Act 2006.

with the provision of the electoral Act, that is to say, minor infraction of the principles of the Act should not form the basis of overturning an election. However, it appears that the Electoral Act seems to lean towards or in favour of infraction of the Act than compliance with it. This section, it appears, is in support of election riggers rather than maintaining a healthy balance between all the opposing contenders in an election. The question that is begging for answers is what amount to, "the election was conducted substantially in accordance with the principles of the Act or that the non-compliance did not affect substantially the result of the Election"?.

In the absence of proper guidance on how to arrive at just answer as sought for above one wonders how petitioners in an election petition cases would succeed. Perhaps this goes to explain the reason behind the tribunals quashing more than two-thirds of election petitions in almost all the election petitions.

An election petition tribunal is empowered to nullify an election if it is of the view that a candidate who was returned as elected was not validly elected. Where such a decision is based on the ground that the respondent did not score the majority of valid vote cast at the election, the tribunal is to make declaration in favour of the candidate who scored the highest number of valid votes cast at the election.

However, notice of an appeal filed by a candidate who is still in office but whose election is declared invalid is to remain in office pending the determination of the appeal. Where such a person does not appeal against such a decision, he is to remain in office pending the expiration of the period of 21 days within which an appeal may be brought. It is pertinent to ask the question where a court's decision in an election petition comes at the middle or end of the tenure of office of the respondent whose election has been nullified, what will in fact be the petitioner's remedy? For instance, where the respondent is returned as a winner by the electoral body and such respondent whose election is petitioned remained in office but at the end of the judicial proceedings the court passed a decision nullifying his election and declaring the petitioner as duly and legally elected, after taking the Oath of office, how long will he then remain in that office?

Two contending views have emerged. One, is that he is to spend or remain in office for the remaining unexpired period or tenure for that particular election. The second view is that he should remain in office to

serve the whole of the term of such office. There is third scenario where the action of the petitioner may succeed, well after the respondent has spent the whole of the term given for such office. In this circumstance, what relief would the successful petitioner have? If one were to align with the first view explained above, it goes without saying that such a petitioner has no remedy in law. In this case another question will follow. What then is the essence of going to court to challenge the respondent election? Given the fact that even if the petitioner succeeds he will not benefit from the fruit of his election victory?

At various times in Nigeria's political history, efforts were made to set out time limit within which to settle election petition cases, well before the swearing in of successful candidates into elective position. How successful were the efforts? The Electoral Act 1982, states "that any election petition shall be disposed of by the court not later than 30 days from the date of such election, while section 132 of the Electoral Act 2002 stipulates that an election petition shall be presented within thirty days from the date the result of election is declared". The impact of setting time limits on the courts to dispose of election petitions cases was the legislative attempt to solve the problem of prolong trials and protracted delays. However, experience has shown that this may not be the solution to the problem after all. For instance, consequences arising out of such limitation has resulted in preclusion from presentation as time barred of some sort or stoppage of trial, that is, the courts or tribunals inability to proceed with the case, or abatement of appeal, which means that appeals that were caught up with time limit will be considered abated. This appears to be a catch twenty-two situation as the protracted delays in the election petition trials, juxtaposed with setting time limits to the courts have invariably the same results namely, injustice to the petitioner. No wonder the Supreme Court of Nigeria has declared such time limitation as unconstitutional and have accordingly declared them null and void[15].

A mid-way solution, that is, between protracted delay and setting time limits seems to be settled in accelerated hearing of election petition proceedings[16]. But the attitude of election petition tribunals in the aftermath of 2003 election has left much to be desired in this respect[17].

15 Unongo v. Aku (1983)11SC 129.
16 Section 148 Electoral Act 2006.
17 see Buhari v. Obasanjo (2005)13 NWLR 1, Ngige v. Obi 2006 ALL FWLR 1041.

Standard of Proof in Election Petition

The law relating to burden of proof or standard of proof in Nigeria could be traced to the law of Evidence, classified into civil and criminal matters. A petitioner who alleges that a crime was committed in the process of an election, for example ballot stuffing, stealing of ballot boxes, threat of violence or violence leading to loss of life or limbs must prove such allegation beyond reasonable doubt, while if the petition involves for example number of votes cast in an election, the standard of proof is on preponderance of evidence. The concern here is the classification of election petition matter into the country's criminal legal processes. For instance a petitioner alleges that some thugs or hired assassin had fired gun or used matchet to kill some persons or destroyed election materials or had interrupted voters from casting their votes in a particular polling unit. Consequent upon this, the petitioner wishes that the court should nullify such votes or election. The court's attitude in this regard has been to request the petitioner to prove his case or the allegation beyond reasonable doubt because there has been imputation of commission of crime. This attitude of the court with due respect is not helping or assisting the democratic process but instead it is compounding an otherwise complex matter for the following reasons.

i) Under Nigerian law, it is the Attorney General or his representative who is legally competent to institute criminal legal action or where any other person wishes to prosecute a case, such person has to obtain the Attorney's General legal fiat.

ii) A petitioner in an election petition case is not seeking the court to punish the respondent for committing a crime as provided under the Electoral Act, Penal Code or Criminal Code.

iii) A petitioner is simply making a case of violation of electoral process or guidelines which if he is able to prove that, his prayer is for the Court to nullify the result of such voting unit.

iv) An election petition case where it succeeds will not hinder the Attorney General from prosecuting the person or persons who might have committed any crime during the electoral process.

So far, several election petition tribunals and courts have passed their verdicts arising from the 2003 election petitions, and with the Supreme Court as the apex court in all legal matters, one might say that election petition rules and regulations are all most settled issues, though some legal minded persons as well as the general public are yet to properly understand and appreciate the outcome of such decisions. The most recent and far reaching judicial pronouncement on election petition matters is the 2003 Presidential election petition. Besides the legal

principles it enunciated, there was never a case that match its records in terms of man hour, number of witnesses and evidence tendered. 355 witness were heard, 311 exhibits were tendered in the course of proceedings. The significance of this case informed this writer to review it and highlight some of the areas for reform on the electoral process, if the rule of law and democracy is to be worth while in Nigeria. The focus will now turn to the case of *Buhari v. Obasanjo*[18].

The petitioners, Muhammad Buhari & Anr filed an election petition against the respondents Chief Olusegun and 268 others before the Presidential Election Tribunal at the Court of Appeal seeking an order of the court to wit:

a) that the election is invalid for reasons of non-compliance with substantial sections of the Electoral Act 2002,
b) the election is invalid for reason of corrupt practices.
c) that at the time of the election the 1st respondent was not qualified to contest or in the alternative, that the 1st respondent was not validly elected by a majority of lawful votes cast in the election and did not receive 25% of votes cast in two-third of the States of the federation and the Federal Capital Territory, Abuja as required by the 1999 Constitution of the Federal Republic of Nigeria.

Issues for Determination and Decisions of the Tribunal

1) Whether the 1st respondent was qualified to contest the presidential election held on the 19th April. 2003.
   The court after reviewing the case of *Ojukwu v. Obasanjo* (supra) resolved the issue in favour of the respondent and concluded that even if there is a distinction between the present case and that of *Ojukwu v. Obasanjo* (supra) it is not more than the distinction between Lagos and Eko.
2) Whether there were substantial non-compliance with the provision of the Electoral Act capable of invalidating the election
   a) On violation of section 18 of the Electoral Act 2002 which made it mandatory for all Electoral Officers, Presiding Officers and Returning Officers to affirm and swear oath of loyalty and neutrality, it was held that for the section to be operative the petitioner must prove that the non-compliance without more is sufficient to invalidate the election.
   b) On non-compliance with section 67(3) of the Electoral Act which requires the Polling Agent to certify the election

18 (2005) All FWLR 1604 (Court of Appeal)

material from the office to the polling booth; the court held that the petitioners failed to prove the allegation of non-certification as pleaded.

c) On violation of s. 40(1) of the Electoral Act which only registered voter is legible to vote, the court held: while there is no doubt, that there is some evidence before this court of people who voted without voter's card there is no proof of the ascertainable number of votes recorded in violation of section 40(1) of the Electoral Act 2002 substantial enough to warrant a nullification of the election ".

d) On violation of section 17(2) and 19 of the Electoral Act which cumulatively prohibits appointment of a member of a political party or one who has openly expressed support for any candidate for the conduct of elections, the court held that in the absence of proof that such a person's conduct prejudiced the election i.e. proof of a person's membership of a party that participated at an election without more is not sufficient non-compliance to invalidate the election in issue.

On non-compliance that substantially affected the election, categorized as undue influence, corrupt practices, violence, arbitrary entry of figures in results sheets, and other prohibited election malpractices. The court had to determine whether there were established such corrupt practices capable of invalidating the election. Some of such affected States will be taken seriatim.

i) Cross Rivers State – Corrupt practices established in one polling station cannot justify the cancellation of the election in Akampa L.G.A. of 126 units.

ii) Akwa Ibom – That the cancellation of the election in the two LGAs and 3 wards is not substantial enough to cancel the whole election of Akwa Ibom State comprising 31 LGAS.

iii) Rivers State – One LGA, one ward, seven units across some LGAS were cancelled and considered insufficient to substantially affect the result of the whole State.

iv) Bayelsa State – The result is that the election in Southern Ijaw LGA, Ekeremor LGA and 5 units of Emakalakala in Ogbia LGA should be cancelled.

v) Taraba State 235 polling units were cancelled out of 1,911 polling units.

vi) Adamawa State – The evidence of petitioners were relevant as to the general pleadings about police and soldiers' intimidation and harassment of ANPP supporters. There was

no evidence in support of the specific allegations of malpractices pleaded.

i) Kaduna State – The evidence before us is that in most polling units, there were no presiding officers and election materials. Since the complaint is against the result in the form EC as prepared by the presiding officers, their non-joinder is fatal. Therefore it was struck out.

ii) Ogun State – The Presidential election of 19/4/02 Ogun State was not conducted in substantial conformity with Electoral Act 2002 and same is accordingly nullified.

Ebonyi and Benue States – That the only evidence of violence is not substantial to affect the election in the entire State.

Imo State – There is no evidence that can substantially affect the election in Imo State.

Enugu State – The irregularities affected only very few polling units in the LGA concerned, it cannot be said that such irregularities affected substantially the election in Enugu State.

) Kogi State – Irregularities in only few polling units is not substantial non-compliance capable of affecting the election in the State.

i) Edo State – There were no election in 9 units of the state and they were cancelled.

Electoral Violence

ırt of Appeal made the following findings as per Tabai J.[19]:

> *"Let me comment on the allegation of violence either by PDP thugs in the presence of military and police personnel or by the military and police personnel themselves. These are pleaded in paragraphs 14(c) and (g), 19 and20 of the petition. And I have already referred to some instances in this judgement. There were instances of some violence in all the 14 States which elections were questioned in this petition. I have already referred to the alleged incident where the Transition Chairman of Ahiazu/Mbaise LGA of Imo State, Mr. Chidi Ibe struck the head of Mr. Anthony Dimugwu with the burt of his gun and which sent him critically injured and unconscious. He regained his consciousness only after about two weeks in a hospital in Italy.*

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From Ebonyi, we heard the story of how one Anthony Nwudo, the Secretary to ANPP in Ezza North LGA of Ebonyi State was killed by PDP youths and his body taken to the residence of one Idoh to deter him from his bid for councillorship under the platform of the ANPP.

From Kogi State, we also heard the evidence of how youths wearing PDP 'T' shirts and fez caps went into the Olokoba polling station firing gunshots leaving in their trail 3 young persons dead..

And from Enugu State, we heard the case of how police Sgt. Anthony Abba, one of the six policemen attached to the ANPP gubernatorial candidate was killed at the premises of the ANPP Chairman of Igbo-Eze North LGA by some men amongst whom was Mike Onu, a PDP stalwart. Instances of such brutal killings either immediately before or on the 19/4/03 are numerous. These allegations were in most cases not controverted. The victims were almost invariably members or supporters of ANPP or some innocent passers-by. And the most tragic and disturbing aspect of the incidents is that these incidents either happened in the presence of policemen and soldiers or immediately reported to them. No arrests were made and no investigations. In the case of the alleged killing of police Sgt. Anthony Abba, 14 PDP thugs and the Transition Chairman of the LGA were arrested, but were released the following day. The scenario created from the various incidents was that some persons were, in the name of politics, licensed to destroy lives and properties. It is a serious dent to our claim to democracy and democratic ideals".

Final holding:- The Court held that, it would lead to absurdity and manifest injustice to nullify the election of the entire nation because of the nullification of the election of one State, some local government areas, wards and units. Such a devastating result could hardly have been contemplated by the framers of the Constitution.

Supreme Court Judgement (Buhari v. Obasanjo)[20]

The petitioners dissatisfied with the decision of the Court of Appeal, appealed to the Supreme Court. The respondents cross appealed against the decision of the Court of Appeal and sought the court to determine whether the appellate court was right in nullifying of the presidential

20 (2005)13 NWLR 1.

election in Ogun State having regard to the evidence adduced by the parties before the court.

The Supreme Court unanimously dismissed the appeal and allowed the cross appeal. The court stated that an order of cancellation of presidential election should not be made by a tribunal or court without clear, positive, credible and overwhelming evidence led to the effect that the entire election was totally flawed nationwide.

However, the Supreme Court justices, made far reaching observations on the Electoral Act and the way and manner the elections were conducted.

i) *On the nature of the Electoral Act, 2002* Per Belgore,

> *"The petition perhaps holds record for its number of respondents, witnesses, exhibits and length of time taken to hear and determine it. I think this is due mainly to the Electoral Act, 2002 riddled with absurdities and anomalities, and several inconsistencies making it the clumsiest Electoral Act ever in the history of this country. But that was the only statute to work with apart from aid from the Supreme law, the Constitution. The election tribunals were no doubt confronted with very difficult task, they had little room for abridging time or number of parties and witnesses"*[21].

ii) *On need for proper drafting of election statutes:-*

> *"We may have to evolve any methodology in framing future Electoral Acts to make trials very short otherwise we risk having the present state of affairs coming up all the time. This would of course necessitate an amendment of the Constitution. A situation where an election petition lasted more than 2 years for a 4 year Presidential term leaves very much to be desired. It is an affront to the rule of law seen from an activist and progressive viewpoint or mind"*[22].

iii) *On daunting task facing petitioner challenging election to the office of the President or Governor in Nigeria:-*

> *"The very big obstacle that anyone who seeks to have the election of the President or Governor upturned is the very large number of witnesses he must call due*

21 Ibid at p. 186 Per Belgore JSC.
22 Ibid, at p. 294 per pars. Acholonu JSC.

to the size of the respective constituency. In a country like our own, he may have to call about 250,000 – 300,000 witnesses. By the time the court would have heard from all of them with the way our present law is couched, the incumbent would have long finished and left his office and even if the petitioner finally wins, it will be an empty victory bereft of any substance"[23].

iv) On violence ridden nature of 2003 Presidential election:–

"Some of the things that happened in 2003 election can be likened to what Macduff the Thane of Cowdar said when he saw the bloodied murdered King Duncan in Macbeth by William E. Shakespear:
'O horror, horror, horror! Tongue not heart cannot conceive nor name Thee...
Confusion hath made his masterpiece
Most sacrilegious murder hath broke open
The Lord's anointed temple and stole thence
The life of the building"
And when Lenoox asked, "Mean you his Majesty"
Macduff answered
'Approach the chamber and destroy your sight
with a new Gorgon .. do not bid me
see, and then speak yourself'.
This country would not like to witness another Gorgon in an election"[24].

iv) On electoral related violence by the Army and Police:–

"While though the main appeal has failed due to what I ascribe as to the impossibility of satisfactorily proving nationwide spread of ineptitude, violence, intimidation and other acts of terriorization as well as other barefaced acts that literally chill the bones and would as William Shakespeare said in Macbeth ("make the sitteth heart knock at my ribs against the use of nature") some of the revelations, that is where the few evidence was led and proved are blood cuddling. That in this day and age in this country that has been independent for 45 years we can still witness horrendous acts by security officers who ought to dutifully ensure peace and tranquility in the election process suddenly turning themselves into agents of destruction, and introduced mayhem to what ordinarily would have been a civilized way of

23 Ibid at p. 186 Per Belgore JSC.
24 Ibid at p. 301 Per pars. Acholonu JSC

exercising franchise by the people who are sovereign, is regrettable. I ascribe the nefarious activities of thugs and the few security officers and party men to lack of understanding of the philosophy and ethics behind election in a democratic state and lack of understanding of the dynamics of election processes"[25].

The above excerpts from the Supreme Court judgements speaks for itself, that the 2003 elections in Nigeria was marred by violence, and the electoral law was inelegantly drafted to meet up with the challenge of serving the interest of justice to the petitioner as well as the millions of voters. Probably, this is a pointer to the difficulty of understanding the type of justice received by the petitioners in the election petitions.

Election petitions – Need for Rethinking

The case of *Buhari v. Obasanjo* has revealed the shortcomings of the Electoral Act and some legal principles used in settling election petition disputes. These shortcomings include but are not limited to the following:

i) *The Conduct of INEC*

When the petitioners sought the court's intervention to subpoena INEC to produce the result of the presidential election, INEC refused to produce the results as requested. The court's opinion is that where a party fails to produce a document required in a Subpoena, the party making the demand would be entitled to lead secondary evidence of the documents so demanded. The question here is where and how would the petitioner be able to get INEC's result to use in proving its case? Since the court would not compel INEC to produce the same. Without INEC giving the petitioner the copy of the result in its custody, it certainly makes it difficult if not impossible for the petitioner to prove the case against the electoral body and this will have negative effect on the validity and acceptability of the whole electoral process. INEC as in the instant case seems to be clothed with legal cover to perpetrate all manner of sharp practices. The result of such attitude was graphically captured by Ray Ekpu. He said,

"In-so-far-as the Supreme Court, or any other court does not compel FEDECO officials to appear in court and to tender documents relating to the elections, and

25 Ibid at pp. 299-300.

in-so-far-as FEDECO officials can offer all sorts of reason for their inability to tender such documents if invited it will be difficult, in fact, to prove election fraud in Nigeria". The only way to win elections in future will be for you to get FEDECO to declare you the winner, and then put the FEDECO officials in one underground tunnel in your village so they do not appear in court and you take food to them until the court battle is over ....[26]".

The Electoral Agency in Nigeria has become notorious for subverting the electoral process. The Court of Appeal has this pronouncement to make on the attitude of INEC:

> *"INEC has not only a pivotal, but also a delicate role to play in ensuring a free and fair election in this country - - - it does not speak well of INEC, in fact it is deplorable, that it can defend an election it conducted at the lower tribunal and without shame turn up at this court to say 'well since the lower tribunal held that the election we conducted was marred by corrupt practices and non-compliance with the provisions of the Election Act, we want to nullify it and allow us conduct another one"*[27]. *(Emphasis supplied).*

It is rather sad for INEC to take responsibility and admit woeful failure, seek for cancellation of the elections it conducted and sought to be given an opportunity for messing up the election once again in the name of conducting new one. The court did not mince words and coming to the following conclusion:

> *"How can we give them another chance to do what they could not do before? There is a common saying – a house divided against itself cannot stand. How can we in clear conscience entrust INEC with another opportunity to conduct election in the same Anambra State, where they could not keep their own officials in check, not to mention ordinary voters who will be expected to participate in the election ---- it is unfortunate that because of the failure to conduct a free and fair election on the 19th of April, 2003, Dr. Chris Ngige who has been running Anambra State as Governor for the past three years will have to be removed at this 99th hour, but out of nothing, nothing can arise"*[28].

Credibility of any election is determined by the conduct of the electoral body charged with the duty and responsibility of conducting election and

26 Ngige v. Obi (2006) All FWLR p. 1175.
27 Ibid, p. 1175
28 Ibid, p. 1175

of course electoral law itself which ultimately the courts would interpret. The Electoral Act and Evidence Act should be amended to enable the courts to compel INEC to produce the results of an election it conducted. This is a matter of responsibility vested in INEC in the interest of justice, the public, the parties and the electoral process, failure to do so will make the INEC officials liable for contempt of court and on conviction to be put behind bars until they comply with the court order, and thereafter forfeit their status.

Standard of Proof in Election Petition

It is a settled principle of law where in an election petition, a petitioner alleges falsification, manipulation or alteration of election result, or acts of violence during election which are criminal offences must be proved beyond reasonable doubt whenever they are made in an election petition.

Political observes and indeed this writer find this position of the law rather strange in the sense that the petitioner's allegations are intended to prove that due to the manipulation or alteration of the result or acts of violence during an election, the results as it stands are not authentic and therefore not representing the true votes cast at such election centres. The petitioner prays that such result should be set aside, annulled and declared null and void. The standard of proof, therefore should not be treated as beyond reasonable doubt for the following reasons:

i) Election matters are purely civil in nature
ii) The petitioner does not seek the court to punish the respondent by way of indictment, imprisonments or in any other manner.
iii) The annulment of election on the ground that the votes cast were altered in favour of the respondent probably by INEC officials will not prejudice a criminal action against such INEC official for any criminal offence committed during an election.

On the whole, a political observer had this to say:

> *Never in the whole course of my professional experience have I come across a civil case when a plaintiff or applicant in a non-criminal matter has been required to prove his case beyond reasonable doubt. That burden of proof has always been placed on the shoulders of prosecutors in purely criminal matters"*[29].

One would advocate that the electoral law or the legal principle requiring a petitioner to prove his case beyond reasonable doubt in a purely civil

29 Chief Adeniran Ogunsanya, quoted in National Concord Newspaper of Saturday, December 7, 1983, p. 1.

case to be amended. It should be on the balance of probability like in all civil matters and not beyond reasonable doubt as is now the case.

Joinder of Parties

Section 144(2) of the Electoral Act requires the petitioner to join election officers and other persons whose conduct of the election and during the election were complained of. The non-joinder of such persons in the petition is fatal to the election petitioner. Here again is a serious bottleneck designed by the Electoral Act and regrettably upheld by the courts for the perpetration of electoral fraud. The nature of elections in Nigeria as has been documented by the courts is that the electoral processes are not violent free and in some instances, members of the police force, party officials and thugs are known to be the perpetrators of such violence. Where and how would the civilian and indeed the petitioner who more often than not is not in the venue of all the election units be able to know the identity of the perpetrators. To request the petitioner to join such persons is to defeat his case even before the election petition commences, because such feat is impossible to achieve. This, too should be the responsibility of the police, INEC officials, and the Office of Attorney General to prosecute such offenders and certainly not the petitioner and not beyond reasonable doubt as is now the case.

It is submitted, that the joining of Corporate INEC on whose shoulder the conduct of election lies should suffice to cover the activities of its agents like electoral officer, a presiding officer, a returning officer or any other person who took part in the conduct of the election. To do so, will be in line with other civil law cases like master and servant, that is, INEC should be held vicariously liable.

Period of Adjudication

Experience from the 2003 election has shown that, there were so many pending election petition cases against the so called winners at the time they were sworn in. Certainly, a situation where persons who were sworn in at the time when they have pending election suits is a serious issue of concern, capable of destabilizing the polity. For instance the presidential election was contested on the 19th day of April 2003 and final judgement in the case was given on Friday 1st July 2005 that is more than two years from the date of the election, in a four year term is indeed an issue for concern in Nigeria's democracy.

Similarly in the Enugu State Gubernatorial elections the judgement was given on Wednesday 15th March 2006 for a mandate that was to expire 29

May 2007 leaves much to be desired. One may still not be surprised if at the time of writing this article there are still pending election petitions before the election petition tribunals.

The reform in this respect should be taken from the practice of the United States whereby all election petitions must be concluded before the winners of election are sworn in[30].

Appointment of Politicians as INEC Officials

Some State Electoral Commissioners were proven to be PDP card carrying members which is in contravention of section 17(2) and 17 of the Electoral Act, 2002 but the Supreme Court held that the inability of the petitioner to prove bias in the instant case was fatal to their case. This finding of fact and decision is somewhat shocking to say the least, because, it is not in doubt that PDP is the ruling party at the federal level and the appointment of such party carrying members at the National, State and local government level is reprehensible. It is undoubtedly suggestive of bias or at most likelihood of bias. If there was no intention of corrupting the electoral process why should the PDP led government specifically violate the electoral law in the appointment of key INEC officials. It seems from the on set, the intention of the government in power was not to have a free, fair and just election.

One is of the opinion that the persons to be appointed as key officials should be neutral election officials and unbias umpires, to this end, they should not be partisan, or sympathizers and above all party card bearing members. The court ought at minimum frown at this kind of practice rather than turn its face to the other side.

The Electoral Act

The Electoral Act was found to be riddled with absurdities and anomalies, and several inconsistencies making it the clumsiest Electoral Act ever in the history of the country which made the tribunal task very difficult. One of such provisions, is section 146(1) of the Electoral Act, 2006 which states that an election shall not be invalidated by reason of non-compliance with the provision of the Act if it appears that the election was conducted substantially in accordance with the principles of the Act and that non-compliance did not affect substantially the result of the election. Although, the reason behind inclusion of this section it is agreed was to ensure that the court does not nullify an election on flimsy grounds, yet it makes the court to be over cautious in its decision and

30 See Bush v. Gore 531 US 2000.

prompt electoral malpractices which are found by almost all the election petition tribunals but except in very few cases the court have been reluctant to annul election results taking section 146(1) as a cover.

The Nature of the Election Petition Tribunals

Elsewhere in this paper, reasons for establishment of tribunals and election petition tribunals were discussed. However, the composition of the election petition tribunal consisting of serving judicial officers and the use of all the known legal principles adopting the legal procedures as are done in normal courts seems to throw the whole adjudicatory process into confusion. In this regard one wonders why the normal courts were not vested with the jurisdiction to try the electoral petition instead of the mere change of name from a court to a election petition tribunal, an old wine in new bottle of some sort. A hard look at the election petition tribunals. An election petition tribunal should be reflective of the worthiness of a tribunal, for instance, it should be flexible in the conduct of proceeding as opposed to strict legal approach and to maintain the need for speedy and cheap justice.

Conclusion

Obviously, this article has been able to establish that the decisions of the election tribunal(s) courts tend to show that the facts as discussed and evaluated the person who should have won the election are the losers and vice versa. The courts are helpless because of the antiquated laws and the rules of practice and procedure under which they operate. The Supreme Court after reviewing the decision of the presidential election petition tribunal made it categorically clear that the Electoral Act was riddled with absurdities and anomalies, and several inconsistencies making it the clumsiest in the history of Nigeria. In a situation where a petitioner in a presidential election petition has to produce between 250,000 and 300,000 thousand witnesses if he is to succeed and even if such were the case before judgement will be passed the respondent would have finished the tenure prescribed for such elective position thereby leaving the petitioner without the fruit of his victory. One might ask, what kind of justice does our court deliver? Are they court of justice or court of injustice? Absurd as the Electoral Act might be the courts are not supposed to be totally blinded by the absurd statute so as to end up with a decision reflective of the same. The old adage of public policy being an unruly horse whence you get astride it, you never know where it will carry you is now not tenable since it is submitted, with a good rider, the unruly horse should be brought under control. Again, whenever the law becomes absurd, and its application would lead to injustice, the court ought to resort to

application of the principle of equity for it is submitted that equity follows the law.

In the alternative, if the judiciary is not ready to interpret, the law in such a manner to avoid manifests injustice in election petition cases, the legislature should be able to amend the electoral law so as to remove the provisions that are known to be the obstacle in the road to justice.

Besides, the electoral law, election petition tribunal should be given the function of a tribunal as earlier highlighted. The present situation of appointing serving judicial officers to serve as members of election petition tribunals and restricted to the application of the rules and regulations applied in the regular courts of law is a contributory factor to the kind of difficulty of understanding judgements of the tribunals and courts. Apparently, there seem to be no difference between an election petition tribunal and a court of law, the two ought to have been distinguished because they are certainly not the same.