

A Rethink on the Standard of Proving Criminal Allegations in Election Petitions under Nigerian Law

Dahiru Jafaru Usman
Department of Public Law, Faculty of Law, Bayero University, Kano, Nigeria
djafaru@gmail.com

Abstract

This article examines the burden and standard of proving criminal allegations in civil and criminal matters under the Evidence Act 2011 (hereinafter referred to as the Act). The article notes how the courts have extended the provisions of the Act to election petitions which are neither civil nor criminal proceedings. The article argues that the requirement of proving criminal allegation beyond reasonable doubt under the Act should be limited to civil and criminal trials and not election petition that is *Sui generis*. The insistence by courts that the standard is also applicable to election petition amounts to imputing words into the provision of Evidence Act that are not there.

1.0 Introduction:

Election is a distinctive feature of democratic societies. It enables electorates to determine who represents them in the legislative and executive arms of government in an organised society. It is generally conceived as a means of peaceful change of leadership in organised societies as it provides the best option for an orderly succession of leadership.

In Nigeria, like other jurisdictions, election petition is widely known and acceptable legal means of expressing contestants' dissatisfaction with an election result as declared. It is in law the major means of overturning a flawed victory in an election. Not only may an election result be challenged by petition, flawed processes of nomination of a candidate for an election can also lead to replacement of a wrongly filled candidate with the right one. The case of Rotimi Chibuke Ameachi¹ the current governor of Rivers State of Nigeria is highly instructive.

Election petitions in the country are commonly presented before election petition tribunals like the National and Legislative Houses Election Petition Tribunal, the Governorship Election Petition Tribunal, the Presidential Election Petitions and the local government council election petitions tribunal either established pursuant to the provisions of the constitution or pursuant to the Electoral laws of the respective states of the federation.

The election tribunals are required to decide any petition filed in accordance with the rules of evidence. That is, no petitioner gets an election return overturned in his favour until he discharges the burden of rebutting the presumption of regularity of such election returns. The statute which regulates the taking and receiving of evidence in Nigeria is the Evidence Act 2011² (hereinafter referred to as the Act) This is a statute that is meant to regulate civil and criminal proceedings in Nigeria to the exclusion of some courts expressly mentioned.³ The trend over the years has been the application of the provisions of the said statute in election petition particularly in the area of criminal allegation. The election petition tribunals including the Supreme Court have always invoked the requirement proof beyond reasonable doubt in any election petition where crime is alleged. This paper intends to analyze the provisions of the Act with a view to determining the propriety or otherwise of the application of proof beyond reasonable doubt in election petitions alleging crime regard being had to the fact that election petitions are *sui generis*.

*Dahiru Jafaru Usman, Lecturer, Department of Public Law, Faculty of Law, Bayero University, Kano, Nigeria,
djafaru@gmail.com

¹ Ameachi V. INEC (2008) 15 NWLR (Part 784)

² The Act was formerly the Evidence Act, 1945 and later Evidence Act Cap E14 Laws of the Federation of Nigeria, 2004. It is now repealed by the provision of Section 257 of the Evidence Act 2011

³ By virtue of the provision of section 256 of the Evidence Act, 2011, the Act is not to apply in proceedings before an arbitrator, general court martial, judicial proceedings in any civil cause or matter in or before any Sharia Court of Appeal, customary Court of Appeal, Area Court or Customary Court. noting that the section contemplates circumstance when these courts may be authorized by publication in a gazette to enforce any or all the provisions of the Evidence Act. By Sub section (2) of the same section 256, Area courts are required to be guided by the provisions of the Evidence Act in criminal trials though sub section (3) made the Area court to be bound by the provisions of sections 134 to 140 of the Act in decided criminal matters submitted before them.

2.0 Meaning of Election:-

Literally, election can be defined as a form of organisation, whereby all or some of the members of the organisation choose a small group of persons or one person to hold office of authority in the organisation.

There appears to be no statutory definition in both the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the Electoral Act 2011 of the term “election.”¹ Even our courts did not give such precise definition. What the courts did was to describe the concept of election as opposed to defining it. The court in the case of **ATTORNEY GENERAL OF FEDERATION V. A.N.P.P.**² acknowledged the lack of a proper statutory definition of the word election. Justice Muhammad J.C.A’s observation is quite apt:

Although the 1999 Constitution of Federal Republic of Nigeria has not defined the word ‘election’, it is generally held to mean the action or an instance of choosing by vote one or more of the candidates for a position especially a political office...

In a democratic dispensation such as ours, it is a process where candidates are, by popular votes chosen to occupy:

1. Office of the president;
2. Office of the Vice President;
3. Office of the Governor;
4. Office of the Deputy Governor;
5. Members of National Assembly;
6. Members of States Houses of Assembly;
7. Chairman of Local Government Council in the Federation;
8. Vice- Chairman of the Local Government Council in the Federation; and
9. Members of the Local Government Council in the Federation”³

In **AONDAKA V. AJO**⁴, the court defined election to constitute accreditations, voting, counting of votes at wards, local government councils and announcement of results.⁵ It is therefore a process comprising accreditation, voting, collation, recording on all relevant election forms and declaration of results. The collation of results at all levels of the electoral process is therefore a constituent of election.⁶ In some quarters however, election is believed to go beyond voting to include delimitation of constituency and nomination of candidates.⁷ For the purpose of this paper and drawing from the above authorities, election is a process of choosing representatives to occupy elective offices or positions created under the constitution or any law. It gives legitimacy to government whether at the federal, state or local government levels.

For legitimacy purpose, elections are required to be free and fair. Where however an election is conducted against the electoral rules and regulation or where contestants are short changed or the election is conducted in a manner that affords a candidate an opportunity over others, the law has given the other contestants the right to institute an action before courts of law or tribunal challenging such returns.⁸ This opportunity the world over is given via election petition before election tribunals⁹ and constitutional courts. The conduct of election against electoral rules may entail the commission of electoral offences and these are of various types.

3.0 Types of electoral offences

Electoral offences vary. They include electoral malpractice or any corrupt electoral practice. Electoral malpractice is however not capable of precise definition. It has wide connotation and the categories of acts or

¹ An electoral system may be by secret ballot i.e. where electorates secretly elect their leaders. The voters cast their vote outside the view of the public. The voter alone decides to vote any candidate of his choice without disclosing his choice. It could be open ballot where electorates openly elect their leaders or join a queue indicating the candidates they are voting for.

² (2003) 15 NWLR (Pt. 844), P. 600

³ (2003) 15 NWLR (Pt. 844), P. 600 @ 664

⁴ (1999) 5 NWLR (Pt. 602)

⁵ Ibid., P 206

⁶ INEC & Ors V. Onyimbah E.C. Ray & Ors (2004) 14 NWLR (Part 892) P. 92 @ 123

⁷ Ujukwu V. Obasanjo (2004) 1 EPR 626 @ 653

⁸ Historically, under the common law, election were conducted based on the open ballot system and complains in relation to abuses of the system like the issue of intimidation, bribery, corruption, treating, personation were initially investigated by a committee of the parliament. Courts or judges were brought in for the first time in 1868 under the Parliamentary Election Act, 1868 when a petition to unseat a member was submitted to a judge of a superior court who was to make his report to the speaker and his report has the same effect as that of an Election Committee under the old arrangement. See Denning’s Judgment in Morgan Vs. Simpson supra @ 162 C-D.

⁹ Reference to election tribunal here is for elections into the legislative houses and office of governors and their deputies. For election court the reference is to the Court of Appeal in the Presidential election petitions.

conducts that can constitute electoral malpractice are not closed. To determine whether an act or conduct amounts to “electoral malpractice” or irregularity, the courts would have to look at the nature of the act or the conduct complained of vis – a – vis the provisions of the electoral Act. The Electoral Act 2011 made provisions defining electoral offences.¹ A careful perusal of the provisions of sections 117 to 132 clearly shows that electoral offences could be committed at different stages of the electoral process. The offences could be at voters’ registration stage, at nomination of candidates’ stage, at polls and even after. Forgery of nominations papers;² improper use of vehicles or boat in conveying any person to registration or polling unit;³ impersonation and voting knowing fully well that one is ineligible to do so;⁴ dereliction of duty⁵; bribery and conspiracy to secure a return into any elective post or bribing of voters⁶ and violation of the secrecy of voting⁷ are among the electoral offences provided under the Electoral Act 2011.

4.0 Meaning and Nature of Election Petition:

In Nigeria, like other jurisdictions, election petition is the only known legal means of challenging a declaration in an election and it “is a complaint by the petitioner against an undue election or return of a successful candidate at an election.”⁸ It is a suit instituted for the purpose of challenging the validity of an election or disputing the due return of a candidate or claiming the return of a candidate on the grounds of lack of qualification, corrupt practices, and irregularity or otherwise.

On the nature of election petition, our courts in a long line of cases continuously declare that election petition is a proceeding that is neither civil nor criminal but one that is *sui generis*. *One of such cases is ABUBAKAR VS. INEC*⁹ where the court in reiterating the *sui generis* character of election petition held thus:

Election petition and the rules applicable to it and its proceedings are unique. It is the reason why election petitions are described as ‘*Sui generis*’. They are different from other proceedings. **They are neither allied to civil nor criminal proceedings. They stand on their own bound by their rules made under the law....**¹⁰ (emphasis supplied)

In fact, the apex court in the country held in the case of *EHUWA V. O.S.I.E.C* that the *sui generis* character of election petition is undisputed. According to the Court:

It is not disputed that election petition proceedings not part and parcel of ordinary civil proceedings of the ordinary courts but *sui generis* and are usually, specifically and specially provided for in legislation for that purpose.¹¹

Similarly, in the case of *EMEJE V. POSITION* the court further emphasized the *sui generis* character in a different way. According to the court:

There are quite established, not novel at all and there are plethora of legal authorities in the regards that an election petition has a peculiar trait or character which is held to be *sui generis*. There is no doubt about this any longer.¹²

Recently the Court of Appeal re-stressed the *sui generis* character of election petitions and categorically stated that not all incidences of formal or ordinary civil actions are applicable to it. According to the court “election petitions are *sui generis*, not all the incidences of a formal or ordinary civil actions are applicable to it.”¹³

In *UDUMA V. ARUNSI*, (2012) 7 NWLR, (Part 1298) 55 @121 Para E. the court clearly stated that “election petitions are *sui generis*. Their very nature makes them peculiar. Sometimes, the general statement of the law applicable in ordinary civil litigation may not be justice in election proceedings.”

¹Part VII, Electoral Act, 2011

² *Ibid.*, Section 118 (1)

³ *Ibid.*, Section 121

⁴ *Ibid.*, Section 122 (1)

⁵ *Ibid.*, Section 123

⁶ *Ibid.*, Section 124

⁷ *Ibid.*, Section 125

⁸ *A.N.P.P. V. INEC* (2004) 7 NWLR (Pt. 871) P. 16

⁹ *Ibid.*, @ 44

¹⁰ (2004) 1 NWLR (Part 865) 215

¹¹ (2006) 18 NWLR (Part 1012) P544 @ 588

¹² (2010) 1 NWLR (Part 1174) P.147

¹³ *INEC V. EJEZIE* (2011) ALL FWLR, (Part 596) 452 @ 480-481, Paras. H-A

From the foregoing, it can be said that election petitions are a class of proceedings that have distinct rules and regulations distinct and separate from the ordinary proceedings in a court of law. Being sui generis, they ought not, in certain critical respects, to be subject to certain requirements of proof that conventional cases are subject to. Proof beyond reasonable doubt a requirement in conventional criminal cases has been selected by this paper for examination to determine the propriety or otherwise of its application to election petitions.

5.0 Meaning of burden of proof:-

The Act being the principal legislation regulating evidence did not specifically define the term 'burden of proof'. But the meaning can be deduced from the provisions of sections 131 (2) and Section 107 of the Act. The former section provides that:

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.¹

Section 107 of the Act however provides that a court in any civil proceedings can order for proof of any fact.

Outside the Act, however, there are attempts at defining the term. The burden and standard of proof is a topic that fundamentally is not difficult. It can however become complex in its finer points. When we speak of the burden of proof, we are dealing with the basic question that arises in all trials whether criminal or civil or who has to prove what in order to succeed.²

The Blacks Law dictionary for instance defined the term to mean a party's duty to prove a disputed assertion or a charge. It is a requirement of a party to a suit to either prove his case or to prove an assertion made by him in the affirmative before any court of law. It is a weight or a responsibility placed on a person to adduce evidence to prove a particular fact.

According to Fidelis Nwadialo burden of proof is the obligation which lies on a party to persuade the court either by preponderance of evidence or beyond reasonable doubts that the material facts which constitute his whole case are true and consequently to have the case established and judgment given in his favour.³

According to Noakes, however, burden or onus of proof is the obligation of proving facts arising during hearing.⁴

It should however be noted that the basic principle governing the incidence of burden of proof is stated as "whoever asserts an allegation whether affirmative or negative must prove it and not he who denies it."⁵ It is in this light that the provisions of Section 131 of the Act dealing with the general nature of burden of proof provide thus

Whoever desires any court to give judgment to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

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

6.0 Burden and Standard of Proof in Civil and Criminal cases

The standard and burden of proof in civil and criminal proceedings has always been distinguished in our administration of justice system. The Act clearly spelt out the burden and standard of proof in civil and criminal cases.

6.1 Burden of Proof in Civil Cases:-

In civil cases, the burden of proof is on the party who would loose or against whom judgment will be given if no evidence is placed before the court. It can therefore be on the defendant as well as the plaintiff. Under the Act, the general rule as per the burden of proof in civil cases is amply stated in section 133 of the Act . The section provides:

In civil cases, the burden of first proving the existence or non- existence of a fact lies on the party against whom judgment of the court would be given if no evidence were

¹ The equivalent Section under the repealed Evidence Act Cap E14, L.F.N. 2004 was S. 135 thereof.

² Burden of Proof and Standard of Proof

http://www.vanuatu.usp.ac.fj/courses/LA310_Evidence/LA310_week4_burdenproof.html accessed 21/11/11

³Fidelis, N., Modern Nigerian Law of Evidence, (Lagos: University Press 1999) 2nd Ed., P. 379

⁴Noakes, An Intoruduction to Evidence, 4th Edition, P. 480

⁵ Ogundiyani V. State (1991) 3 NWLR (Part 181) P522 @ 532; Ezeazodosiako V. Okeke (2005) 16 NWLR (Part 952) P. 612 @ 629

produced on either side, regard being had to the presumption that may arise on the pleadings¹.

In civil cases generally the burden lies on the plaintiff. The standard has always been on balance of probabilities and not one beyond doubt. The proof lies upon him who affirms, not upon him who denies. He who asserts must prove what he asserts. This is so because the negative does not admit of the direct and simple proof of which the affirmative is capable.² After the evidence of the plaintiff and the defendant and after discharging the burden as raised by either the plaintiff or defendant, it is duty of the court to weigh the whole evidence and give judgment for the party in whose favour there is a preponderance of evidence.³

The standard of proof in civil cases is upon the preponderance of evidence. This is clearly captured by the provisions of Section 134 of the Act. According to the section:

The burden of proof shall be discharged on the balance of probabilities in all civil proceedings⁴

The onus is on the plaintiff or whoever alleges a given fact. This proposition found support in several judicial authorities. The case of **WACHUKWU V. OWUNWANNE**⁵, is one of the recent authorities on the point. According to the Supreme Court "Civil cases are decided on preponderance of evidence and balance of probabilities."⁶

6.2 Burden and Standard of Proof in Criminal cases:-

A criminal trial is never about seeking justice for the victim. If it were, there could be only one verdict: guilty. That's because only one person is on trial in a criminal case, and if that one person is acquitted, and then by definition there can be no justice for the victim in that trial. It is a trial that is neither a whodunit nor a multiple choice test. It is not even a criminal investigation to determine who among various possible suspects might be responsible for a terrible tragedy. In a murder trial, for instance, the state, with all of its power, accuses an individual of being the perpetrator of a dastardly act against a victim. The state must therefore prove that accusation by admissible evidence and beyond reasonable doubt.⁷

Under our laws, the burden of proving all the essentials of an alleged crime (whether in a purely criminal or a civil matter), is on the person who alleges the commission of that crime. The standard of proof required is proof beyond reasonable doubt. The law makes the reasonable standard indispensable because somebody's liberty or life is at stake. It impresses on the judge or court the necessity of reaching a subjective state of certitude as to the guilt of the accused from the evidence adduced by the prosecution.

Historically, the requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt is a principle of great antiquity. According to Alan M. Derhsowitz, the demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the court of all the essential elements of guilt.⁸

The standard of proof beyond reasonable doubt was invoked to safeguard the liberty and freedom of any person standing trial for the commission of an offence. The idea is not unconnected with the principle which has been held for thousand years in western societies which insisted that it is better for 10 guilty defendants to go free than for one innocent defendant to be wrongly convicted. This daunting standard is believed in some quarters to have its roots in the biblical story of Abraham's argument with God about the sinners of Sodom.⁹ According to this belief, Abraham admonishes God for planning to sweep away the innocent along with the guilty and asks Him whether it would be right to condemn the sinners of Sodom if there were 10 or more

¹Formerly section 135 Evidence Act, Cap. E14 L.F.N. 2004

²Haruna V. Modibbo (2004) 16 NWLR (Pt. 900) P. 487 @ 505 -506, Buhari v. INEC (2008) 4 NWLR (Pt. 1078) P. 546

³Aguda, T.A., The Law of Evidence (Ibadan: Sweet & Maxwell, 1999) 4th Ed. @ 211

⁴Section 134, Evidence Act, No. 18, 2011

⁵(2011) ALL FWLR (Part 589) 1044

⁶Ibid. @1068 Para. C

⁷Alan, M.C., The Standard is Proof Beyond a Reasonable Doubt, Even if it's 'Likely' or 'Probable' that she Committed Murder. <http://michaelblackburnsr.blogspot.com/2011/07/standard-is-proof-beyond-reasonable.html>, last visited 16/

⁸ See the observation of Justice Frankfurter In re Winship (No. 778) http://www.law.cornell.edu/supct/html/histories/USSC_CR_0397_0358_ZO.html, 15/9/11

⁹Alan, M.C., The Standard is Proof Beyond a Reasonable Doubt, Even if it's 'Likely' or 'Probable' that she Committed Murder. <http://michaelblackburnsr.blogspot.com/2011/07/standard-is-proof-beyond-reasonable.html>, last visited

righteous people among them. God agrees and reassures Abraham that he would spare the city if there were 10 righteous. The legal standard is believed to have emerged from the above compelling account.

The requirement of proof beyond reasonable doubt is a notion not only peculiar to Nigerian laws but basic in the laws of many countries. It is equally and rightly one of the boasts of a free society and a safeguard of due process of law in the historic, procedural content of due process.¹

In the United State case of *Brinegar v. United States*², the court pronounced that guilt in a criminal case must be proved beyond reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.³

It was, therefore, made as part of the legal systems in most common law countries so that no man is to be deprived of his life, liberty under the forms of law unless the court that tries him is able, upon its conscience, to say that the evidence placed before it is sufficient to show beyond reasonable doubt the existence of every fact necessary to constitute the crime charged. Where this is not the case it is only fair that the accused be granted an acquittal from the specific charge.

The reasonable doubt standard plays a vital role in the scheme of criminal procedure in jurisdictions where it is adopted. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence that bedrock, 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of criminal law.⁴

It is interesting to note that while Scientists search for truth and Philosophers search for morality, a criminal trial searches for only one result: proof beyond a reasonable doubt. A criminal trial is therefore not a search for truth.

The relevant section of the Act that imported the common law standard of requiring proof beyond reasonable doubt is Section 135 (1) of the Act. It provides

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

What then is a civil or criminal proceeding? According to Black's Law Dictionary "civil proceedings" means 'a proceeding for the redress of a private injury'⁵ while a criminal proceeding "is one instituted and conducted for the purpose of either preventing the commission of crime, or for fixing the guilt of a crime already committed and punishing the offender"⁶. It is strictly a step taken before a court against some person or persons charged with some violation of the criminal law.⁷

The Supreme Court also defined the word criminal proceeding in the case of *Akilu V. Fawehinmi No. 2*, to mean "a proceeding in which a person is accused of an offence in those proceedings."⁸

Commenting on the above section Nnamani Agu JSC as he then was stated as follows

For the avoidance of doubt, the expression "burden of proof" is often loosely used to include the burden to prove the guilt of an accused person beyond reasonable doubt – a burden which is always on the prosecution and never shifts... This burden in criminal cases must be discharged beyond reasonable doubts either by direct or circumstantial evidence.⁹

Re-stressing proof beyond reasonable doubt Fabiyi JCA (as he then was) stated that:

The standard of proof in criminal allegations is one of proof beyond reasonable doubt. This principle of law was evolved by Lord Sankey L.C. in *Woolmington V. D.P.P.* (1935) A.C. 485. It Was Further Reinforced by Denning J. as he then was in *Miller V. Minister of Pensions* (1947) 2 All E.R. 372. Same has been codified in section 138 (1) & (2) of the Evidence Act.

¹Coffin v. United States, 156 U.S. 432 (1895)

²Brinegar v. United States, 338 U.S., at 174

³Brinegar v. United States, (1949) 338 U.S., @ 174

⁴Coffin V. United States (1895) 156 U.S., 432 @ 453

⁵Blacks Law Dictionary 6th Edition, West Publishing Co. (1999) p. 374

⁶Ibid.

⁷Ibid.

⁸(1989) NWLR (Pt. 102) 122 @ 192 Para. B

⁹Esangbedo V. State (1989) 4 NWLR (Pt. 113) 57

In fact the accused need not to utter a word in the course of his trial. The prosecution must prove the charge against the accused. See the case of *Bello V. State*¹. Any proof not beyond reasonable doubt cannot ground a conviction of an accused standing trial in Nigeria. Where it is so, it violates or tampers with the presumption of innocence and such breach is null and void.²

But courts have always insisted that the standard is proof beyond reasonable doubt and not beyond all shadow of doubt. To make it so the law will fail to protect the community. In this light the Supreme Court per A.M. Mukhtar JSC said

Proof beyond reasonable doubt and proof beyond all shadow of doubt do not mean the same thing. The later places a heavier burden on the prosecution, a burden which is not known to our adjectival law” ... Although the law requires that a crime must be proved beyond reasonable doubt, it does not envisage that such proof be beyond the shadow of doubt. This position of the law is well echoed by Lord Denning in the case of *Miller V. Minister of Pensions (1947) 2 ALL E.R. PAGE @372* which is encapsulated thus:

“Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted of fanciful possibilities to defect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”³

7.0 Proof Beyond Reasonable Doubt in Election Petition

In election petitions as in purely criminal cases, when a crime is alleged the courts require that it be proved beyond reasonable doubt. However, a close examination of the language of S. 135 of the Act, unambiguously, reveals that the requirement of proving any criminal allegation beyond reasonable doubt is “**in any proceeding civil or criminal.**”

The language of the above section of the Act and the way it is constructed did not say “in any proceedings where a criminal allegation is made” which could include *sui generis* proceedings like election petitions. The section after saying “if the commission of a crime by a party to any proceedings is directly in issue” went ahead to qualify “any proceedings” by particularly stating the proceedings to be either “civil or criminal.” But our courts, always invoke the above provision or rather requirement of proving beyond reasonable doubt criminal allegations in election petitions which the same courts have always maintained to be a proceeding that is neither civil nor criminal. In fact the courts are unanimous that election petition is *sui generis*. It is neither allied to criminal nor civil proceedings.

Unless a different interpretation is given to either the word “civil” or criminal” proceedings in the above provision of the Act, it is therefore wrong to extend the application of the said section to include election petition. Holding otherwise is an erection of an indefensible barrier into an enactment as it tantamount to introducing words in the Act that are not there. This is, more so, when no ambiguity has been shown to exist which may warrant introducing such extraneous constructions in aid of clarifying the ambiguity. The cardinal rule of interpreting statutes is to accord it its literal interpretation where from the language of the statute it is clear and direct. In fact the function and role of the court is only to interpret a statute in the light of the language used. A court of law cannot go beyond the language used in a statute to examine the possible effect of the application of a statute particularly when the language is clear and not stressed to accommodate possible or likely effect of the statute. The only duty of the court is to interpret a statute and not its likely consequences. This much was approved by the court in *TANKO V. STATE*.⁴ In fact Lord Discount Dilhome in *Stork V. Frank Jones (Tripton)*⁵ is quoted saying that it is a wrong thing for the court to read words into a statute that are not there. According to him

If it were the case that it appeared that an Act might have been better drafted, or that amendment to it might be less productive of anomalies, it is not open to the court to remedy the defect. That must be left to the legislature.

It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do...”

¹(2007) 10 NWLR (Pt. 1043) P. 564

² S. 36 (5) Constitution Federal Republic of Nigeria, 1999, Cap C25, Laws of the Federation of Nigeria 2004

³ Moses Jua V. State NACLR 1 @ 19

⁴ (2009) 4 NWLR (Pt. 1131) 430 @ 499 A-B

⁵ (1978) 1 WLR, 231

Similarly the apex Court in Nigeria per Bairamian J.S.C. equally reiterated that it is not the province of a court to amend legislations. This was in the case of **OKUMAGBA V. EGBE**. According to the court:
but amendment is the function of the legislature, and the courts cannot fill a gap which comes to light by altering the words of a regulation to make it read in the way they think it should have been enacted The office of a judge is *ius dicere* not just dare.¹

Our law reports are replete with authorities sanctioning the need to accord clear and unambiguous words in statutes their ordinary grammatical meaning. One of such cases is **ATTORNEY GENERAL OF THE FEDERATION V. GUARDIAN NEWSPAPER LTD.**² In this case the court opined thus:

Where the words used in the provisions of any law are clear and unambiguous, they must be given their ordinary meaning unless this would lead to absurdity or be in conflict with other provisions of that law. Thus, a court of law is not to ascribe meanings to the clear, plain and unambiguous provisions of a statute in order to make such provisions conform with the court's own view of their meaning or of what they ought to be in accordance with the tenets of sound social policy³.

More clearly, the court in **EHUWA V. O.S.I.E.C.**⁴ stated the proper approach in the interpretation of statutes with clear and unambiguous words in the following words:

The proper approach to the interpretation of clear words of a statute is to follow them in their simple, grammatical and ordinary meaning rather than look further because that is what *prima facie* gives them their reliable meaning.

In **BURAIMOH V. KARIMU** the court simply states that

In the interpretation of statute where the words are straightforward and unambiguous then the court shall interpret the words by applying the ordinary, plain, natural and grammatical meaning.⁵

More recently, the court stated the guiding principles governing the interpretation of statutes in the case of **LEKWAUWA V. UKAEGBE.**⁶ According to the court:

It is a cardinal rule of construction of statutes that statutes should be construed according to the intention expressed in the statutes themselves. If the words of the statutes are themselves precise and unambiguous, then, no more is necessary than to expound the words in their natural and ordinary sense. The words of the statutes do alone in such circumstances; best declare the intention of the lawmakers.⁷

In fact where words are so clear like the provisions of Section 135 of the Act, no one including judges is allowed to substitute the words in a statute with his own words. This position is supported by a number of decisions. One of which is **I.N.E.C. V. A.C.** In this case the court held that:

Where the words of a statute are clear and unambiguous, they should be given their literal and grammatical meaning and not what a judge says the provision means. No court is entitled to substitute it's for the words of the Act. The function of the court with respect is to declare and not to give the law. If there is a lacuna in the law, it is for the legislature to fill the gap and not for the court to take upon itself the added responsibility of legislating. This is the essence of separation of powers, that the court will not undertake the work of the legislature nor will the latter takeover the work of the judiciary.⁸

¹ (1965) 1 ALL NLR 62 @ 65

² (1999) 9 NWLR (Pt. 618) P. 187

³ **A G'F. V. GUAR NEWSPAPER @ 264 Paragraphs C-G.** See **ADEBOWALE v. MIL. GOV., OYO STATE** (1995) 4 NWLR (Pt. 392) 733, **IFEZUA v. MBDAGUHA** (1984) 1 SCNLR 427

⁴ (2007) 3 JNSC 403 @ 437 – 438 Paras H-A

⁵ (1999) 9 NWLR (Pt. 618) P 310 @ 323 Paragraphs D-E

⁶ (2009) ALL FWLR (Pt. 469) 539 @ 544 – 545 Paragraphs G-B

⁷ (2009) ALL FWLR (Pt. 469) 539 @ 544 – 545 Paragraphs G-B

⁸ (2009) ALL FWLR (Pt. 480) 732 @ 764 Paragraph s E-H

Again, the rule of construction of statutes is “to intend that the Legislature meant what they have actually expressed.”¹ The object of all interpretation is to discover the intention of parliament, “but the intention of parliament must be deduced from the language used,”² for “it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law.”³

With all the above pronouncements, the election petition tribunals and courts in Nigeria, in interpreting the provisions of Section 138 of the repealed Evidence Act⁴ (now section 135 of the Act) in election petitions, do not keep to the wordings of the section which are clear and direct. By the wordings of the section, the standard of proving a criminal allegation beyond reasonable doubt is “in any proceeding civil or criminal.” The words ‘civil or criminal’ should be given their literal meaning. The wordings should not be extended to include special and distinct proceedings like election petitions which are *sui generis*. This is because where, by the use of the clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh and absurd or contrary to common sense the result may be.⁵ The interpretation of statutes is not to be collected from any notions which may be entertained by the court as to what is just and expedient.⁶ Words are not to be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the court is to expound the law as it stands, and to leave the remedy to (if one be resolved upon) to others.”⁸

The Court of Appeal in **ACTION CONGRESS V. JANG** recently demonstrated the need for courts to keep to the wordings of statutes where they are clear like the wordings of the provisions of section 135 of the Act which qualify proceedings to civil and criminal proceedings. In this case the Court of Appeal refused to read into the provision of the section 141 of the Electoral Act, 2006 the definition of a day as a period of 24 hours as defined by the Interpretation Act. The court opined that the thirty day period for the purposes of filing an election petition includes “the whole or part of the first and last days.”⁹ It is the opinion of the court that it cannot import the idea of ‘whole day’ into the provision of the Electoral Act. Doing so said the court, amounts to an abandonment of the courts adjudicatory function to embark on an exercise of judicial legislating.

Unfortunately, Tribunals and courts in Nigeria appear to be doing exactly the above in their interpretation of section 135 of the Act dealing with standard of proving criminal allegation in election petitions filed before them. This is because the courts appear to always extend such standard requirement of proving beyond reasonable doubt criminal allegations to election petition which is undoubtedly and settled by the same courts as neither civil nor criminal but a proceedings that is *sui generis*.

Again if we apply the latin maxim “expressio unius est exclusion alterius” meaning expression of one thing is the exclusion of another, we can conveniently say that the express mention of “any proceeding civil or criminal” in the section under consideration, excludes election petition which is *sui generis*. The same conclusion could be reached if the latin maxim “inclusion est exclusion alterius” which means the expression of one thing, is the exclusion of another is applied. Thus, the express mention of civil and criminal proceedings exclude election petition which is neither of the two. Furthermore, if the latin maxim “enumeratio unius exclusio alterius” meaning that the express mention of civil and criminal proceedings in the Act automatically exclude election petitions.

The application of the above maxims in the interpretation of statutes was endorsed in the case of **EHUWA V. O.S.I.E.C.**¹⁰ According to the court

In the construction of statutory provisions, where a statute mentions specific things or persons, the intention is that those not mentioned, are not intended to be included. The latin maxim is expressio unius est exclusion alterius” means the expression of one thing is the exclusion of another. It is also termed “inclusion unius est exclusion alterius” means the expression of one thing, is the exclusion of another. It is also termed “inclusion unius est exclusion alterius” or enumeration unius exclusion alterius” exclusion of another. In other words, the express mention of one thing in a statutory provision, automatically excludes any other which otherwise would have applied by implication with regard to the same issue.

¹ R V Banbury (Inhabitants) (1834) 1 A. & E. 136, Per Parke J @ P. 61

² Capper V. Baldwin (1965) 2 Q.B. 53, Per Lord Parker C.J. at P.61

³ Davies Jenkins & Co. Ltd. V. Davies (1967) 2 W.L.R. 1139, Per Lord Morris of Borth-y-Gest @ 1156; I.R.C. V. Dowdall, O’ Mahoney & Co. (1952) A.C. 401, Per Reid.

⁴ Evidence Act, Cap E 14 L.F.N., 2004

⁵ Carledge V. E. Jopling & Sons, Ltd (1963) A.C. 758

⁶ Per Coleridge J in Gwyne V. Burnell (1840) 7 Cl. & F. 572

⁷ Whitehead V. James Stott Ltd. (1949) 1 KB 358; Galashiels Gas Co., Ltd. V. O’ Donne II (1949) A.C. 275

⁸ Sutters V. Briggs (1922) 1 A.C. 1, Per Lord Birkenhead L.C. @ p. 8

⁹ (2009) ALL FWLR (Part 467) 156 at 183-183 Paras F-F

¹⁰ (2007) 3 JNSC 403 @ 417 – 418 Paras H-C

Looked from another perspective, criminal trials presuppose filing of charges, or information, indictment or complaint depending on the level of court and the jurisdiction. The accused is then staged in the dock and a charge or information read to him, his plea is thereafter taken and the prosecution then proceeds to lead evidence to convince the court of trial beyond reasonable doubt that the accused is truly guilty. The accused is not to be automatically punished until he is allowed to defend himself. This is in addition to his constitutional right to cross-examine the prosecution witnesses with view to discrediting them¹. He equally has the added right to available defences. This provision is in contrast to what is obtainable in election petition which are primarily proceedings purposely challenging the validity of an election or the undue return of a candidate no more no less. It is a proceeding where the respondents against whom the petition is filed are not put in the dock with a view to finding their guilt and subsequent punishment. Most of the criminal allegations in election petition only go to show the extent of non-compliance with the basic electoral laws and rules of fair conduct of elections.

Even where the court finds the commission of a crime proved by the petitioner the highest the Tribunal can do is to recommend to the office of the Attorney General for the probable prosecution of the identified electoral offenders. No more no less. The tribunal cannot sentence the identified electoral offenders whose pleas were not taken nor given the opportunity to cross examine the witnesses that indicted them talk less of being allowed to present their defences to each of the allegations labeled against them. They must be subjected to the rigours of our criminal justice as accused persons before being punished. If that is the case it is a misplacement of principles to require that any allegation of crime in election petition be proved beyond reasonable doubt. The position taken by Court of Appeal in *SEIKEGBA V. PENEWOU*² is highly commendable. In this case the court in rejecting the submission that the standard of proving falsification of election result is beyond reasonable doubt held thus;

The standard of proof of allegation of falsification of election is not as high as that required for an allegation of crime. It is instead based on balance of probabilities. Therefore, the counsel for the 2nd to 6th respondents was wrong to have argued that it was a proof beyond reasonable doubt.³

In fact no election petition tribunal is competent to try any criminal offence. In the case of *AGOMUO V. OGWUEGBU*⁴ the Court of Appeal held a tribunal wrong when the Tribunal indicted some of the respondents for corrupt practices. In fact it sets aside the verdict of criminal liability the Tribunal imposed on the respondents.⁵

Although the elections tribunals are not competent to try electoral offences, it is submitted that electoral offenders and fraudsters should be brought to book before the regular courts. In Nigeria, such prosecutions are hardly heard of. Perhaps that could be the reason why electoral offences go on unabated.

8.0 Conclusion:

This paper argues that the insistence of our election petition tribunals and courts that proof of criminal allegations in election petitions must be proved beyond reasonable doubt relying on the provisions of section 135 (formerly S. 138) of the Act, is reading into the section what is not there. This is because the provisions of the Act clearly qualified any proceedings where allegation of crime is made to civil and criminal proceedings, it excludes election petition which our courts in a long line of cases, held to be neither civil nor criminal but *sui generis*. The wordings of the Act ought and should be given their ordinary, simple and grammatical meaning. That is the proper thing to do. The function of the court is to declare and not to give the law. If there is a lacuna in the law, it is for the legislature to fill the gap and not for the court to take upon itself the added responsibility of legislating. The court is to expound the law as it stands, and to leave the remedy to (if one be resolved upon) to others.

It is therefore recommended that if the standard of proof is to remain beyond reasonable doubt then the provision of the Act under reference should be amended to reflect that “in any proceedings” before a court of law where the commission of a crime is alleged, proof is beyond reasonable doubt” as opposed to what exist today under the Act. It should replace the existing wordings “in any proceedings civil or criminal.”

Equally, it is submitted that such insistence on proof beyond reasonable doubt when no one is on trial, is a promotion of technical justice against the wish of electorates who should be represented by only people who went to polls and played the game in accordance with the minimum standards of conducting election. This technical justice is what the courts have frowned at in many occasions and which it is recommended must not be

¹ S. 36 (6) (d), Constitution Federal Republic of Nigeria, 1999 as amended

² (1999) 9 NWLR (Pt. 618) P. 354

³ (1999) 9 NWLR (Pt. 618) P. 354 @ 364 Paragraphs A-B

⁴ (1999) 4 NWLR (Pt. 599) P. 405 @

⁵ (1999) 4 NWLR (Pt. 599) P. 405 @ 412

allowed to defeat the essence of ensuring only people with genuine mandate get the return tickets as winners of election. The case of INTEROCEAN OIL CORP. NIG. UNLIMITED V. FADEYI is one of the occasions where the court made a case for substantial justice as opposed to technical justice. According to the court:

“The attitude of Nigerian courts these days is to do substantial justice between parties and discard technicalities or technical justice”.¹

It is equally argued that the non prosecution of electoral offenders is the cause of the unabated commission of electoral offences. It is the reason why politicians do all sort of criminalities at the poll knowing fully well the burden placed on the petitioner of proving any such criminal allegation is beyond doubt. Since the essence of highlighting electoral offences in petitions is to show to the tribunal that the election falls short of the rules of free conduct of election, the standard of proof should at best be on the balance of probabilities. This would go a long way in ensuring that the winners of election did not commit criminality to obtain a return against the wishes of the electorate. It would equally instill more confidence on the side of electorates to our electoral process.

¹ (2008) ALL FWLR (Pt. 403) 1381 @ 1393 Paragraph F

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