IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
ON TUESDAY THE 9TH DAY OF MAY 2023
BEFORE THEIR LORDSHIPS

JOHN INYANG OKORO	JUSTICE, SUPREME COURT
MOHAMMED LAWAL GARBA	JUSTICE, SUPREME COURT
ADAMU JAURO	JUSTICE, SUPREME COURT
TIJJANI ABUBAKAR	JUSTICE, SUPREME COURT
EMMANUEL AKOMAYE AGIM	JUSTICE, SUPREME COURT

SC/CV/508/2023

BETWEEN

1. ADEGBOYEGA ISIAKA OYETOLA
2. ALL PROGRESSIVE CONGRESS(APC)

} APPELLANTS

AND

1. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)
2. ADELEKE ADEMOLA JACKSON NURUDEEN
3. PEOPLES DEMOCRATIC PARTY (PDP)

} RESPONDENTS

JUDGMENT
(DELIVERED BY EMMANUEL AKOMAYE AGIM, JSC

This appeal No. SC/CV/508/2023 was commenced on 5-4-2-2023 when the appellants herein filed a notice of appeal against the judgment of the Court of Appeal delivered on 24-3-2023 in Appeal No. CA/AK/EPT/GOV/01/2023 allowing the appeal to it against the judgment of the Osun State Governorship Election

Tribunal delivered on 27-1-2023 in Petition No. EPT/OS/GOV/01/2022 granting the petition of the appellants against the election of the 2nd and 3rd respondents and holding that the petition was proved and that 1st appellant and not the 2nd respondent won the election of Governor of Osun State. The Court of Appeal set aside the said judgment and restored the election of the 2nd respondent, holding that the appellants failed to prove their petition against the 2nd respondent's election as Governor of Osun State on 16-7-2022.

A notice of cross appeal was equally filed on 6th April 2023 against the judgment of the Court of Appeal dismissing the cross-appeal to it against the judgment of the Tribunal.

The parties filed, exchanged and adopted their respective briefs as follows – appellants' brief, 2nd respondent's brief, 3rd respondent's brief, appellants' reply brief to 3rd respondent's brief, cross-appellant's brief and cross-respondent's brief.

The appellants' brief raised the following questions for determination –

> "1. **Whether on a proper consideration of the materials in the record and relevant applicable decisions of the Supreme Court, the lower court was right when it held that**

the Tribunal did not determine on the merit, the preliminary objection raised by the 2nd respondent against the petition. Ground 1.

2. Whether in the light of the pleadings, the evidence led and the applicable law, the lower court was not wrong in the view it took of Exhibit 2R. RW4, and its resolution of the issue regarding the non-qualification of the 2nd respondent to contest the Osun State Governorship election held on 16th July, 2022. Grounds 2, 3, 4, 5 and 6

3. Whether the lower court was not wrong in its consideration and determination of the appeal of the 2nd respondent when it raised the question whether the appellants led admissible evidence in support of their pleadings which question was not warranted by the grounds of appeal of the 2nd respondent to the lower court. Ground 7.

4. Whether on a proper consideration of the pleadings and the evidence in the records, Section 137 and paragraph 46(4) of the Evidence Act, 2022 and the judgment of the trial tribunal, the lower court was not wrong in holding that the appellants did not prove

their petition. Grounds 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20 and 22.

5. Whether in the light of the grounds of appeal of the 2nd respondent to the lower court, the court was not wrong when it held that the evidence of PW1 was inadmissible on the ground that he did not proffer proof of his qualifications before the lower tribunal and did not deny his membership of APC which made him a person interested in the petition. Ground 14.

6. Whether delivery of two conflicting decisions by the same panel of the lower court on the same issue in the three appeals which are now on appeal before the Supreme Court should not render the judgments in the three appeals unreliable to merit their setting aside. Ground 21.

7. Whether in the determination of an appeal, it is open to the lower court as it did in arriving at its decision on the appeal of the 2nd respondent, to rely on its own private knowledge of facts concerning the BVAS machine, not borne out by the evidence in

the record of appeal which bind the court and the parties. Ground 16."

The 2nd respondent's brief raised the following issues for determination-

"1. Whether the Court of Appeal was correct to hold that the Tribunal failed to determine the merit and to pronounce on the objections to the hearing of the Petition, raised by the 2nd Respondent. Ground 1.

2. Whether the Court of Appeal was correct to hold that Exhibit 2R. RW4 (the Judgment of the Court of Appeal) was properly before the Tribunal for consideration, in determining the issue of the qualification of the 2nd Respondent. Grounds 2, 3, 4, 5 and 6.

3. Whether the Court of Appeal was correct to consider the Appellants' pleadings and the evidence led in support in determining the appeal, having regard to the Grounds of Appeal filed by the 2nd Respondent. Ground 7.

4. Whether having regard to Section 137 of the Electoral Act and paragraph 46(4) of

the First Schedule thereof, the pleadings and evidence led, the Court of Appeal was correct to hold that the Appellants failed to prove that the 2nd Respondent was not duly elected as the Governor of Osun State. Grounds 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 22.

5. Whether the decision in the Judgment which gave rise to this appeal to the effect that the Appellants failed to prove substantial non-compliance is vitiated by a pronouncement made in another Judgment, subsequently delivered by the Court of Appeal. Ground 21."

The 3rd respondent's brief raised the following issues for determination-

"1. Whether the learned Justices of the Court of Appeal were right when they held that the ruling of the trial tribunal on the preliminary objection did not address the issues raised in the 2nd Respondent's preliminary objection? (Distilled from Ground 1 of the Notice of Appeal).

2. **Whether the learned Justices of the Court of Appeal rightly found that the learned trial Tribunal wrongly rejected Exhibit 2R.RW4, the Certified True Copy of the Judgment of the Court of Appeal in CA/A/362/2019 ADEKELE V. RAHEEM & ORS and is bound to take judicial notice of the said Judgment and abide by same? (Distilled from Grounds 2, 3, 4, 5 and 6 of the Notice of Appeal).**

3. **Whether the learned Justices of the Court were right when they held that the Appellants herein failed to prove the allegations in their petition and that the trial Tribunal was wrong to have granted the declaratory reliefs sought by the Appellants herein in the petition? (Distilled from Grounds 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the Notice of Appeal.)"**

The cross appellant's brief raised the following issues for determination-

"1. **Whether or not the lower court was right to hold that the Judgment of the trial tribunal**

was valid when member II did not render an opinion while the Chairman allowed the petition and member I dismissed the petition. (Ground 1).

2. Whether or not the lower court ought to have set aside the entirety of the proceedings at the trial tribunal after finding that trial tribunal breached the Cross-Appellant's right to fair hearing. (Ground 2).

3. Whether the lower court was right to hold that the decision of this Honorable court in Sokoto v. INEC (2022) 3 NWLR (Part 1818) 577 was not applicable to this case (Ground 3).

4. Whether or not the lower court was right to hold that there was no evidence of bias against the Cross-Appellant in the decision of the Chairman of the trial tribunal. (Grounds 4 and 5).

5. Whether or not the lower court ought to have dismissed the 1st and 2nd Cross-Respondents' petition when same was incompetent. (Grounds 1 and 6)."

The cross-respondent's brief raised the following issues for determination-

> "i. **Whether the lower court was not right to have held that the majority decision of the tribunal was validly rendered? Ground 1.**
>
> ii. **Whether the lower court is not justified in its refusal to declare the entire judgment of the tribunal a nullity? Ground 2.**
>
> iii. **Whether the lower court was not correct to have held that the case of SOKOTO V. INEC (2022) NWLR (PT. 1818) 577) was inapplicable to the admissibility of Exhibit BVR? Ground 3.**
>
> iv. **Whether the lower court was wrong not to have condemned the trial tribunal in the absence of positive evidence of bias? Grounds 4 and 5.**
>
> v. **Whether the 1st and 2nd Cross-Respondents' petition is incompetent? Ground 6."**

I have considered the issues raised for determination in the respective briefs of the parties herein in this appeal and the cross appeal.

I will first consider this appeal and then determine the cross-appeal if need be.

I will determine this appeal on the basis of the issues raised for determination in the appellants' brief.

Let me start by considering together issues 3,4,5 and 7 in the appellant's brief as they deal with the evidential basis of the decision of the Court of Appeal setting aside the decision of the trial court that the petitioners proved grounds 2 and 3 of their petition.

I have carefully read and considered the arguments in the respective briefs on these issues.

Ground 2 of the petition is that the 2nd respondent was not duly elected by majority of lawful votes cast at the election. Ground 3 of the petition is that the 2nd respondent's election was invalid by reason of non-compliance with the Electoral Act 2022 and Independent National Electoral Commission (INEC) Regulations, Guidelines and Manuals.

Let me start by considering the case made out by the petitioners on the above two grounds in their petition and evidence.

In the petition both grounds are based on the same allegation of facts of non-compliance with the Electoral Act and INEC Regulations, Guidelines and Manuals in election in 744 polling units across 10 Local Government Area of Osun State. The particulars of the two grounds stated in paragraphs 49 to 50.751 of the petition are the same. Paragraphs 34 to 46 and 52 to 67 of the petition clearly state the totality of the petitioners' case in the said two grounds.

Their case in their pleading is that the elections in 744 polling units in 10 Local Government Areas were characterized by widespread non use of the Bimodal Voter Accreditation System (BVAS) for accreditation of voters, that the presiding officers in the polling units permitted voting in many of the polling units without accreditation and/or verification with the use of BVAS, that there was no proper accreditation of voters in the said 744 polling units, that about 173,655 of the votes cast were from voters not validly accredited, that accreditation with BVAS was not done for a large number of voters in the 744 polling units, that the failure to use BVAS to accredit and verify voters in any polling unit rendered the election and results from the election in such unit void, that the total number of accredited and verified voters recorded in the BVAS are at variance with the total

number of votes cast in the forms EC8A for each of the 744 polling units, that the results in the Form EC8A for each unit show that the number of votes cast exceed the number of accredited voters recorded in the BVAS, that in the counting of the votes cast in each polling unit and the collation of the results of the election, it is the number of accredited voters recorded in the Bimodal Voter Accreditation System (BVAS) and transmitted directly from the polling units by the BVAS to the back end server or data base and the votes or results so recorded by the BVAS and transmitted directly from polling units by the BVAS to the back end server or data base that should be taken into account, that that the BVAS transmits on the spot information of duly accredited voters to the data base of 1st respondent and the information from such data base form the valid basis for voters to partake in the voting process by casting their votes for candidates of their choice, that the votes credited to the 1st appellant and 2nd respondent in the 744 polling units are vitiated and void for non-compliance with the mandatory provisions of the Electoral Act on accreditation and verification of voters in the elections and that upon deduction of the unlawful votes in the 744 polling units, it is the 1st petitioner and not the 2nd respondent who scored majority of the votes cast in the election and satisfied the requirements for

election as Governor of Osun State and ought to have been so declared.

The appellants in their petition desired the Tribunal to give judgment to them granting them the reliefs they claimed on the basis that the facts they assert in their petition exist. Therefore, they had the primary legal burden to prove the existence of those facts by virtue of S.131(1) of the Evidence Act 2011 which provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must" prove that those facts exists." Because the evidential burden to disprove the petitioners' case would shift and vest on the respondents only if the evidence produced by the petitioners establish the facts alleged in the petition by virtue of S.133(1) and (2) of the Evidence Act, the Tribunal was bound to first consider if the evidence produced by the petitioners established the existence of the facts alleged in the petition, before considering the evidence produced by the respondents to find out if the evidence disproved the case established by the petitioners on a balance of probabilities.

I think that the best starting point in determining if the evidence produced by the petitioners established the existence of the facts pleaded in the petition, is to find out the evidence

required to prove non accreditation, improper accreditation and over voting in 744 polling units across 10 Local Government Areas.

The evidence required to prove non-accreditation improper accreditation and over voting under the Electoral Act 2022 are the BVAS, the Register of Voters and the Polling Unit result in INEC Form EC8A by virtue of S.47(1)(2) and 51(2) of the Electoral Act 2022, Regulations 14, 18, 19(b)(i-iv), (e)(i-iii) and 48(a) of the INEC Regulations and Guidelines for the Conduct of Elections 2022.

S. 47(1) and (2) of the Electoral Act 2022 provides that-

(1) A person intending to vote in an election shall present himself with his voter's card to a Presiding officer for accreditation at the polling unit in the constituency in which his name is registered.

(2) To vote, the presiding officer shall use a mat card reader or any other technological device that may be prescribed by the Commission, for the accreditation of voters, to verify, confirm or authenticate the particulars of the intending voter in the manner prescribed by the Commission.

S. 51 (2) of the Electoral Act 2022 provides that-

Where the number of votes cast at an election in any polling unit exceeds the number of accredited voters in that polling unit, the Presiding officer shall cancel the result of the election in that polling unit."

Regulation 14(a) of the Regulations and Guidelines for the Conduct of Elections 2022 provide that -

No person shall be allowed to vote at any Polling Unit other than the one at which his/her name appears in the Register of Voters and he/she presents his/her PVC to be verified using the Bimodal Voter Accreditation System (BVAS), or as otherwise determined by the Commission.

(b) Each Voter shall cast his/her vote in person at the Polling Unit where he/she registered or was assigned, in the manner prescribed by the Commission."

Regulation 18(a) and (b) provides that-

(a) In accordance with Section 47 (2) of the Electoral Act 2022, a person intending to vote shall be verified to be the same person on the Register of Voters by the use of the Bimodal Voter Accreditation System (BVAS) or any other device approved by the Commission, in the manner prescribed in these Regulations and Guidelines.

(b) Any poll official who fails to verify voters in the manner prescribed by the Commission shall be deemed to be guilty of dereliction of duty and shall be liable to prosecution.

Regulation 19(b) provides that –

The accreditation process shall comprise of:

(i) Checking the Permanent Voter's Card (PVC) of the voter;

(ii) Positive identification of the voter in the BVAS;

(iii) Authentication of the voter by matching his/her fingerprints of face (facial recognition) using the BVAS;

(iv) Positive identification of the voter in the Register of Voters.

(e) The verified voter shall then proceed to the APO II who shall:

(i) Request for the Voter' PVC;

(ii) Check the Register of Voters to confirm that he voter's name, details, and Voter Identification

Number (VIN) are as contained in the Register of Voters;"

(iii) Tick the appropriate box of the horizontal boxes on the right margin beside the voter's details on the Register, showing the category of election and that the person's name is on the Register of Voters;"

Regulations 48(a) provides that –

An election result shall only be collated if the Collation Officer ascertains that the number of accredited voters agrees with the number recorded in the BVAS and votes scored by Political Parties on the result sheet is correct and agrees with the result electronically transmitted or transferred directly from the Polling Unit as prescribed in these Regulations and Guidelines.

It is glaring from the above reproduced provisions of the Electoral Act and the INEC Regulations and Guidelines that the evidence required to prove that voting was allowed without accreditation or that there was improper accreditation are the Register of Voters, BVAS and the Polling Unit result in Form EC8A and that the evidence required to prove that there was over

voting are the record of accredited voters in the BVAS and the Polling Unit result in Form EC8A.

Having determined the evidence required to prove the assertions of non accreditation, improper accreditation and over voting, let me now consider what evidence the appellants produced in the Tribunal to prove their above assertions.

The evidence relied on and tendered by the petitioners to prove grounds 2 and 3 of the petition include the testimonies of their two witnesses, PW1 and PW2, polling units results in INEC Form EC8A for each of the 744 polling units and the report of the examination of the content of the INEC database or back end server following an inspection ordered by the Trial Tribunal (exhibit BVR). The BVR issued on 27-7-2022 is said to contain information on the number of accredited voters and results transmitted from BVAS used in the 16-7-2022 election in the 744 polling units.

The BVAS devices for each of the 744 polling units which the appellants solely relied on as the basis for grounds 2 and 3 of their petition were not produced and tendered by them as evidence in support of their case. Rather they sought to prove the record of accredited voters in the BVAS devices for each of the 744 polling units by means of a report of the examination of the

INEC data base or back end server(exhibit BVR) said to contain the information on the number of accredited voters and number of votes cast in a polling unit transmitted by the BVAS to the said INEC data base during the election on election day. The record in the BVAS machine for each polling unit is the direct and primary record of the number of voters accredited in that polling unit on the election day in the process of the election. It is not in dispute that the disputed polling units results were collated in their respective wards by their Ward Collation Officers. The collation By virtue of Regulation 48(a) of INEC Regulations and Guidelines (supra), a presumption arises from the collation of the polling units results that the number of accredited voters recorded in the result in Form EC8A agrees with the record of accredited voters in the BVAS. The petitioners cannot rebut this presumption without producing the BVAS machines in evidence. Regulation 48(a) INEC Regulations and Guidelines (supra) states what the number of accredited of voters in the result should agree with as **"the number recorded in the BVAS"**. So it is the number of accredited voters recorded in the BVAS that the number of accredited voters recorded in the result in Form EC8A must be compared with or verified from to determine if there was over voting in a polling unit. For practical purposes and for ease of reference an original or certified true copy of an INEC

certificate of the record of number of accredited voters of the BVAS for each polling unit can be produced from an examination of the record of the BVAS machines and tendered in evidence along with the BVAS machines. In any case, Regulation 48(a) having expressly and specifically mentioned the election documents or instrument with which the number of accredited voters recorded in Form EC8A is to agree with or to be compared with, only that document and no other shall be evidence for that purpose.

Exhibit BVR, the report of the examination of the content of the INEC database or back end server containing the number of accredited voters and number of votes cast transmitted by the BVAS for each polling unit to the data base or back end server, does not qualify as the BVAS provided for in Regulation 48(a) and the number recorded therein as extracted from the INEC data base is not the **"the number recorded in the BVAS"** as provided in Regulation 48(a). There is no part of the Electoral Act or the INEC Regulations and Guidelines for the Conduct of Elections 2022 that makes INEC data base or back end server a part of the accreditation process or record of accredited voters. The INEC data base is a post election record created by S.62 of the Electoral Act 2022 and named therein as the National Election

Register of Election Results for the purpose of keeping reliable and verifiable records of past election results polling unit by polling unit. The exact text of S.62 of the Electoral Act reads thusly -

> **"62.(1) After the recording and announcement of the result, the presiding officer shall deliver same along with election materials under security and accompanied by the candidates or their polling agents, where available, to such person as may be prescribed by the Commission.**
>
> **(2) The Commission shall compile, maintain and update, on a continuous basis, a register of election results to be known as the National Electronic Register of Election Results which shall be a distinct database or repository of polling unit by polling unit results, including collated election results, of each election conducted by the Commission in the Federation, and the Register of Election Results shall be kept in electronic format by the**

Commission at its national headquarters.

(3) **Any person or political party may obtain from the Commission, on payment of such fees as may be determined by the Commission, a certified true copy of any election result kept in the National Electronic Register of Election Results for a State, Local Government, Area Council, registration area or Electoral Ward or Polling Unit, as the case may be, and the certified true copy may be in printed or electronic format."**

There is no part of the Electoral Act or the INEC Regulations and Guidelines for the Conduct of Elections 2022 that requires that the Presiding Officer of the election in a Polling unit transmit the particulars or number of accredited voters recorded by the BVAS to the INEC data base or anywhere. This is obvious from all the provisions reproduced above.

Equally, there is no part of the Electoral Act and INEC Regulations and Guidelines that require that election result of a polling unit should on the spot during the poll be transmitted to the INEC National Election Register or data base. Rather, the

Regulations provide for the BVAS to be used to scan the completed result in Form EC8A and transmit or upload the scanned copy of the polling unit result to the Collation System and INEC Result viewing Portal (IReV).

Regulation 38 of the Regulation reads thusly-

> **"38. On completion of all the Polling Unit voting and results procedures, the Presiding Officer shall:**
>
> **(i) Electronically transmit or transfer the result of the Polling Unit, direct to the collation system as prescribed by the Commission.**
>
> **(ii) Use the BVAS to upload a scanned copy of the EC8A to the INEC Result Viewing Portal (IReV), as prescribed by the Commission.**
>
> **(iii) Take the BVAS and the original copy of each of the forms in tamper evident envelope to the Registration Area/Ward Collation Officer, in the company of Security Agents. The Polling Agents may accompany the Presiding Officer to the RA/Ward Collation Centre."**

As their names depict, the Collation System and the INEC Result Viewing Portal are part of the election process and play particular roles in that process. The Collation System is made of the centres where results are collated at various stages of the election. So the polling units results transmitted to the collation system provides the relevant collation officer the means to verify a polling unit result as the need arises for the purpose of collation. The results transmitted to the Result Viewing Portal is to give the public at large the opportunity to view the polling unit results on the election day. It is clear from the provisions of Regulation 38(i) and (ii) that the Collation System and Result Viewing Portal are different from the National Electronic Register of Election Results. The Collation System and Result Viewing Portal are operational during the election as part of the process, the National Electronic Register of Election Results is a post election record and is not part of the election process.

As I had held herein, there is no part of the Electoral Act requiring the Presiding Officer to transmit the accredited voters in a polling unit or the polling unit result during election to the INEC data base as part of the election process.

As stated in S.62(1) of the Electoral Act, 2022 "After the recording and announcement of the result, the presiding officer

shall deliver same along with election materials under security and accompanied by the candidates or their polling agents, where available, to such person as may be prescribed by the Commission. This is to enable the Commission compile, maintain and update, on a continuous basis, a register of election results. This intention is clear from Subsection(2) of S.62 which provides that "the Commission shall compile, maintain and update, on a continuous basis, a register of election results to be known as the National Electronic Register of Election Results which shall be a distinct database or repository of polling unit by polling unit results, including collated election results, of each election conducted by the Commission in the Federation, and the Register of Election Results shall be kept in electronic format by the Commission at its national headquarters"

In the light of the foregoing, I hold that the INEC data base or National Electronic Register of Election Results is not relevant evidence in the determination of whether there was non accreditation or over voting or not in an election in a polling unit and cannot be relied on to prove over voting.

Therefore the case of the appellants that the Presiding Officer was bound to instantly or on the spot, during election transmit the number of accredited voters and results of election in the

BVAS to the INEC data base or back end server and that "in the counting of votes cast at the polling unit and the collation of the results of the election, it is the number of accredited voters, votes cast or results transmitted directly from polling units to the data base that should be taken into account" has no support in any of the provisions of the Electoral Act or INEC Regulations (supra). There is no such duty on the Presiding Officer. In any case, the appellants' two witnesses testified that on the spot electronic transmission of results from BVAS may in some instances be frustrated by lack of internet connectivity, BVAS battery failure and error in pressing the 'send button' of the BVAS. So even in the context of the case they presented, the appellants have shown in their pleadings and evidence, that the BVR cannot be a complete and accurate record of the number of voters accredited and of the number of votes cast on the day of poll, 16-7-2022 because it is not the direct record of these numbers and contains only the numbers transmitted to it from the BVAS. So that if the BVAS malfunctions and is unable to instantly transmit as it was recording because of lack of internet connecting, failure of INEC officials to press the submit button properly and loss of power in the battery, what is recorded in the BVAS will not be in the data base. The data base can only contain what is transmitted it from the BVAS at a particular time and not what the BVAS recorded at

that time. So by the appellant's own showing it cannot be a complete and accurate record of those numbers and therefore cannot be relied on to dispute the number of accredited voters recorded in the Form EC8A on the day of poll.

In the light of the foregoing, I hold that exhibit BVR is not useful or relevant to prove non and improper accreditation of voters and over voting.

The appellants did not produce the Register of voters for each of the 744 polling units and have argued that they are no longer relevant for accreditation of voters and are therefore not relevant to their case. I do not agree with this argument.

It is clear from the provisions of S.47(1) and (2) of the Electoral Act 2022 and Regulations 14(a) and (b), 18(a) and (b), 19(b) and (e) that the Register of voters for each polling unit is relevant evidence to prove the alleged non accreditations of voters in the 744 polling units on the election day. It is worth stating that in the event of a conflict between the record of accredited voters in the BVAS machine and ticked names in the Register of voters due to human errors in the ticking of the names in the Register of voters, the BVAS Record shall prevail.

The other evidence adduced by the appellants to prove their case is the Expert Analysis Report prepared by PW1, who by his own admission is a member of the 2nd appellant and had been a Special Assistant to the 1st Appellant and was engaged by the appellants to establish the invalidity of the disputed results in Form EC8A for the 744 polling units. He testified further that " I made the report as directed by the Petitioners" and that " I am part of those who wrote the petition." By his own testimony, he established that he was not an independent expert as he had an interest in the subject of his analysis and carried out the analysis from the conclusion that the results were invalid, to justify that conclusion to support the contemplated election petition. It was an analysis from an answer and not from a question. Such a report is not the product of an independent, impartial, detached and professional analysis. He is clearly a person with the disposition or temptation to depart from the truth. In **Anyaebosi V V.R.T, Briscoe (Nig) Ltd (Supra)**, this court held that the likelihood that the maker of a report is tainted by the incentive to conceal or misrepresent facts, renders him a person interested. The listing of the Expert Analysis Report in the petition among the documents to be relied on to prove the petition show it was made in anticipation or contemplation of the petition to be filed. The report having been made by PW1 as a

person interested in the subject matter of the report when the petition was anticipated to establish that the election result was invalid is not admissible evidence by virtue of **Section 83(3) of the Evidence Act, 2011 (as amended)** which provides as follows:-

> ***Nothing in this Section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."***

He admitted that his analysis was based on his examination of the content of the Form EC8A's for the 744 polling units and the BVR. It is obvious that the same documents were in evidence before the Tribunal and that therefore it was bound to review, evaluate and analyze the same documents and make its own inferences from them and cannot adopt the opinion of PWI based on his inferences from the documents as its own. The Court cannot adopt the opinion of a person concerning a documentary evidence before it without itself considering that evidence and drawing its own inferences from it. Such opinion on the content of a document (Form EC8A) not made by the person expressing it(PW1) is hearsay and not admissible. S.37 of the Evidence Act 2011 defines "Hearsay" to mean a statement "(a) oral or written

made otherwise than by a witness in a proceeding; or (b) contained or recorded in a book, document or any record, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it." In any case S.67 of the Evidence Act 2011 provides that "the opinion of any person as to the existence or non-existence of a fact in issue or relevant fact in issue is inadmissible except as provided in Sections 68–76 of this Act. The expert analysis report does not fall within the exceptions in Sections 68-76 of the Evidence Act 2011. It is inadmissible evidence.

The entire testimony of PW1 in examination in chief was, as admitted by him, based on his examination and analysis of the said Forms EC8A and BVR. He had no personal knowledge of the facts of the case. He was not present in the election in any of the polling units. He was not a polling agent of the 2nd appellant. He was only engaged as the leader of the appellant's team to coordinate the analysis of the Form EC8As and BVR. He admitted that he did not examine the BVAS and the Register of voters for the 744 polling units before he wrote his Expert Analysis Report. Yet he analysed the content of the record of the BVAS he never saw and drew conclusions that there was non accreditation or

improper accreditation of voters and over voting in the disputed 744 polling units without directly examining the record of rht BVAS or a report of the direct examination of the said record.

His entire testimony in examination in chief is hearsay evidence and is inadmissible evidence. See Ss. 37 and 38 of the Evidence Act 2011. The same applies to the testimony in examination in chief of PW2, who was the appellants' state collation agent and was not present in any of the polling units and so did not witness the election process in any of them. His testimony in examination in chief concerning the record in the BVAS based on BVR a 3rd hand statement of same, in that it is said to be the report of examination of entries in the INEC data base made by a person who did not examine the BVAS records, which entries are said be derived from information transmitted from BVAS is therefore hearsay and not admissible evidence. As it is, the appellants did not produce originals or certified true copies of INEC documents, to wit, BVAS machines or certificates of their record issued by INEC from the examination of the record of accredited voters in the BVAS machines, Register of Voters and Form EC8A for each of the 744 polling units that sufficiently disclose the non compliance they alleged in their petition.

The appellants did not elicit any admissible and credible oral evidence of non accreditation, improper accreditation in any of the 744 polling units. In their pleading and evidence, the appellants did not state the polling unit where there was no accreditation of voters and did not allege or show how the improper accreditation occurred. So they did not prove the allegation of non accreditation and improper accreditation.

It is glaring from the foregoing that the appellants did not adduce relevant and admissible evidence to prove non-accreditation of voters, improper accreditation of voters and over voting.

By virtue of S.131 and S.133 (1) and (2) of the Evidence Act 2011, the appellants had the primary legal burden to prove the existence of the facts asserted by them in grounds 2 and 3 of their petition. By virtue of S.133(2) of the Evidence Act 2011, it is only when the appellants discharge that burden, that the evidential burden would shift to the respondents to adduce evidence to disprove the case made by the appellants. It is obvious that the appellants' case collapsed at the conclusion of their evidence as their pleadings and evidence made no case that

required the respondents to disprove by evidence and so no evidential burden shifted to the respondents.

Be that as it is, the respondents still went ahead, may be, out of abundance of caution, to produce the BVAS machines for the 744 polling units in evidence and the certified true copy of the record of accredited voters in the BVAS machines (exhibit RWC). A reading of the Form EC8A for each of the 744 polling units together with exhibit RWC show that the number of accredited voters and votes cast in the FORMs EC8A agree with the number of accredited voters in the BVAS except in 6 polling units, where over voting was shown to have occurred, and that the over voting in the 6 polling units out of the disputed 744 units did not affect the election of the 2nd respondent.

The Court of Appeal correctly found that the appellants failed to prove grounds 2 and 3 of the petition and correctly allowed the appeal to it on those grounds and set aside the decision of the Tribunal.

Issues 3,4,5 and 7 are resolved against the appellants.

Let me now consider issue No. 2 concerning the qualification or disqualification of the respondent for election as Governor of a State.

I have carefully read and considered the arguments in the respective briefs on this issue.

The first of the three grounds of the appellants' petition is that the 2nd respondent was, at the time of the election, not qualified for election as Governor of a State because he was not educated up to at least the school certificate level or its equivalent, that he did not possess the educational qualifications showing that he was so educated and that the Diploma certificate from Penn Foster High School and the Bachelor of Science degree in Criminal Justice from Atlanta Metropolitan State College attached to his Form EC9 submitted to INEC are forged. The trial Tribunal found that the Ede Muslim High School Leaving Testimonial and Statement of Result presented by the 2nd respondent to show he was educated up to school certificate were forged, after refusing to countenance certified true copies of the judgment of the Court of Appeal in CA/A/362/2019-PDP V Wahab Adekunle Raheem & Ors(exhibits 2R.RW4) that had decided they were not forged on the ground that they are photocopies of certified true copies of the judgment. It also found that the 2nd respondent qualified for the said election on the basis of other educational qualifications. On appeal to the Court of Appeal against these findings of the Tribunal, the Court

of Appeal held that –"**The documents tendered by the appellant, Exhibit 2R.RW4(Judgment CA/A/362/2019) were indeed certified and the same was reported as ADELEKE V. RAHEEM & ORS(2019) LPELR 48729(CA). In the circumstance, the appellant's counsel having acquitted himself of his duty to the Tribunal, it behoves on the Tribunal to not only take judicial notice of the judgment but abide by the pronouncements contained therein. I repeat, that issue transcend beyond the admissibility of the judgment but its binding force on the Tribunal on the basis of stare decisis.**

I agree with the argument of Learned SAN for the 3rd respondent that there is no ground of this appeal against the specific finding of the Court of Appeal that Exhibit 2R.RW4(Judgment of Court of Appeal in Appeal No. CA/A/362/2019) tendered in the Tribunal is a certified true copy. By not appealing against it, the appellants accepted it as correct, conclusive and binding upon them and therefore cannot argue against the finding. See See **Iyoho v. Effiong (2007) 4 SC(Pt.iii) 90, SPDC Nig Ltd & Anor V X.M Federal Ltd & Anor(2006) 7 SC(Pt.iii) 27 and Dabup V Kolo(1993) 12 SCNJ I.**

The Judgment decided the status of the information from 2nd respondent that he completed secondary education at Ede Muslim High School, Ede and that he sat for the 1981 May/June West

African School Certificate Examination in the said School, the status of the School leaving Testimonial and Statement of result of 1981 May/June West African School Certificate Examination issued by at Ede Muslim High School, Ede and decided the said information is true and that the testimonial and statement of result were not forged. The appeal against this decision to this court was dismissed. Although the 1st appellant was not a party in that case, he is bound by the judgment because as rightly submitted by Learned SAN for the 2nd respondent it is a judgment in rem and binds the whole world on the decided issues. In **Oni & Anor V Oyebanji & Ors(SC/CV/398/2023 on 6-4-2023)** this court Per Agim JSC restated the law on this concept thusly – "**As this Court held in Ogboru & Anor v. Uduaghan & Ors (2011) LPELR-8236 (SC) "A judgement in rem may be defined as the judgement of a court of competent jurisdiction determining the status of a person or thing as distinct from the particular interest of a party to the litigation. Apart from the application of the term to persons, it must affect the "res" in the way of condemnation, forfeiture, declaration, status or title. (a) Examples are judgment of a Court over a will creating the status of administration. (b) Judgment in a divorce by a Court of competent jurisdiction dissolving a marriage declaring the nullity or affirming its existence. (c) Judgment in an election petition. The feature of a judgment in rem is that it binds all persons**

whether a party to the proceedings or not. It stops anyone from raising the issue of the status of persons or persons or things, or the rights or title to properly litigated before a competent Court. It is indeed conclusive against the entire world in whatever it settles as to status of the person or property. All persons whether party to the proceedings or not are stopped from averring that the status of persons is other than the Court has by such judgement declared or made it to be". Okpalugo vs. Adeshoye (t996) 10 NELR pt. 476, pg. 77, Fan trades Ltd. vs Uni Association Co. Ltd. (2002) 8 NWLR Pt. 770, pg. 699., Ogbahon vs. Reg. Trustees CCCG (2002) 1 NWLR Pt. 749, pg. 675, Olaniyan vs Fatoki (2003) 13 NWLR pt. 837, Pg. 273."

In Dike & Ors v. Nzeka II & Ors (1986) LPELR – 945 (SC), the Supreme Court held thusly- "It is therefore necessary to have a clear idea of the distinction between a judgment tin rem and a judgment in personam. A judgment is said to be in rem when it is an adjudication pronounced upon the Status of some particular thing or subject matter by a tribunal having the jurisdiction and the competence to pronounce on that Status. Such a judgment is usually and invariably founded on proceedings instituted against or on something or subject-matter whose status or condition is to be determined. It is thus a solemn declaration on the status of some persons or thing. It is therefore binding on all persons in so far as their interests in the status of the property or person are concerned. That is why a judgment in rem is a judgment contra

mundum – binding on the whole world – parties as well as non-parties. A judgment in personam, on the other hand, is on an entirely different footing. It is a judgment against a particular person as distinguished from a judgment declaring the status of a particular person or thing. A judgment in personam will be more accurately called a judgment inter partes. A judgment in personam usually creates a personal obligation as it determines the rights of parties inter se to, or in the subject-matter in dispute whether it be land or other corporeal property or liquidated or unliquidated demand, but does not affect the status of either the persons to the dispute or the thing in dispute."

The judgment on these issues operate as estoppel per rem judicatam to bar any further suit by anybody on these same issues. Although the appellants were not parties in that case, they are bound by the judgment on those issues and are barred from litigating on them on the principle of estoppels perem judicatam. It equally binds the trial Tribunal and robs it of the jurisdiction to try those issues by virtue of the operation of the same principle of estoppel per rem judicatam. It is an abuse of the process of court to seek to re-litigate an issue that the judgment of this court has judicially determined."

By virtue of the principle of estoppel per rem judicatam, the trial Tribunal lacked the jurisdiction to try the very same issues finally decided in the said judgment of the Court of Appeal. Exhibit 2.RW4 having been brought to the notice of the Tribunal and even formed part of the evidence before it, the Tribunal was bound to consider its contents to determine if it is not bound by the judgment therein. On the principle of stare decisis the Tribunal was bound to follow the decision of the Court of Appeal on the status of the same testimonial and statement of result.

No evidence was adduced to establish the allegations of forgery of Diploma Certificate of Penn Foster High School and the Bachellor of Science degree in Criminal Justice from Atlanta Metropolitan State College beyond the hearsay testimonies of PW1 and PW2. There is no evidence that the institutions that awarded the 2nd respondents those educational qualifications denied awarding him those qualifications and issuing the certificates. As it is, without the awarding institutions disclaiming them, their authenticity and validity remain intact. This Court in **Dantiye V A APC & Ors (SC/CV/627/2020)** delivered on 30-10-2020 held per Augie JSC thusly – "**Since this matter revolves around the WAEC results and alleged false information, the only way the facts in issue can be resolved is by evidence from WAEC**

to the effect that the 2nd defendant is not the owner of the result in dispute and that the result and certificates did not emanate from WAEC to the 2nd defendant in person. The plaintiff in proving his case failed to write to or visit the West African Examination Council to ascertain the true state of things but relied on mere assumptions and speculations. The plaintiff has the burden to establish by credible and cogent evidence that the result does not belong to the 2nd defendant. The burden of proof.... rest squarely on the plaintiff who is alleging false representation.....It is the duty of the court to consider and act only on credible evidence and not on speculations or unfounded assumptions.

In **APC V Ebeleke & Ors (judgment in SC/CV/182/2021 of 16-4-2021)** following its decision in Dantiye V APC restated the law thusly – **"The 1st respondent did not elicit any evidence from WAEC stating that it did not issue those results or that the 2nd respondent did not sit for the said examination and did not obtain the grades in the subjects listed therein. The 1st respondent did not elicit evidence from Uboma Secondary School, Ikperejehe Etiti stating that the signature on exhibit A28 is not that of its principal or that it did not issue exhibit A28 or that the 2nd respondent did not sit for the said examination in that school or that the content of exhibit A28 are false in any respect. Without any of the above evidence, there is no evidential basis for the findings that the results are contradictory, not authentic and false because of the differences**

in them. See Dantiye V APC & Ors(supra), Maihaja v Gaida(2017) LPELR -42474, Abubakar V INEC (2020) 12 NWLR(Pt1737) 110, Dankwambo v Abubakar & ors (2015) LPELR – 35716(SC) and Agi V PDP & Ors(2016)LPELR- 42578(SC)."

This court in **APC & Anor V Obaseki & Ors (judgment in SC/CV/376/2021 of 28-5-2021)** also held that - **The basic evidence required to prove that the University degree certificate attached to INEC Form EC9 is forged is a disclaimer from the University of Ibadan that is said to have issued the certificate. The evidence required to prove that the A/Level WAEC Certificate attached to Form EC9 is forged is a disclaimer from WAEC that conducted the examination and issued the result and certificate. See the restatement of this law by this court in Maihaja v. Gaida (2017) LPELR – 42474 (SC) and Mohammed V Wammako(2018) All FWLR (Pt.937) 1608 at 1630. It is curious that the appellants did not produce evidence of any official disclaimer from the University of Ibadan of the degree certificate attached to the Form EC9 or any official disclaimer of the A Level WAEC Certificate by WAEC. Without evidence from the institution or body that is purported to have issued any certificate or other document stating that it did not issue the certificate or document or that any part of the certificate or document is not made by it, it would be idle and useless to contend that it is forged.**

See **Ibezim V Elebeke(Judgment in SC/CV/2021 of 16-4-2021)**

In the light of the foregoing, issue No. 2 is resolved against the appellant.

Let me now determine issue No. 1.

I have carefully considered the arguments in the respective briefs on this issue.

It is glaring that the Tribunal lumped several preliminary objections together, without considering each of them and the issues raised in each, dismissed them. The exact text of its decision reads thusly – "the several preliminary objections to the competence of the 1st petitioner as a candidate in the election and the jurisdiction of this Tribunal to determine the said petition are hereby dismissed." This amounts to sweeping aside the objections without hearing or determining them. The dismissal of the objections did not proceed from the determination of any of the objections. It violates the fair trial of the objections and the entire petition and the right of the parties to fair hearing. This feature renders Tribunal's judgment a nullity.

Issue No. 1 is resolved against the appellants.

In the light the above determinations, I do not think it is useful determining the remaining issues.

On the whole this appeal fails as it lacks merit. It is accordingly dismissed. The judgment of the Court of Appeal delivered on 24-3-2023 in Appeal No.CA/AK/EPT/GOV/01/2023 is hereby affirmed.

I make no order as to costs.

This judgment binds the sister Appeals Nos. SC/CV/509/2023, SC/CV/510/2023 and SC/CV/511/2023.

EMMANUEL AKOMAYE AGIM
JUSTICE, SUPREME COURT

APPEARNACES:

Prince Lateef O. Fagbemi, SAN, with Chief Akinlolu Olujinmi, CON, SAN, Prof. Kayode Olatoke, SAN, Chief H.O. Afolabi, SAN and Ifeanyi Egwuasi, Esq for the Appellants.

Prof Paul Ananaba SAN, Chief Henry Akunebu SAN, with Olawale Fakunle Esq; Oluwole Jimi-Bada Esq, and **Stanislaus N. Mbaezue, Esq** for the 1st Respondent.

Dr. Onyechi Ikpeazu, OON, SAN, Kehinde Ogunwumiju SAN,Tunde Afe-Babalola, SAN; with Niyi Owolade Esq and **N.I. Harrison,** for 2nd Respondent.

Dr. Alex Iziyon SAN, N.O.O. Oke SAN,Olurotimi Alli, Esq; C.S. Ekeocha Esq, and **Alex Iziyon II.** for 3rd Respondent.