**IN THE OSUN STATE GOVERNORSHIP ELECTION PETITION TRIBUNAL**

**HOLDEN AT ABUJA**

**ON FRIDAY THE 22ND DAY OF MARCH, 2019**

**BEFORE THEIR LORDSHIPS:**

**HON. JUSTICE MUHAMMAD I. SIRAJO - CHAIRMAN**

**HON. JUSTICE PETER C. OBIORAH - MEMBER I**

**HON. JUSTICE ADEGBOYE A. GBOLAGUNTE - MEMBER II**

**PETITION NO. EPT/OS/GOV/1/2018**

**BETWEEN:**

1. SENATOR ADEMOLA NURUDEEN ADELEKE

2. PEOPLES DEMOCRATIC PARTY (PDP) PETITIONERS

AND

1. INDEPENDENT NATIONAL ELECTORAL

COMMISSION (INEC)

2. ADEGBOYEGA ISIAKA OYETOLA RESPONDENTS

3. ALL PROGRESSIVES CONGRESS

**DISSENTING JUDGMENT OF JUSTICE MUHAMMAD IBRAHIM SIRAJO, CHAIRMAN OF THE TRIBUNAL.**

I have the priviledge of reading in draft the majority Judgment of the Tribunal just delivered by my learned brother, Justice Peter C. Obiorah, Member 1. Even though I participated actively and contributed immensely by personally writing some portions of the Judgment just delivered, I disagree with the decisions and conclusions reached by my learned brothers with regards to the allegation of non-compliance with the provisions of the Electoral Act, particularly, the allegation of non-recording of columns of the result sheets designed to document accreditation and ballot accounting. I also disagree with the majority decision and conclusion on the lawfulness or validity of the re-run election of 27/09/2018. Other than these two substantive issues, I adopt the entire review of the pleadings and the evidence, the reserved rulings on the 5 applications that has just been delivered, the decisions on all the preliminary issues raised in the final addresses of learned counsel for the parties and all other substantive issues in this petition as mine, save the two issues highlighted above. I now give my reasons for dissenting on the two issues.

The petitioners challenged the cancellation of election in 7 polling units across four Local Government Areas, namely; Orolu, Ife North, Ife South, and Osogbo. The petitioners pleaded in paragraph 21B of the petition that the Returning Officer did not possess the legal right to cancel the result of the 7 polling units. They proceeded to plead at paragraph 24 that it was the 1st respondent that cancelled the result of the election in the 7 polling units, namely; units 1 and 4 in ward 8, unit 3 in ward 9 all of Orolu Local Government Area; unit 2 ward 10, Ife North Local Government Area; unit 12 ward 7, unit 10 ward 8 in Ife South Local Government Area and unit 17 ward 5 in Osogbo Local Government Area for the following reasons:

1. Disruption in the aforementioned units in Orolu Local Government Area
2. Malfunction of card readers in the aforementioned units in Ife South Local Government Area
3. Over-voting in the aforementioned unit in Ife North Local Government Area
4. No voting took place in the aforementioned unit in Osogbo Local Government Area.

Learned senior counsel for the petitioners submitted in his final address that the Returning Officer who cancelled the election in 7 polling units and ordered a re-run election in the affected units does not have the power to do what he did.

In response, the 1st respondent pleaded that the Returning Officer appointed by her has the right under the relevant Laws and manuals to cancel any election and fix another date for a supplementary election. She pleaded further that where the Returning Officer discovers during the collation of the Governorship results that the margin of win between the two leading candidates is not in excess of the total number of the registered voters in the polling units where elections were cancelled or not held, the Returning Officer shall decline to make a return until another poll has taken place in the affected polling units. However, in his final written address on behalf of the 1st respondent, Adesina A. Agbede, Esq, did not address the Court on this issue of law.

Learned senior counsel for the 2nd respondent submitted on the authority of **Faleke vs. INEC [2016] 18 NWLR (Pt. 1543) 61** that the 1st respondent could rely and make use of its Manual and Guidelines to order a re-run election.

In arguing issue four formulated by him, learned senior counsel for the 3rd respondent justified the Guidelines and Manuals which gave power to the Returning Officer not to make a return where the margin of win between the two leading candidates is less than the total number of registered voters in the polling units where elections were cancelled or did not take place. He submitted that the power of the 1st respondent to make the Guidelines and Manual is donated to it by the Electoral Act. He submitted that the decision of the 1st respondent to declare the election of 22/09/2018 inconclusive and conducting a supplementary election was in order.

It is not in dispute between the parties in this petition that at the conclusion of the Governorship election in Osun State on 22/09/2018, the 1st respondent declared the election inconclusive and ordered a re-run election in the 7 polling units listed above. The re-run election was conducted on 27/09/2018. The petitioners participated in the said re-run election.

The question that arises is whether the Returning Officer has the power to order a re-run. By virtue of the INEC Guidelines, paragraph 44(n) thereof, and Manuals for Election Officials, 2018, made pursuant to the powers donated to the 1st respondent by the Electoral Act, the Returning Officer has the vires to order a re-run election where the margin of win between the two leading candidates is less than the total number of registered voters where elections were cancelled or did not hold. In ***Faleke vs. INEC (2016)9 SCNJ 1 @ 89,*** the Supreme Court held:

*“The effect of all that I have said above is that the 1st respondent was correct when it declared the election of 21/11/2015 inconclusive on the ground that the margin of win between the two front-runners at the election was less than the total number of registered voters in the 91 affected polling units where elections were cancelled.”*

With regards to the polling unit where election did not hold, the power of the Returning Officer to order a re-run need no further scrutiny. In the instant Petition, even though PW74 testified that election actually took place in unit 017 Ward 5, Osogbo Local Government, he failed to tender the result sheet for the said polling unit. The only way a party will prove that election took place and was concluded is by tendering the original counterpart of the result sheet given to his agent at the polling unit. Neither the pink copy, nor the certified true copy of the result sheet for Unit 017 Ward 5, Osogbo Local Government was produced and tendered by the petitioners. I therefore hold that the holding of election in that polling unit on 22/09/2018 has not been proved. By analogy, if there was no election in unit 17 ward 5, Osogbo Local Government Area there would be no result to cancel. With respect to the remaining 6 polling units in Ife North, Ife South and Orolu Local Governments, the questions begging for answers are: Was there election in those polling units and was any result cancelled at all? If results were cancelled, at what point in the election process were the results cancelled? Who cancelled the results of the election? Are the cancelled results before the Tribunal? Were the results of the affected polling units declared by the respective Presiding Officers of the units before they were cancelled? Finally, did the announcement by INEC that the election was inconclusive amounts to cancellation of election if polls did not hold at all? These questions can only be answered by evidence. It is one thing for the petitioners to plead that the Returning Officer cancelled the election, it is entirely another thing to prove the averments in the pleading by credible evidence, especially in view of the fact that the reliefs claimed by the petitioners are declaratory. Even admission by the respondents will not suffice.

The petitioners pleaded at paragraph 101 of the petition that they will rely on the certified true copy of the 1st respondent’s press release on the Governorship election issued on 23/09/2018. They however failed to produce and tender it. The petitioners did not tender a single result sheet, not even the pink copies that were given to party agents to show that election took place in the 7 polling units on 22/09/2018 before the results were cancelled. The petitioners did not call as witnesses, its polling unit agents assigned to the 7 polling units to testify as to the holding of election or lack of it in the affected polling units. The petitioners failed to lead evidence to show if election in the 7 polling units was cancelled at all and by who. These lacunae herein itemized cannot be filled by pleadings or counsel address, but by hard facts emanating from the witness box. Suppositions and conjectures do not have place in our law of evidence.

I am not unmindful of the extant position of the law as regards the power of Presiding Officers to cancel polling unit results. In ***Ikpeazu vs. Otti [2016] LPELR – 40055****,* Galadima, JSC, stated the law at page 31 of the report thus:

*“Beyond arguments of respective counsel on this issue, the law has been fairly settled on whose responsibility it is to cancel an election result. The two lower courts are ad idem on this. It cannot be disputed either that the appellant and the respondents herein were in agreement as well at the Trial Tribunal that the State returning Officer had no power whatsoever to cancel polling results.”*

The Supreme Court relied on its earlier decision in ***Doma vs. INEC [2012] NWLR (Pt. 628) 813 at 833****.* I am bound by these decisions on the doctrine of stare decisis. However, we should not lose sight of the fact that in those two cases, particularly the case of Doma vs. INEC (supra), the election was conducted and result declared at the polling unit before the Returning Officer cancelled it on account of over-voting. What is more, the form EC8A in question was tendered before the Tribunal. In the instant petition, there is no evidence as to whether election took place or not, other than the pleading that in one of the polling units there was over-voting. Even at that, there is no evidence as to who cancelled the result of the polling unit where over-voting occurs. If result was truly declared at the polling unit, why were the petitioners shy of tendering their own copy of the result sheet and speaking to it through a witness? I say without equivocation that there is no shred of evidence to prove that it was the Returning Officer that cancelled the result of the affected polling units, if there was cancellation at all. The issue of lack of vires on the part of the Returning Officer to cancel election result does not therefore arise due to want of proof.

Earlier on, I held that by virtue of paragraph 44(n) of the INEC Guidelines, the Returning Officer has the power to declare an election inconclusive and order a supplementary election. It is in the exercise of that power that the Governorship election in Osun State was declared inconclusive and a re-run election ordered. In the final analysis, I hold that the re-run election conducted on 27/09/2018 is valid. I also hold that the cases of ***Doma vs. INEC (supra) and Ikpeazu vs. Otti (supra),*** for the reasons stated above, do not apply to the instant petition as the petitioners have failed to show that there was cancellation of election and who did the cancellation. Merely declaring an election inconclusive does not necessarily imply that an election was cancelled.

On the allegation of non-recording of columns in the result sheets designed to document accreditation and ballot accounting, the Petitioners pleaded in paragraphs 43 – 78 of the petition that the non-recording of items in the result sheets was made deliberately to shield the wrongful entries made as to the votes of the parties and the result of accreditation. In their quest to prove this allegation, the Petitioners tendered from the Bar certified true copies of Forms EC8A and called its agents in the affected polling units who tendered the pink copies of the Form EC8A given to them at their respective polling units. The Petitioners’ polling agents who gave direct evidence concerning non-recording of columns for accreditation and ballot accounting in the Forms EC8A are: PW35 – PW42, PW44 – PW50, PW54 and PW56 – PW63, making a total of 24 direct witnesses. The pink copy of the result for unit 3 ward 3, Iwo Local Government, exhibit P269A, tendered by PW42 which is one of the exhibits tendered to prove non-recording of columns for accreditation and ballot accounting is not worthy of consideration by me in that the witness who tendered it, Salimonu Monsurat Ololade, who described herself as a male in the written statement on oath which she adopted as her evidence, turned out to be a female. I took this position because, even though the witness corrected her written deposition with respect to which political party she represented as agent and the unit code of the polling unit where she served, she did not amend her statement on oath to say that she is a female and not a male. Most importantly, the columns for accreditation and ballot accounting were duly and properly filled in exhibit P269A, the pink copy of form EC8A tendered by her. No wonder, none of the learned counsel for the respondents cross-examined her. In the result, I hereby discountenance her evidence for not proving the non-compliance alleged in her polling unit. I am now left with 23 polling unit witnesses under this specie of non-compliance.

The general testimony of PW74 and the statistical analysis of PW77 also touches on this allegation as well.

As with the testimonies of the witnesses who testified with respect to the allegation of over-voting, those 23 witnesses also used a common refrain in all their written statements on oath which they adopted as their respective evidence before the Tribunal.

The common refrain in all their testimonies is:

*“That the 1st Respondent (or Electoral officer) failed to record the columns of the result sheets designed to document the accreditation and ballot accounting at …”*

The particulars of the polling units are then supplied. Some of the witnesses also added in their statements on oath that there were cases of non-compliance in their units. However, none of the witnesses bother to explain in their evidence in-chief the nature of the non-compliance and how it substantially affected the result of the election.

Answering questions under cross-examination, all the witness admitted that there was accreditation in their respective polling units before the commencement of voting, and those among them that voted in the election, like PW35, PW37, PW38, PW40, PW41, PW44 – PW48, PW54, PW56 – PW63 were all duly accredited before they cast their votes. All of these witnesses said they have no problem with the votes scored by the candidates, that their only problem is that the 1st Respondent did not fill the columns for accreditation and ballot accounting in the Forms EC8A given to them at the polling stations. These pieces of evidence, given under cross-examination, contradicted the averments of the Petitioners in parts of paragraphs 45 through to 76 of their petition wherein the petitioners pleaded that the omissions were deliberately made to hide wrongful entries as to votes and accreditation. These witnesses testified that the white copies, i.e., the certified true copies of the results which contained entries of accreditation and ballot accounting, were doctored. In particular, PW36 stated under cross-examination that his complaint is not about the non-workability of the card reader or about proper accreditation or non-counting and announcement of votes, but about improper recording of the entries in the result sheet. PW39 said his complaint is for the result in his polling unit 8 ward 6, Iwo Local Government where ADP won, to be cancelled for improper recording of columns for accreditation and ballot accounting. All these witnesses also agreed that they signed on the white copies of the results for their polling units and that they were given pink carbonized copies.

Apart from identifying some of the forms EC8A, PW74, the State collation agent of the Petitioners, did not speak to any of the 23 exhibits under consideration as to tie them to the alleged non- recording of columns for accreditation and ballot accounting. His evidence did not add any value to the petitioners’ case in respect of this very allegation. Besides this, not being at any of the polling units on the date of election and having no input in the making of the Forms EC8A’s tendered from the Bar or by the polling agents and by him, PW74 merely gave hearsay evidence with respect to this specie of result sheets. Under the provisions of the Evidence Act, the said testimony is inadmissible.

In his final address, Adesina Agbede of counsel for the 1st Respondent submitted that in order to succeed on allegation of non-compliance with the provisions of the Electoral Act, the Petitioners must prove not only that there was non-compliance, but that the non-compliance substantially affected the result of the election. He submitted that the Petitioners have failed to prove non-compliance and how it substantially affected the result of the election. He contended that most of the witnesses called relied only on Form EC8A in proof of the allegation without the use of voters’ registers and card reader. It is the further submission of Mr. Agbede that the Petitioners have failed to show the number of lawful votes credited to the Respondents as a result of the irregularity and non-compliance. He urged the Tribunal to hold that the allegation has not been substantiated. Earlier, learned counsel has cited and relied on ***Buhari vs. Obasanjo (2015) All FWLR (Pt. 271) 1; Nyesom vs. Peterside (supra); Buhari vs. INEC (2008) 18 NWLR (Pt. 1120) 246 and Okereke vs. Umahi (2016) 11 NWLR (Pt. 1524) 438,*** among others.

In his own address on the issue, Chief Wole Olanipekun, SAN, submitted on behalf of the 2nd Respondent with respect to relief (X) claimed by the Petitioners that no shred of evidence has been led by the Petitioners to even suggest that the 2nd Respondent either alone or in conjunction with any other Respondent, manipulated, altered or amended the card reader accreditation data/accreditation on Forms EC8A at any unit or anywhere at all as it is not the duty of the 2nd Respondent to fill Form EC8As. On the merit of the allegation of failure to record the columns of the result sheets designed to document the accreditation and ballot accounting, learned senior counsel submitted that result sheets are different from the results of the election already declared, which is what the Tribunal can set aside and not result sheets. He maintained that the result of elections are the scores of the parties and nothing more. After making reference to the provision of section 139 of the Electoral Act, Chief Olanipekun, SAN, submitted that the section is clear to the effect that a complaint of non-compliance must not only be substantial, it must also substantially affect the result of the election. He pointed to the strict nature of the requirement which does not allow for any form of variation, through the use of the word “shall” in the statute. The Tribunal is referred to ***Buhari vs. INEC (supra) and CPC vs. INEC*** on the burden of proof in an action seeking declaratory reliefs such as the instant petition. He drew the attention of the Tribunal to the peremptory language of section 139 of the Electoral Act and urged the Tribunal to apply it and not to interprete it since the language used therein is clear. He referred the Tribunal to ***Akeredolu vs. Mimiko (2014) 1 NWLR (Pt. 1388) 402 at 476 – 477; Haruna vs. Modibbo (supra) and Oke vs. Mimiko No.2 (2014) 1 NWLR (Pt. 1388) 332 at 366 – 367.***

Learned senior counsel submitted that it is not the case of the Petitioners that the alleged failure to record the concerned columns of Form EC8A affected the result of the parties or the credible accreditation, voting, counting of votes and declaration of results for the respective political units. He also submitted that it is also not the case of the Petitioners that election was marred by corrupt practices, or violence or any electoral malpractice, as the Petitioners’ witnesses were consensual in stating that they were not complaining about the scores of the parties or about accreditation or counting and announcement of result. Learned senior counsel argued that with this admission the case of the Petitioners is bound to fail and collapse.

On the Forms EC8A tendered before the Court, Chief Olanipekun, SAN, agreed that the clear deduction to be made is that those pink copies could not be as clear and legible as the white certified true copies of the original because of their carbonized nature. He submitted further that the alleged failure to “record the columns of the result sheets designed to document the accreditation and ballot accounting”, simpliciter, is nowhere stipulated as a basis for cancellation of results in a polling unit, and that for the allegation to be impactful, the Petitioners should have gone a step further to plead and give evidence on how the alleged non-compliance substantially affected the conduct of the election.

On behalf of the 3rd Respondent, Chief Akin Olujinmi, SAN, submitted that the allegation of non-compliance was not made out by the Petitioners in that no non-compliance with the law or regulation of election was established, not to talk about its substantiality as to substantially affect the result of the election. His other submissions are substantially the same with the arguments of learned senior counsel for the 2nd Respondent which I reviewed above. I do not consider it necessary to embark on repetition.

In his written address and reply to the 2nd Respondent’s address, learned senior counsel for the Petitioners submitted that perusal of the pink copies of the result sheets will show entries which were not shown at all in the original copies and that this cannot be explained by illegibility of carbonized copies. He further submitted that in a large extent, columns left blank in pink copies were filled in the same original versions even when other entries in the same result sheets disclosed same figures in both versions of the result sheets. He urged the Tribunal not to be swayed in the manner the 2nd Respondent had done by undue reliance to non-applicable Supreme Court decisions, but to have due regard to the evidence led. The Petitioners tabulated at the conclusion of their address the total number of votes in polling units where there is non-recording of accreditation on Forms EC8A as affecting 5,072 votes of the APC and 3,013 votes of the PDP, among other votes affected by irregularities.

In the 2nd Respondent’s reply on points of law, learned senior counsel submitted that the Petitioners could not have taken any lead in the election having admitted that they benefitted from the irregularities, relying on the maxim “he who comes to equity must come with clean hands”. He further argued on the authorities of ***Onuigwe vs. Emelumba (2008) 9 NWLR (Pt. 1092) 371 at 411 – 412 and Opia vs. Ibru (1992) 3 NWLR (Pt. 231) 658 at 686 – 687,*** that a Petitioner cannot ask for the voiding of any election in part, and urging to be declared winner in the same election. It is further submitted for the 2nd Respondent that the admission of the Petitioners’ counsel that the case of the Petitioners is based only on Form EC8A simpliciter; only stopped short of expressly admitting that the allegations of over-voting, improper ballot accounting and non-accreditation have not been proved.

On behalf of the 3rd Respondent, Olumide Olujinmi Esq, submitted in his reply on points of law that the table unilaterally drawn up by the Petitioners in their address at pages 23 to 33 at paragraphs 7.07 to 7.15 should be discountenanced because they were not made part of the pleadings. He referred, on this submission, to ***Andrew vs. INEC (2018) 9 NWLR (Pt. 1625) 399 at 565 C.*** He also urged the Tribunal to hold that the Petitioners have accepted/conceded the 3rd Respondent’s submissions in paragraphs 2.84 to 2.88 and 2.89 to 2.98, having failed to reply to same.

The Petitioners pleaded this specie of non-compliance in 50 polling units across 12 Local Government Areas of Osogbo with 19 polling units as per paragraph 46 of the petition, Olorunda with 4 polling units as per paragraph 49, Iwo with 11 polling units as per paragraph 52, Ilesa East with 2 polling units as per paragraph 56, Ife South, Egbedore and Ayedaade with 3 polling units each as per paragraphs 60, 68 and 74 of the petition respectively. Others are Ife North, Ejigbo, Boripe, Ayedire and Atakumosa East with 1 polling unit each as per paragraphs 62, 66, 70, 72 and 77 respectively.

As stated earlier, out of those pleaded polling units, the Petitioners led evidence in only 23 polling units. The implication is that the allegation of failure by the 1st Respondent to record the columns of the result sheets designed to document the accreditation and ballot accounting is abandoned by the Petitioners in 27 of the 50 polling units pleaded. The law is settled that pleadings no matter how well couched do not constitute evidence. Facts pleaded for which no evidence is led in support is deemed abandoned. See ***Mamman vs. Kofar-Bai (2015) LPELR – 25966 (CA); Akande vs. Adisa (2012) LPELR – 7807 (SC).***

It should be noted that this particular allegation is strictly made against the 1st Respondent, the Umpire that conducted the Osun State Governorship election. It is the case of the Petitioners in their pleading that the election in the polling units where there is failure to record columns of the result sheets designed to document accreditation and ballot accounting, shall be cancelled while the votes scored by the parties in those polling units shall be deducted from the scores of the Petitioners and the 2nd and 3rd Respondents. After this is done, the Tribunal shall proceed to declare the 1st petitioner as winner of the election. In so pleading, the petitioners overlooked and circumvented the provisions of section 140 (2) of the Electoral Acton what the Tribunal shall do in proven cases of non-compliance. I shall return to this *anon*.

As stated earlier, in the course of cross-examination of all the 23 witnesses called by the Petitioners under this allegation, all of them testified that there was accreditation in their respective polling units. They also confirmed that after the election, votes were sorted out, counted and the scores announced before they are entered into the result sheets. All those 23 witnesses chorused the fact that they have no complaint against the votes scored by the parties in their respective polling units. It is therefore established before me, through the testimonies of the petitioners’ witnesses that there was accreditation in the polling units manned by these 23 witnesses who served as polling agents for the Petitioners. It is also established through the same witnesses that votes credited to the Petitioners and the 2nd& 3rd Respondents were the actual votes scored by them in the affected polling units. Therefore, there is no challenge in respect of accreditation or votes scored by the petitioners and the 2nd and 3rd respondents in these 23 polling units. It has also not been shown or demonstrated through the Forms EC8A and the voters’ registers that there was over-voting in those 23 polling units. The only grouse the Petitioners had with the results of the election in those polling units is that the data for accreditation and ballot papers have not been entered in the Forms EC8A, and as a result of this omission they want the result of the affected polling units cancelled, even though the witnesses called by them said they have no problem with the votes credited to the parties in the result sheets. However, the question as to how the omission by the agents of the 1st Respondent to record some data in the columns of the result sheets, which is a question of fact, affected substantially the result of the election, is also not stated in the testimonies of all the 23 witnesses. Furthermore, none of these 23 witnesses testified that the omission to record some entries in the result sheets was deliberately made to shield the wrongful entries as to the votes of the parties and the result of accreditation, as pleaded by the petitioners. It is settled law that pleading cannot supplant evidence. Witnesses must testify on facts pleaded in order to crystalize such facts in to legal evidence capable of consideration by a Court or Tribunal.

It should be borne in mind that this is clearly not a case of non-accreditation, in that all the witnesses agreed that accreditation took place in their respective polling units. It is the law that where there is no accreditation in an election, the resultant votes scored by the parties are unlawful votes as the election itself is null and void. In ***PDP vs. Usman (2015) LPELR – 26032 (CA),*** the Court of Appeal relying on ***Fayemi vs. Oni (2009) All FWLR (Pt. 493) 1254,*** held that:

*“It is the law that a ballot without accreditation is void as no election can lawfully proceed without accreditation. Where there is no accreditation, it goes to the root of the election.”*

The above stated consequence of non-accreditation cannot be imported and applied to the 23 polling unit results under consideration in view of the abundant evidence of accreditation in all the 23 polling units, through the affirmative admission of the petitioners’ witnesses.

What then is the consequence of the 1st Respondent’s failure to record the columns for accreditation and ballot accounting in the result sheets for those 23 polling units?

Section 139(1) of the Electoral Act, 2010 (as amended) provides:

*“An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this act if it appears to the Election Tribunal/or Court that the election was conducted substantially in accordance with the principle of this Act and that the non-compliance did not affect substantially the result of the election.”*

An election denotes a process of choosing by popular votes a candidate for political office in a democratic system of government. See ***Marwa vs. Nyako (2012) LPELR – 7837 (SC).*** The processes involved in an election in a polling unit starts with accreditation, casting of votes, sorting and counting of ballot papers, announcement of scores for political parties, recording the scores in the appropriate form together with the figures of accredited voters and account of ballot papers.

It is clear from the above provision that it is not every non-compliance or deviation with the provisions of the Act that will lead to invalidation of an election. The framers of the Electoral Act are fully conscious of human fallibility and that is why the statute did not expect and calls for absolute compliance with its provisions. The degree of compliance required to validate an election is substantial compliance. For any non-compliance to have the effect of invalidating an election, such non-compliance must in itself be substantial and must have substantially affected the result of the election. See ***Ibrahim vs. Shagari (1983) LPELR-1412(1412SC); Buhari vs. Obasanjo (2005) 50 WRN 1; Omisore vs. Aregbesola (2015) LPELR-24803 (SC); Oke vs. Mimiko (2013) LPELR-21368.*** Therefore, a Petitioner who alleges non-compliance with the provisions of the Electoral Act must not only assert and establish such non-compliance, he must prove to the satisfaction of the Tribunal how the non-compliance affected the result of the election in the polling unit or the constituency concerned. In this petition, it is not in dispute that about 90% of the processes involved in the conduct of election in a polling unit has been fully complied with. Voters were duly accredited before they cast their votes. At the conclusion of voting, ballot papers were sorted out and counted. The Presiding Officers announced the votes scored by the parties, entered the figures in the result sheets and signed. The party agents countersigned the result sheets and collected copies. The only non-compliance is that the Presiding Officers did not record the columns for accreditation and ballot accounting data. There is no complaint that the election in those 23 polling units was afflicted by any other irregularity. I am satisfied that there is non-compliance by way of omission to record the columns for accreditation and ballot accounting in 23 polling units out of the 3,010 poling units in Osun State. What then is the degree of the non-compliance? Has it attained the degree of substantial non-compliance? Considering the fact that all the petitioners’ 23 witnesses called in proof of this allegation have confirmed that accreditation duly took place in their respective polling units and that they have no complaint about the scores of the parties, coupled with the absence of proof of over-voting in the affected polling units, I hold that the omission to record the columns for accreditation and ballot paper accounting on the result sheets, though a non-compliance, did not amount to substantial non-compliance.

Assuming, however, that I am wrong in so holding, and that the degree of non-compliance is substantial, has it been proved by the Petitioners how the said non-compliance substantially affected the result of the election? None of the 23 witnesses has demonstrated before the Tribunal how the non-recording of the columns for accreditation and ballot accounting substantially affected the result of the election in their respective polling units. Merely chorusing that the certified true copies of the result sheets were “doctored”, “mutilated” or “altered” as did the petitioners’ witnesses before the Tribunal, does not amount to demonstration of how the non-compliance affected the result of the election, especially in view of the fact that all my findings and analysis above are predicated on the pink copies of the result sheets tendered by the petitioners’ witnesses. What is more, in view of the fact that the presumption of regularity with respect to the certified true copies of the result sheets for these 23 polling units has been successfully rebutted by the petitioners for the various reasons stated in the majority judgment of this Tribunal, which I subscribed to, there is no reason for me to base my decision on them.

In the petition, the Petitioners have drawn some tables in which they calculated the purported number of votes for both the Petitioners and the 2nd& 3rd Respondents that were affected by this category of non-compliance. In their final address, learned counsel for the Petitioners again drew up tables showing the total number of votes affected in both the scores of the Petitioners and that of the 2nd& 3rd Respondents. That is how far the petitioners have gone in showing how this non-compliance substantially affected the result of the election. For the umpteenth time, let me reiterate that pleading and counsel submission are not evidence and are not substitutes for evidence. The law is trite on this. None of the 23 polling unit agents in the 23 affected polling units testified as to the effect of the non-recording of the columns on the result of the election. The only witness that attempted to do that is PW77, who in his report, exhibit P616, at paragraph 4.1.2 at pages 5 and 6, did some calculation of addition and subtraction and arrived at the conclusion that if the votes from the 50 polling units that are affected with irregularity as to non-recording of accreditation are deducted from the scores of the parties, APC will score 250,029 votes and PDP will have 251,753, translating to a lead by PDP with a margin of 1,724 votes.

It should be borne in mind that the analysis of 50 polling units results as done by PW77 in his report was carried out before the filing of this petition. These same polling units are the same polling units I referred to earlier in this judgment which are pleaded in paragraphs 43 – 78 of the petition. Pleading and the analysis of PW77 apart, were all the result of the 50 polling units demonstrated in Court by witnesses? PW77, apart from identifying bundles of Forms EC8A in Court as the raw materials he used for his inspection and analysis, did not speak to any of the unit results while testifying in-chief. Under cross-examination, he only spoke to exhibits P43, P43A and P178, which do not form part of the exhibits under consideration of allegation of non-recording of columns for accreditation and ballot accounting. For purposes of emphasis, let me repeat that only 23 witnesses, i.e., PW35 – PW41, PW54, PW56 – PW63 testified and tendered 23 forms EC8A on this head of non-compliance. I can therefore not rely on the report of the Statistician, i.e., exhibit P616, to the extent that 27 of the forms EC8A (more than half) out of the 50 upon which he based his findings, were not demonstrated before the Tribunal, they were merely dumped on the Tribunal either from the Bar or by PW74. Furthermore, PW77 never spoke specifically to any of the 23 forms EC8A in the polling units under consideration. It is not the duty of the Judex to tie these pieces of documentary exhibits to the relevant aspect of the Petitioners’ case.

The net result of my analysis above is that the Petitioners have failed to show how the non-compliance with respect to recording of the columns for accreditation and ballot accounting in 23 polling units substantially affected the results of the election in those polling units as to lead to their cancellation.

In ***Adeyeye vs. Oduoye (2010) LPELR – 3623 (CA) F,*** Fasanmi, JCA, held:

*“It is not enough to merely catalogue instances of malpractices and breaches of the Electoral Act without adding up or tallying the number of votes involved or affected and their impact on the overall results of the election against his interest…The figures given by the appellant’s counsel in his address at the Tribunal and in his briefcannot be substitute for pleadings and or evidence.”*

In the final analysis, I hold that this specie of non-compliance is not substantial, and that even if it is substantial, it has not been proved that it substantially affected the result of the Osun State Governorship election held on 22/09/2018 and 27/09 2018.

Let me conclude by saying that even if this specie of non-compliance is found to be substantial as to affect substantially the result of the election, the Tribunal does not have the vires to subtract the votes affected by the non-compliance from the scores of the candidates and proceed to declare the candidate with the highest number of votes as the winner of the election. This last remark is informed by the provisions of section 140 (2) of the Electoral Act, 2010 (as amended), which gives the Tribunal the power to only order a fresh or re-run election where non-compliance is established. By no stretch of imagination or ingenuity of reasoning can a Tribunal import the provisions of section 140 (3) of the Electoral Act in to section 140 (2) of the same Act, where the proved electoral malfeasance is “substantial non-compliance”. It is the law that where an allegation of non-compliance is proved, the Tribunal is only permitted to nullify the election and order a supplementary election in order not to disenfranchise voters in the affected areas in line with the principles of the Act. Section 140 (2) of the Electoral Act provides:

*“Where an election tribunal or court nullifies an election on the ground that the person who obtained the highest votes at the election was not qualified to contest the election, or that the election was marred by substantial irregularities or non-compliance with provisions of this Act, the election tribunal or court shall not declare the person with the second highest votes or any other person as elected, but shall order for a fresh election.”(Underlining mine, for emphasis).*

This is a mandatory provision that cannot be circumvented by the Tribunal or Court. The allegation we are dealing with here is allegation of non-compliance and it falls squarely under this sub-section of section 140 of the Electoral Act. There is no escaping from this sub-section and its effect, so long as the allegation is predicated on non-compliance. I only need to add that an order for fresh or supplementary election referred to in section 140 (2) quoted above can only be made where it is expressly asked for by a petitioner(s) as the Tribunal is not a charity.

Having resolved these two important issues against the petitioners, I hold that the petition has no merit and same is hereby dismissed by me.

I award the sum of N200,000 cost to each of the 2nd and 3rd respondents.

**HON. JUSTICE MUHAMMAD I. SIRAJO**

(CHAIRMAN)

22/3/2019

Appearances:-

Dr. Onyechi Ikpeazu, SAN with Chief N.O.O. Oke, SAN, Dr. Paul C. Ananaba SAN, Emeka Etiaba, SAN, Emeka Okpoko, SAN, and Kehinde Ogunwumiju SAN, for the Petitioners leading Niyi Owolade, Esq, I.N.I Iheanacho, Esq, Sunday Abednego Esq, Niyi Arije Esq,Edmund Z. Biriomoni, Esq, Eze George Alala, Esq, Wole Jimi Bada Esq, Stanislaus Mbaezue Esq, Igbeaku Evulukwu Esq, N.I. Harrison Esq, Ezenwoko Ananaba Esq, Julius Mba Esq, Obinna Omijo Esq, Prince Adebiyi Adetosoye Esq, Itodo George Esq, and Deborah Anonaba Esq.

L.M. Pwahomdi Esq, with Adesina Agbede Esq, and Fatima M. Atuman Esq, for the 1st Respondent.

Chief Wole Olanipekun, SAN, with John Olusola Baiyeshea, SAN, Dayo Akinlaja SAN, for the 2nd Respondent leading Adegbile Moronkeji Esq, Abiodun Olaide Esq, Dr. Ajibola Basiru Esq, Abdulrasak Adeoye Esq, Dr. M.T. Adekilekun Esq, B.N. Azuka-Molokwu Esq, Ayo Adesanmi Esq, M.K. Fidelis Esq, Akintola Makinde Esq, Bebor Tabai Esq, Kolawole Aro, Esq, Ayodeji Timothy, Esq, Grace Ifeoluwa Baiyeshea Esq, Olugbenga Fayemiwo Esq, Ayo Olatubora Esq, Oluwadamilola Olukeye Esq.

Chief Akin Olujinmi, SAN, with Alh. Lasun Sanusi SAN, Dr. Abiodun Layonu SAN, and Chief Yomi Alliyu SAN, for the 3rd Respondent leading A.A. Abimbola Esq, A.W. Salimon Esq, Olayinka Okedara Esq, Kolapo Alimi Esq, Akinsola Olujinmi Esq, Oluwole Ilori Esq, Gbolagade Ajao Esq, Egonna Annaesiuba Esq, Chiazor Ngige (Miss), Mayowa C. Ejidare Esq, and Chinedu Ugwu Esq.