

**A CRITIQUE OF THE USE OF SMART CARD READER IN THE CONDUCT
OF ELECTIONS IN NIGERIA: A CASE STUDY OF WIKE V. PETERSIDE**

BY

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DEGREE OF MASTER OF LAWS (LL.M)**

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DECLARATION

I hereby declare that this work is the product of my research efforts undertaken under the supervision of Professor Auwalu Hamisu Yadudu and has not been presented anywhere for the award of a degree or certificate. All sources have been duly acknowledged.

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CERTIFICATION

This is to certify that the research work for this dissertation and the subsequent write-up by **Al-Amin Mohammed Shuwa (SPS/15/MLL/00001)** were carried out under my supervision.

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APPROVAL

This dissertation titled “**A CRITIQUE OF THE USE OF SMART CARD READER IN THE CONDUCT OF ELECTIONS IN NIGERIA: A CASE STUDY OF WIKE V. PETERSIDE** ” by **Al-amin Mohammed Shuwa (SPS/15/MLL/00001)** has been well examined by us and we hereby approve it for the award of degree of Master of Laws (LL.M).

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DEDICATION

This dissertation is dedicated to my late parents and brother Alhaji Muhammad Shuwa, Hajja Fanna and Tijjani Muhammad Shuwa respectively. May Allah forgive them and grant them Jannat-al-Firdaus. Ameen.

ABBREVIATIONS

AC	Action Congress
APC	All Progressive Congress
ANPP	All Nigeria Peoples Party
APGA	All Progressive Grand Alliance
APO	Assistant Presiding Officer
AFIS	Automated Fingerprint Identification System
CERC	Constitution and Electoral Reform Committee
CJN	Chief Justice of Nigeria
DW	Defendant Witness
ERC	Electoral Reform Committee
EUEOM	European Union Election Observer Mission
FEDECO	Federal Electoral Commission
ICT	Information Communication Technology
INEC	Independent National Electoral Commission
ING	Interim National Government
JCA	Justice of Court of Appeal
JSC	Justice of Supreme Court
NEC	National Electoral Commission
NECON	National Electoral Commission of Nigeria
NJC	National Judicial Council
PDP	Peoples Democratic Party
PO	Presiding Officer
PVC	Permanent Voters Card
PW	Plaintiff Witness
REMOBS	Re-modified Open-Secret Balloting System
SCRM	Smart Card Reader Machine
UNDP	United Nation Declaration of Human Rights

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ABSTRACT

This research work reviewed the judgment of the Supreme Court in the case of Wike V. Peterside in relation to the use of Smart card reader machine. Democracy as a system of government based on the acquisition of authority from the people with its laudable values, such as sovereignty of the people, institutionalization of the rule of law, the emphasis on the legitimacy of rulers; the availability of the choices through competitive election process and accountability in governance are far from achieving them in Nigeria, due largely to the fraudulent manipulation of the election process by the political class. The elections process in Nigeria was bedeviled by rigging, violence and manipulation of court process by politicians. Attempts by various governments to carry out electoral reforms were virtually not successful in providing the desired result of free, fair and credible election. Until in 2015 general elections the Electoral Management Body introduced technologically based accreditation of voters through the use of smart card reader machine with a desire to address election malpractice. Officials of Independent National Electoral Commission (INEC) in Rivers State refused to abide by INEC regulations on the use of the Smart card reader machine and resorted to manual accreditation of voters that was not reliable in providing the desired result of fraud free election as provided by section 49 of the Electoral Act 2010 (as amended). Adopting the doctrinal research methodology the work critically analyzed the judgments of the lower courts and Supreme Court in the instant case and ascertained the rules of interpretation of statutes adopted in arriving at their respective decisions. The Election Petition Tribunal and Appeal Court relied on the prospects of the Smart Card Reader in minimizing rigging, purposive rule of interpretation of Electoral Act 2010 and INEC subsidiary regulations to annul the election, while the Supreme court used Literal rule of interpretation of the Act and relied on section 49 of the Electoral Act, 2010 (as amended) against INEC regulations that introduced smart card reader and without considering the credibility and reliability of the devices in reversing the two lower courts decisions. The research recommended for review of the judgment of the Supreme court and Section 49, 138 and 139 of the Electoral Act, 2010 be amended to incorporate smart card reader machine as sole means of accreditation process, violation of INEC subsidiary legislation be one of the grounds for election petition and petitioners to proof either of the two burden of proof that deals with substantial non-compliance and substantial effect on the result of the election respectively. .

CHAPTER ONE

1.1 Background to the Study

Majority of the electoral management bodies around the World use new technology with the aim of improving the electoral process. Almost all developed nations that practice democracy use Information Communication Technology (ICT) to conduct elections.¹ In Africa no fewer than twenty five (25) Sub-Saharan African countries (e.g. Siera-Leone, Democratic Republic of Congo, Zambia, Malawi, Rwanda, Senegal, Somaliland, Mali, Togo, Ghana and others) have already held elections through the use of Biometric Voter Register.²

Biometric identification systems are already in widespread use for voter registration and as of early 2013, 34 of the world's low and middle income countries had adopted biometric technology as part of their voter identification system.³ For instance, different kinds of biometric infrastructures have been used in some African States like Ghana, Mali, Kenya, Cameroon, Sierra Leone, Mozambique, Zambia, Malawi, Rwanda, Senegal and Mauritania, with varying degrees of success, to improve transparency in recent elections.⁴ The administration of the elections in Nigeria witnessed the use of Smart Card Reader Machine (SCRM) for the authentication of biometric Permanent Voters' Cards (PVCs) and the accreditation of voters in 2015 general election. The

¹ ACE Project: The Electoral Knowledge Network. Available at <http://aceproject.org/en/regions/africa/GH/ghana-electoral-commission-ghana-strategic-plan/view> Accessed on 14/02/2017 at 8.30am.

² Ibid

³ Gelb, A. and Clark, J (2013) Identification for Development. Working Paper 315 Centre for Global Development, Washington D.C Available at <https://www.cgdev.org/publication/identification-development-biometrics-revolution-working-paper-315> Accessed on 5/02/2017. at 11am.

⁴ Nwangwu, C. Biometric Voting Technology and 2015 General Elections in Nigeria. The Real Issues ‘‘ Organized by The Electoral Institute between 27th and 28th July 2015. Available at <http://www.inecnigeria.org/wp-content/uploads/2015/07/Conference-Paper-by-Chikodiri-Nwangwu.pdf> Accessed on 7/02/2017. at 6.40pm.

introduction of these devices was necessitated by the fact that reliable voter register and identification mechanism are some of the preconditions for free, fair and credible elections.

History of election in Nigeria was characterized by malpractices and violence before, during and after elections. The results declared by election management bodies are usually challenged in courts. Elaigwu in his paper title “Nigeria the current state of the Federation: Basic challenges⁵ ” stated thus,; the electoral process has been crisis ridden since 1999. It seems each successive election since then has been worse than earlier ones. The result is that government emerges with a baggage of crisis of legitimacy, which often complicates the dynamics of federalism. This was what happened in 2003 and 2007 elections.

Electoral malpractices make the citizens lose confidence in the electoral process and lack of confidence by the citizenry in the democratic process is an impediment in deepening electoral democracy because if the citizenry does not believe in the fairness, accuracy, openness and basic integrity of the election process, the very basic of any democratic society might be threatened.⁶

The outcomes of the elections were highly disputed on the ground of alleged gross irregularities and violence. The Presidential elections of second, third and fourth Republics were all challenged in courts with the exception of 2015 Election that ushered in President Muhammadu Buhari and this was largely due to the credibility and

⁵ Elaigwu, J.I. (2007) Nigeria the current state of the Federation: Basic Challenges, paper presented at International Conference on Federalism in Honor of Professor Ronald Watts organized by the Institute of Intergovernmental Relations Queens, University Kingston, Canada, October, 18 – 21 2007. Available at <http://www.queensu.ca/iigr/sites/webpublish.queensu.ca/iigrwww/files/files/conf/Arch/2007/Watts/papers/Elaigwu.pdf> Accessed on 5/02/2017 at 6.15am.

⁶ Alvarez, R.M. and Hall T.E. (2008) Electronic Elections: The Perils and Promises of Digital Democracy. Princeton, Princeton University Press. <http://press.princeton.edu/titles/8641.html> Accessed on 5/02/2017, at 9.23am.

reliability of the smart card reader machine in improving the accreditation process of the election. The then presidential candidate of the All Nigeria People's Party (ANPP), General Muhamadu Buhari (rtd), challenged the declaration of Obasanjo of Peoples Democratic Party (PDP) as winner of the election by Independent National Electoral Commission (INEC) at the Court of Appeal on the 20th of May, 2003.⁷ Four justices heard the case and Justice Frances Tabai who read the leading judgment upheld the results of the presidential elections as declared by INEC despite serious election malpractices and violence that took place.

In 2007, General Muhammadu Buhari and Atiku Abubakar who contested for the same office under the ANPP and the Action Congress (AC) respectively disputed the result of the election by filing separate petitions in the Court of Appeal, the court with jurisdiction to receive and adjudicate on presidential petitions in the first instance.⁸ After a long hearing of the two petitions, the Court of Appeal dismissed the petitions and confirmed the declaration of Umaru Musa Yar'Adua by INEC as the president elect. Dissatisfied with the judgments of the Court of Appeal, both Buhari and Atiku appealed to the Supreme Court. The Supreme Court in a split decision (4 -3 in the case of Buhari and 6 – 1 in the case of Atiku) affirmed the decision of the Court of Appeal.

The winner of the 2007 Presidential Election late Alhaji Umaru Yar'adua came into power with legitimacy problem and as a result of that he came up with the idea of Electoral Reform Committee (ERC) headed by Justice Mohammed Uwais. On 28th of August, 2007, 22-member Electoral Reform Committee was set up to “examine the

⁷ Ebenezer L.E. Synoptic Analysis of Issues in Nigerian Presidential Elections Disputes 1999 – 2007 Department of Political Science University of Ilorin, Nigeria. from <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.940.5791&rep=rep1&type=pdf>, accessed on 13/02/2017, at 11.00pm

⁸ S. 239 (1) & (2) of the Constitution of the F.R.N 1999 (as amended).

entire electoral process with a view to ensure that we raise the quality and standard of our general elections and thereby deepen our democracy.⁹

The Committee made some laudable recommendations to deepen democracy and electoral process. Major recommendations are the use of electronic voting machines for elections but this should be introduced gradually, INEC Chairman should be appointed by National Judicial Council (NJC); In future elections accreditation should take place first within a defined time-frame, to be followed by voting within a defined timeframe; Agents of political parties should be given copies of results and have the right to demand a re-count on the spot; INEC be given financial autonomy, etc.¹⁰

The then incoming administration of President Goodluck Jonathan relieved the appointment of former Chairman of INEC Prof. Maurice Iwu and replaced him with Professor Attahiru Jega to carry out major reform in Nigerian electoral process that will be acceptable to all stakeholders and the international community. The body responsible for conducting election in Nigeria under the leadership of Professor Attahiru Jega came up with reforms to improve the credibility of elections in Nigeria.

One of the major improvements was the introduction of the Automated Fingerprint Identification System (AFIS) in the 2011 general elections as a digital register to eliminate doubles and multiple registrations.¹¹ However, the new system was not capable of verifying the identity of voters at the polling stations, hence, the usual

⁹ The Report of the Electoral Reform Committee (2008) Vol. 1 Main Report December 2008 Nigeria. Available at <http://eie.ng/wp-content/uploads/2014/03/JusticeMohammedUwaisReport.pdf> Accessed on 13/02/2017., at 12.23pm.

¹⁰ Ibid.

¹¹ Piccolino, G. (2015) What other African Elections tell us about Nigeria's Bet on Biometrics. Can be accessed at www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/10/what-other-african-elections-tell-us-about-nigerias-bet-on-biometric/. Accessed on 14/02/2017, at 8.21pm..

malpractices of multiple voting and ballot boxes stuffing took place in many polling units across the country.¹²

Consequent upon that, a more robust technologically based reform was adopted by introduction of Smart Card Reader Machines (SCRM) and Permanent Voters Cards (PVC), a device used to scan the PVC in order to verify the identity of a voter in a polling unit. The smart card reader was one of the greatest innovations of biometric verification technology which considerably improved credibility of 2015 general elections. Though, the use of technology in elections is not an end in itself, but assists in the various aspects of electoral administration.¹³

Despite, wide acceptability and credibility of technologically based methods of conducting election across the globe there are questions on the legality of this device. Nigerian Electoral Act 2010 (Amended) is anti-technology as enunciated in its section 52, which prohibited the use of electronic-voting.¹⁴

Towards the built up to 2015 general election the Nigerian Seventh Senate summoned the then INEC Chairman Prof. Jega to justify the rationale for using the Smart Card Reader machines and Permanent voters cards for voters accreditation. In response, Professor Jega demonstrated the use of card readers and its capacity to eliminate electoral fraud carried out at the accreditation stage of an election. Thereafter,

¹² Alebiosu, E.A. Smart Card Reader and the 2015 General Elections in Nigeria. Available at <http://www.inecnigeria.org/wp-content/uploads/2015/07/Conference-Paper-by-Emmanuel-Alebiosu.pdf> Accessed on 14/02/20017, at 7.34pm

¹³ ACE PROJECT: The Electoral Knowledge Network. Available at <http://aceproject.org/ero-en/regions/africa/GH/ghana-electoral-commission-ghana-strategic-plan/view>, accessed on 14/02/2017, at 10.30pm.

¹⁴ S. 52 of the Electoral Act 2010 (as amended).

the senate endorsed the use of card reader for voters' accreditation in 2015 general election.¹⁵

Elections in Abia, Akwa Ibom, Ebonyi, and Rivers States were challenged in various Elections Tribunals largely due to adoption of manual accreditation of voters instead of smart card reader machines prescribed by INEC. Both Tribunal and Court of Appeal upturned the Governorship election in Rivers State and asked for fresh election. However, Supreme Court of Nigeria upheld the disputed election and vehemently rejected the ruling of both Election Petition Tribunal and Court of Appeal in *Wike V Peterside*.¹⁶ Musdapher J.S.C in *Gbadamosi v. Dairo*¹⁷ stated in his lead judgment that:-

It is a policy of the Supreme Court for a longtime not to disturb concurrent findings of two lower courts unless special circumstances exist to warrant interference. Such special circumstances included:- a) perverse findings; b) error in procedural or substantive law occasioning a miscarriage of justice.

However, Supreme Court decision in *Wike v Peterside*¹⁸ relied on Section 49 of the Electoral Act 2010 (as amended) which provides for manual accreditation of voters with its multitude of defects against the credible accreditation process as provided by Smart card reader needs to be reviewed with a view of ascertaining the method of interpretation of statutes adopted by the apex court. Therefore, this research will

¹⁵ Falana, F How Electoral Act (Amended) 2015 Legalized Card Reader, Thisdaylive Online Paper, available at https://www.thisdaylive.com/index.php/2016/04/05/the-legality-of-card-reader/Accessed_on_5/02/2017, at 11.13pm.

¹⁶ (2016) 2 S.C.N.J (Pt. 1) 208.

¹⁷ SC 167/2001 (2007) 29 NSCQR p. 187.

¹⁸ (2016) 2 S.C.N.J (Pt. 1) 208.

critically examine the decision of the apex court which overturned the two lower courts' judgments.

1.2 Statement of Problem of the Research Work

Election rigging in Nigeria has always been one of the major problems that bedeviled democratization. Concerted efforts made by former INEC Chairman Professor Attahiru Jega in introducing Smart Card Reader Machines and PVC are well appreciated within and outside Nigeria. One of the real issues about the 2015 general elections in Nigeria was the use of innovative anti-rigging biometric devices. The administration of the elections witnessed the use of Smart Card Reader (SCR) for the authentication of biometric Permanent Voters' Cards (PVCs) and the accreditation of voters.

The introduction of these devices was necessitated by the fact that reliable voter register and identification mechanism are some of the preconditions for free, fair and credible elections.¹⁹ However, the legality of the device was questioned. Judgments of Supreme Courts which says Smart Card Reader Machines has dethroned and depose the Register of voters has really reversed the gains made through introduction of the new system. It is an invitation to stop using the smart card reader machine and reverse back to only manual accreditation in future elections by all stakeholders, which will no doubt open gate for multiple registrations, multiple voting and erosion of voters' confidence as well as other election malpractices hitherto addressed by the technologically backed accreditation. In view of the credibility of the smart card reader in raising the standard of election there is need to critically analyze the Supreme Court Judgment of *Wike v.*

¹⁹ ACE PROJECT: The Electoral Knowledge Network. Available at <http://aceproject.org/ero-en/regions/africa/GH/ghana-electoral-commission-ghana-strategic-plan/view> Accessed on 14/02/2017, at 10.30pm.

*Peterside*²⁰ that gave credence to Manual Accreditation of voters' instead of the important role Smart card reader has played in improving the standard and quality of Nigerian Electoral process.

1.3 Research Questions

The following research questions will be addressed:

1. What actually was the Rule of interpretation of the statutes adopted by the Supreme Court in the case of *Wike v. Peterside* in relation to the use of smart card reader machine?
2. What are the prospects and challenges of the smart card reader machines in combating election malpractices in Nigeria?
3. Could the reasons adduced by the Supreme Court against the use of smart card reader in the case of *Wike v. Peterside* be legally justifiable?
4. What are the identifiable factors in the case of *Wike v. Peterside* that can lead to a change in Supreme Court decision?

1.4 Aim and Objectives of the Research Work

The aim of the study is to critically examine the method and effectiveness of interpretation of the statutes adopted by the Supreme Court with hope to achieving the following objectives:

- a. To identify method of interpretation of the statutes adopted by the Supreme Court in relation to the use of smart card reader and its legal relevance in giving effect to the statutes of interpretation.
- b. To ascertain the prospects and challenges the smart card reader machines will encounter in combating election malpractices in Nigeria.

²⁰ (2016) 2 S.C.N.J. (Pt. 1) 208.

- c. To ascertain the reasons adduced by the Supreme Court against the use of smart card reader if justifiable.
- d. To identify factors that should be relied upon to change the verdict of the Supreme Court in the case under review.

1.5 Justification of the Study

This study is significant considering the importance of achieving free, fair and credible elections that will be accepted by all and sundries through the use of Smart card reader machines and PVC. Independent National Electoral Commission (INEC) under the Chairmanship of Prof. Jega came up with this laudable reform of the use of smart card reader machine to address electoral malpractices in Nigeria. There is need to carry out research of this type to critically review Supreme Court decision which relied on manual accreditation of voters with its manifest defects against technologically backed accreditation devices through the use of Smart card reader as provided by the INEC guidelines. The outcome of this research work will go a long way in addressing the legal issues involved considering the following stakeholders:

- a) Firstly, voter's confidence will be developed through credible elections in the absence of malpractices.
- b) Secondly to election management bodies; enhances their credibility and job performance, consequently reduced election disputes and its associated cost that includes insecurity.
- c) Thirdly, credit to the government that conducts election through the use of card reader.
- d) Fourthly, to the political parties and their contestants, will henceforth pay attention to their normal activities of selling programs to voters instead of wasting scarce resources on rigging and other vices that derail democracy.

- e) Fifthly, conducting of credible election provided by the card reader will ensure global acceptance.
- f) Sixthly, to judicial officers who take part in giving their decisions when election results are disputed in Court of law.
- g) Finally, to researchers and students it provides a benchmark information and data base in upgrading their research. This research further pave way for adopting e-voting electoral process in future time.

1.6 Scope of the Study

This research work is limited to elections conducted in Nigeria with particular reference to the newly introduced smart card reader machines and permanent voters' cards. Supreme Court decision will be mainly used for critical review and analysis. Rules of interpretation of statutes adopted by the apex court in the case of *Wike v. Peterside* is ascertained and critically examined as well as look at other rules which ought to be adopted by the apex Court.

1.7 Methodology

The methodology adopted in this study is doctrinal method. Primary and secondary sources of data relating to election in Nigeria like Constitution of Federal Republic of Nigeria, 1999 (as Amended), Electoral Laws, Judicial decisions and other relevant laws will be reviewed. Secondary sources such as textbooks, documents from other sources relating to elections such as journals, articles and expert opinions on legal issues, research works relating to elections are also be considered. Tool of doctrinal research method was used to critically analyze the Supreme Court Judgment in the case

of *Wike v. Peterside* in relation to the use of smart card reader to enable better research work.

1.8 Literature Review

Smart card reader machine is a new innovation to Nigerian electoral process as such not much was written in this area. However, the research work was able to consult some courts decisions, articles written by lawyers, scholars and expert opinions in the area of the study and hereby reviewed below the most important of these works:

Sagay, I.²¹ in his online paper title “Rivers Governorship verdict farewell to election Petitions” hinges his argument on the credibility of the smart card reader to provide free, fair and credible election. He quoted views expressed by the Election Petition Tribunal and Court of Appeal that says the Smart Card Reader was intended to and did strengthen the application and efficacy of the Electoral Act, by ensuring a credible election for the benefit of Nigerians. Also the author based his assertion on the large scale murder, mayhem, chaos and catastrophic before, during and after Rivers State Governorship election. He also questioned the Supreme Court ruling on the issue of the substantial non compliance with the Electoral Act.

He added that if all the Card Reader does is to enhance, improve and protect the capacity of the Voters’, it could not in any sense have ‘deposed’, ‘dethroned’ the Voters’ Register as Nweze JSC asserted in *Okereke v Umahi*²². This literature based more on credibility of the smart card reader and violence that took place without looking at the legal

²¹ Sagay, I. (2016) Rivers Governorship Poll verdict is farewell to election petitions: The Nation online paper of 17th April, 2016 Available at <http://thenation.net/rivers-gov-poll-verdict-farewell-election-petitions-says-sagay/>, accessed on 10/02/2017, at 12.23am.

²² SC 1004/2015 Available at <http://www.lawnigeria.com/Court-Judgments/2016-JUDGMENTS/OKEREKE%20V.%20UMAHI%20&%20ORS.html> Accessed on 17/12/2016

framework which need to be put in place and the method of interpretation adopted by the apex court. The knowledge gap not covered will be bridged in this research work.

Ahuraka, I.²³ in his paper dwelt on the need to prove election petition cases beyond reasonable doubt. The author also said the Card Reader Machine for accreditation of voters was provided for in the Approved Guidelines and Regulations for the conduct of the 2015 General Election, the National Assembly however, failed to amend section 49 (1) and (2) that provided for manual accreditation of voters. Although the work is important contribution to this topic, it has failed to critically review the Supreme Court decision and ascertain the method of interpretation adopted by the apex court which this work intends to cover.

Ibrahim, S.G. and Makama, A.A.²⁴ in their article stated that the smart card reader machine was first experimented in Nigeria's electoral process and it remains one of the greatest innovative technologies in the history of election in Nigeria's democratic practice, it was effective; it unseated a ruling party and incumbent government due to its efficacy it disallowed elections rigging. However, the views expressed by the authors did not examine the Supreme Court decision on the use of the smart card reader as well as legal impediments on the use of the device. So, this research work bridged the knowledge gaps.

²³ Ahuraka, I. Can Supreme Court Judgments End Electoral Frauds? Available at <http://leadership.ng/news/502275/can-supreme-court-judgements-end-electoral-frauds> Accessed on 15/02/2017, at 10.17am.

²⁴ Ibrahim, S.G and Makama, A.A. The successes of the Card Reader Machine in Nigeria's 2015 Elections: Issues and Challenges. International Journal of Multidisciplinary Research and Modern Education. Vol. 1 Issue 11, 2015 Available at www.rdmodernresearch.org Accessed on 15/02/2017, at 11.35pm.

Nwangwu, C.²⁵ in his paper reviewed the Role of the Card Reader in improving credibility of the 2015 General Elections. The paper concluded by recommending that the innovation should not only be fully embraced but e-voting system be incorporated into Nigeria's Electoral process as a panacea for electoral fraud. This literature did not however examine the judgment of the Supreme Court on the use of smart card reader which this research considers.

The writer **Aziken E.**²⁶ started by giving insight into assurances made to Nigerians by INEC Chief Press Secretary MR. *Kayode Idowu* and its former Chairman *Attahiru Jega* after mock trial before the commencement of the 2015 elections. According to the author in Ebonyi State during mock trial it was observed that forty one (41%) failure in cross matching finger prints of card holders to their cards. The author said there were incidents of the device discovering cloned Permanent Voter's Cards in Port-Harcourt. He further said at the end of Voter registration exercise in 2011, the Commission had claimed that over 800,000 double registered voters were removed from the Electronic Register.

The author concluded by saying many African countries such as Ghana, Kenya, Sierra Leone, Somaliland, Mozambique, Zambia, Malawi, Rwanda and Senegal have adopted the use of the card reader and Biometric Voters' registers. To buttress his assertion the author quoted the head of Sierra Leone Electoral Management Body

²⁵ Nwangwu, C. Biometric Voting Technology and 2015 General Elections in Nigeria. The Real Issues '' Organized by The Electoral Institute between 27th and 28th July 2015. Available from <http://www.inecnigeria.org/wp-content/uploads/2015/07/Conference-Paper-by-Chikodiri-Nwangwu.pdf> Accessed on 7/02/2017, at 12.14pm.

²⁶ Aziken E. '' Election 2015, Card Readers: Lesson from other Lands. Vanguard online newspaper dated 12th March, 2015. Available at <http://www.vanguardngr.com/2015/03/card-readers-lessons-from-other-lands> Accessed on 7/02/2017, at 5.23pm.

Christiana Thorpe who said “Credible Elections start with credible voter registration;” This literature dwelt more on credibility of the smart card reader machine and lesson to derive from other African countries. Areas not covered by this literature the research intends to cover.

Amenaghawon, J.²⁷ in his online article stressed on the role of smart card reader by stating that the device had been promoted by INEC as an anti electoral fraud device and was introduced to enhance the integrity of the voting process and dissuade multiple voting. He further stated that card readers were programmed to work in specific polling units. Also the author concluded by saying despite pockets of challenges concerning its use, which included possible battery failures to power the device, knowledge gaps of the INEC ad hoc staff, outright malfunctioning of the device or failure, Nigerians have generally applauded the innovation. This literature is very important to the research work, though legal issues relating to validity of the smart card reader not treated.

The author **Alebiosu, E.A.**²⁸ in his article title ‘Smart card Reader and 2015 General Elections in Nigeria’ opines that quality election management is crucial to the sustenance of democracy. This is because if the citizenry does not believe in the fairness, accuracy, openness and integrity of election process, the very basic of any democratic society might be threatened. The author further buttressed the deficiencies of the past elections before introduction of the smart card reader. This literature is important to the

²⁷ *Amenaghawon, J.* (2015). 2015 Nigeria Elections: The gains, the Challenges and the Lessons Premium Times online Newspaper dated 24/04/2015 Available at <http://opinion.premiumtimesng.com/2015/04/24/2015-nigeria-elections-the-gains-the-challenges-and-the-lessons-by-joseph-amenaghawon/> Accessed on 5/02/2017, at 4.30pm.

²⁸ *Alebiosu, E.A.* Smart Card Reader and 2015 General Elections in Nigeria Available at <http://www.inecnigeria.org/wp-content/uploads/2015/07/Conference-Paper-by-Emmanuel-Alebiosu.pdf> Accessed on 5/02/2017, at 9.19pm.

research work. However, it did not examine the judgment of the apex court on the use of smart card reader. So, the gap is covered by this research work.

The writer **Piccolino, G.**²⁹ stated in his paper title ‘‘what other African elections tell us about Nigeria’s biometrics’’ that Nigeria has used the Automated Fingerprint Identification System since the 2011 polls. But in 2011, the system only created a digital register to eliminate doubles from the list, and was not capable of verifying the identity of voters at the polling stations. He further said the Nigerian Electoral Management body stated that the Card reader will bring additional benefits especially in preventing double votes and ballot stuffing. In Ghana, biometrics was important in restoring the public’s confidence in the electoral process after the controversial 2008 elections.

This literature did not look at the Supreme Court decision regarding the use of smart card reader. The area not covered by the author is provided by this research

Itodo, S.³⁰ The author who reviewed the successes of last Presidential Election of Ghana stated that the successes recorded could guide the National Assembly and INEC on key areas of electoral reform ahead of 2019. He said Ghanaians demonstrated leadership in the way and manner they participated and managed the elections at a time it was predicted that the elections would be marred by violence. He further said Nigeria borrowed the card reader technology from Ghana and success ratio of the devices during last election was 99%. This literature is very vital in area of learning Ghana’s successes

²⁹ Piccolino, G. What other African elections tell us about Nigeria’s bet on biometrics. Available at <https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/10/what-other-african-elections-tell-us-about-nigerias-bet-on-biometrics/> Accessed 14/02/2017, at 8.18pm.

³⁰ Itodo, S. The Many Lessons From The 2016 Ghana Elections. Published by Democracy Digest Suite 800 Washington, DC 20004. Available at <https://www.demdigest.org/many-lessons-2016-elections/>. Accessed on 7/10/2017, at 7.16pm.

and many lessons will be learned by Nigeria. However, the author did not examine the decision of the apex Court. This research work is covered the gap.

Ekeke, C.³¹. The author criticized the Judgment delivered by Supreme Court in *Wike V. Peterside* by stating that the apex court, explained why it ignored the incontrovertible evidence of over-voting contained in the Independent National Electoral Commission's Card Reader accreditation reports and awarded victory to those who in fact, did not win election. It is difficult to understand why the apex court has issues with technology-driven accreditation that has enhanced credibility of the electoral process. He further buttressed his position by saying the successes recorded by the card reader during the election was 99.7% and only 0.03% failure the machines recorded. However, this literature did not carry out detailed review of the Judgment to unearth the method of interpretation of statutes adopted by the apex Court. This research work considers same and provides the missing gap.

Oluwadayisi, A.O.³² in his book stated that while analyzing the effect of substantial non-compliance with the provision of the Electoral Act (2010) and cited *Sorunke v. Odebunmi* case where the Federal Supreme Court cited with approval the following observation of Lord Coleridge in *Woodward v. Sarsons*, thus:

If this proposition he closely examined, it is found to be equivalent to this, that then non-observation of the rules or forms which is to render the election invalid, must be so great as to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or

³¹ Ekeke, C. The Activism of Reactionary Supreme Court. Latest Nigerian News Online side. Published by Ynaija on 10/2/2016. <https://www.latestnigeriannews.com/news/2574047/chinedu-keke-the-activism-of-a-reactionary-supreme-court.html>. Accessed on 20/1/2017, at 11.35pm.

³² Oluwadayisi A.O (2013) Practical Approach to Civil & Criminal Litigation Revised Ed. 2013 Abuja Printed by Vicoladmedia

might have affected the majority of the voters, or in other words the result of the election”. This literature is very important to this research in the sense that non use of the smart card reader affected the result of the election. Areas not covered by the literature are addressed.

Akpedeye, S.³³ maintained that Nigerian Supreme Court cannot set aside or vary its judgment, except it was obtained through fraud or to correct clerical error. The author cited late Justice Oputa of blessed memory who stated that “we are final not because we are infallible; rather we are infallible because we are final”. The only exception relates to correction under the slip rule, which cannot be regarded as a review properly called. However, the Supreme Court may revisit its judgment under Order 8 Rule 16, Supreme Court Rules to correct clerical errors or omissions or gaps to give meaning to the judgment or decision of the court and not to vary it³⁴. The author cited case of *Johnson v. Lawanson*,³⁵ wherein the Supreme Court exercised power to overrule itself due to serious defect it uncovered in the ruling. This literature is important to this research work in view of the fact that the decisions of the Supreme Court are final but fallible at times, and so the decision on the use of Smart Card Reader needs to be critically examined in view of the credibility of the smart card reader.

Bakare, O.³⁶ in his book stated that election petition cases are special one and requires special care. Therefore, petitioners needs to proof beyond reasonable doubt allegations of election malpractice, unlawful votes, crimes, corrupt practices and non-compliance

³³ Akpedeye, S. (2016) Supreme Court cannot set aside own Judgment. Available at <http://www.vanguardngr.com/2016/07/supremecourtcannot-set-aside-judgment-akpedeye-san/> Accessed on 29/04/2017, at 12.23pm.

³⁴ Order 8 Rule 16 of the Supreme Court Laws of the Federal Republic of Nigeria.

³⁵ (1971) 7 NSCC 82.

³⁶ Bakare, O. (2012) Election Petition: Procedure and Proceeding. Available at <http://treasurethegreat.blogspot.com.ng/2012/03/election-petition-procedure-andhtml>. Accessed on 12/04/2017, at 11.14pm.

with electoral Act. This literature did not look at the important role played by smart card reader in an election and also failed to look at the rules of interpretation of statutes used in election cases by judges. So, this research treats same.

Yebisi, E. T.³⁷ in his book stated that the decision of the Supreme Court which is the apex court is final; however, situations may warrant reviewing their judgments. Popular saying of respected jurist Oputa J.S.C was quoted by the author, thus, ‘’ ...We are not final because we are infallible, rather because we are final’’. The author made comparison of Supreme Court of Ghana and that of Nigeria. Rule 54 of the Supreme Court of Ghana Rules,³⁸, made pursuant to the authority of the Constitution, spells out the grounds for review as:

- a) Exceptional circumstances which have resulted in a miscarriage of justice;
- b) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by him at the time when the decision was given. This work is very important to this research work, though, it has not look at the recent decision of the Supreme Court pertaining to the use of Smart card reader machine in an election.

Azingi, E.C.J.³⁹ examined the power of the Supreme Court to overrule itself. He cited case of *Johnson V. Lawanson*,⁴⁰ which was the pace setting case for the court to overrule itself. Issue arose as a result of how to give proper construction to section 129 of the

³⁷ Yebisi, E.T. (2014) The Constitutional power of review of the Supreme Court of Ghana: Lesson for Nigeria. International Journal of Humanities and Social Science Invention. Volume 3 Issue 4 April. 2014. ISSN (Online): 2319 – 7722, ISSN (Print). Available at www.ijhssi.org. Accessed on 23/02/2017, at 11.35pm.

³⁸ Rule 54 of Supreme Court of Ghana (C1 16) 1996.

³⁹ Azinge E.C.J (1990) Power of the Supreme Court to overrule itself: An examination of *Johnson v. Lawanson* (1971) 7 NSCC 82 and *Asiyambi v. Adeniji*. A Journal of Contemporary Legal Problems. 1990 Vol. 1 NO. 5 p. 71-77.

⁴⁰ (1971) 7 NSCC 82.

Evidence Act which the Privy Council decision had equated the date of contract in that section with the date of proceedings. Thus, Coker J.S.C delivering the Court's judgment, found it difficult not to feel some remorse at a situation calling for a review of a stand point which had influenced the laws of this country for some 12 years or more and relish with which that line of decisions had been followed must be considered as clear evidence of the piquancy of such feeling. The author stated that when the court is satisfied that an erroneous decision was made which was reached per *incuriam* and will inflict hardship and injustice upon generations in the future, then there is need to correct the decision. The author concluded by stating that the court should depart from its previous decision if it is satisfied that such decision is inconsistent with the provisions of the Constitution, erroneously reached per *incuriam* and will if followed perpetuate hardship and considerable injustice, cause temporary disturbance of rights acquired under it or continue to fetter the exercise of judicial discretion.⁴¹

Though this literature predates introduction of the smart card reader, is very important to this research work since it critically reviewed Judgments delivered in error by Supreme Court and later reversed those judgments.

1.9 Organizational Layout

This study consists of five (5) Chapters. Chapter one introduces the work by giving background to the study, statement of the problem, the research questions, aims and objective of the study, justification of the study, scope of the study, its methodology, literature review and organizational layout.

Chapter two is conceptual basis for election process and Courts Judgment on election Petitions which examines concept of democracy and election, election process,

⁴¹ Ibid.

history of Nigerian election, manual accreditation of voters, the use of smart card reader and election petition courts, establishment and functions. The chapter further looks at various rules of interpretations adopted by judges when taking decisions.

Chapter Three is the analysis of the Courts decision in *Wike v. Peterside*, issues raised by the Lower and Apex Courts for determination were analyzed in relation to the use of smart card reader. In this chapter the decision of the apex court was critically analyzed. Furthermore, the rules of interpretation of statutes adopted by the lower courts and Supreme Court were ascertained and discussed.

Chapter Four deals with the prospects and challenges of the smart card reader machines. Finally, the chapter concludes by examining factors that changes the Supreme Court decision.

Chapter Five finally makes summary and conclusions from the issues raised and discussed in the previous chapters, proffer recommendations for the apex Court Judges on the need to review their decision as well as apply judicial activism and progressive outlook in their future judgments. The need for legislators to be vigilant and pro active in giving legislative backing to the Election Management Body at all times is recommended.

CHAPTER TWO

CONCEPTUAL BASIS FOR ELECTION PROCESS AND COURTS JUDGMENT ON ELECTION PETITIONS

2.1 Introduction

This chapter examines concept of democracy, election and its features. Nigerian electoral process and electoral malpractices in Nigeria are discussed. Manual accreditation of voters with its attendant's consequences is discussed. The chapter also ascertains reasons for adoption of the smart card reader machine and its efficacy in minimizing electoral malpractices. The chapter further examines election petition courts; Election management body and their establishment and functions. The chapter concludes by examining various rules of interpretations of statutes adopted by Courts in adjudication of cases. The literal, golden, mischief methods and purposive approach will be examined to see how courts arrived at decisions.

Successive Governments efforts in Nigeria to carry out genuine reform to build electorates confidence has been jettisoned by many obstacles. These obstacles are been encountered at various stages of election process; before, during and after elections. The cherished democratic dividends as enjoyed by other countries across the globe are missing in Nigeria. Thus, one vital reform measure taken by former INEC Chairman Professor Attahiru Jega was the introduction of accreditation of voters' technological devices, that is, Smart card reader machine in 2015 general elections to minimize electoral fraud is well appreciated within and across the globe, though the apex Court of the land questioned the legitimacy of the device.

2.2. Concept of Democracy

2.2.1 Democracy and its Values

The term democracy is very wide one, thus, it does not lend itself to a generally acceptable definition. Many scholars, political elites, Jurists, lawyers and researchers have offered wide range of definitions to the term democracy. The word democracy is coined from two Greek words: *Demos* (the people) and *Kratos* (rule) which simply means people's rule. In its Greek perception means rights of the citizens of the Greek city states to participate directly in an act of governance.¹

Black's Law Dictionary defined Democracy as:

That form of government in which the sovereign power resides in and is exercised by the whole body of free citizens directly or indirectly through a system of representation, as distinguished from a monarchy, aristocracy, or oligarchy.²

Democracy is a system of government based on the acquisition of authority from the people; the institutionalization of the rule of law; the emphasis on the legitimacy of rulers; the availability of the choices and cherished values (including freedoms), and accountability in governance. This definition given by Elaigwu is very elaborate and captured some of the features of democracy. System of government, based on obtaining authority from the people, existence of rule of law, legitimacy of rulers, presence of choices through political parties, freedom and accountability.³

¹ [The saurus](https://www.vocabulary.com/dictionary/democracy) Vocabulary.com Dictionary. Accessed from <https://www.vocabulary.com/dictionary/democracy>. on 23/09/2017, at 10.29pm.

² Black's Law Dictionary 7th Edition p25.

³ Elaigwu J.I (2014) Federalism and Democracy in Nigeria "Democracy and Democratic Deficits" Institute of Governance and Social Research Jos, Nigeria. p. 242.

Democracy is generally held to be system of government involving respect for majority opinion and choices, equality, popular participation, observance of the rule of law and due process.⁴

The popular definition of democracy as Government of the people by the people, for the people, which is ascribed to Abraham Lincoln, has become a mere slogan devoid of any scientific or measurable factors. More precise and scientific definitions can be proffered. Democracy is based on two key principles: 1) Popular control over collective decision making and decision makers; and 2) An equal right to share in such control, that is, political equality.⁵ Thus, there are five basic elements without which no community can call itself truly democratic: Equality; Sovereignty of the people; Respect for human life; the rule of law; and Liberty of the individual.⁶ Democratic equality implies ‘one man one vote’ irrespective of differences in wealth, religion, intelligence and ethnic background. It also connotes the equal right and opportunity of all citizens to hold political office. It follows therefore that, adherence to the principle of the rule of law in a democratic setting, allows for respect for the dignity and worth of the human body and mind.⁷

Democracy and rule of law are inseparable and interwoven. Without the rule of law, democracy will become a toothless bulldog that barks without biting. The main principles of the rule of law are equality before the law, impartiality and the rights of the

⁴ *Ibid*

⁵ Sagay, I.E., (2009). Electoral Reform as a Means for Saving Nigerian Democracy and Unity. Being a Paper Presented at the Action Congress South West Zonal Conference at Premier Hotel Ibadan on 20th March, 2009.

⁶ *Ibid*.

⁷ Efebeh, E.V. (2015) Democracy and the Rule of law in Nigeria: 1999-2015. Journal of Research on Humanity and Social Sciences Vol.5. No. 20, 2015. Accessed from <http://www.iiste.org> on 31/07/2017. at 10.25pm.

individual.⁸ Democracy ensures meaningful and extensive competition among individuals and organized groups. Levels of civil and political liberties, freedom of expression, and freedom of the press, freedom to form and join organization are sufficient to ensure the integrity of political competition and participation ...⁹ Therefore, before true democracy can be achieved or practiced, the following ingredients must be present; rule of law, liberty and right of dissention, fraud proof electoral system and ability to abide by the rules of the game.¹⁰

2.2.2 Election and its Functions

Election is the act of choosing representatives to fill vacant posts by vote, it is an act of choosing those that govern a state; it may be conducted periodically. Elections are central institution of democratic representative governments.¹¹

The Supreme Court in the cases of *Ojukwu v. Yar'adua*¹² and *A.P.G.A.V. Ohakim*¹³, elaborately defined the term in the following ways:

...an election constitutes accreditation, voting, counting of votes, collating at ward and Local Government Council and announcement of votes.

Voting alone or voting in a unit does not constitute whole "election.

⁸ Igwe, L. E., (2010) Democracy and development in Nigeria: Issues and Challenges. *International Journal of Economic Development Research and Investment*, Vol. 1 Nos. 2 & 3 2010

⁹ Diamond, L., Linz, J.J. and Lipset, S.M. (1990), Politics in developing countries, Lynne Rienner Publishers. Accessed from < <https://isdsnet.com/ijds-v1n2-29.pdf> > on 12/07/2017 at 4.30pm.

¹⁰ Yusuf, A. (201 6) Democracy Today and the Rule of Law: Perspective of Nigeria's Democratic System. Accessed from <[http://www.yusufali.net/articles/DemocracyToday And The Rule Of Law Perspective Of Nigerias Democratic System.pdf](http://www.yusufali.net/articles/DemocracyToday%20And%20The%20Rule%20Of%20Law%20Perspective%20Of%20Nigerias%20Democratic%20System.pdf)> on 27/07/2017 at 5:30Pm.

¹¹ Omonijo, B.R. et al. (2007). *Basic Terms in Political Science*, Mac Anthony Ventures, Ado-Ekiti.

¹² (2009) 12 NWLR (pt 1154)50 at 150 Paragraph E

¹³ (2009) 4NWLR (PT.1130)116 at 176 Paragraphs C-F.

Genuine, free and fair elections constitute the threshold or doorway into a democratic, stable and progressive society. Without free and fair elections, there can be no democracy.¹⁴

Elections are part and parcel of the democratic process, and as the right to democratic governance have become established as a Human right, so too has the right to regular, free and fair elections.¹⁵

Indeed, the United Nation Declaration of Human Rights (UNDHR) (1948), in Article 21(3), emphasized the importance of elections to human development and democracy: ‘The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.’¹⁶ Elections allow the populace to choose their representatives and express their preferences for how they will be governed.¹⁷

The integrity of the election process is fundamental to the integrity of democracy itself. Consequently, election system must be sufficiently robust to withstand a variety of fraudulent behaviors and must be sufficiently transparent and comprehensible that voters and candidates can accept the results of an election.¹⁸

Election performs several functions: it is an instrument through which the voting public compels accountability from elected officials; it facilitates political recruitment; it

¹⁴ (2009) 4NWLR (PT.1130)116 at 179 Paragraphs C-F.

¹⁵ *Ibid.*

¹⁶ United Nation Declarations of Human Rights (UNDHR) (1948) Article 21(3). Accessed from <http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf> on 23/06/2017 at 8.41pm.

¹⁷ Oladotun, O. O. A Framework for Electronic Voting in Nigeria, International Journal of Computer Applications (0975 – 8887) Volume 129 – No.3, Ladoke Akintola University of Technology, , Ogbomoso, Nigeria. Accessed from <https://www.researchgate.net/profile/Oladotun_Okedirani/publication/284146629.pdf> on 20/01/2017 at 7.23am.

¹⁸ *Ibid.*

enables citizens to make enlightened choices; and it confers moral authority on political leaders.¹⁹

Election gives opportunity for the electorates to participate in decision making process and act as a *post mortem* that investigates the record of office holders to ascertain whether they have kept faith with their election promises or not.²⁰ Elections serve as an important mechanism and viable means that ensure orderliness in the process of leadership succession and change. It gives legitimacy and political authority to every administration.²¹ In democracy, the authority of the government derives solely from the consent of the governed. The principal mechanism for translating that consent into governmental authority is the holding of free and fair elections.²²

2.2.3 Election Process

Electoral process relates to the entire cycle ranging from the provision of voter education to the dissolution of the National Assembly. The electoral process includes the following: Delimitation of electoral boundaries; Registration of voters; Notice of elections; Nomination of candidates; Electioneering campaigns; Elections, announcement of results and completion of tribunal sittings; Participation of other organizations; Resolution of electoral conflicts resulting from the participation of other

¹⁹ Awopeju A. (2011) Election Rigging and the Problems of Electoral Act in Nigeria. Afro Asian Journal of Social Sciences Vol. 2, No. 2.4 Quarter IV 2011 ISSN 2229 – 5313.

²⁰ Durotoye, A. Nigeria's (2015) Presidential Election: Between Democratic Consolidation and Change. European Scientific Journal July 2015 Edition Vol. 11 No.19 ISSN: 1857 – 7881 (Print) e-ISSN 1857-7431. Accessed from < <http://eprints.abuad.edu.ng/324/1/5936-17242-1-PB.pdf> > on 9/11/2017 at 7:23am.

²¹ Osinakachukwu, N.P. (2011) The Electoral Process and Democratic Consolidation in Nigeria. Journal of Politics and Law Vol. 4, No. 2. Accessed from < <https://www.researchgate.net/publication/267415880> > Accessed on 9/11/2017 at 5:00am.

²² *Ibid.*

organizations, people, groups, etc.²³ The electoral process is a complex process that encompasses the good intentions and undesirable outcomes of election administration, particularly in emerging democracies where general elections are often marred by electoral malpractices. Similarly, Nigerian Electoral process is characterized by electoral fraud.²⁴ To appreciate Nigeria's Electoral process there is need to examine history of election in Nigeria.

2.3. History of Election in Nigeria

History of Election in Nigeria was characterized by malpractice and violence before, during and after the election. The chapter looks at the development of the Nigeria's election process from pre independence period (1922) to the forth Republic period (2015) with a view of examining the various reforms introduced by the respective governments to address the challenges.

2.3.1 Pre Independent Period

The Elective principle was introduced in 1922 for the first time under Clifford Constitution for the Calabar and Lagos Municipal Elections and was also used in the 1946 Council Elections. The guidelines only provided for the participation of a few Nigerians and voting was conditional upon tax payment, restricted to adults with an annual income of not less than 100 Pounds sterling.²⁵ There was restriction of voting either by tax or sex until 1959 when full universal adult suffrage (21 year minimum voting age) was adopted nationwide. Various political organizations came up and with

²³ Elekwa, N.N. (2008): The Electoral Process in Nigeria: How to Make INEC Succeed. *The Nigerian Electoral Journal*. 2(1) 30-42.

²⁴ Eko-Davies, O.E.(2011). A critical appraisal of election laws in Nigeria. Accessed from <<https://www.unilorin.edu.ng/studproj/law/0640ia070.pdf>> on 29/09/2017 at 11:25am.

²⁵ Igini, M. (2015) "Electoral laws and the conduct of the 2015 General Elections" The Electoral Institute at The Conference on Post 2015 General Election. Available from www.inecnigeria.org.com. Accessed on 31/5/2018, at 10.23am.

their formation a more effective vehicle for expressing grievances and aspirations was provided. The Richard's Constitution of 1946 replaced the Clifford's Constitution of 1922 without increasing the number of elective posts.²⁶

The 1954 Constitution replaced and repealed the 1951 Constitution and further expanded the electoral field as it provided the basis for the independence of Nigeria. Under the Constitution, a unicameral legislature of 184 elected members was set up for the country.²⁷ No provision was made for election petitions arising from electoral disputes as to the result of the elections except in the Northern Regional Electoral Regulations provided Election Petitions by a complainant who was complaining of undue election or undue return of a member.²⁸

By 1958 the first detailed electoral regulation the Elections Regulations of 1958 (For the House of Representatives) was drafted, but was amended subsequently in 1959, as the Federal Legislative House Regulations of 1959.²⁹

2.3.2 First Republic period

Upon the attainment of independence in 1960 the Nigerian Electoral (Transitional Provisions) Act 1961 was enacted.³⁰ Subsequently, the federal parliament enacted the Electoral Act, 1962 which brought about elaborate provisions on Election Petition to enable aggrieved persons have an opportunity to present their case in respect of the conduct of an election.³¹ The 1962 Act had a post-election dispute requirement

²⁶ Babalola, A. (2015) Election law and practice in Tarfa, R. Key Issues and Challenges of Electoral Tribunals in Nigeria Accessed from < <http://www.rickeytarfa.com/wp-content/uploads/2015/02/key-issues-and-challenges-of-electoral-tribunals-in-nigeria.pdf> > on 15/07/2017 at 12:12pm.

²⁷ S. 90 of the Northern Regional Electoral Regulations of 1954.

²⁸ Ibid.

²⁹ Nigerian Elections Regulations of 1958.

³⁰ Ibid.

³¹ Nigerian Federal Legislative House Regulations of 1959.

including the need to pay deposit on lodging an election petition. This addition was later abolished in the amendment of the Electoral Act of 1964.³²

The problems associated with the post independence national election of 1964 and the 1965 Western Region election were characterized by wide spread rigging, intimidation, violence and chaos that led to some political parties to boycott the election, creating serious constitutional crisis.³³ Disputes over census results, the 1964 General Election results, the Western Regional crisis, the Tiv Riots, among others, led to military coup. During the first period of military rule, all electoral political activities were banned.³⁴

2.3.3 Second Republic period

The 1977 Electoral Decree introduced several milestones including; reduction of voting age from 21 to 18 years, the mandatory need to show a three year tax clearance certificate before a person can qualify to contest elections, the disqualification of electoral officers from voting in elections, and for the first time, it placed a time limit for the conclusion of election petitions before winners are sworn into offices.³⁵

Section 34(2) of the 1977 Act provides that: in the case of an election to the office of the president a candidate shall be declared duly elected to such office if:-

- (a) He has the highest number of votes cast at the election, and;
- (b) He has not less than one quarter of all the votes cast at the election in each of at least two-thirds of all the states within the federation.³⁶

³² Ibid.

³³ Ibid.

³⁴ Report of the Electoral Reform Committee (2008). Volume 1 Main Report. Pp89. Accessed from <<https://www.scribd.com/document/85483790/Electoral-Reform-Committee-Report-2008#>> on 30/09/2017 at 7:23am

³⁵ Ibid.

³⁶ S. 34 (2) of Nigerian Electoral Decree 1977 (as amended 1978).

The 1977 Electoral decree was modified in 1978 and created the procedure for fielding candidates for election. The second republic covered the period between 1979 and 1983. Two general elections took place during this period, that is, the 1979 and 1983 general elections which were conducted by the Federal Electoral Commission (FEDECO). After the 1979 general elections, the case of *Obafemi Awolowo v. Shehu Shagari*³⁷ arose almost entirely because of the manner in which the Electoral Act 1977, as subsequently amended, was couched in respect of the president. The Supreme Court adopted the reasoning of the elections tribunal and reasoned that 2/3rds of 19 states could be arrived at by dividing the votes cast in the 13th state, that is kano state in this case, rejecting Awolowo's contention that the Electoral Decree of 1977 as amended in 1978 did not admit of fractionalization of a state. Eso, JSC as he then was in a dissenting judgment held that the appeal should have succeeded. It should be noted that one feature of this case was that the proceedings were concluded before the President was sworn-in unlike what is happening now whereby declared winners sworn in before determination of the case.³⁸ The 1977 Electoral Act (as modified in 1978) was used in conducting 1983 elections with its manifest riggings by ruling parties, which resulted to large number of election petitions filed against the winners that culminated to Military coup d'etat.³⁹

2.3.4 Third Republic period

Consequently, further development of electoral Laws were put on hold until 1987 with the introduction of the Transition to Civil Rule (Political Programme) Decree of 1987 and the formation of the National Electoral Commission of Nigeria (NEC) by

³⁷ [1979] 12 NSCC 87

³⁸ Ibid.

³⁹ Ibid.

the Babangida administration.⁴⁰ Also the effective period of the framework was extended when the State Government (Basic Constitutional and Transitional Provision) Decree No 50 of 1991, the National Assembly (Basic Constitutional and Transitional Provisions) Decree No.18 of 1992 and the Presidential Election (Basic Constitutional and Transitional) Decree No.13 of 1993 were then enacted and became the framework used in 1993 when a General election was finally conducted.⁴¹

In the aborted third republic, the judiciary was also embroiled in controversy. The suspension of announcement of June 12 presidential elections by National Electoral Commission (NEC) triggered off series of litigations as individuals and groups approached the Courts to compel NEC to release the remaining results. The High Courts of Lagos and Ibadan ordered NEC to release the remaining results.⁴² However, other High Courts restrained the electoral body from releasing the result. It was in the midst of controversial court rulings that the election was annulled by General Babangida.⁴³

The unofficial winner of the election, Chief M.K.O. Abiola approached a Lagos High Court to seek redress but the Court was unable to hear the suit because of the Decree enacted by military government barring Courts from entertaining suits concerning June 12 presidential election.⁴⁴

The election was aborted and the crisis that followed led to the famously stepping aside of General Babangida. Interim National Government (ING) of Ernest

⁴⁰ Transition to Civil Rule (Political Programme) Decree of 1987.

⁴¹ Ebenezer, L.J. A Synoptic Analysis of Issues in Nigerian Presidential Elections Disputes 1999 – 2007 Historical Research Letter Vol.13, 2014 ISSN 2225-0964 (Online). Accessed from < <http://www.iiste.org/journals/> > on 26/07/2017 at 8:09am.

⁴² Odinkalu, C.A. The Management of Transition to Civil Rule by the Military in Nigeria (1966-1996). Institut français de recherche en Afrique IFRA-Nigeria Accessed from < <http://books.openedition.org/ifra/634?lang=en> > on 4/11/2017 at 6:08pm.

⁴³ Ibid.

⁴⁴ Ibid.

Shonekan was sworn in on 27th of August 1993. The ING only lasted for about three months. It was swept aside by Gen. Sani Abacha on 27th of November, 1993. Abacha suspended the Constitution and started ruling by Decree.⁴⁵ General Sani Abatcha promulgated Decree No.3 of 1996, which also established the National Electoral Commission of Nigeria (NECON) with this decree. The latter framework was replaced by the Local Government (Basic Constitutional and Transitional Provisions) Decree of 1997, the State Government (Basic Constitutional and transitional Provisions) Decree No.22 of 1997 and the National Assembly (Basic Constitutional and Transitional Provisions) Decree No.6 of 1998 all of which were meant to guide the transition elections planned by the General Sani Abacha Government which allowed the existing five registered parties to adopt him as their consensus presidential candidate, just before his untimely death.⁴⁶

2.3.5 Fourth Republic period

General Abubakar who became the Head of State after the dead of Abatcha commenced a new transition program using a new legal framework that includes; the Transition to Civil Rule (Political Programme) Decree No.34 of 1998; the National Assembly (Basic Constitutional and Transitional Provisions) Decree No.5 of 1998; and The Presidential Election (Basic Constitutional and Transitional Provisions) Decree No.6 of 1999.⁴⁷ There have been several amendments of the main electoral framework in

⁴⁵ Odusote, A. (2014) Nigerian Democracy and Electoral Process since Amalgamation: Lessons from a Turbulent Past. *IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 19, Issue 10*. Accessed from <www.iosrjournals.org> on 21/09/2017 at 4:58pm.

⁴⁶ Ibid.

⁴⁷ Ibid.

the form of the 2001 Electoral Act, the 2002 Electoral Act, the Electoral Act of 2006 and the Electoral Act of 2010 (as amended).⁴⁸

In the fourth Republic five general elections (1999, 2003, 2007, 2011 and 2015) were held under various Electoral Acts and all the Presidential elections were disputed and challenged up to the apex Court except 2015 election that produced the current President *Muhammadu Buhari*. It should be noted that, the judiciary made tremendous successes in the forth republic by reversing the rigged elections, and restoring mandates and tenure of political office holders. In *Ngige v. Peter Obi*,⁴⁹ the Court of Appeal (Governorship Election Appeal Tribunal) upheld the nullification of the election of Governor *Ngige* of *Anambra* State and his replacement with *Mr. Peter Obi*. In *Osunbor v. Oshiomole*⁵⁰, the Court of Appeal in exercising its jurisdiction as the Governorship Appeal Tribunal sitting in Benin affirmed the decision of the Election Petition Tribunal of Edo State that on 11th of November, 2008 nullified the election of Professor *Osunbor* of the PDP and declared Comrade *Adams Oshiomhole* of the AC as the duly elected governor of Edo State.

Similarly, in *Agagu v. Mimiko*,⁵¹ the same Court of Appeal equally upheld the decision of the Election Petition Tribunal that nullified the election of Governor *Olusegun Agagu* and declared Dr *Olusegun Mimiko* as the duly elected Governor of Ondo State. The case of *Fayemi v. Oni*⁵² the Court of Appeal reversed the decision of the lower tribunal that declared Governor *Oni* winner of the 2007 Governorship election

⁴⁸ Ibid.

⁴⁹ (2006) 14 NWLR (Pt. 999) 1.

⁵⁰ (2007) 18 NWLR (Pt.1065) 32.

⁵¹ (2009) All FWLR (Pt. 462) p. 1123.

⁵² (2011) All FWLR (Pt. 554) p. 1

in the state. The Appeal Court ordered the removal of *Oni* from office in order to pave way for fresh elections in ten local governments of the state. The rerun elections which took place in April 2007 still returned *Oni* as the elected governor but under controversial circumstances. *Fayemi* returned to the election tribunal to challenge the election and on appeal, declared the winner of the election.

The history of elections so far held in the fourth republic is history of elections malpractices at various stages of the electoral process under taken by desperate politicians who want to outsmart their opponents by all means. The research study will examine elections malpractice in Nigeria since 1999.

2.5 Electoral Malpractices in Nigeria since Fourth Republic (1999)

Electoral malpractice is a process by which the rule and regulations that govern the conduct of election are manipulated to favor specific interest. It is achievable through numerous tactics and strategies including outright rigging and falsification of electoral result.⁵³ Yusuf and Zaheddin in their write up defined electoral malpractices as the reflect determination of politicians, political actors and political parties to capture power by all means and at all cost.⁵⁴

Election rigging is palpable illegalities committed with a corrupt, fraudulent or sinister intention to influence an election in favor of a candidate(s) by means such as illegal voting, bribery, threat and undue influence, intimidation and other acts of coercion exerted on voters, falsification of results, fraudulent announcement of results,

⁵³ *Ebirim, S.I.*, (2014): The Effects of Electoral Malpractices on Nigeria Democratic Consolidation (1999-2003). *Public Policy and Administration Research*, Vol. 4 No. 2, 49-54. Available at www.iiste.org. Accessed 7/09/2017, at 3.21pm.

⁵⁴ Yusuf, I. and Zeheddin, O. (2015) Challenges of Electoral Processes in Nigeria's Quest for Democratic Governance in the Fourth Republic *Research on Humanities and Social Sciences* Vol.5, No.22, 2015.

fraudulent announcement of a losing candidate.⁵⁵ Electoral malpractice as “ illegalities committed by government, officials responsible for the conduct of elections, political parties, groups or individuals with sinister intention to influence an election in favor of a candidate(s)”⁵⁶ Election rigging has not only marred democratic consolidation in Nigeria but has also violated the fundamental human rights of so many Nigerians.⁵⁷

The advent of political activities in 1999 has witnessed some stability in terms of military intrusion into governance. Even then, the democratization process was bedeviled by badly conducted elections that left Nigerians frustrated and questioning the election process.⁵⁸ Political parties were registered by the INEC to contest the elections into legislative and executive positions. Although there were hitches and complaints, the elections were generally described as free and fair.⁵⁹ However, Observer Group witnessed irregularities in the poll but adjudged that the result broadly reflected the will of the Nigerian people.⁶⁰

The collation phase of simple process of transferring results from polling units and aggregating them at ward, local council and state levels was fraught with numerous difficulties. The process of results collection has been area of disputes and contestations

⁵⁵ Nwabueze, B. (2008) *Nature and Forms of Election Rigging*. Accessed from: <http://nigerdeltaworldcongress.org/articles/nature_and_forms_of.pdf> On 20/04/2017 at 12:23pm.

⁵⁶ Ezeani, EO (2005) ‘Electoral malpractices in Nigeria’ p. 415 in Aluaigba, M.T. *Democracy Deferred: The Effects of Electoral Malpractice on Nigeria’s Path to Democratic Consolidation*. Journal of African Elections Vol 15 No 2.

⁵⁷ Jega, A.M. (2014) ‘Challenges of Fraud-Free Election under a Democratic Dispensation’ Public Lecture / Book Launch by the Mustapha Akanbi Foundation (MAF) in Ilorin, Kwara State, on the 12th March, 2014. Accessed from < www.inecnigeria.org > Visited on 20/09/2017, at 11.11am.

⁵⁸ Ihonvbere, Julius O., (1999). The 1999 presidential elections in Nigeria: the unresolved issues. , A Journal of Opinion 27(1), Transition in Nigeria. 59-62. In Adibe, J. INEC and Challenges of Free and Fair Elections in Nigeria.

⁵⁹ Report of the Commonwealth Observer Group (2015). Nigerian Presidential and National Assembly Elections Commonwealth Secretariat Marlborough House, Pall Mall London SW1Y 5HX United Kingdom. Accessed from <www.thecommonwealth.org> on 20/06/2017 at 12:09pm.

⁶⁰ Transition Monitoring Group (TMG). (1999). Interim Report of the Presidential Elections held on Saturday, 27th of February 1999. Accessed from < http://nigeriaworld.com/focus/politics/tmg_report1.html > On 12/08/2017 at 12:11pm.

by parties. After the 2003 elections the European Union Election Observer Mission (EUEOM) reported that in a number of states the conduct of the elections did not comply with Nigerian law and international standards.⁶¹

The outcome of the 2007 general elections was considered more fraudulent than the previous ones and the worst in the contemporary electoral history of Nigeria. The 2003 general elections were hardly credible but 2007 balloting was blatantly fraudulent.⁶² Different stages of rigging were identified, these are pre-election rigging; polling-day rigging and post-election rigging methods as forms and stages of electoral fraud in the country, appears outstanding.⁶³

The common forms of electoral fraud include multiple and false registration, vote buying, underage voting, multiple voting, voter intimidation, ballot stuffing and snatching, false declaration of winners, influential politicians hired thugs harassed voters at polling units with various types of weapons and other forms of malpractices, at different stages of the electoral process before, during and after elections.⁶⁴

Thus, the 2007 elections are believed to be the worst since the first elections held in 1922 and the compelling need to embark on electoral reforms to ensure free, fair and credible elections becomes obvious.⁶⁵ The history also shows that elections conducted by the military tended to be more credible than those conducted by civilian authorities.⁶⁶

⁶¹ Suberu, R. (2007) 2007 Nigeria's Muddled Elections'. *Journal of Democracy* 18(4).

⁶² Ibrahim, J. (2007). *Nigeria's 2007 Elections: The Fitful Path to Democratic Citizenship*. Washington, DC: United States Institute of Peace (USIP).

⁶³ Ibid.

⁶⁴ Report of the Electoral Reform Committee (2008). Volume 1 Main Report. Pg108. Accessed from <<https://www.scribd.com/document/85483790/Electoral-Reform-Committee-Report-2008#>> on 30/09/2017, at 12.24am.

⁶⁵ Ibid.

⁶⁶ Ibid.

The primary reason for this has been the effort by politicians to perpetuate their hold on power at all costs and over the years, the politicians have become more desperate and daring in taking and retaining political power; more reckless and greedy in their use and abuse of power. Thus, electorates, seeing their hopes dashed with each set of elections, have come to believe that politicians lack the will to use state power to transform the lives of ordinary citizens.⁶⁷

In addition there is indeed a new and sophisticated dimension to electoral fraud in Nigeria. This is the manipulation of the judicial process to produce false winners.⁶⁸ Thus, the winner of the 2007 presidential election, late President *Umaru Musa Yar'adua*, seen the level of electoral malpractices embarked on electoral reform and inaugurated the Electoral Reform Committee, with the mandate to make wide ranging recommendations for electoral reform in Nigeria.⁶⁹

The Terms of Reference given to the 2008 Electoral Reform Committee were as follows:⁷⁰

(a) Undertake a review of Nigeria's history with general elections and identify factors which affect the quality and credibility of the elections and their impact on the democratic process. (b) Examine relevant provisions of the 1999 Constitution, the Electoral Act, and other legislation that have bearing on the electoral process and assess their impact on the quality and credibility of general elections. (c) Examine the roles of institutions, agencies and stakeholders in shaping and impacting on the quality and credibility of the electoral process. (d) Examine electoral systems relevant to Nigeria's

⁶⁷ Animashaun, K. (2008). Regime Character, Electoral Crisis and Prospects of Electoral Reform in Nigeria. *Journal of Nigeria Studies* Vol. 1 No.1. P. 11.

⁶⁸ Ibid.

⁶⁹ Electoral Reform Committee (2008) Report Vol. 1 Main Report December 2008.

⁷⁰ Ibid, P. 143-156.

experience and identify best practices that would impact positively on the quality and credibility of the nation's electoral process. (e) Make general and specific recommendations (including but not limited to constitutional and legislative provisions and/or amendments) to ensure: (i) A truly independent Electoral Commission imbued with administrative and financial autonomy; (ii) An electoral process that would enable the conduct of elections to meet acceptable international standards; (iii) Legal processes that would ensure that election disputes are concluded before inauguration of newly elected officials; and (f) Mechanisms to reduce post-election tensions including possibility of introducing the concept of proportional representation in the constitution of governments. (g) Make any other recommendations deemed necessary by the committee.

Total of 907 presentations were made by various stakeholders across the Country and also met with various stakeholders and Nigerian inventors of electronic voting devices. The Justice Uwais ER Committee made far reaching recommendations, amongst which are few of them below:⁷¹

1. Strengthen and protect the autonomy of INEC from political interference. This is to be done first, by giving the National Judicial Council (NJC) a major role in the appointment of Chairman and National Commissioners of INEC.
2. To grant INEC financial autonomy by placing her on First Line Charge and granting it relative financial autonomy.
3. Reconstitute the Commission accordingly, and especially so as to remove the stigma of the 2007 elections and improve its integrity.

⁷¹ Jega, A.M. (2015) Electoral Reforms in Nigeria: Challenges and Prospects. Being a Paper presented at the First University of Abuja Public Lecture Series, Thursday October 29, 2015. Accessed from <https://www.uniabuja.edu.ng/pdf/ElectoralReformsbyProfJega.pdf>. On 10/11/2017 at 9:54pm.

4. Unbundle' INEC. That is, create other agencies to handle responsibilities being undertaken by INEC, which have overburdened it, such as constituency delimitation; registration and regulation of political parties; and prosecution of electoral offenders; and thus allow INEC to focus on its core mandate of organizing and managing elections.
5. Introduce some form of proportional representation, to promote inclusiveness, especially in National and State legislatures, and improve the representation of women, persons with disabilities and the youths.
6. Improve the transparency and credibility of the conduct of elections,
7. Review and amend the Electoral Act 2006 and the 1999 Constitution to substantially improve the electoral legal framework.

Other ERC recommendations are: the use of electronic voting machines for elections which should be introduced gradually; the introduction of independent candidacy; the resolution of election petitions within a timeline of 6 months; the non-assumption of office by the candidate declared as winner until the petition challenging his/her victory is finally decided; and the imposition of a 10- year ban, from elective office, on any politician convicted of election malpractices.⁷²

However, the Government White Paper on the Uwais report which was released in March 2009 rejected some of the far reaching recommendations.⁷³ The Government rejected some of the major recommendations of the panel that the president should no longer appoint the Chairman and members of INEC, election petition should be concluded before winners are sworn in, independent candidacy, imposition of 10 year

⁷² Jega, A.M. (2015) Electoral Reforms in Nigeria: Challenges and Prospects. Being a Paper presented at the First University of Abuja Public Lecture Series, Thursday October 29, 2015. Accessed from <https://www.uniabuja.edu.ng/pdf/ElectoralReformsbyProfJega.pdf>. On 10/11/2017 at 9:54pm.

⁷³ Ibid.

ban on any convicted politician and burden of proof of disputed election be shifted to INEC instead of Petitioners.⁷⁴

Consequently, with partial implementation of the recommendations of the Uwais Committee and the emergence of new challenges that call for reforms, the setting up of the Constitution and Electoral Reform Committee (CERC) was crucial and justifiable.⁷⁵ Thus, President Muhammadu Buhari on the 4th of October, 2016 set up 24 Man Election Reform Committee headed by Senator Ken Nnamani and Secretary of the Committee who also doubles as member was Professor Lawal Mamman Yusufari of Faculty of Law, Bayero University Kano.⁷⁶ The following Terms of Reference was given to the Committee⁷⁷:

- a). Review of the laws impacting elections in Nigeria, including relevant provisions of the 1999 Constitution (as amended) and the Electoral Act 2010 (as amended) to assess their impact and adequacy for the administration of elections in Nigeria.
- b) Review and recommend the jurisdictional mandates of the proposed Electoral Tribunal.
- c) Review of recent judicial decisions on election petitions as they relate to:
 - i. Conflicting judgments
 - ii. Absence of consequential orders
 - iii. Delays in the issuance of Certified True Copies of judgments

⁷⁴ Ibid.

⁷⁵ The Constitution and Electoral Reform Committee (CERC) (2017) P. 36. Nigerian Federal Government Report.

⁷⁶ INEC Nigeria News. Accessed from <<http://www.inecnigeria.org/?inecnews=electoral-reform-nnamani-committee-submits-report>> On 16/09/2017 at 5:23am.

⁷⁷ The Constitution and Electoral Reform Committee (CERC) 2017 p. 3. Nigerian Federal Government Report 2017.

iv. Harmonize the Electoral Act in view of these judgments with a view to enhancing the electoral process.

d) Review of the lessons learnt from the 2015 general elections and make recommendations for the improvement of the electoral system.

e) Identify and assess international best practices on elections and electoral systems relevant to Nigeria's experience and identify best practices that would impact positively on the quality and credibility of the nation's electoral process.

f) Review the extent of implementation of the recommendations of the 2008 Electoral Reform Committee (ERC) headed by Justice Muhammad Uwais (the Uwais Report) and advice on outstanding issues for implementation.

g) Advise on the implementation of outstanding recommendations contained in the ERC Report.

h) Identify areas of the Constitution impacting on the conduct of elections that need reform.

i) Recommend the best approach to effective prosecution of electoral offences.

j) Consolidate the recommendations for Electoral Reforms into a single Electoral Act Bill to achieve the repeal of the 2010 Electoral Act and re-enactment of a new Electoral Act for the country.

k) Prepare and recommend a draft bill for approval of the President for submission to the National Assembly for enactment.

l) Co-ordinate with the National Assembly to achieve timely passage into law of the proposed bill.

m) Submit a Report of its Recommendations for reforms and draft clauses and provisions to be proposed for Legislative action within ten (10) weeks.

In contrast to Uwais report the Nnnamani Committee report also made far reaching recommendations with the aim of strengthening and deepening Nigerian democracy through amendment of the Constitution and Electoral Act, 2010. Thus, the following are some of the major recommendations made:⁷⁸ 1) Committee recommends the amendment of Section 52 (1) (b) to read thus: “Electronic accreditation and voting may be used at an election as the Commission may determine”; 2) The position of INEC Chairman, National Commissioners, and the Resident Electoral Commissioners shall be advertised and applications be evaluated by a Screening Committee; 3) Amendment to section 158 of the Constitution by adding sub-section; (3) as follows: “The Independent National Electoral Commission (INEC) shall not be subject to the direction or control of any authority or person in the performance of its functions”; 4) Independent candidates should be nominated by 25 voters and be responsible for 10% of the maximum stipulated election expenses for the various offices as provided under section 91(2) of the Electoral Act 2010 (As Amended); 5) To unbundle INEC the Committee recommends setting up of Political Parties and Electoral Offences Commission (PPEOC); 6) The scrapping of State Independent Electoral Commissions (SIECs) and transfer of their functions to INEC; 7) To stop incidences of conflicting judgments, rulings and orders, legislative reform be undertaken and also National Judicial Council (NJC) shall set timelines within their guidelines for dealing with any complaint; 8) Timeline within which to hear and determine election petitions be reviewed; 9) The presiding officer shall, after counting the votes at the polling units, enter the votes

⁷⁸ Ibid p. 3, 4, 5, 89, 91 and 119.

scored by each candidate and electronically transmit same in the form and manner prescribed by the commission; 10) Relevant law be amended to shift the burden of proof from the petitioners to INEC to show, on the balance of probability, that disputed elections were indeed free and fair and candidates declared winners were truly the choices of the electorate, the petitioner only needs to introduce evidence of substantial non-compliance and standard of proof shall remain preponderance of evidence. Only on proofing criminal issue the burden of proof will be beyond reasonable doubt.

Thus, the report of the Committee was sent to the National Assembly to ensure passage of the recommendations into Law.

2.6.1 MANUAL ACCREDITATION OF VOTERS

Accredit means to give official authorization or status.⁷⁹ Therefore; accreditation process of an election is very vital step before allowing an intending voter to vote for a candidate. Akaahs, J.C.A (now J.S.C) in the case of *Nweke v. Ejims*⁸⁰ placed a high but acceptable emphasis on the eminent position of accreditation in an election and pronounced that: I also agree that a person cannot vote until he has been accredited and it is the stamping of the voter's card and the marking of the electoral registrar that proves that the accreditation did in fact take place.

Above pronouncement was the interpretation of paragraph 20(2) of Schedule 5 to the State Government (Basic Constitutional and Transitional Provisions) Decree NO.3 of 1999.⁸¹

⁷⁹ Black, H.C. (1990) Black Law Dictionary. P. 20 Seventh Ed. St. Paul Minn. West Publishing Co

⁸⁰ (1999) 11 NWLR (Pt. 625) 39 at p. 53 paras. C-D

⁸¹ Paragraph 20(2) Schedule 5 State Government (Basic Constitutional and Transitional Provisions) Decree NO. 3 of 1999.

The Presiding Officer is required to cross-check voter's cards of a person apply for accreditation by checking the register of voters and may ask the voters if required by a candidate or the party Agent. Any intending voter that fails to answer the questions satisfactorily will be denied accreditation and voting. On the other hand a voter that answered the question will be allowed to vote, mark the name of the voter in the register of voters, stamp, sign and each voter's card at the back.

Accreditation of voters is very vital in the electoral process. In the case of *Buhari v. Obasanjo*,⁸² *Onnoghen* (J.S.C) in his dissenting judgment from the majority decision held that where an election is held with total failure to accredit voters, the election is invalid ab-initio. Once a petitioner is able to prove that there was no accreditation of voters the election supposed to be declared null and void.

The Electoral Act 2010 (as amended) recognizes manual accreditation of voters. It provides that: (1) Any person intending to vote with his voter's card, shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is registered with his voter's card. (2) The Presiding Officer shall, on being satisfied that the name of the person is on the Register of voters, issue him a ballot paper and indicate on the Register that the person has voted.⁸³ A candidate in an election or his Polling Agent may challenge the right of an intending voter to receive a Ballot paper.⁸⁴

The accreditation process of an election is bedeviled with fraudulent act by desperate politicians who want to rig the election by all means. Most of the rigging in election is perfected during registration, accreditation, voting and collation processes. It was in effort toward gradual introduction of E-voting the Biometric finger proof

⁸² (2005) 2 NWLR (Pt. 910) 241; 175 – 176, paras. D-C.

⁸³ S. 49 of the Electoral Act 2010 (as amended)

⁸⁴ S. 50 of the Nigerian Electoral Act 2010 (as amended).

technology capable of verifying intending voters was introduced as first phase in 2015 general election to make electoral process free, fair and credible.

2.6.2 The use of smart card reader machine in election process in Nigeria

The word Smart has many definitions, ranging from clever, fashionable, shred, calculating and something electronically fitted with built in microprocessors. Thus, Smart Card means a small piece of plastic that holds information in a magnetic strip, written form or microprocessor.⁸⁵

Reader means somebody who read or device that has capability of reading.⁸⁶

Nigerian Electoral management bodies since first republic uses various balloting methods that includes; open balloting in first republic, open-secret balloting in second republic, option-A4 in third republic, modified and Re-modified Open-Secret Balloting System (REMOBS) in fourth republic.⁸⁷ Thus, for the first time in the history of electoral process in Nigeria, the 2015 general elections saw the emergence of the use of a combined technology of electronic voters' register, permanent voters' card and smart card readers for authentication of voters. These technologies to a large extent eliminated duplication of voters' registration and hence multiple voting. However, ballot casting was still by manual means.⁸⁸

The use of information and communication technology in accreditation stage of election is the first phase of Electronic voting (e-voting) technology.⁸⁹ Smart card was invented at the end of seventies by a Frenchman Michel Ugon. Later the French group of

⁸⁵ *Encarta Microsoft Dictionary, 2009 Editions. Redmond, Published by Microsoft Corporation WA 98052-6399 United States of America.*

⁸⁶ *Ibid.*

⁸⁷ *Okediran, O. and Adeshina, G.R. (2015) A Framework of Electronic Voting in Nigeria. International Journal of Computer Applications (0975 – 8887) Volume 129 – No.3. Accessed from <<https://www.researchgate.net/publication/284146629>> on 16/08/2017 at 12:12pm.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

bankcards CB (Carte Bancaire) was created in 1985 and has allowed the diffusion of 24 million devices.⁹⁰ The development of the smart card reader machine started in 1990s as a memory device which keeps data and record for future use. The smart card reader is a technological device setup to authenticate and verify on Election Day a Permanent Voter Card (PVC) issued by INEC.⁹¹ The device uses a cryptographic technology that has ultra-low power consumption, with a single core frequency of 1.2GHz and an Android 4.2.2 operating system. In other words, the INEC card reader is designed to read information contained in the embedded chip of the permanent voter's card issued by INEC to verify the authenticity of the PVC and also carry out a verification of the intending voter by matching the biometrics obtained from the voter on the spot with the ones stored on the PVC.⁹²

Since 2010, new products smart card reader and Olympus have been offered with an additional feature. The new feature will among other things reads the content of the encrypted voter's bio-data and biometrics details with the associated private key and the availability of a matching voter ID to the smart card then begins to run a live matching with the voter information database where a version of each voter's bio-data and

⁹⁰ *Mohammed, L.A. et al. (2004) Smart Card Technology: Past, Present, and Future. Departments of Computer and Communication Systems Engineering, Biology and Agricultural Engineering 43400, UPM Serdang Selangor, Malaysia. Available at http://www.journal.au.edu/ijcim/2004/jan04/ijcimvol12n1_article2.pdf. Accessed on 19/3/2018*, at 12.24pm.

⁹¹ Independent National Electoral Commission (INEC) (2015) Frequently Asked Questions. Available at http://www.inecnigeria.org/?page_id=28 Accessed on 22/08/2017, at 5.21am.

⁹² ISO/IEC 7816-3:2006 Identification cards — Integrated circuit cards — Part 3: Cards with contacts — Electrical interface and transmission protocol.

biometric details is housed. If a match is found, the person is authenticated and certified as a duly registered voter.⁹³

The ability of the card reader to perform the above described functions as well as keeping a tally of the total numbers of voters accredited at the polling unit and forwarding the information to a central database server over a Global System for Mobile (GSM) network makes the card reader most welcome at this point in time in the nation's electoral history.⁹⁴

The use of PVCs with biometric data and verification of voters through card readers has been planned since before the 2011 elections. The system recognizes the need for continuous efforts to reduce fraud so that Nigerians can have growing confidence in the fairness of elections.⁹⁵

In exercise of the powers conferred by the Constitution of the Federal Republic of Nigeria, 1999 (as amended)⁹⁶ and the Electoral Act 2010 (as amended)⁹⁷, the Independent National Electoral Commission (INEC) issued Manual Guidelines and Regulations for the 2015 General Elections. The accreditation process as outlined by the INEC Guideline is as follows:⁹⁸

7 (a) No person shall be allowed to vote at any polling unit/voting point other than the one you registered, name of the person appears in the register of voters and must have

⁹³ Engineering Network Team (2015) Gains of the INEC Card Reader in the 2015 Elections. Available at <http://www.go.engineer-ng.net/m/blogpost?id=6404812%3ABlogPost%3A103341> Accessed on 23/09/2017, at 9.14am.

⁹⁴ Ibid

⁹⁵ Ibid.

⁹⁶ Paragraph 15 of Part 1 of the Third Schedule to the Constitution (as amended) of FRN 1999.

⁹⁷ S. 52 of the Electoral Act op. cit.

⁹⁸ S. 7, 8 and 9 of INEC Elections Guidelines and Regulations 2015. Accessed from <<http://www.inecnigeria.org/?page-2015-guidlines-regulations> > on 16/08/2017, at 6.30pm.

PVC. An intending voter has to be verified by the Card Reader, or as otherwise determined by the Commission.

(b) A voter must personally come to the polling unit/voting point and vote in the manner prescribed by the Commission.

(c) The Presiding Officer shall regulate the admission of voters to the polling unit, and shall exclude all other persons except candidates or their polling agents, other poll and election officials, security personnel, accredited observers and any other person who in his opinion has lawful reason to be admitted.

8(a) There shall be separate periods for accreditation and voting.

(b) The accreditation process shall comprise of verification of voters using the Card Reader; Checking of the Register of voters; and inking of the cuticle of the finger.

(c) Accreditation shall commence at 8:00 am and close at 1:00 p.m, provided that all voters who are already on the queue by 1:00 pm shall be accredited.

The cost and process of manual accreditation and voting are both increasing geometrically and tedious to execute and there has been a declining participation rate due to: inconvenience of manual system of voting like, inaccuracy in ballot counting and delayed in announcement of election results; loss of significant time during ballot counting; unacceptable percentages of lost, stolen and miscounted ballot papers, votes loss through unclear or invalid ballot marks and limited accommodations for people with disabilities.⁹⁹

2.7 Election petition in Nigeria

An election petition refers to the procedure for challenging the result of a presidential election, gubernatorial election, election into legislative houses or election

⁹⁹ Ibid

into local government. Thus, election petitions are *sui generis* and as such they are considered to be distinct and completely divorced from civil proceedings.¹⁰⁰

Thus, INEC shall have power to:¹⁰¹ Organize, undertake and supervise all elections to the offices of the President and Vice-president, the Governor, Deputy Governor of a state, and to the membership of the Senate, the House of Representatives and the Houses of Assembly of each of the Federation; Register political parties; Monitor the organization and operations of parties; Arrange for annual examination and auditing of the fund and accounts of political parties; Arrange and conduct the registration of persons qualified to vote and prepare, maintain and revise the register of voters for the purpose of any election; Monitor political campaigns and prove rules and regulations; Delegate any of its powers to any Resident Electoral Commissioners; Carry out such other functions as may be conferred upon it by an Act of the National Assembly.

Subject to the provisions of the Electoral Act, 2010 (as amended) the Commission shall issue and publish in the Gazette, guidelines for the elections which shall make provisions, among other things, for the step by step recording of the poll in the electoral forms as may be prescribed beginning from the polling unit to the last collation centre for the ward or constituency where the result of the election shall be declared.¹⁰² The applicable laws for an election petition are the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the Electoral Act, 2010 (as amended),

¹⁰⁰ Afe Babalola (2007): Election Law and Practice Vol.1. (2nd ed.) Ibadan: Afe Babalola p.297 cited by Tarfa, R. Key Issues and Challenges of Electoral Tribunal in Nigeria Available at <http://www.rickeytarfa.com/wp-content/uploads/2015/02/key-issues-and-challenges-of-electoral-tribunals-in-nigeria.pdf> Accessed on 7/09/2017, at 7.16am.

¹⁰¹ S. 15 of the Third Schedule to the Constitution of Federal Republic Nigeria 1999 (as amended).

¹⁰² S. 73 of the Electoral Act, 2010 (as amended).

Practice Direction for Election Appeals to the Supreme Court (2011), Election Tribunal and Court Practice Directions (2015) and INEC Manual and Guidelines for Election Officials 2015.¹⁰³ The Constitution takes the first place in the order of precedence, in that any provision in any Act or Regulation which is contrary to its provision(s) is null, void and of no effect to the extent of such inconsistency.¹⁰⁴

2.7.1 Election petition tribunal

The Governorship Election Tribunal is established by section 285(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The tribunal shall consist of a Chairman and two other members.¹⁰⁵ The Chairman shall be a judge of High Court and the two other members shall be appointed from among Judges of a High Court, Kadis of a Sharia Court of Appeal, Judges of a Customary Court of Appeal or other member of judiciary not below the rank of a Chief Magistrate. The Chairman and other members shall be appointed by the President of the Court of Appeal in consultation with the Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal or the President of Customary Court of Appeal of the State as the case may be.¹⁰⁶ The quorum of the tribunal shall be the Chairman and one other member.¹⁰⁷ S. 177, 178, 179, 180 and 182 of the Constitution provided for the qualification of a person aspiring to be elected as Governor and Deputy Governor, the election and the tenure of their offices.¹⁰⁸

¹⁰³ Oluwadayisi, O. (2013). Practical Approach to Civic and Criminal Litigation. Revised Ed. Publ. by Vicolad Grafik Media Ltd. Abuja, Nigeria.

¹⁰⁴ Ibid.

¹⁰⁵ S. 285 (2) of the Constitution of the FRN 1999 (as amended).

¹⁰⁶ S. 2 (1), (2) and (3) of Sixth Schedule to Constitution of FRN 1999 (as amended)

¹⁰⁷ S. 285 (4) Ibid.

¹⁰⁸ S. 177, 178, 179, 180 and 182 Ibid.

The election tribunals shall be constituted not later than 14 days before the election; and open their registries for business 7 days before the election.¹⁰⁹

An election petition shall be filed within 21 days after the date of the declaration of result of the elections; Election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition.¹¹⁰ It is mandatory for all petitioners to comply with this provision. For instance in the case of *Otu v. INEC*¹¹¹, the statutory period was not complied with, the election Tribunal dismissed the petition for lack of jurisdiction to entertain the petition. In the case of *Falae v. Obasanjo*¹¹², the statutory provision on time was not adhered to by the petitioner. Similarly, in the case of *Malah V. Kachallah*¹¹³, the inability of the petitioner to file his petition within time was due to administrative difficulties, as a result of late arrival of tribunal officers. Despite that Tribunal held that the administrative difficulties encountered by the petitioner in the course of filing his petition could not override the express provisions of the law. Thus, the petition was held to be incompetent.

Election may be questioned on any of the following grounds of election petitions.¹¹⁴

- a. That a person whose election is questioned was at the time of the election not qualified to contest the election;
- b. That the election was invalid by reason of corrupt practices or non-compliance with the provisions of the electoral act;

¹⁰⁹ S. 133 (3) of the Electoral Act, 2010 (as amended).

¹¹⁰ S. 285 (5), (6) and (7) of the Constitution FRN 1999 (as amended).

¹¹¹ (1999) 5 NWLR (Pt. 602) p. 32

¹¹² [1999] 6 NWLR (Pt. 606) 283.

¹¹³ [1999] 6 NWLR (Pt. 606) P. 283 at 290

¹¹⁴ S. 138(1) of the Electoral Act, 2010 (as amended).

- c. That the respondent was not duly elected by majority of lawful votes cast at the election; or
- d. That the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

Thus, in the case of *Ojukwu v. Yar'adua*,¹¹⁵ the court per *Nikki Tobi* (JSC as he then was) observed that: "It is even safer for a petitioner to copy the appropriate grounds or grounds, as in the subsection' and that a petitioner, who chooses his own words, should realize that he is taking a big gamble, if not a big risk''. Similarly, in the case of *Oke v. Mimiko*, it was held that; in view of the delicate nature of election matters, minor defects or irregularities should not be overlooked as would be in ordinary civil causes.¹¹⁶

Thus, Section 139 of the Electoral Act, 2010 (as amended) provides for certain defects not supposed to invalidate election. The Section provides that:¹¹⁷ (1) An Election shall not be liable to be invalidated by reason of non compliance with the provisions of the Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principles of this Act and that the non compliance did not affect substantially the result of the election. (2) An election shall not be liable to be questioned by reason of a defect in the title, or want of title of the person conducting the election or acting in the office provided such a person has the right or authority of the Commission to conduct the election.

¹¹⁵ (2009) 12 NWLR (Pt 1154) 50 Paras. D-F..

¹¹⁶ (2014) 1 NWLR (pt.1388) 225at 233.

¹¹⁷ S. 139 of the Electoral Act, 2010 (as amended).

*Sagay*¹¹⁸ posits that Section 146 of the Electoral Act, 2006 which is in *impari materia* with Section 139 (1) of the 2010 Electoral Act (as amended) is conjunctive in nature. For an election not to be invalidated, (i) it must comply substantially with the provisions of the Act and (ii) non-compliance, (whether substantial or insubstantial) must not affect substantially, the result of the elections. In other words, any election has to clear two hurdles in order to be valid; (i) it must comply substantially with the provisions of the Act; (ii) where there was any non-compliance, no matter how insignificant, it must not have substantial effect on the result. Therefore, a petitioner will succeed if he can establish either of the following: 1) Substantial non-compliance with the provisions of the Electoral Act, only, or 2) substantial effect on the result of the election by any degree of non-compliance, no matter how trivial. However, our Courts are having the mistaken believe that a petitioner must satisfy all the two criteria before invalidating an election. This is absolutely wrong.

Thus, in *Buhari v Obasanjo(supra)* *Belgore* (JSC as he then was) made the following statement: The burden on petitioners to prove that non-compliance has not only taken place but has also substantially affected the result [must be] fulfilled. There must be clear evidence of non-compliance, then that non-compliance has substantially affected the election. The Tribunal or Court as the case may be, determines that a candidate who was returned as elected was not validly elected on any ground, the Tribunal or the Court shall nullify the election. Where an election tribunal or court nullifies on the ground that the person who obtained the highest votes at the election was not qualified to contest the election, or that the election was marred by substantial

¹¹⁸ Sagay, I.E. (2009) The Proper Construction of ‘Substantive Compliance’ in S. 146(1) of the Electoral Act, 2006. Being a Lecture Delivered at Faculty of Law, Lagos State University on 16th June, 2009.

irregularities or non-compliance with the provisions of the Act, the election tribunal or court shall not declare the person with the second highest votes or any other person as elected, but shall order a fresh election. If the Tribunal or Court determines that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the Election Tribunal or Court, as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the election and satisfied the requirements of the Constitution and the Act.¹¹⁹ Similarly, in the case of *Osunbor v. Oshiomhole*¹²⁰ the declared winner of the election was sacked by the Court and declared Adam Oshiomhole as duly elected Governor. If the Election Tribunal or Court has decided that the declared winner was not validly elected, then if notice of appeal against the decision is given within 21 days from the date of the decision, the candidate returned as elected shall, notwithstanding the contrary decision of the Tribunal or the Court, remain in office pending the determination of the appeal.¹²¹

2.7.2 The Courts of Appeal

An appeal to the Court of Appeal shall lie as of right from decisions of the Governorship Election Tribunal on any question as to whether any person has been validly elected to the office of Governor or Deputy Governor or term of office has ceased or the seat of any such person has become vacant.¹²² The Appellant shall file in

¹¹⁹ S. 140 of the Electoral Act, 2010 (as amended).

¹²⁰ (2007) 18 NWLR (Pt.1065) 32.

¹²¹ S. 143 Op. Cit.

¹²² S. 246(1) (c) (ii) (iii) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

the Registry of the Tribunal his notice and grounds of appeal within 21 days from the date of the decision appealed against.¹²³ An appeal from decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal or Court of Appeal.¹²⁴

The petition was struck out in the case of *Okon v. Bob*¹²⁵ by the election petition tribunal and as a result the petitioner approached Court of Appeal with notice of appeal. The court held as follows:

An appeal will only lie to the election petition tribunal to the Court of Appeal if there is any decision by the election tribunal whether any person has been validly elected...Such an appeal will only come within the provisions of section 246(1)(b) of the Constitution of Nigeria 1999, if there is determination of the petition on the merit and any other decision made in the course of the election proceedings which is a decision is not covered by section 246(1)(b)

However, in a similar case of *Usani v. Duke*¹²⁶ the notice of appeal was filed as a result of striking out the petition and the Court of Appeal held that a decision striking out an election petition is appealable. Thus, right of appeal is exercisable whether a petition was allowed, dismissed or struck out. In *Ibori v. Ogboru*¹²⁷, the Supreme Court

¹²³ S. 285 Ibid.

¹²⁴ S. 240 Ibid.

¹²⁵ (2004) 1 NWLR (Pt. 854) 378 at p. 400 B-H.

¹²⁶ [2004] 7 NWLR (Pt.871) 256 at p.342 C-G

¹²⁷ (2006) 17 NWLR (pt.1002) 542 at p.574, 585-6

held the definition of ‘decision’ under the constitution did not distinguish between an interlocutory and a final decision in an election petition.

2.7.3 Supreme Court

The Supreme Court is the apex court in Nigeria and its judgment is final. Thus, the apex court shall consist of the Chief Justice of Nigeria; and such number of Justices of the Supreme Court, not exceeding twenty one, as may be prescribed by an Act of the National Assembly.¹²⁸ The Supreme Court to the exclusion of any other court have both original and appellate jurisdictions in any dispute between the Federation and a State or between States relating to disputes involving any question of law or fact on which the existence or extent of a legal right depends and to hear as well as determine appeals from Court of Appeal respectively.¹²⁹

An appeal shall lie from decisions of the Court of Appeal to Supreme Court as of right in decisions on any question; whether any person has been validly elected to the office of the President or Vice President; whether the term of office of President or Vice President has ceased; whether the office of the President or Vice President has become vacant; whether any person has been validly elected to the office of Governor or Deputy Governor; whether the term of office of a Governor or Deputy Governor has ceased; whether the office of a Governor or Deputy Governor has become vacant; and such other cases as may be presented by an Act of the National Assembly.¹³⁰

As a court of last resort, the doctrine of binding judicial precedent otherwise called *stare decisis* has effectively ensured the subordination of the other tiers of the

¹²⁸ Section 230 of the Constitution of FRN 1999 (as amended).

¹²⁹ S. 232(1) and 233 (1) Ibid.

¹³⁰ Section 233 (2)(e) and (f) of the Constitution of FRN 1999 (as amended).

judicial hierarchy to its overall pervading influence. As the pinnacle of the judicial system and thus having the final say on any point of law, justice Oputa, J.S.C., (as he then was) opined that: "...We are not final because we are infallible, rather because we are final".¹³¹

The Common law tradition does not permit any further appeal from the final decision of the highest appellate court, subject to the right of the President or Governor to exercise the prerogative of mercy.¹³² This means, the finality of a decision of the Supreme Court shall not affect the right of the President or Governor to exercise the prerogative of mercy.¹³³ The policy of binding judicial precedent is rooted in the Nigerian legal order as inherited from the British legal system and even at the apex court there is a limit to the power of the Supreme Court to overrule its previous decision.¹³⁴ To do otherwise would be a negation of the finality of the decision of the court. Once it gives its decision on the dispute, it becomes *functus officio* and it is precluded from reviewing or varying the judgment or order apart from the correction of clerical mistakes or accidental slips.¹³⁵ However, frequently the Supreme Court had been urged to depart from its previous position in order to strike a proper balance between putting finality to the law and persevering in error. There is no power in the Supreme Court to set aside or review its own judgment given in the same case. The only exception relates to correction under the „slip rule“, which cannot be regarded as a review properly so called. Thus, the Supreme Court may revisit its judgment under order 8 rule 16, Supreme Rules to correct clerical errors or omissions or gaps to give meaning to the judgment or decision of the

¹³¹ *Federal Civil Service Commission & Ors. v Laoye* [1989] 2 NWLR (pt 106) 253.

¹³² Section 235 Op. Cit.

¹³³ *Olatunbosun v NISER* [1988] 3 NWLR (pt. 80) 25 7.

¹³⁴ *Ngwo & Ors. v Chukwu & Ors.* (1988) NSCC 1115 8.

¹³⁵ *Architect Registration Council of Nigeria v Professor M. A. Fassassi* [1987] 6 SCNJ 5: J. E. A.

court and not to vary it.¹³⁶ This is without prejudice to the inherent power of the Supreme Court to set aside its judgment in appropriate cases when; the judgment is obtained by fraud or deceit either on the court or by one or more of the parties can be impeached or set aside by means of action or where the judgment is nullity.¹³⁷

2.8 The Rules of Interpretation of Statutes Adopted by the Court.

Separation of power among the three arms of government is well enunciated in the Constitution of the Federal Republic of Nigeria 1999 (as amended). The three arms of government are: the Legislature whose main duty is to make the law, the Executive is charged with the function of implementation of the law and Judiciary is charged with the function of interpretation of the law.¹³⁸ The tools use by the judiciary to interpret the laws are: Rules of interpretation of Statutes, the Interpretation Act, Decision of Superior Courts defining words, Interpretation Section, Long title and preamble, Law dictionaries and Legal texts such as Maxwell on the Interpretation of statutes.¹³⁹

Thus, in this section the research will only examine various rules of interpretation of statutes by Courts through decided cases.

2.8.1 Literal Rule

This rule is the basis of all court decisions in relation to statutes. Here judges rely on the exact wording of the statute for the case. They do not interpret meaning. Lord Diplock in the case of *Duport Steel v. Sirs*¹⁴⁰ defined the rule:

¹³⁶ *Shuaibi v Nigeria-Arab Bank Ltd.* [1988] 4 SCNJ 109.

¹³⁷ *Orthopaedic Hospital v Apugo & Sons* [1990] 1 NWLR (Pt. 129) 652.

¹³⁸ Section 4(2), 5(1) and 6 of 1999 Constitution of FRN (as amended).

¹³⁹ Imhanobe, S.O. (2007) *Legal Drafting and Conveyancing*. Pp 152. Published by Sylvester Imhanobe, Legal Research Ltd. , Maitama, Abuja.

¹⁴⁰ (1980) 1 All ER 529.

Where the meaning of the statutory words is plain and unambiguous it is not then for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they consider the consequences for doing so would be inexpedient, or even unjust or immoral.

Thus, if the words of the Statutes are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law giver.¹⁴¹

In the case of *Adefemi v. Abegunde*¹⁴² Court of Appeal in an election case held that: It is trite law that when the words of a document, legislation or Constitution are clear, plain and unambiguous as in the present case as regards the provisions of section 107(1) (f) of the 1999 Constitution, there is no need to give them any other meaning than their ordinary natural and grammatical construction would permit unless that would lead to absurdity, or some repugnancy or inconsistency with the rest of the legislation or Constitution. It has therefore been held time without number, that in such a situation a court of law is without jurisdiction or power to import into the meaning thereof, what it does not say. That nothing is to be added or taken from the statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted.

¹⁴¹ *I.B.W.A. v. Imano (Nig) & Anor* (1988) N.S.C.C (Pt II) 245.

¹⁴² Unreported CA/IL/EP/SA/2/2003 Paras. 2 P. 28.

Similarly, Literal Rule was followed in the English case of *Fisher v Bell*¹⁴³ while deciding matter relating to the Offensive Weapons Act, of 1959. It is an offence to offer certain offensive weapons for sale. Bristol shopkeeper, James Bell displayed a flick knife in his shop window. When brought to trial it was concluded that Bell could not be convicted given the literal meaning of the statute. The law of contract states that having an item in a window is not an intention of sale but is an invitation to treat. Given the literal meaning of this statute, Bell could not be convicted.

Lord Simmonds said; “the duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly restricted”,¹⁴⁴

Main advantages of the Literal Rule are¹⁴⁵: no scope for the judges own opinions or prejudices to interfere; respects parliamentary supremacy and upholds separation of power; encourages drafting precision, promotes certainty; and reduces litigation.

Disadvantages of the Literal Rule are:

1. Sometimes the use of the literal rule may defeat the intention of Parliament. In the case of *Whiteley v. Chappel*¹⁴⁶, the Court held that, the accused could not be convicted of impersonating "any person entitled to vote" at an election, because the person he impersonated was dead. Using a literal construction of the relevant statutory provision,

¹⁴³ (1960) QBD 10 Nov 1960 - swarb.co.uk.

¹⁴⁴ *Magor and St. Mellons Rural District Council v. Newport Corporation* {1952} A.C. 189 at 191.

¹⁴⁵ Critical Analysis of the Literal, Golden and Mischief Rule Law Published by Law Teacher online. Accessed from < <https://www.lawteacher.net/free-law-essays/administrative-law/critical-analysis-of-the-literal-golden-and-mischief-rule-law-essay.php>.> On 26/11/2017, at 2.44pm.

¹⁴⁶ (1868) LR 4 QB 147.

the deceased was not "a person entitled to vote." Thus, the consequences of a literal interpretation are enormous.

2. Opponents of the plain meaning rule claim that the rule rests on the erroneous assumption that words have a fixed meaning. Words are imprecise, leading justices to impose their own prejudices to determine the meaning of a statute. However, since little else is offered as an alternative discretion confining theory, plain meaning survives.¹⁴⁷

3. It obliges the courts to fall back on standard Common law principles of statutory interpretation. Legislation is drawn up with these principles in mind. However, these principles may not be appropriate to Constitutional interpretation, which by its nature laid down general principles.

Belgore JSC (as he then was) in *Buhari v Obasanjo*¹⁴⁸ while interpreting section 135(1) of the Electoral Act, 2002 which is in *impara materia* with section 139 (1) of the Electoral Act (2010), in literal way, stated: The burden on petitioners to prove that non-compliance has not only taken place but has also substantially affected the result must be fulfilled. There must be clear evidence of non compliance, then that non-compliance has substantially affected the election.

2.8.2 The Golden Rule

The Golden Rule has only modified the literal rule in some respects. It acknowledges the position of the literal rule as the ordinary rule, but adds that where the literal rule leads to absurdity and inconsistent, the court should modify the language to discover the intention of the legislature. Thus, the golden rule was applied in the case of

¹⁴⁷ Ibid.

¹⁴⁸ (2005) 50 WRN 1 at p.178.

Council of University of *Ibadan vs Adamolekun*¹⁴⁹, wherein the court had to interpret the provision of S.3 (4) of the Constitution (Suspension and Modification Decree) of 1966 which states that where an Edict is in conflict with a Decree, the edict is to become void to the extent of its inconsistency with the Decree. However, in S.6 it was provided that no question as to the validity of a decree or edict was to be entertained in a court. The Court ruled that it would lead to absurdity to literally interpret the provision of S.6 due to the fact that if it did, how then would it be able to enforce the provisions of S.3(4) and thus, the Edict was voided.

The golden rule was first formulated in the case of *Beck vs Smith*¹⁵⁰ and later in *Grey v Pearson*¹⁵¹ wherein provided that the literal interpretation of a statute should be used only to the extent that it would not produce absurdity or negate from the intention of the legislature. If the literal interpretation of the statute were to produce absurdity, then the intention of the legislature should be applied. Similarly, *Kekere-Ekun JSC* stated that: The golden rule of interpretation of statutes is that where the words used is clear and unambiguous they must, *prima facie*, be given their natural and grammatical meaning unless it would lead to absurdity.¹⁵² Lord Denning posits in an earlier *Seaford* case that golden rule is a process of supplementing the written words so as to give force and life to the intention of the legislature.¹⁵³

¹⁴⁹ (1967) 1 NLR 213,214.

¹⁵⁰ (1836) 2 M. & W. 191.

¹⁵¹ (1857) 6 H.L.C. 61; 10 E.R. 1216.

¹⁵² *Ukachukwu v. PDP & 3 Others* LER [2014] SC 589.

¹⁵³ *Seaford Court Estate Ltd. v. Asher* (1949) 2 All ER 155 at 164.

2.8.3 The Mischief Rule

The Mischief Rule was evolved from the *Heydon's* case¹⁵⁴, wherein Judges laid down the rule that in the interpretation of statutes there is need to take into consideration four issues:

1) What was the common law before the making of the statute; 2) What was the mischief and defect that gave rise to the statute; 3) What remedy has parliament resolved and appointed to cure the mischief; and 4) The true reason of the remedy.

The Mischief Rule unlike the Literal and Golden rule, does not limit the judge to the words used in the statute, they can go behind the words to discover the mischief (purpose or object) of the statute. Thus, Lord Denning in the case of *Engineering Industry Training Board v. Samuel Talbot (Engineers) Ltd.*¹⁵⁵ held that: We no longer construe Acts of Parliament, according to their literal meaning. We construe them according to their object and intent.

Despite the advantage of the mischief rule House of Lords condemned this approach and referred to it as “’ naked usurpation of the legislative function.”¹⁵⁶

2.8.4 Purposive Approach

The Purposive approach is the modern approach to Interpretation of Statute; evolved from the mischief rule and has a chequered history in England. The main feature of this approach is that it takes into account not only the words of the legislation according to their ordinary meaning but also the context within which it was drafted and

¹⁵⁴ (1584) 76 ER 637. Rule in Heydon's Case Law and Legal Definition. USLegal.com. Available at <https://definitions.uslegal.com/r/rule-in-heydons-case%20/>. Accessed on 28/02/2018, at 6.33pm.

¹⁵⁵ 1584) 3 Co Rep 7a.

¹⁵⁶ *Anisminic Ltd v Foreign Compensation Commission* (1969) 1 ALL ER 480 at 482.

allows judges to admit official reports.¹⁵⁷ In other words, the judges are allowed to see records of proceedings at the committee stage of the Bill to determine the intention of the Legislature. Lord Denning was by far the strongest and the most persistent advocate of this approach during his time at the Court of Appeal. Thus, he had advocated the purposive approach in the following words:¹⁵⁸ It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman.

He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give ‘force and life’ to the intention of the legislature. That was clearly laid down by the resolution of the judges in *Heydon’s* case, and it is the safest guide today.’’

Lord Denning further stressed that:

We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

¹⁵⁷ *Magor and St Mellon RDC v. Newport Corporation*. (1952) AC 189

¹⁵⁸ *Ibid.*

The House of Lord confirmed the above statement in the case of *Pepper Inspector of Taxes v. Hart*¹⁵⁹, where it was held that:

Having regard to the purposive approach to the construction of legislation the Courts had adopted in order to give effect to the true intention of the Legislature, the rule prohibiting the Courts from referring to parliamentary material as an aid to statutory construction should, subject to any questions of parliamentary privilege, be related so as to permit reference to parliamentary material: (i) the legislation was ambiguous or obscure or the literal meaning led to an absurdity, (ii) the material relied on consisted of statements by a Minister or other promoter of the Bill which led to the enactment of the legislation together with such materials if necessary to understand the statements and their effect, and (iii) the statements relied on were clear.

Lord *Griffiths* further held that:

The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.¹⁶⁰

¹⁵⁹ (1993) 1 ALL E.R.42

¹⁶⁰ Ibid.

According to Lord Denning, in the case of *Seaford Court Estates Limited v. Asher* ‘the English Language is not an instrument of mathematical precision.’¹⁶¹ Consequently, ‘a judge should not be a ... mere mechanic in the power house of semantics. He should be the man in charge of it’.¹⁶² Hence, developments in the judiciary have shown that the judiciary will rather lend its weight to support substantial justice than technicalities which, supports fairness as it was in the days when the principles of equity prevailed over conflicting rule of common law.

Oputa JSC (as he then was) in the case of Attorney General of Oyo State held that: The picture of law and its technical rules triumphant and justice prostrate may no doubt have its admirers. Nevertheless, the spirit of justice does not reside in forms of formalities, or in technicalities, nor is the triumph of the administration of justice to be found in successfully picking one’s way between pitfalls of technicality. Law and all its technical rules ought to be but a handmaid of justice and legal inflexibility (which may be becoming of law) may, if strictly followed, only serve to render justice grotesque or even lead to outright injustice. The court will not endure that mere form or fiction of law, introduced for the sale of justice, should work a wrong, contrary to the truth and substance of the case before it.¹⁶³

The Judiciary in Nigeria intervened in many cases where the literal interpretation of the statutes will lead to absurdity and miscarriage of justice; thus, adopt other rules of interpretation by looking at the object and purpose of the Statutes. The Judiciary's functioning, within the principle of activism, is required to be independent: the exercise

¹⁶¹ *Seaford Court Estates Limited v. Asher* (1949) 2 K.B. 481 at 489-499.

¹⁶² Lord Denning, (1979). *The Discipline of Law*, (Butterworths, London) p.56-57.

¹⁶³ *Attorney-General of Oyo State v. AG Federation* (1986) 5 NWLR (Pt. 450), 828 at 886.

of judicial authority ought not to be subjected to the control or direction of any person or authority. The Nigerian Constitution is to be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms contributes to good governance.¹⁶⁴

In the case of *Amaechi v. INEC*¹⁶⁵ purposive approach was adopted by the Supreme Court, thus, Oguntade JSC quoted with approval the dictum of Lord Denning on this score in the case of *Packer v. Packer* (1958) p.15 at 22 where the Law Lord had declared:

What is the argument on the other side? Only then, that no case has been found in which it had been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both.

However, literal Interpretation of Section 285 (6) of the Constitution of Nigeria, 1999 (as amended) in the case of *ANPP v. Goni*¹⁶⁶ due to expiration of the 180 days to hear and determine election petition without looking at the merit of the case resulted to miscarriage of justice to the petitioner.

2.9 Conclusion

Democracy as a system of government based on the acquisition of authority from the people with its laudable values, such as sovereignty of the people, institutionalization of the rule of law, the emphasis on the legitimacy of rulers; the availability of the choices through competitive election process and cherished values and accountability in

¹⁶⁴ Oluwadayisi, A.O. The Role of the Judiciary in the Application of Peace building. Op Cit.

¹⁶⁵ (2008)5 NWLR (Pt. 1080) p. 227 at 315.

¹⁶⁶ (2012) 7 NWLR (PT 1298) p. 147 at 321.

governance are far from achieving them in Nigeria, due largely to the fraudulent manipulation of the election process by the political class.

History of Nigerian electoral process was highly bedeviled by election malpractices, before, during and after elections, (including the court process). Thus, history has shown that concerted efforts by previous and current governments to reform and improve the electoral process have not provided the desired result.

The introduction of Smart card reader machines, permanent voters' cards and electronic register in 2015 general elections improved considerably the credibility of the election. In conclusion, the conceptual bases of election and electoral process as well as trial of disputed election are in serious need of reformation. The need for our judges to be progressive toward providing justice to all parties by adopting modern tool of interpretation of statutes, such as purposive approach by taking into account not only the words of the legislatures according to their ordinary meaning but also the context within which it was drafted. To ensure justice judges to check official reports or the record of proceedings at the committee stage of the Bill to determine the intention of the Legislature. The next chapter analyzes the decisions of the Courts in the case of *Wike v. Peterside* in relation to the use of smart card reader machine.

CHAPTER THREE

THE ANALYSIS OF THE COURTS DECISION IN *Wike V. PETERSIDE*

3.1 Introduction.

This chapter analyzes the decisions of the Election Petition Tribunal, Court of Appeal and Supreme Court in the case of *Peterside v. Wike*¹ To ascertain the reasons adduced against the use of smart card reader machine and whether they are justifiable, methods of interpretation of statutes adopted by the various Courts and what methods ought to have been adopted.

The chapter further identified factors that should have lead to change in Supreme Court decision.

3.2 Brief Facts of the Case of *Wike v. Peterside*

The petitioner Hon. (Dr) *Dakuku Peterside* contested for the office of the Governor of Rivers State on the 11th and 12th of April, 2015 under the platform of All Progressive Congress (APC) who scored 124,896 votes and Mr. *Nyesom Ezenwo Wike* of People Democratic Party (PDP) scored 1,029,102 votes, thus was declared a winner by the third respondent in the disputed election.² The petitioner challenged the declaration of the second respondent at the Election Petition Tribunal, and the case was decided in favor of the petitioner by calling for fresh election. Thereafter, the respondent/appellant challenged the decision of the tribunal at the Court of Appeal and the court upheld the tribunal decision. However, at the Supreme Court the decision of the Court of Appeal was upturned and declared the appellant as duly elected Governor of Rivers State.

¹ (2016) 2 S.C.N.J. {Pt.1}

² Ibid at p. 250.

3.3 The Decision of the Election Petition Tribunal in *Peterside v. Wike*

The petitioners dissatisfied with the declaration of the second respondent as the winner of the election by the first respondent (INEC), filed a join petition challenging the outcome of the result. Thus, the grounds of the petition before the Election Tribunal are:³

- i) That the second respondent was not duly elected by majority or highest number of lawful votes cast at the election; ii) That the election of the second respondent was invalid and unlawful by reason of substantial non-compliance with the provisions of the Electoral Act, 2010 (as amended), Manual for Election Officials 2015 as well as the first respondent's (INEC) 2015 General Elections approved guidelines and regulations; iii) The election was invalid by reason of corrupt practices.

The petitioners sought for the following reliefs:⁴

- 1) That it may be determined and thus determined that the second respondent was not duly elected or returned by the majority of lawful votes cast at the Governorship election in Rivers State held on 11th and 12th April, 2015;
- 2) That it may be determined and thus determined that the said election and the return of the second respondent, was void by acts which clearly violate and breach various provisions of the Electoral Act (as amended), including but not limited to rigging and manipulation of election results, unprecedented acts of violence, thuggery, abduction, coercion of opponents, non-compliance with the provisions of the Electoral Act, manual for election and guidelines, etc.

³ *Wike v. Peterside* (2016) 2 S.C.N.J. (Pt. 1) 208 at p. 213.

⁴ *Ibid* p. 214.

- 3) That it may be determined and thus determined that the results of the Governorship election for the Rivers State held on 11th and 12th April, 2015 for the entire Rivers State save Eleme Local Government Area, wards 1, 2, 3, 8, 9, 11 and 19 of Port Harcourt Local Government Area as declared and announced by the first respondent be nullified.
- 4) That a fresh election in all the polling Units and wards of Rivers State be conducted by the first respondent.
- 5) Any other appropriate relief(s) that this Honorable Tribunal may deem fit to grant in the circumstances of this petition.

In response the declared winner (2nd respondent) filed his reply to the petition and raised preliminary objection challenging the competence of the petition and the jurisdiction of the Tribunal to entertain same.

Thus, the Tribunal gave its ruling on the objections raised and stated that the tribunal has jurisdiction to hear and determine the petition.

The second respondent dissatisfied with the Tribunal's ruling, appealed to the Court of Appeal. Thereafter, the court heard both parties brief of arguments and delivered its ruling on the interlocutory appeal. Thus, the Court directed the Tribunal to immediately resolve the issue of the locus standi of the Petitioners and other issues not resolved.⁵

In compliance with the order the newly constituted panel with Justice Ambursa as the chairman delivered the ruling on 9/9/2015.⁶

The Tribunal earlier ordered and conducted pre-hearing and pre-trial conference. Pre-trial conference report was drawn up and signed by the Tribunal headed by the

⁵ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p. 252.

⁶ *Ibid.*

Chairman Hon. Justice M.A. Pindiga. Before trial proper commenced, Justice Pindiga was removed and the panel was reconstituted by the President of the Court of Appeal with Justice Suleiman M. Ambursa as the new Chairman. This singular changed of the Tribunal Chairman later became an issue.

The following are the four main issues for determination by the Tribunal⁷:-

- (1) Whether the second respondent was not duly elected by majority or highest number of lawful votes cast at the election.
- (2) Whether the said election and the return of the second respondent, are void by acts which clearly violate and breach various provisions of the Electoral Act 2010 (as amended).
- (3) Whether the results of the Governorship election for the Rivers State held on 11th and 12th April, 2015 for the entire Rivers State save Eleme Local Government Area, wards 1, 2, 3, 8, 9, 11 and 19 of Port Harcourt Local Government Area as declared and announced by the first respondent be nullified.
- (4) Whether there is need to void the election and call for fresh election in all the polling Units and wards of Rivers State be conducted by the first respondent.

Issue No. 1

Whether the second respondent was not duly elected by majority or highest number of lawful votes cast?

The petitioner invited 56 witnesses while first and the second respondents presented a total of 40 witnesses. The claim of the petitioners was anchored on section 138 (1) (b) (c) of the Electoral Act, 2010 (as amended). An election may be questioned on the grounds, that the election was invalid by reason of corrupt practices or non-compliance

⁷ *Wike v. Peterside* (2016) 2 S.C.N.J. (Pt 1) 208 at p. 251.

with the provisions of the Act; and that the respondent was not duly elected by majority of lawful votes cast at the election. The Petitioner who was PW54 personally testified on September 16, 2015. The petitioner submitted that election did not hold in the state. He described what happened as the ‘allocation of votes’ to the second respondent. The petitioner (PW54) elaborated on the incidents which made him to file the petition challenging the result of the governorship election as announced by the first respondent (INEC) and through him Exhibits A303, A304, A305, A306 and A307 were tendered. He said that reports he received from party agents reflected instances of over-voting in over 2,900 polling units, a substantial non-compliance to the Electoral Act 2010, which means that “the second respondent was wrongly declared winner because he did not secure majority of lawful votes cast in the elections.”⁸

Testifying further, he said, “I came out to vote with my wife in Ward 3 of Opobo Nkoro Local Government Area but some hoodlums came and carted away the election materials.” The petitioner’s testimony was the crux of APC’s petition against the governorship election. An attempt by the respondent’s counsels to discredit his evidences was not successful. However, the respondent counsels hinged on the petitioners oral statements that said the reports he received from party agents are hearsay evidence and cannot be relied upon as provided by the Evidence Act, 2011.⁹

The remaining 55 witnesses of the petitioner testified one after the other gave oral evidences and tendered incriminating election documents. It is an undisputable fact that on Election Day, hell broke loose as the state was virtually turned into a theatre of war as reports of violence was the order of the day. Political thugs and miscreants took over

⁸ *Wike v. Peterside* (2016) 2 S.C.N.J. (Pt 1) 208 p. 253.

⁹ *Ibid* p. 254.

the state, snatching ballot boxes, assaulted security agents, political party agents, voters, observers, INEC personnel were forced at gun point to jettison the use of PVC and Card reader in the process of conducting the election, limbs were damaged and lives were lost. Total of 831 exhibits A1 to A831 were tendered by the witnesses. The voters registers tendered were in respect of 11 out of 23 Local Governments. They were tendered from the Bar as Exhibits A271 – A281. It is noteworthy that Result sheets (Forms EC8A) were tendered in respect of 15 out of 23 Local Government Areas. PW49 who was INEC official tendered Exhibit A9 which contained number of accredited voters.¹⁰

The petitioner's witness PW49 tendered Forms EC8A (Exhibits A282 – A300) which was result sheets that showed the total number of the alleged votes cast 1,153,998 were shown to be in conflict with the number of accredited voters as per exhibit A9 which shows a figure of 292,878. During cross examination the witness was attacked on the basis that he was not the maker of the document and the online generated figure through the smart card reader excluded those who voted without accreditation by the card reader machine. The petitioner contended that the card reader machine was made mandatory by INEC's guideline and has the backing of the Electoral Act.¹¹

Issue No. 2: Whether the said election and the return of the second respondent, are void by acts which clearly violate and breach various provisions of the Electoral Act 2010 (as amended), including but not limited to rigging and manipulation of election results, unprecedented acts of violence, cultism, abduction, coercion of opponents, non-compliance with the provisions of the Electoral Act, manual for election and guidelines

¹⁰ *Wike v. Peterside* (2016) 2 S.C.N.J. (Pt 1) 208 p. 255.

¹¹ *Ibid* p. 256.

etc, committed at the towns, villages, settlements, wards and polling stations, as well as unlawful interference in the electoral process by political office holders.¹²

Out of the 56 witnesses of the petitioner 18 were ward collation agents who covered the voting process on the Election Day. Their oral evidences of what took place in the wards covered. However, during cross examination their evidences were seriously impugned upon by the respondent counsel. Respondent counsels contention were that since they were not the polling agents who directly covered the elections, all their evidences are hearsay evidence and cannot be relied upon. The witnesses insisted that their evidences are not hearsay evidence but direct evidence of polling units covered by them.¹³

The first and second petitioners in their bid to establish Non-Compliance with the Electoral Act, 2010 (as amended) tendered Voters registers of 11 out of the 23 Local Government Areas. To further proof non compliance respondent's witnesses were confronted with the entries in the registers and their responses were doubtful. According to the petitioners counsels the Non compliance was substantial and affected the result of the election. The counsel for the respondent cited the case of *Ucha V. Elechi*¹⁴ to rebut the allegations of Non- Compliance.

On the issue of violence the military and police officers who participated in the election testified that there was no election in the state. Two police officers: *Garba Micheal*, a Deputy Superintendent of Police and Squadron Commander Mopol 56 in Tai, and *Ezebuoro Chisom*, a Deputy Superintendent of Police and unit commander in Squadron 48 of the Police Mobile Force in *Ahoada East*

¹² Ibid.

¹³ Ibid.

¹⁴ (2012) 13 NWLR (Pt. 1317) 330.

stated that the election was marred by violence and voter intimidation by different cult groups and made several arrests.¹⁵

Issues No. 3 and 4.

Whether the results of the Governorship election for the Rivers State held on 11th and 12th April, 2015 for the entire Rivers State save *Eleme* Local Government Area, wards 1, 2, 3, 8, 9, 11 and 19 of Port Harcourt Local Government Area as declared and announced by the first respondent be nullified and need to void the election and call for fresh election.¹⁶

At the conclusion of the trial and after considering the written addresses of the learned counsel on both sides, the Tribunal delivered its judgment on Saturday 24th October, 2015. While delivering judgment the tribunal raised one issue for determination, whether or not the petitioners have proved their case. Thus, the tribunal dismissed the preliminary objection concerning the competence of the Tribunal raised by the respondents.

On the substantive case the tribunal restates the petitioners' allegations including poll being marred by intimidation of voters, non-availability of result sheets, snatching of electoral materials, non-collation of results at wards and Local Government levels etc. The Tribunal stated that the evidence of the petitioners' witnesses is relevant and reliable. Thus, concluded that the petitioners have proven their case.

¹⁵ *Wike v. Peterside* (2016) 2 S.C.N.J. (Pt 1) 208 at Pg 257.

¹⁶ *Ibid* P. 258.

The tribunal stated that INEC has the backing of the Constitution and the Electoral Act, 2010 (as amended) to insist on the use of the smart card reader machine.¹⁷ The Exhibit A9 presented by the petitioners, which is a report by head of election monitoring team of INEC office in Rivers State, *Charles Okoye* (PW49), confirmed the allegations of the petitioners of over voting and non-compliance with the Electoral Act, 2010 (as amended). Where the court is of the opinion that the non-compliance did not and could not have had any impact on whatsoever on the election, then the Petitioner has failed to shift the onus of proof and the petition thus fails. But where, in the opinion of the court, the effect of the non-compliance is fundamental and has created in the court's mind a doubt on the regularity of the election and the authenticity of the ensuing result, then the onus shifts on the respondents. In such a situation, unless the Respondent leads evidence to establish that the non-compliance did not affect the elections and the result, the petition succeeds. It is my respectful view that in such a situation, proof is not beyond reasonable doubt but in the preponderance of evidence.¹⁸

The Tribunal cited violation of section 138 (1) (b) and (c) of the Electoral Act 2010 which provides that: An election may be questioned on grounds that the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Electoral Act; that the respondent was not duly elected by majority of lawful votes cast at the election. If the Tribunal or the Court of Appeal as the case may be determined that a candidate who was returned as elected was not validly elected on any ground, the Tribunal or the Court shall nullify the election. Thus, the Tribunal or the Court nullifies an election on the ground that the person who obtained the highest votes at the election

¹⁷ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p. 259.

¹⁸ *Ibid.*.

was not qualified to contest or that the election was marred by substantial irregularities or non-compliance with the provisions of the Electoral Act, the tribunal or court shall not declare the person with the second highest votes or any other person but shall order a fresh election.¹⁹

The tribunal stated further that the smart card reader machines were introduced by INEC to ensure credibility and transparency of election. In other words the introduction of the smart card reader machine is to stop corrupt practices or non-compliance with the Electoral Act, 2010 (as amended). Consequently, stated that there is no any conflict between the introduction of smart card reader machine and the provisions of the Electoral Act. A simple glance of the results (Exhibit A10) showed that the election was not conducted in substantial compliance with the Electoral Act, 2010 (as amended).²⁰

On the issue of violence the military and police officers who participated in the election testified that there was no election in the state. Two police officers: Garba Micheal, a Deputy Superintendent of Police and Squadron Commander Mopol 56 in Tai, and Ezebuirio Chisom, a Deputy Superintendent of Police and unit commander in Squadron 48 of the Police Mobile Force in Ahoada East stated that the election was marred by violence and voter intimidation by different cult groups, adding that they made several arrests.²¹

Furthermore, the Tribunal held that:

We therefore consider any subsequent act of non-compliance with the contents of Exhibits A301, 830, 831 and A9 on the efficacy of the card

¹⁹ S. 140 (1) (3) of the Electoral Act, 2010 (as amended).

²⁰ *Wike v. Peterside* (2016) 2 S.C.N.J. (Pt 1) 208 p. 289.

²¹ *Ibid* p. 290.

reader for the election as an act which will render the election a nullity.

The public funds sacrificed in the procurement of the card readers are not for fun but to enhance the credibility of elections in Nigeria. That ought to be held with esteem by all officers of the first respondent (INEC) in the conduct of elections.

Thereafter, the Tribunal came to the following conclusion:²²

The evidence adduced by the petitioners in the testimony of their witnesses, the contents of the exhibits tendered which were linked to their case and the clear discrepancy in the number of votes accredited as in Exhibit A9 and those in Exhibit A10 proved that the petitioners have succeeded in adducing credible evidence in support of the pleaded facts in their petition.

Consequently, the tribunal Chairman Justice Ambursa stated that all his two members are satisfied that the petitioners have proved their case successfully and hereby order INEC to conduct fresh election. Thus, the Tribunal sacked the second respondent as Rivers state Governor.²³

3.3.1 Analysis of the Tribunal judgment

The four issues formulated by the petitioner for determination by the Tribunal were well enunciated. The first issue which is, whether the second respondent was not duly elected by majority or highest number of lawful votes cast at the election. The tribunal relied on the INEC guidelines and regulations that introduced the smart card reader machine to annul the election of Governor Wike. Considering the number of

²² *Wike v. peterside* (2016) 2 (Pt. 1) 208 p. 283.

²³ *Ibid* p. 291.

accredited voters by the smart card reader machine which is 292,878 against the alleged manually accredited voters with figure of 1,153,998 voters, there is no doubt the second respondent was not elected by highest number of lawful votes cast at the election. The smart card reader machine was introduced by INEC to ensure credibility and transparency of election. In other words the introduction of the smart card reader machine is to stop corrupt practices or non-compliance with the Electoral Act, 2010 (as amended).²⁴ Thus, the research agreed that there is no any conflict between the introduction of smart card reader machine and the provisions of the Electoral Act. A simple glance of the results (Exhibit A10) showed that the election was not conducted in substantial compliance with the Electoral Act, 2010 (as amended).²⁵ It should be noted that manual accreditation of voters was very defective in minimizing election rigging, thus, the introduction of card reader device is to address election malpractices.

On the second issue of whether the said election and the return of the second respondent, are void by acts which clearly violate and breach various provisions of the Electoral Act 2010 (as amended). The tribunal refused to apply literal interpretation of section 49 and 138 (1) (b) (c) and (2) of the Electoral Act 2010 (as amended). It used mischief and purposive approaches of interpretation of the law, in view of the fact, that using literal rule will bring absurdity and inconsistent to the whole essence of achieving free, fair and credible election. Rivers state INEC officials deliberately jettisoned the use of the smart card reader machine and used manual accreditation with its manifest defects as provided by section 49 of the Electoral Act 2010 (as amended). Thus, Ejembi Eko

²⁴ Section 138 (1) (b) (c).

²⁵ *Wike v. Peterside* (2016) 2 S.C.N.J. (Pt 1) 208 at p. 289.

J.C.A. supported the introduction of the smart card reader machine in his judgment in the case of *Umana v. Emanuel*²⁶, wherein he stated that;

I do not believe that with the fast pace of development and the whole World embracing the latest IT technologies, that resistance should be placed to emerging technologies geared towards transparency in elections, by backward thinking interpretations that can only be deleterious to the system. Holding otherwise would be to truncate the great efforts of the third respondent (INEC) in its bid to ensure credible election and in so doing attempt to plug all loopholes that can be exploited by unscrupulous persons.

INEC is a creation of the law as provided by the Constitution of the Federal Republic of Nigeria 1999 (as amended) under section 15 (a) of the Third Schedule, it granted power to organize, undertake and supervise election in Nigeria. Similarly, section 153 of the Electoral Act 2010 (as amended) conferred INEC the power to introduce manual, guidelines and regulations for conduct of election in Nigeria.

Third issue for determination is whether the results of the Governorship election for the Rivers State held on 11th and 12th April, 2015 for the entire Rivers State save Eleme Local Government Area, wards 1, 2, 3, 8, 9, 11 and 19 of Port Harcourt Local Government Area as declared and announced by the first respondent be nullified. In view of the monumental rigging and violent that took place there is every need to nullify the election. Manual accreditation of voters as provided by section 49 of the Electoral Act 2010 (as amended) paved way for rigging of the election to favor the Governor (Mr.

²⁶ (2016) LPELR 40040 (SC).

Wike). In the same vein violent that took place before, during and after the election has stopped majority of voters from exercising their franchise.

The fourth issue for determination was whether there is need to void the election and call for fresh election in all the polling Units and wards of Rivers State is conducted by the first respondent. As decided by the tribunal there is need to void the election and call for fresh poll in Rivers State, in view of the fact that what happened in the State was charade and far below the standard required of election. The election was not in substantial compliance with the Electoral Act 2010 (as amended) and INEC regulations that introduced the use of smart card reader machine for accreditation of voters. The evidence adduced by the petitioners through their witnesses, the contents of the exhibits tendered, clear discrepancy in the number of votes accredited as in exhibit A9 and A10 as well as killings that took place before, during and after the election justified void the election.

3.4 The Decision of the Court of Appeal in Wike Vs. Peterside

The respondent/appellant being dissatisfied with the judgment of the Rivers State Governorship Election Petition Tribunal appealed to the Court of Appeal, Abuja Judicial Division, asking the court to set aside the judgment of the Rivers State Governorship Election Tribunal which nullified his election on the 24th of October, 2015. In a notice of Appeal dated 3rd November, 2015 and filed on behalf of the appellant by his counsel, the appellant formulated 26 grounds of appeal against the entire judgment of the tribunal.²⁷ The appellant joined the petitioner/respondent, the APC, the INEC and the PDP as first, second, third and fourth respondents respectively.

²⁷ *Wike v. Peterside* (2016) 2 S.C.N.J. (Pt. 1) 208 p. 248.

Thus, the Appellant set out grounds of appeal in paragraph 3 and the reliefs were set out in paragraph 4.²⁸

Appellant's major grounds of appeal among others are:²⁹ (1) That the Tribunal nullified the election on the basis of Card Reader accreditation even though Section 49 of the Electoral Act, 2010 (as amended) only recognized manual accreditation of voters; 2) That the proof of accreditation of voters under the law is by the production of the register of voters bearing the indications of the presiding officer as to the persons accredited to vote and not by card reader report; 3) That the tribunal erred in law when it relied on hearsay and inadmissible evidence to nullify the election; 4) That the finding and conclusion of the tribunal was not supported by evidence before the court; 5) That the Tribunal wrongly neglected, failed and refused to abide by and follow the binding decision of the Court of Appeal in *APC vs Olujimi Agbaje*.³⁰ The judgment delivered on 26th August, 2015 which was duly cited in the trial and thereby came to a wrong conclusion; 6) That the petitioners at the tribunal failed to disclose any reasonable cause of action against the Respondents; and 7) That the Tribunal failed to conduct a pre-trial conference after the removal of the first Chairman, thus, the tribunal erred in its judgment.

Major issues for determination before the Court of Appeal were distilled from the Grounds of appeal and these include:³¹

1) Whether the Tribunal was right to place reliance on the Card Reader Report tendered in evidence by the petitioners and admitted as Exhibit 'A9'?

²⁸ Ibid p. 247.

²⁹ Ibid p. 248.

³⁰ CA/L/EP/GOV./751A/2015.

³¹ *Wike v. Peterside* (2016) 2 S.C.N.J. (Pt. 1) 208 p. 247..

- 2) Whether the Tribunal right when it came to the conclusion that there was no conflict between the provisions of section 49 and 52 (1) (b) of the Electoral Act, 2010 as amended, on the one hand and the Manual for Election Officials 2015 and the Approved Guidelines and Regulations made by INEC for the election and accordingly that failure to follow the Manual or Guidelines have effect of rendering the election void?
- 3) Whether the Tribunal was right when it came to the conclusion that the petitioners ground for petition which included non-compliance with Manual for Election Officials 2015 and General Elections Guidelines and Regulations was within the purview of Section 138 (1) (b) of the Electoral Act 2010 as amended?
- 4) Whether the Tribunal was right when it failed to apply to the facts of the present case, to the decisions of the Supreme Court in the case of *Kakih v. P.D.P*³² among others regarding the onus, method and standard of proof in election cases?
- 5) Whether the Tribunal was right when it came to the conclusion that the evidence in the election petition was properly evaluated by the Election Tribunal and that the petitioners were entitled to judgment?

The Court heard the contention of counsel for the appellant and the respondents on all the issues formulated for determination. The appellant's counsel argued that the Manual for election officials 2015 and General Elections Approved Guidelines and Regulations are outside the purview of the grounds for petition and failure to adhere strictly to them would not affect the result of the election. However, the respondents' counsels contended that INEC is being conferred with power by both the Constitution and the Electoral Act 2010 to issue Manual for election officials 2015 and General

³² (2014) 5 NWLR (Pt. 1430) 330.

Elections Approved Guidelines and Regulations. Sections 15 and 153 of the Third Schedule of the Constitution 1999 and Electoral Act, 2010 (as amended) respectively, granted powers to the INEC to issue Election manual and Guidelines as well as Regulations. The counsels for the respondents argued along this line and at the end of the hearing the Court accepted respondents' contention and upheld the Tribunal decision of sacking the appellant election.³³

All other issues for determination before the Court were decided in favor of the petitioner/respondent.³⁴

Thus, the Court of Appeal Abuja Division delivered its judgment on 16th December, 2015 by affirming the judgment of the Rivers State Governorship Election Tribunal which nullified the election and return of the appellant as Governor of Rivers State and ordered the conduct of a fresh election.³⁵ The Court clearly held that: "The blatant and brazen disobedience of the River State INEC officials cannot render the use of the Card Reader unlawful. The INEC Card Reader usage is well entrenched in the Electoral Act and Regulations by the authority with which INEC has been well endowed."³⁶

The judgment maintained that fresh Governorship election be conducted within 90 days from the judgment date.³⁷

3.4.1 Critical review of the Court of Appeal Judgment

The reasons adduced by the Court of Appeal in affirming the lower court decision is justified and supported by the research work. It should be noted that the

³³ *Wike v. Peterside* (2016) 2 S.C.N.J. (Pt. 1) 208 p. 248.

³⁴ *Ibid* p. 250.

³⁵ *Ibid* p. 283 – 284.

³⁶ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 at pg 249.

³⁷ *Ibid* p. 250 – 255.

reliance by the Court of Appeal on INEC guidelines and regulations that introduced smart card reader machine for accreditation of voters which was jettisoned by Rivers State INEC officials, use of mischief and purposive rules of interpretation of the section 49, 138 and 139 of the Electoral Act 2010 (as amended). There was no conflict between section 49 of the Electoral Act 2010 (as amended) and the subsidiary legislation that introduced smart card reader machine as a means of credible accreditation of voters, since the intention of both provisions is to achieve credible and transparent election. The manual accreditation as stipulated in section 49 of the Electoral Act 2010 (as amended) is bedeviled with defects such as multiple voting, non recognition of actual voter and fraudulent manipulation of the whole election process. Thus, any measures taken to address those deficiencies must be applauded and supported through progressive interpretations of laws as per election.

3.5 The Supreme Court Decision

The appellant still dissatisfied with the decision of the Court of Appeal approached the Supreme Court which is the final arbiter in elections matter regarding gubernatorial and Presidential elections.³⁸ The Notice of Appeal filed on 16/12/2015 contains 20 grounds of appeal. The appellant and 1st and 2nd respondents exchanged briefs of arguments.³⁹

3.5.1 Issues for Determination.

The major issues for determination before the apex court include the following:

1. Was the Court of Appeal right when it failed to appreciate that the “ruling” of the election tribunal given on 9/09/2015, signed by Justice S.M. Ambursa relied on by the

³⁸ S. 233 (e) (i) (iv) of the Constitution of the FRN 1999 (as amended).

³⁹ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p. 251.

Court of Appeal to arrive at the conclusion that the election tribunal considered and resolved all the issues raised in the appellant's motions filed on 30/06/2105, 1/08/2015 and 17/08/2015 respectively was not competent and valid.

2. Was the Court of Appeal right when it came to the conclusion that the appellant's constitutional right to fair hearing was not breached by the election tribunal.
3. Was the Court of Appeal right when it came to the conclusion that the election petition meant for service out of jurisdiction, was competently issued and served such as to cloth the election tribunal with the necessary jurisdiction to entertain the same?
4. Did the Court of Appeal came to the right conclusion when it held that the election petition which no stamp and seal of the Nigerian Bar Association was affixed was cognizable and capable of being entertained and determined.
5. Was the Court of Appeal right when it came to the conclusion that the 1st and 2nd respondents/petitioners had the locus standi to present the election petition, subject matter of the appeal?
6. Was the Court of Appeal right when it sustained the reliance placed by the election tribunal on the card reader report tendered in evidence by the petitioners and admitted as exhibit 'A9'?
7. Was the Court of Appeal right when it came to the conclusion that the documents tendered by the petitioners were not documentary hearsay and documents that were merely dumped on the election tribunal and were capable of being relied on for the purpose of proving the election petition?
8. Was the Court of Appeal right when it came to the conclusion that the petitioner's ground for the petition which included non-compliance with manual for election

officials 2015 and general elections approved guidelines and regulations was within the purview of section 138(1)(b) of the Electoral Act, 2010 (as amended).

9. Was the Court of Appeal right when it came to the conclusion that there was no conflict between the provisions of sections 49 and 52 (1)(b) of the Electoral Act, 2010 (as amended), on the one hand and the Manual for election officials 2015 and the approved guidelines and regulations made by INEC for the election and accordingly, that failure to follow the manual or guidelines have the effect of rendering the election void.
10. Was the Court of Appeal right when it failed to apply to the facts of the present case the decisions of the Supreme Court in the case of *Kakih v. P.D.P.*⁴⁰ and *Ucha v. Elechi*⁴¹ among others, regarding the onus, method and standard of proof in election cases involving allegations of non-compliance with the provisions of the Electoral Act.
11. Was the Court of Appeal right when it came to the conclusion that the evidence in the election petition was properly evaluated by the election tribunal and that the petitioners were entitled to judgment.

The 1st respondent's brief was settled by his counsel wherein he formulated eight issues for determination while the 2nd respondent's counsel formulated five issues for determination. The appellant filed replies to the 1st and 2nd respondent's briefs.

Arguments on the Issues: Issues Nos. 6, 7, 8, 9, 10 and 11 relating to Smart Card Reader report, INEC Guidelines, Section 49 and 52 of the Electoral Act, 2010 (as amended), procedure and standard of proof of non-compliance and evaluation of weight of evidence respectively will be examined. The selected issues for examination relates to area of research study.

⁴⁰ (2014) 5 NWLR (Pt.1430) 377

⁴¹ (2012) All FWLR (Pt. 625) 237, (2012) 13 NWLR (Pt.1317) 330.

Arguments on Issues 6 and 7: Counsel for the appellant referred to Exhibit A9 which is the Smart Card Reader Report relied upon by the respondents wherein only 292,878 voters were accredited for the election and majority of voters were unable to vote due to unprecedented violence.⁴² He argued that Exhibit A9 tendered by PW49 relied by the two lower courts amounts to documentary hearsay as it was not tendered by the maker; being a computer printout and a public document it has to conform with the Evidence Act.⁴³

Appellant's counsel further contended that the two lower courts were wrong in holding that the "albatross" of INEC in Rivers State was the brazen disobedience in the use of Card Readers as, they failed to appreciate that Exhibit A9 would at best provide evidence of electronic accreditation data, which was successfully uploaded before the server was shut down 6 weeks after the election and not evidence of the correct figure of voters who were successfully accredited by the Card Readers. He also submitted that the data from the Card Reader alone, without an examination of the Voters Register cannot provide proof of accreditation or over voting at an election. He supported his position with the cases of *Fayemi V Oni*⁴⁴ and *Awuse V Odili*.⁴⁵

On the allegation of dumping of exhibits on the Tribunal and documentary hearsay, appellant's counsel submitted that Exhibits A10, A282 – 300, A301, A303, A304 and A307 were tendered through witnesses who did not make them, referring to Section 37 (a) and (b) of the Evidence Act and the case of *Utteh Vs. The State*⁴⁶, he

⁴² *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p. 276.

⁴³ Sections 104 and 111 of the Evidence Act 2011 (as amended).

⁴⁴ LER (2010) CA/IL/EPT/GOV/10 of 15/10/2010.

⁴⁵ LER (2005) CA/PH/EPT/119/04 at 52.

⁴⁶ (1992) 2 NWLR (Pt 223) 257 at 273 F

argued that the documents so tendered amounted to documentary hearsay and are therefore inadmissible.

He maintained that notwithstanding the tendering of certified copies of the documents from the Bar, they are of no probative value in the absence of their makers being called as witnesses. He cited the case of *Belgore V Ahmed*⁴⁷ to support his line of argument. Counsel to the appellant contended further that Exhibit A9 was inadmissible for being made by a party interested at a time when proceedings were pending, contrary to provisions of the Evidence Act 2011 (as amended).⁴⁸

In response to the above submissions on Issues Nos. 6 and 7, counsel for the first respondent submitted that contrary to the submissions of counsel, both the lower courts found the documents to have been properly certified, pleaded and linked to relevant aspects of the petitioner's case through relevant witnesses. Relying on the case of *Saleh Vs. Bioini*⁴⁹, he submitted that any official of a corporate body such as INEC can give evidence in respect of a transaction concerning the corporate body even if he was not present when the transaction was made.

He contended that by the authority of *Nwobodo V Onoh*⁵⁰ election result forms made in the course of the election are admissible against the electoral body as admissions in favor of the petitioners having been made in the ordinary course of business by the Electoral body by its officials. Thus, Section 41 of the Evidence Act 2011 (as amended) provides that:⁵¹

⁴⁷ (2013) 8 NWLR (Pt 1355) 60 at 100.

⁴⁸ Section 83 (3) of the Evidence Act, 2011 (as amended).

⁴⁹ (2006) 6 NWLR (Pt 9760 316 at 317).

⁵⁰ (1984) 1 SC 1 at 91.

⁵¹ Section 24 (a) and 41 of the Evidence Act, 2011 (as amended).

A statement is admissible when made by a person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books, electronic device kept in the ordinary business, or in the discharge of a professional duty, or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

Furthermore, counsel for the first respondent referred to the decision of the court in *Kayill Vs. Yilbuk & Ors*⁵² to contend that even where a document is admitted in the absence of its maker, the court will consider the weight to be attached to it. Exhibits A303 and A307 are reports issued by INEC conveying its official position on the election it conducted, while Exhibit A305 was a report issued by a private election monitoring organization that monitored the election. Similarly, he submitted that the contents of public documents are deemed proved upon mere production without the necessity of calling the makers. He relied on the case of *Ogbuinya Vs. Akudo*.⁵³ He submitted that the exhibits, which are public documents (A2, A9, A10, A300, A301, A303, A307, B30 and B31) substantially, complied with the requirement of the law on certification and were therefore properly admitted and relied upon by the Tribunal.⁵⁴ He cited the case of *Dagash Vs. Bulama*⁵⁵ to support his submission. The first respondent

⁵² (2015) 2 SCM 161.

⁵³ (2001) FWLR (Pt. 72) 1987 at 2001.

⁵⁴ *Wike V Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p. 279.

⁵⁵ (2004) All FWLR (Pt. 212) 1666 at 1710 A-B.

counsel contended that all the exhibits enjoy the presumption of correctness, authenticity and regularity accorded them by Evidence Act, 2011.⁵⁶

Counsel for the second respondent submitted that the case of *Utteh Vs. The State*⁵⁷ is not applicable to the facts of this case, as all documents in contention are certified true copies of public documents which are admissible through any witness.⁵⁸ He submitted that on the authority of *Belgore V Ahmed*⁵⁹ is distinguishable from the facts of this case while the case of *Shell Development Co. Ltd. Vs. Otuko*⁶⁰ is Court of Appeal decision. Finally, he submitted that in the absence of fraud, the content of documents tendered and admitted by the Tribunal cannot be contradicted or discredited by oral evidence. He relied on cases of *Emeji Vs Posotive*⁶¹; *Igbeke Vs Emordi*⁶²; *Nnyanwu Vs. Uzonuaka*⁶³ and *UBA Vs. Ozigi*.⁶⁴

On the allegation of dumping of exhibits, counsel for the second respondent submitted that the witnesses who tendered the exhibits were eye witnesses and their reports were based on what they saw on the field and the exhibits were properly tied to the 1st and 2nd respondents' case. That the appellant had failed to utilize the opportunity he had of impugning the weight of the documents.⁶⁵

Resolution of Issues No. 6 and 7: *Kekere-Ekun J.S.C* in her Lead Judgment held that if the ground for challenging the return of a candidate in an election is by reason of

⁵⁶ Sections 104, 105, 146, 167 and 168 of the Evidence Act, 2011 (as amended).

⁵⁷ (1992) 2 NWLR (Pt 223) 257 at 273 F.

⁵⁸ Section 24 (a) and 41 of the Evidence Act, 2011 (as amended).

⁵⁹ (2013) 8 NWLR (Pt 1355) 60 at 100.

⁶⁰ (1990) 6 NWLR (Pt. 159) 693 at 713.

⁶¹ (2010) 1 NWLR (Pt. 1174) 48 at 69.

⁶² (2010) 11 NWLR (Pt. 1204) 1 at 35.

⁶³ (2009) 13 NWLR (Pt. 1159) 445.

⁶⁴ (1994) 3 NWLR (333) 385.

⁶⁵ *Wike v. Peterside* (2016) 2 S.C.N.J. (Pt. 1) 208 p. 280.

corrupt practices or non-compliance with the provisions of the Electoral Act, the petitioner must prove: (a) that the corrupt practice or non-compliance took place; and (b) that the corrupt practice or non-compliance substantially affected the result of the election.⁶⁶ To support the criteria of proving corrupt practices or non-compliance with the provisions of the Electoral Act, the following authorities were cited, *Yahaya V Dankwambo*⁶⁷; *Awolowo V Shagari*⁶⁸; *Buhari V Obasanjo*⁶⁹ and Section 138 (1) (b).⁷⁰

Furthermore, the Justice held that in order to prove non-compliance and/or over voting, the 1st and 2nd respondents were bound to rely on the Voters Registers in respect of all the affected Local Governments. The Voters' Registers tendered were in respect of only 11 out of 23 Local Governments. They were tendered from the Bar as Exhibits A271 – A281 and no attempt was made to link them to Exhibit A9. It is also noteworthy that Result sheet (Forms EC8A) were tendered in respect of only 15 out of 23 Local Government Areas. During cross examination of appellant witnesses at the Tribunal the respondents counsels linked Forms EC8A (Exhibits A282 – A300) to show that the number of accredited voters stated therein was in conflict with the number of accredited voters as per Exhibit A9. However, this cannot meet the standard of proving over voting polling unit by polling unit and the Voters' Registers cannot be jettisoned.⁷¹ Thus, the INEC directives, Guidelines and Manual cannot be elevated above the provisions of the Electoral Act so as to eliminate manual accreditation of voters. This will remain so until

⁶⁶ Section 139 (1) of the Electoral Act, 2010 (as amended).

⁶⁷ (2015) Legalpedia Electronic Citation LER [2015] SC. 732/2015.

⁶⁸ (1979) All NLR 120.

⁶⁹ (2005) 2 NWLR (Pt.910) 241.

⁷⁰ Section 138 (1) (b) of the Electoral Act, 2010 (as amended).

⁷¹ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt 1) 208 p. 227.

INEC takes steps to have the necessary amendments made to bring the usage of the Card Reader within the ambit of the substantive Electoral Act.⁷²

She further held that Exhibit A9 cannot be conclusive proof of the number of accredited voters at the election, since the witness (PW49) acknowledged that there are circumstances when the Card Reader may not read a voter's PVC in which case incident forms are used. No incident forms were tendered by the 1st and 2nd respondents.⁷³

Kereke-Ekun J.S.C commended INEC for the innovation of the Card Reader machine to bolster the transparency and accuracy of the accreditation process and to maintain the democratic norm of "one man one vote" by preventing multi-voting by a voter. Nevertheless, Section 49 (1) and (2) of the Electoral Act 2010 (as amended) which provide for manual accreditation of voters is extant and remains a vital part of the Electoral Law.⁷⁴ Thus, the Section provides that:⁷⁵

(1) Any person intending to vote with his voter's card shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is registered with his voter's card; (2) The Presiding Officer shall, on being satisfied that the name of the person is on the Register of Voters, issue him a ballot paper and indicate on the Register that the person has voted.

Kekere-Ekun JSC cited the case of *Okereke Vs. Umahi & Ors*⁷⁶, wherein Nweze JSC stated thus:

Indeed, since the Guidelines and Manual which authorized the use and deployment of the electronic Card Reader Machine, were made in exercise

⁷² Wike Vs Peterside (2016) 2 S.C.N.J (Pt. 1) 208 p. 289.

⁷³ Ibid p. 285

⁷⁴ Ibid p. 287

⁷⁵ S. 49 (1) and (2) of the Electoral Act, 2010 (as amended).

⁷⁶ (2016) 2 S.C.N.J 208 (Pt 1) p. 33-34.

of the powers conferred by the Electoral Act, the said Card Reader cannot, logically, depose or dethrone the Voters' Register whose judicial roots are, firmly embedded or entrenched in the self same Electoral Act from which it (Voter's Register), directly derives its sustenance and currency. Thus, any attempt to invest it (the Card Reader Machine procedure) with such overarching preeminence or superiority over the Voters' Register is like converting an auxiliary procedure into the dominant procedure of proof that is proof of accreditation.

Thus, issues 6 and 7 were resolved in favor of the Appellant.⁷⁷ Arguments on Issue 8: Counsel for the appellant submitted that the ground of the petition which included non-compliance with the Manual for Election Officials 2015 and General Elections approved Guidelines and Regulations was outside the purview of Sections 138 (1) (b) of the Electoral Act 2010 (as amended). He supported his submission with the decision of *Ojukwu V Yar'adua*⁷⁸ and contended that having regard to Section 138 (2) of the Electoral Act; an act or omission which is contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election, but which is not contrary to the provisions of the Act, shall not of itself be a ground for questioning the election. He submitted that the Act draws a distinction between the Electoral Act and any subsidiary legislation by INEC.⁷⁹

In response, counsel for the 1st respondent referred to some recent decisions of the Court of Appeal to the effect that reference to the Manual, Guidelines and

⁷⁷ Ibid p. 290.

⁷⁸ (2009) 12 NWLR (Pt. 1154) 50 at 121.

⁷⁹ S. 138 (1) (b) and (2) of the Electoral Act, 2010 (as amended).

Regulations as one of the ground of a petition alleging non-compliance with the Electoral Act does not make the ground incompetent. He relied on *PDP Vs INEC*.⁸⁰

Resolution of Issue 8: *Okereke-Ekun* in her lead judgment reiterated the golden rule of interpretation of statutes that where the words used in a statute are clear and unambiguous they must be given their natural and ordinary meaning unless to do so would lead to absurdity or inconsistency with the rest of the statute. It was held inter alia in the case of *Ibrahim V. Barde*⁸¹ per *Uwais*, CJN (as he then was) that if the words of the statute are precise and unambiguous, no more is required to expound them in their natural and ordinary sense. He held further that the words of the statute alone, in such circumstance, best declare the intention of the lawmaker. The apex Court supported this position with the cases of *Ojokolobo V. Alamu*⁸², *Adisa V. Oyinwola & Ors.*⁸³, and *Uwazurike & Ors. Vs. A.G. Federation*.⁸⁴

The grounds of election petition as provided by the Act and restated by her Lordship are:⁸⁵

(1) An election may be questioned on any of the following grounds, that is to say: (b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act.

(2) An act or omission which may be contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election but which is not

⁸⁰ (2009) 8 NWLR (Pt. 1143) 297 at 316 – 317 and 333.

⁸¹ (1996) 9 NWLR (Pt. 474) 513 at 517 B – C

⁸² (1987) 3 NWLR (Pt. 61) 377 at 402 F – H

⁸³ (2000) 6 SC (Pt. 11) 47.

⁸⁴ (2007) 2 SC 169.

⁸⁵ Section 138 (1) (b) & (2) and 153 of the Electoral Act 2010 (as amended).

contrary to the provisions of this Act shall not of itself be a ground for questioning the election.

Thus, Kekere-Ekun JSC concluded that with the above provisions it is quite clear and unambiguous that an act or omission (in this case manual, guidelines and regulations) which is not contrary to the provisions of the Electoral Act cannot of itself be a ground for election petition. Consequently, the apex court resolved issue 8 in favor of the Appellant.⁸⁶

Arguments on Issue 9: Counsel for the appellant contended that the requirement for biometric verification of a voter through the Card Reader is a requirement of the Guidelines and Manual outside what is statutorily provided for in Section 9, 10 and 12 of the Electoral Act, which expressly set out the qualification for registration as a voter. He therefore posited that the verification of the biometrics of voters cannot be imposed by INEC as a condition precedent to valid accreditation of voters.

He noted that while Section 49 of the Electoral Act mandates a voter to present himself to the Presiding Officer (PO) at a polling unit. However, the Manual for election officials urge a voter to present himself to the Assistant Presiding Officer 3 (APO 3)” (queue controller) for the polling unit or polling point. He is of the opinion that in effect the power and procedure vested in the PO has been removed and vested in the Queue Controller. The several steps enunciated for verification and statistics in the manual under the card reader procedure are far more detailed than the two step manual accreditation process provided for in Section 49 of the Electoral Act 2010 (as amended). Appellant’s counsel further set out the procedures to be followed after accreditation and submitted that the right of a voter to be issued with a ballot paper as soon as his name is

⁸⁶ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p.. 290.

verified on the Register of Voters' has also been removed. The process of electronic accreditation procedure, such as storing and uploading of information verified by the card reader was criticized by the appellant's counsel.⁸⁷

In reaction, counsel for the first respondent argued that there is no conflict as the powers vested on INEC cannot be questioned and do not detract from the provisions of the Electoral Act 2010 (as amended). He submitted that the finding of the court below that the Guidelines and Manual are complementary to one another should be accepted as the correct position.⁸⁸

Counsel for the 2nd respondent made similar submissions and referred to the findings of the lower court on this issue, which he contended, cannot be faulted. He rejected the submission that the card reader has introduced electronic voting and submitted that there is nothing in the card reader that diminishes voters' right to vote.⁸⁹ Resolution of Issue 9: Kekere-Ekun J.S.C in her lead judgment stated that she is not in agreement with the submission of the counsel for the Appellant on the issue of Section 52 of the Electoral Act 2010 (as amended) has prohibited the use of card reader machines in the accreditation stage.

Section 52 (1) (b)⁹⁰ of the Electoral Act prohibits the use of electronic voting for the time being. Furthermore, it has been acknowledged throughout this judgment that the innovation of the use of the card reader was to aid in the transparent conduct of elections.

⁸⁷ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p. 292.

⁸⁸ *Ibid* p. 293.

⁸⁹ *Ibid* p. 293 - 294.

⁹⁰ S. 52 (1) (b) of the Electoral Act 2010 (as amended).

Kekere-Ekun J.S.C in the course of resolving issues 6, 7 and 8, further held that:⁹¹ failure to follow the Manual and Guidelines, which were made in exercise of the powers conferred by the Electoral Act cannot, in and of itself, render the election void. However, this should not be understood to mean that the innovation of the card reader is in conflict with relevant sections of the Electoral Act. This issue is resolved against the Appellant.”

Arguments on Issues 10 and 11: In respect of issues 10 and 11 counsel for the appellant submitted that the lower court erred in failing to apply the decisions of this court in *Kakih Vs PDP*⁹² and *Ucha Vs. Elechi*⁹³ on the burden of proof of non-compliance with the Electoral Act, non-voting, misconduct and non-conduct of the election.

Counsel for the appellant further submitted that where there is an allegation that a voter was unable to cast his vote because there was no election or because the election was mired by misconduct, he must tender his voter’s card in evidence, which must be proved that if the disenfranchised voters were allowed to vote the petitioner would have won the election. He noted that the petition in this case was founded wholly on the allegation that there was no complete process of election in any of the polling units (except for a few wards in Eleme Local Government Area), that election was not held or where it held it was mired by irregularities, violence, chaos and other malpractices.⁹⁴

Counsel for the appellant further submitted that out of 56 witnesses, only two (PW9 and PW10) claimed to be voters and they did not tender their voters cards. He referred to the

⁹¹ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt 1) 208 p. 294.

⁹² (2014) 5 NWLR (Pt.1430) 377.

⁹³ (2012) 13 NWLR (Pt 1317) 330.

⁹⁴ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p. 295.

evidence of PW49 in his witness statement wherein he averred that voting went smoothly and that results were announced and entered in Form EC8A, and contended that he was not a disenfranchised voter and did not fit the category of witness required to prove the allegations of non-voting, misconduct and non-conduct of election.⁹⁵

In response, counsel for the first respondent placed particular reliance on the evidence of PW40 with regard to the allegations of violence by thugs and disruption of election. He noted that the said witness testified that he and his monitoring team covered 19 LGAs and that he personally with three National Commissioners covered 8 LGAs. He referred to Exhibit A2, the report tendered in support of his account of what transpired.⁹⁶

On the issue of evaluation of evidence, he referred to various aspects of the record and the evidence of witnesses considered by the Tribunal and submitted that the evidence was properly evaluated. Moreover, he relied on the authorities of *Yabatech Vs. M.C. & D Ltd.*⁹⁷; *Woluchem Vs. Gudi*⁹⁸ to the effect that the evaluation of evidence and ascription of probative value thereto is the prerogative of the trial court that has the advantage of seeing and observing the witnesses and this opportunity is not available to an appellate court.

Furthermore, counsel for the first respondent submitted that for an election known to law to have taken place, all the constituent elements of an election must be shown to have taken place. He considered the procedure for accreditation prescribed by INEC in Exhibit A309, the evidence of PW49 and Exhibit A9 tendered through her and

⁹⁵ Ibid p. 295.

⁹⁶ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p. 296.

⁹⁷ (2014) 3 NWLR (Pt. 1395) 616 at 664.

⁹⁸ (1981) 5 SC 291.

contended that in view of the prescription by INEC of the use of the card reader for accreditation there was no justification for resort to any other form of accreditation. He submitted that according to the Guidelines, if the card reader failed and could not be replaced or repaired by 1 pm the election was to be postponed to the following day.⁹⁹ While counsel for the second respondent reiterated the principles of law governing the attitude of this court to concurrent findings of fact by two lower courts and urged the court not to accept the invitation by the appellant to re-evaluate the evidence. He adopted the evaluation of evidence by the two lower courts below properly evaluated the evidence before them and came to the correct conclusion.¹⁰⁰

Resolution of Issues 10 & 11: Kekere-Ekun J.S.C. in her lead judgment stated that the law is trite that the results declared by INEC enjoy a presumption of regularity, in other words, they are prima facie correct. The onus is on the petitioner to prove the contrary. Supported this position with the cases of *Buhari Vs. Obasanjo*¹⁰¹; and *Akinfosile Vs. Ajose*.¹⁰² She quoted section 139 (1) of the Electoral Act 2010 (as amended), which provides:¹⁰³

An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not substantially affect the result of the election.¹⁰⁴

⁹⁹ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p. 297.

¹⁰⁰ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p. 297.

¹⁰¹ (2005) 13 NWLR (Pt. 941) 1.

¹⁰² (1960) SCNLR 447.

¹⁰³ *Wike v Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p. 297.

¹⁰⁴ S. 139 (1) of the Electoral Act 2010 (as amended).

Kekere-Ekun J.S.C. relied on the case of *Ucha V Elechi*¹⁰⁵ and stated that where a petitioner complains of non-compliance with the provisions of the Act, he has onerous task for he must prove it polling unit by unit, ward by ward and the standard of proof is on the balance of probabilities. He must show figures that the adverse party was credited with as a result of the non-compliance, for example Forms EC8A, election materials not signed/stamped by Presiding Officers. It is only then the respondents are to lead evidence in rebuttal.¹⁰⁶

On the issue of burden of proof regarding crime Kekere-Ekun, J.S.C relied on the authorities of Section 135 (1) (2) of the Evidence Act¹⁰⁷, *Abubakar V Yar'Adua*¹⁰⁸ and *Omoboriowo V Ajasin*,¹⁰⁹ thereby outlined the standard of proving allegation of crime by a party. Where the commission of a crime by a party to a proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. The burden of proof is on the person who asserts it.¹¹⁰

The evaluation of evidence and ascription of probative value thereto are the primary duties of the trial court which had singular opportunity of seeing and hearing the witnesses testify and an appellate court would ordinarily not interfere with the findings.¹¹¹ In other words, the apex court will not interfere with the concurrent findings of facts by two lower courts unless it is shown that the findings are perverse or not based on a proper and dispassionate appraisal of the evidence, or that there is an error either of

¹⁰⁵ (2012) 13 NWLR (Pt 1317) 330.

¹⁰⁶ Ibid.

¹⁰⁷ S. 135 (1) (2) of the Evidence Act 2011 (as amended)

¹⁰⁸ (2008) 19 NWLR (Pt. 1120) 1 at 143 D 144 B.

¹⁰⁹ (1984) 1 SCNLR 108.

¹¹⁰ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 p. 296.

¹¹¹ Ibid p. 298.

law or fact, which has occasioned a miscarriage of justice.¹¹² Other authorities cited to support this position are thus, *Saleh Vs. B.O.N Ltd*¹¹³; *Agbaje Vs Fashola*.¹¹⁴ Kekere-Ekun JSC observed that the purport of the appellant's submission in respect of the evaluation of evidence by the Tribunal, which was affirmed by the lower court, is that had the Tribunal and the lower court applied the decisions of the Supreme Court in *Kakih v. P.D.P*¹¹⁵ and *Ucha v. Elechi*¹¹⁶, would have reached a different conclusion. Thus, the apex court adopted this position.

Furthermore, Kekere-Ekun JSC in her lead judgment inclined to agree with the counsel for the appellant that the evidence of PW40 cannot take the place of polling agents or voters who were disenfranchised. Similarly, evidences of PW53 and PW54 State collation agent for the 2nd respondent and the 1st respondent respectively, who witnessed the hijacking of materials but got their reports from their respective agents. Moreover, evidences of PW53 and PW54 state collation agent for the 2nd respondent and the 1st respondent respectively, who witnessed the hijacking of materials but got their reports from their respective agents. The apex court rejected their evidences due to non visit to all the Local Government Areas under their coverage. Exhibits A303, A304, A305, A306 and A307 various election observers reports on the conduct of the election tendered by PW54. Not being the maker of these documents, he was not competent to testify in respect thereof.¹¹⁷

¹¹² *Ogoala v. The State* (1991) 2 NWLR (Pt. 175) 509

¹¹³ (2006) 6 NWLR (Pt. 976) 316 at 329 – 330 H – C

¹¹⁴ (2008) 6 NWLR (Pt. 1082) 90 at 153 B – E.

¹¹⁵ (2014) 5 NWLR (Pt.1430) 377.

¹¹⁶ (2012) 13 NWLR (Pt 1317) 330.

¹¹⁷ Ibid p 301.

Furthermore, she held that both the Tribunal and the court below made much of the fact that witnesses called by the appellant were discredited under cross examination and therefore their evidence was unreliable, this gave impetus to the case of the 1st and 2nd respondents. The 1st and 2nd respondents sought declaratory reliefs before the Tribunal and the law is that where a party seeks declaratory reliefs, the burden is on him to succeed on the strength of his own case and not on the weakness of the defense (if any). Such reliefs will not be granted, even on admission. Supported this position with the cases of *Emenike Vs. P.D.P*¹¹⁸; *Dumez Ltd. Vs. Nwachoba*¹¹⁹; *Ucha Vs. Elechi*.¹²⁰

Thus, *Kekere-Ekun* J.S.C concluded that the 1st and 2nd respondents failed to establish the allegation of non-compliance with the provisions of the Electoral Act in the manner enjoined by the apex court in *Ucha Vs. Elechi* (supra) polling unit by polling unit. Voters' registers were tendered in respect of 11 out of 23 Local Government Areas. Disfranchised voters from all the affected polling units ought to have been called to testify.¹²¹ Thus, issues 10 and 11 were resolved in the appellant's favor.¹²²

On the whole issues 3, 4, 5 and 9 were resolved in favor of the respondents by the apex court. However, despite the resolution of four issues in favor of the respondents, the appellant's appeal was allowed by the Supreme Court. The judgment of the Court of Appeal, Abuja Division delivered on 16/12/2015 which affirmed the judgment of the Rivers State Governorship Election Tribunal delivered on 24/10/2015 was accordingly set aside. Thus, the petition of the 1st and 2nd respondents was dismissed and the return

¹¹⁸ (2012) LPELR SC 443/2011 at 27 D – G.

¹¹⁹ (2008) 18 NWLR (Pt. 119) 361 at 374 – 374.

¹²⁰ (2012) 13 NWLR (Pt. 1317) 230.

¹²¹ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1)208 p. 301.

¹²² *Ibid*.

of the Appellant as the duly elected Governor of Rivers State by the 3rd Respondent (INEC) was affirmed by the apex court.¹²³

3.5.2 Critical Appraisal of the Judgment of the Supreme Court

There is every need to critically appraise the judgment of the apex court in the instance case of *Wike v. Peterside* in view of the reversal of the two lower courts decisions. The decision of the Supreme Court is final, no avenue for appeal and once final decision is made the Court will become *functus officio* and precluded from reviewing or varying the form of the judgment except correction of clerical mistakes or accidental slips.¹²⁴ It was held in the case of *Ogoala v. The State*¹²⁵ that the apex court will not interfere with the concurrent findings of facts by two lower courts unless it is shown that the findings are perverse or not based on a proper and dispassionate appraisal of the evidence, or that there is an error either of law or fact, which has occasioned a miscarriage of justice. Thus, this research will critically appraise the judgment of the apex court hereunder:

1) Was the Supreme Court right when it discarded the reliance placed by the two lower courts on the Card Reader Report (Exhibit 'A9') tendered in evidence by the petitioners? The Card Reader Report (Exhibit A9) in the instant case of *Wike v. Peterside* (supra) was the transmitted data of voters accredited by the Card Reader. It was introduced by INEC to check electoral fraud perpetrated at accreditation and result collection stage. Rivers State INEC officials deliberately jettisoned the use of the technological devices that provides correct accreditation of voters. With due respect to the Justices of the apex

¹²³ Ibid.

¹²⁴ *Architect Registration Council of Nigeria v Professor M. A. Fassassi* [1987] 6 SCNJ 5: J. E. A.

¹²⁵ (1991) 2 NWLR (Pt. 175) 509

court this judgment that gave credence to manual accreditation is not justifiable. Moreover, the Constitution of Federal Republic of Nigeria 1999 and the Electoral Act, 2010 (as amended) conferred power on INEC to issue guidelines and regulations for election.¹²⁶

In the light of the above Falana also shared the above view, thus, stated that:

Following a successful and comprehensive compilation of biometric registration of Nigerians of voting age in 2011 the INEC decided to improve on voter for all elections. The device was designed to deal with the manipulation of election results through the declaration of bogus votes that have no correlation with the number of registered voters. Thus, with the use of the card reader machines, the number of total votes cast in an election cannot exceed the number of accredited voters. The strident opposition to the use of card reader for voter accreditation by seasoned riggers of elections was borne out of the realization that it could substantially eliminate the manipulation of election results.¹²⁷

Falana further stated that “the former chairman of the INEC, Professor Attahiru Jega was summoned to the Senate to justify the introduction of the card reader for voters' accreditation. In taking up the challenge, Professor Jega demonstrated the use of card readers and its capacity to eliminate electoral fraud perpetrated at the accreditation stage of an election. At the end of the exercise, the Senate was compelled to endorse the use of card reader for the 2015 general election. Thereafter, the Electoral (Amendment)

¹²⁶ S. 15(a) of the Third Schedule of the Constitution of Federal Republic of Nigeria, 1999 (as amended) and S. 153 of the Electoral Act, 2010 (as amended).

¹²⁷ Falana, F. (2016). How Electoral (Amendment) Act 2015 Legalized Card Reader. Premium Times Online Newspaper. Available at <http://opinion.premiumtimesng.com/2016/03/17/electoral-amendment-act-2015-legalised-card-reader-femi-falana>. Accessed on 5/2/2017, at 5.26pm.

Bill 2015, which sought to legitimize the use of card reader, was unanimously passed by both chambers of the National Assembly. The Bill was signed into law by former President Goodluck Jonathan on March 20, 2015”. He maintained that in view of the amended version of the Electoral Act the use of the smart card reader was legal.¹²⁸

It is really unfortunate the petitioners and counsels representing them failed to canvass the amended version of the Electoral Act 2015 that allowed INEC to use any procedure for the conduct of the election. Thus, with the amendment of the provision, INEC has been conferred with the power to determine the procedure to be used for any election. Specifically, S. 52 (1) (b) of the Electoral Act states that “voting at an election shall be in accordance with the procedure determined by the Independent National Electoral Commission.”¹²⁹ With the amendment of the law INEC was on terra firma (solid ground) when it determined to use the card reader machine for the accreditation of voters for the 2015 general election.¹³⁰ Therefore, the use of the Smart Card Reader was allowed by the amended version of the 2015 Electoral Act, 2010 (as amended).

Furthermore, the petitioners at the tribunal stage did not only rely on the Card Reader Report but also tendered in evidence Forms EC8A - Result forms (Exhibits A282 – A300) in respect of 15 Local Government Areas, card reader report (Exhibit A9) and voters registers of 11 out of 23 Local Government Areas. Counsel for the first respondent submitted that contrary to the submissions of the counsel for the appellant, both lower courts found the documents to have been properly certified, pleaded and linked to relevant aspects of the petitioner’s case through relevant witnesses. On the

¹²⁸ Ibid.

¹²⁹ Policy and Legal Advocacy Centre (2015) “Fact Sheet” 2015 Amendment to the Electoral Act 2010.

¹³⁰ Ibid.

authorities of *Saleh V. Bioni*¹³¹ and *Nwobodo V Onoh*,¹³² INEC being a corporate body, any official of the body can give evidence in respect of a transaction concerning the corporate body even if he was not present when the transaction was made. Election result forms made in the course of the election are admissible against the electoral body as admissions in favor of the petitioners. This is because it was made in the ordinary course of business by the officials of the electoral body. Therefore, the judgment of the apex court in the case of *Wike v. Peterside* (supra) is not justifiable going by the reasons adduced against the use of Smart Card Reader.

(2) Whether grounds of the petition which included non-compliance with the Manual for Election Officials 2015 and General Elections approved Guidelines and Regulations was outside the purview of Section 138 (1) (b) of the Electoral Act 2010 (as amended). Section 138 (1) (b) and (c) of the Electoral Act 2010 (as amended) provides that: (1) an election may be questioned on any of the following grounds, that is to say: (b) that the election was invalid by reason of corrupt practices or non-compliances with the provisions of this Act; (c) that the respondent was not duly elected by majority of lawful votes cast at the election.

INEC is a creation of the law and thus, the Constitution of Federal Republic of Nigeria 1999 (as amended) under Section 15 (a) of the Third Schedule gave the body power to organize, undertake and supervise election in Nigeria.¹³³ Therefore, INEC is conferred with the power to introduce manual, guidelines and regulations for the conduct of election in Nigeria. Similarly, Section 2 (a), (b) and (c) of the Electoral Act 2010 (as

¹³¹ (2006) 6 NWLR (Pt. 976) 316 at 317.

¹³² (1984) 1 SC 1 at 91.

¹³³ S. 15 (a) of the Third Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

amended) has granted additional power to INEC to conduct voter and civic education, promote knowledge of sound democratic election processes and conduct any referendum as required to be conducted pursuant to the provision of the 1999 Constitution or any other law or Act of the National Assembly. In addition Section 153 of the Electoral Act 2010 provides thus;¹³⁴

The Commission may, subject to the provisions of this Act, issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of this Act and for its administration thereof

Thus, with the above provisions it shows that INEC is conferred with the power by both the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the Electoral Act to introduce Election guidelines, manual for election officials and regulations for election. Furthermore, S. 52 of the new version of the Electoral Act 2010 amended in March 2015 before the election gave additional power to INEC to use any method of election.¹³⁵

Moreover, the Constitution of the Federal Republic of Nigeria 1999 (as amended) being the supreme law and its provisions is binding on all authorities and persons throughout the country¹³⁶. Thus, the Constitution of Nigeria clearly stated that: If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.¹³⁷

The essence of the Electoral Act 2010 (as amended) is to provide credible election and where non adhering with the subsidiary legislation introduced by INEC will result in

¹³⁴ S. 153 of the Electoral Act 2010 (as amended).

¹³⁵ S. 52 (1) (b) of the Electoral (Amendment) Act 2015, PLAC Available at <http://placng.org/wp/wp-content/uploads/2016/04/factsheet.pdf> Accessed 7/02/2017, at 8.22pm.

¹³⁶ S. 1 (1) of the Constitution of Federal Republic of Nigeria 1999 (as amended).

¹³⁷ Ibid S. 1 (3).

rigging through manual accreditation, to give judicial backing to the Card Reader as a new device for accreditation to ensure one man one vote will not be out of place. Sagay while sharing same view cited the judgment of Nweze, JSC in *Okereke v. Umahi*¹³⁸, where the Supreme Court, said that the use of the Card Reader would ‘dethrone’ and ‘depose’ the Voters’ Register; he questioned that, how does the Card Reader ‘depose’, or ‘dethrone’ the voter’s Register. After verification by the Card Reader, the voter’s name still has to be identified in the voters’ Register and ticked before he can vote. It must be noted that both the Tribunal and Court of Appeal emphasized that the Card Reader was intended to and did strengthen the application and efficacy of the Electoral Act, by ensuring a credible election for the benefit of Nigerians.¹³⁹ Thus, Ejembi Eko J.C.A. also supported the Smart Card Reader in his judgment in the case of *Umana v Emmanuel*¹⁴⁰ ... when he stated that:

I do not believe that with the fast pace of development globally and the whole world embracing the latest IT technologies, that resistance should be placed to emerging technologies geared towards transparency in elections, by backward thinking interpretations that can only be deleterious to the system. Holding otherwise would be to truncate the great efforts of the 3rd respondent (INEC) in its bid to ensure a credible election and in so doing attempt to plug all loopholes that can be exploited by unscrupulous persons.

¹³⁸ (2016) 2 S.C.N.J 1 at Pg. 43.

¹³⁹ Sagay, I. (2016) Rivers Poll Verdict is farewell for Election Petitions. The Nations Newspaper of 17th April, 2016. Available at <http://thenationonline.ng.net/rivers-gov-poll-verdict-farewell-election-petitions-says-sagay>. Accessed on 22/3/2017, at 7.09pm.

¹⁴⁰ (2016) LPELR-40040 (SC)

(3) Issues 10 and 11 on the allegation made by the appellant that burden of proof were not discharged by the petitioners/respondents. The apex court held that the lower courts erred in failing to apply the decisions of Supreme Court in *Kakih V PDP*¹⁴¹ and *Ucha V. Elechi*¹⁴² on the burden of proof of non-compliance with the Electoral Act, non-voting, misconduct and non-conduct of the election. On the evaluation of evidence before the court, various aspects of the record and the evidence of witnesses were considered and properly evaluated by the Tribunal before arriving at its decision. Moreover, the evaluation of evidence and ascription of probative value thereto is the prerogative of the trial court as the advantage of seeing and observing the witnesses is not available to an appellate court.¹⁴³ As rightly stated by the counsel for the second respondent *Yusuf Ali*, the principles of the law governing the attitude of the apex court to concurrent findings of fact by two lower courts is not to disturb the findings unless pervasive and urged the court not to accept invitation by the appellant to re-evaluate the evidence. However, the apex court re-evaluated the evidence and held that the results declared by INEC enjoy a presumption of regularity or they are prima facie correct. The onus is on the petitioner to prove the contrary.¹⁴⁴

Sagay while analyzing substantial non-compliance with the Electoral Act, stated that; “Nigerian Judges, even up to the level of the Supreme Court, have had great difficulty understanding the provision of Section 146 (1) of the Electoral Act 2006 which is in *pari materia* with Section 139 (1) of the Electoral Act 2010 (as amended),

¹⁴¹ (2014) 5 NWLR (Pt. 1430) 330.

¹⁴² (2012) 13 NWLR (Pt.1317) 330.

¹⁴³ *Yabatech v. M.C & D Ltd.* (2014) 3 NWLR (Pt. 1395) 616 at 664.

¹⁴⁴ *Akinfosile V Ajose* (1960) SCNLR 447.

they have generally misinterpreted and misapplied it to the detriment of election Petitioners.¹⁴⁵ Thus, S. 139 (1) of the Electoral Act 2010 (as amended) provides that:

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

The apex court erroneously held that where a petitioner complains of non-compliance with the provisions of the Act, he has an onerous task for he must prove it polling unit by polling unit, ward by ward and standard of proof is on balance of probabilities. He must also show figures that the adverse party was credited with as a result of the non-compliance, e.g. Forms EC8A, election materials not signed/stamped by Presiding officers. It is only then that the respondents are to lead evidence in rebuttal.¹⁴⁶ Similarly, in *Buhari v Obasanjo*¹⁴⁷, *Belgore JSC* (as he then was) made the following statement with regard to an identical provision in the 2002 Electoral Act.

It is manifest that an election by virtue of section 135(1) of the Act shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the Act. It must be shown clearly by evidence that the non-compliance has affected the result of the election.

However, it is clear that the provision on substantial compliance in S. 139 (1) of the Electoral Act 2010 (as amended), is conjunctive in nature. For an election not to be

¹⁴⁵ Sagay, I. (2010) ‘The Crisis of Election Petitions and Decisions’ Lecture Series on Electoral Integrity Organized by The Obafemi Awolowo Institute of Government and Public Policy, held on 23/11/2010 at LCCI Conference Hall Alausa, Ikeja, Lagos.

¹⁴⁶ *Ucha V Elechi* (2012) 13 NWLR (Pt. 1317) 330.

¹⁴⁷ [2005] 50 WRN 1 at p.178

invalidated, (i) it must comply substantially with the provisions of the Act and (ii) non-compliance, (whether substantial or insubstantial) must not affect substantially, the result of the elections. In other words, any election has to clear two hurdles in order to be valid; (i) it must comply substantially with the provisions of the Act; (ii) where there was any non-compliance, no matter how insignificant, it must not have substantial effect on the result.¹⁴⁸

Thus, a petitioner will succeed if he can establish either of the following:

(a) Substantial non-compliance with the Act only. Or

(b) Substantial effect on the result by any degree of non-compliance, no matter how trivial. Our Courts have in a majority of cases been operating under the great misapprehension that a petitioner has to establish in every case, not only that there has been a substantial non compliance with the Electoral Act but also that the substantial non compliance must have substantial effect on the result of the election. This is absolutely wrong.¹⁴⁹

Thus, applying this standard of prove to the use of Smart Card Reader indicates that non use of the device will have substantial effect on the result. By mere examination of the result declared by INEC, which showed total of 1,153,998 as accredited voters against 292, 878 voters captured by the Card Reader, there was serious discrepancy. Therefore, non use of the new devices which minimized rigging has resulted to substantial malpractice that led to declaration of fictitious result. There was an increase of 861, 120 (294.02%) number of voters alleged to have being accredited manually

¹⁴⁸ S. 139 of the Electoral Act 2010 (as amended).

¹⁴⁹ Ibid.

which when compared with those accredited with the Smart Card Reader report figure (Exhibit A9) of 292, 878, thus, substantial effect on the result declared by INEC.

The petitioner needs only to establish one of the two standards of proof in order for the election to be invalid; 1. Substantial non-compliance with the Electoral Act, 2010, that includes the schedules and regulations of elections; 2. Substantial effect on the election result of any infraction of the Electoral Act, schedules, regulations, etc, no matter how trivial the infraction. Thus, on the second standard of prove the petitioner has succeeded.

The above principle was borrowed from the case of *Morgan v. Simpson*¹⁵⁰, wherein Lord Denning held, that:

If the election was conducted so badly that it was not substantially in accordance with the law as to election the election is vitiated irrespective of whether the result was affected or not.

Thus, Lord Denning came to the following conclusions that:

(a) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not. That is shown by the *Hackney case*, where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote.

(b) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls provided that it did not affect the result of the election.

(c) Even where the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls and it

¹⁵⁰ (1975) QB 151.

did affect the result then the election is vitiated. That is a situation whereby the Election complied with the Electoral Act but failed to comply with the election regulations and as a result it affected the result of the election. This was exactly what happened during the 2015 Governorship election of Rivers State.

In *Swem v. Dzungwe*,¹⁵¹ the Supreme Court held that once a petitioner establishes non-compliance and the court or other tribunal cannot say whether or not the result of the election could have been affected by such non-compliance, the election will be avoided on the ground that civil cases are proved by a preponderance of accepted evidence. At that stage, the onus shifts to the respondent to show that the non-compliance did not affect the results of the election.

Furthermore, on the allegation of crime Sagay stated that¹⁵²;

He could not understand how the verdict was arrived at, despite the murder, mayhem, chaos and devastation almost amounting to a catastrophe, displayed on television, reported in all newspapers in all its gory details; after the damning reports of International and Local Observers who barely survived their mission. It was the worst shock ever created by a Supreme Court decision since I was knowledgeable enough to follow and understand Court judgments.

3.6 The Method of Interpretation of Statutes adopted on the use of Smart Card Reader.

There are four most popular methods of interpretation of statutes adopted by courts while taking decisions. The literal rule of interpretation is the basis of all court

¹⁵¹ [1966] NWLR 297 (SC 1).

¹⁵² Sagay, I. (2016) Rivers governorship poll verdict is farewell to election petitions. The Nations Newspaper of April 17, 2016. Available at <http://thenationonlineng.net/rivers-gov-poll-verdict-farewell-election-petitions-says-sagay>. Accessed on 22/04/2017, at 6.18pm.

decisions in relation to statutes and judges rely on the exact wording of the statute for the case. That nothing is to be added or taken from the statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted.¹⁵³

Lord Simmonds in the case of *Magor and St. Mellons Rural District Council v. Newsport Corporation*¹⁵⁴ stated, thus:

The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly restricted

Thus, the Golden Rule has modified the literal rule in some respects. It acknowledges the position of the literal rule as the ordinary rule, but adds that where the literal rule leads to absurdity and inconsistency, the court should modify the language to discover the intention of the legislature. However, the Mischief rule further modified the Golden rule by laying down the rule that in the interpretation of statutes there is need to take into consideration four issues: 1) What was the common law before the making of the statute; 2) What was the mischief and defect that gave rise to the statute; 3) What remedy has parliament resolved and appointed to cure the mischief; and 4) The true reason of the remedy.¹⁵⁵ Thus, Lord Denning in the case of *Engineering Industry Training Board v. Samuel Talbot (Engineers) Ltd*¹⁵⁶ held that:

¹⁵³ *Adefemi v. Adegunde* (2003) CA/IL/EP/SA/2/2003 Paras. 2 p. 28.

¹⁵⁴ (1952) A.C. 189 at 191.

¹⁵⁵ *Heydon* case (1584) 76 ER 637. US Legal Convenient, available at <https://definitions.uslegal.com/r/rule-in-heydons-case/>. Accessed on 12/3/2018, at 4.07pm.

¹⁵⁶ (1584) 3 Co Rep 7a.

We no longer construe Acts of Parliament according to their literal meaning. We construe them according to their object and intent.

The Tribunal and Court of Appeal relied on the INEC Guidelines, Regulations and Manual of Election Officials 2015 which directed the use of the Smart Card Reader for accreditation of voters instead of the manual accreditation of voters provided by Section 49 of the Electoral Act 2010 (as amended). It is of note that the two lower courts adopted purposive approach of interpretation of statutes to accept the newly introduced Card Reader Machine as sole determinant of accreditation. The Purposive approach is the modern approach to Interpretation of Statute; evolved from the mischief rule and has a chequered history in England. The main feature of this approach is that it takes into account not only the words of the legislation according to their ordinary meaning but also the context within which it was drafted and allows judges to admit official reports.

The Tribunal in the instant case maintained, thus: “It was by this enormous powers conferred on INEC that the body introduced the Card Reader to bring sanity and sanctity into the electoral body....The albatross around the neck of the Rivers State INEC is that it totally failed, neglected and refused to follow the guidelines as set out by the controlling body. The blatant and brazen disobedience of the Rivers State INEC officials cannot render the use of the Card Reader unlawful. The INEC Card Reader usage is well entrenched in the Electoral Act and Regulations by the authority with which INEC has been well endowed”¹⁵⁷.

The tribunal stated further that the card reader machines were introduced by INEC to ensure credibility and transparency of election. In other words the introduction of the smart card reader machine is to stop corrupt practices or non-compliance with the

¹⁵⁷ *Wike v. Peterside* (2016) 2 S.C.N.J (Pt. 1) 208 wherein Tribunal’s reason for its ruling was quoted.

Electoral Act, 2010 (as amended). Consequently, stated that there is no any conflict between the introduction of smart card reader machine and the provisions of the Electoral Act.¹⁵⁸

Thus, Ejembi Eko J.C.A. in the case of *Umana v Emmanuel*¹⁵⁹ ... when he stated that;

I do not believe that with the fast pace of development globally and the whole world embracing the latest IT technologies, that resistance should be placed to emerging technologies geared towards transparency in elections, by backward thinking interpretations that can only be deleterious to the system. Holding otherwise would be to truncate the great efforts of the 3rd respondent (INEC) in its bid to ensure a credible election and in so doing attempt to plug all loopholes that can be exploited by unscrupulous persons.

The Supreme Court commended INEC for the introduction of the Smart Card Reader Machines in all of its recent ruling but concluded that despite its efficacy in stopping electoral fraud the new devices cannot, logically, depose or dethrone the Voters' Register whose juridical roots are firmly embedded or entrenched in the self same Electoral Act from which the Voters' Register derives its sustenance and currency.

Thus, it is worthwhile to apply the four steps involved in Mischief rule to the accreditation process as provided by Section 49 of the Electoral Act 2010 (as amended). Thus, the four steps are; 1) what was the common law position before the making of the statute that deals with manual accreditation? Accreditation of voters under the common

¹⁵⁸ Ibid.

¹⁵⁹ (2016) *LPELR-40040 (SC)*

law was to ensure one man one vote, with a view of stopping fraudulent election; 2) What is the mischief and defect the manual accreditation of voters intended to cure as provided for under Section 49 of the Electoral Act 2010 (as amended)? The answer is to minimize electoral fraud and ensure credible elections; 3) What remedy has parliament resolved and appointed to cure the mischief; The remedy and cure provided for accreditation of voters under section 49 of the Electoral Act 2010 (as amended) is defective and as a result it has not stopped or minimized multiple registration and voting by fraudulent voters; and 4) The true reason of the remedy. What was the intention of the legislature when the Section was made into law? It was to ensure that the principle of one man one vote is maintained and curtailed multiple registrations and voting at the same time.

It is of note that the manual accreditation of voters' faces many challenges such as multiple registration and voting, falsification of results, not knowing actual number of voters that turnout for voting and all other forms of election rigging. Thus, any effort made by the INEC to cure those deficiencies should be applauded and embraced by all and sundries. Accreditation of voters is very vital in the electoral process. In the case of *Buhari v. Obasanjo*¹⁶⁰, *Onnoghen* (J.S.C) in his dissenting judgment from the majority decision held that where an election is held with total failure to accredit voters, the election is invalid ab-initio. Once a petitioner is able to prove that there was no accreditation of voters the election supposed to be declared null and void.

Any person intending to vote with his voter's card, shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is registered with his voter's card. (2) The Presiding Officer shall, on being satisfied that the name of

¹⁶⁰ (2005) 2 NWLR (Pt. 910) 241; 175 – 176, paras. D-C

the person is on the Register of voters, issue him a ballot paper and indicate on the Register that the person has voted.¹⁶¹ This manual accreditation of voters that involved only three steps is not sufficient to stop rigging and is bedeviled with fraudulent act by desperate politicians who want to rig the election by all means. Most of the rigging in election is perfected during registration, accreditation, voting and collation processes. It was in effort toward gradual introduction of E-voting the Biometric finger proof technology capable of verifying intending voters was introduced as first phase in 2015 general election to make electoral process free, fair and credible. Therefore, the mischief or the defect intended by the legislatures in enacting the law was not cured.

Similarly, the apex court in the instant case while interpreting Section 138 of the Electoral Act 2010 (as amended), which dealt with grounds of petition under Section 138 (1) (b) and (2) of the Electoral Act 2010 (as amended) came to the conclusion that non-use of the Smart Card Reader Machines by INEC officials cannot be a ground for petition. Thus, the 138 (1) (b) and (2) provides that¹⁶²; “(1) An election may be questioned on any of the following grounds, that is to say: (b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act; (2) An act or omission which may be contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election but which is not contrary to the provisions of this Act shall not of itself be a ground for questioning the election”. However, this section can be interpreted in Purposive way to mean that the Smart Card Reader Machine which its main purpose is to improve the standard of accreditation of voters and stop electoral fraud is not against the provisions of the

¹⁶¹ Section 49 (1) and (2) of the Electoral Act 2010 (as amended).

¹⁶² S. 138 (1) (b) and (2) of the Electoral Act 2010 (as amended).

Electoral Act 2010 (as amended). This is the purposive approach to interpretation of the Electoral Act 2010 (as amended). It was really unfortunate the apex court commended the efforts of the Electoral Management body (INEC) but further concluded by saying the only method known to law is the manual accreditation of voters as provided by section 49 of the Electoral Act 2010 (as amended).

Section 153 of the Electoral 2010 (as amended)¹⁶³ provides thus; “The Commission may, subject to the provisions of this Act, issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of this Act and for its administration thereof.” The Supreme Court interpreted the above provisions literally without looking at the absurdity and inconsistency it will create in the election. Thus, the apex court concluded that non use of the Smart Card Reader cannot be a proper ground for invalidating the Rivers State Governorship election.¹⁶⁴ In the case of *P.D.P Vs INEC*¹⁶⁵, it was held that where the literal construction of a statute will lead to absurdity the court should lean in favor of the purposive approach to avoid the absurdity.

Section 52 (1) (b) of the Electoral Act 2010 (as amended) had prohibited the INEC from the use of any form of electronic voting. However, toward the built up to 2015 general elections the section was amended and INEC was conferred with the power to determine the procedure to in conducting election. Specifically, the new Section 52 (1) (b) states that “voting at an election shall be in accordance with the procedure determined by the Independent National Electoral Commission.” With the amendment of the law the INEC was on terra firma when it determined to use the card reader machine for the accreditation of voters for the 2015 general election.

¹⁶³ S. 153 of the Electoral Act 2010 (as amended).

¹⁶⁴ *Wike v Peterside* (2016) 2 S.C.

¹⁶⁵ (1999) 11 NWLR (Pt. 626) 200 at 261 B – C.

3.7 Conclusion

The decisions of the Election Petition Tribunal and Court of Appeal relied on the efficacy and reliability of the Smart Card Reader Machine in providing credible election. Thus, their judgments relied heavily on the new devices introduced by INEC and merit of the petition against the result declared. Legal issues bordering on Sections 49 and 138 (1) (b) (c) and (2) of the Electoral Act 2010 (as amended) that deals with manual accreditation of voters and grounds of petition respectively were interpreted in purposive ways without taking into consideration their literal meanings. This progressive approach adopted by the two lower courts must be appreciated in view of the fact that interpreting those sections in their literal ways will result to absurdity and inconsistency to the whole issue of providing free, fair and credible election. Where the literal construction of a statute will lead to absurdity the court should lean in favor of the purposive approach to avoid the absurdity.

However, the apex court's decision that upturned the judgments of the lower courts failed to view the petition on the merit of the case but applied the law in its strict literal form. Though their judgment is final, but failed to evaluate the facts objectively, most especially the credibility of the new device in providing free, fair and credible election which is the main essence of the whole Electoral Act, 2010 (as amended). Similarly, the apex court relied on strict interpretation of the Electoral Act 2010 (as amended) without looking at the absurdity it will bring to the entire democratic ideal of 'one man one vote'.

Therefore, our justices need to avoid adhering to technicalities of the law and ensure justice is administered at all times. Thus, the reasons adduced by the Supreme Court against the use of smart card reader machines are not justifiable.

CHAPTER FOUR

THE PROSPECTS AND CHALLENGES OF THE USE OF SMART CARD

READER IN NIGRIAN ELECTION

4.1 Introduction

The previous chapter examined the decisions of the Rivers State Governorship Election Petition Tribunal, Court of Appeal and Supreme Court in the petition against declaration of Mr. Wike as Governor of Rivers State by the Independent National Electoral Commission (INEC) in 2015 Election. Thus, the decision of the Supreme Court was critically appraised and ascertained the methods of interpretation of statutes adopted by the justices of the apex court to arrive at their respective decisions.

In this chapter the research will ascertain the Prospects and Challenges of the Smart Card Reader in combating election malpractices. The chapter will further ascertain the factors that will lead to change in decision of the apex court.

4.2 The Prospects of Smart Card Reader Machines in Nigeria

The use of information and communication technology in accreditation stage of election is the first phase of Electronic voting (e-voting) technology.¹ Smart card was invented at the end of seventies by a Frenchman Michel Ugon. Later the French group of bankcards CB (Carte Bancaire) was created in 1985 and has allowed the diffusion of 24 million devices.² The development of the smart card reader machine started in 1990s as a memory device which keeps data and record for future use. The smart card reader is a

¹ Okediran, O. and Adeshina, G.R. (2015) *A Framework of Electronic Voting in Nigeria*. *International Journal of Computer Applications* (0975 – 8887) Volume 129 – No.3. Accessed from <<https://www.researchgate.net/publication/284146629>> on 16/08/2017 at 12:12pm.

² Mohammed, L.A. et al. (2004) *Smart Card Technology: Past, Present, and Future*. Departments of Computer and Communication Systems Engineering, Biology and Agricultural Engineering 43400, UPM Serdang Selangor, Malaysia. Available at http://www.journal.au.edu/ijcim/2004/jan04/ijcimvol12n1_article2.pdf. Accessed on 19/3/2018, 12.25pm.

technological device setup to authenticate and verify on Election Day a Permanent Voter Card (PVC) issued by INEC.³ The device uses a cryptographic technology that has ultra-low power consumption, with a single core frequency of 1.2GHz and an Android 4.2.2 operating system. In other words, the INEC card reader is designed to read information contained in the embedded chip of the permanent voter's card issued by INEC to verify the authenticity of the PVC and also carry out a verification of the intending voter by matching the biometrics obtained from the voter on the spot with the ones stored on the PVC.⁴

The Smart card readers and PVCs have addressed three major problems that have been a recurring issue in Nigerian electoral process. These bottlenecks are:⁵

(i) Fraudulent increase in number of registered voters, (ii) Inability of the manual accreditation to dictate true voter; and (iii) Multiple registrations of voters to allow for inflated turnouts.

Therefore, the prospect of the Smart Card Reader in providing credible, free and fair election is not in doubt. Thus, the smart card reader machine was introduced in 2015 general elections to carry out five basic things on Election Day:⁶ 1) The devices were configured to be used in specific polling unit. 2) The smart card reader will authenticate and confirm the true owner of Permanent Voter Card; 3) The card readers deployed to each polling unit across the country was configured to authenticate finger print of an

³ Independent National Electoral Commission (INEC) (2015) Frequently Asked Questions. Available at http://www.inecnigeria.org/?page_id=28 Accessed on 22/08/2017, 11.25am.

⁴ ISO/IEC 7816-3:2006 Identification cards — Integrated circuit cards — Part 3: Cards with contacts — Electrical interface and transmission protocol.

⁵ Kuye, C.O. (2013) Design and Analysis of Electronic Voting System in Nigeria International Archive of Applied Sciences and Technology IAAST; Vol 4 [2] Society of Education, India [ISO9001: 2008 Certified Organization]. Available at www.soeagra.com/iaast/iaast.htm Accessed on 16/08/2017 at 10.30am.

⁶ Orji, A. (2015) Five things to know about INEC Card Readers. Available at <http://anthoniaorji.com/nigeria-5-things-to-know-about-inecs-smart-card-reader/>. Accessed on 12/3/2018.

intending voters and pictures of the intending voters; 4) The card readers have certain features such as built in memory stored in a card and benefits that will deter another person from using somebody else's PVC; 5) The smart card reader machines will capture the number of voters accredited through the devices and transmit the data to central server global network system.

The Nigerian 2015 general elections witnessed the use of smart card reader machine for authentication of voters but actual ballot casting was still by manual means under a scheme called Re-Modified Open-Secret Ballot System (REMOBS).⁷ Re-modified in the sense that accreditation of voters took place between hours of 8am to 2pm while voting process was conducted immediately after accreditation. Similarly, the deployment of smart card reader machine in 2015 general elections by INEC has introduced changes by achieving the following objectives: (1) Prevented electoral fraud. (2) Allowed the electorates votes to count (3) Reduced litigations arising from elections. (4) Authenticated and verified voters. (5) Protected the integrity and credibility of the elections. (6) Audited numbers of accredited voters that used the devices from polling units across the federation. (7) Ensured transparency and accountability. (8) It also provided a range of statistical analysis of the demographics of voting for the purposes of research and planning. (9) Built public confidence and trust in the election; conflicts

⁷ Engineering Network Team (2015) Gains of the INEC Card Reader in the 2015 Elections. Available at Go.engineer-ng.net/m/blogpost?id=6404812%3ABlogPost%3A103341. Accessed on 23/09/2017, at 10.06am.

Ensured a free and fair election and further deepened Nigeria's electoral and democratic process.⁸

The card reader technology was able to reduce election fraud by providing accurate records of accredited voters who were the same people that were allowed to vote and able to address discrepancies between actual voters and fraudulent voters. Thus, it was the first time in Nigeria an incumbent President lost an election, as a result of the prospect and efficacy of the smart card reader machines in providing free, fair and credible election. It is of note that only in few States of the federation the use of the smart card reader machines were jettisoned and non use of the devices became subject of litigation.⁹

Therefore, the smart card reader machine technology has the prospects of eradicating electoral fraud at the accreditation stage of an election and builds voters confident in the electoral process.¹⁰ The devices have the prospect of deepening democracy and pave way for Electronic voting in the near future.

4.3 Challenges of Smart Card Reader Machines in future Elections

In view of the efficacy of the Smart Card Reader the Nigerian federal legislatures are in the process of amending the Electoral Act of 2010 to legalize the use of the smart card readers for the authentication of voter. The amendment to the Act will also pave the way for electronic voting in future elections. The bill, which passed its third reading,

⁸ Ibrahim, S.G. and Makama, A.A. (2015)'' The Successes of the Card Reading Machine in Nigeria's 2015 General Elections: Issues and Challenges'' International Journal of Multidisciplinary Research and Modern Education (IJMRME) ISSN (Online): 2454 - 6119 Volume I, Issue II. Available at www.rdmodernresearch.org Accessed on 21/08/2017, 12.25am.

⁹ Makama, A.A. and Muhammed, U. (2015) The Impact of Technology on Nigeria's Democratic Development: An Analysis of the Card Reading Machine. Vol. 1 Issue II International Journal of Multidisciplinary Research and Modern Education. Available at www.rdmodernresearch.org Accessed on 12/06/2017, at 2.09pm.

¹⁰ Ibid.

also stipulates that votes and recorded results must be transmitted electronically directly from polling units in an encrypted and secured form to the central server.¹¹

However, the devices cannot be free from challenges in providing credible election. Thus, there are many challenges which may likely affect the successful operation and sustainability of the new devices in providing credible elections. These challenges are: 1) The challenge of some provisions of the Electoral Act, 2010 (as amended) and Justices interpretation of the law; 2) Issues relating to failure of the devices and knowledge gap by INEC staff; 3) Attitudes of desperate politicians and INEC corrupt staff; 4) Violent acts of politicians and thugs.

1) The challenge of some provisions of the Electoral Act 2010 (as amended) and Justices interpretation of the law:- Firstly, the issue of how to interpret provision dealing with Substantial Non-Compliance with Electoral Act will no doubt post a serious challenge to the new devices. The section provides thus,

An election shall not be liable to be invalidated by reason of non compliance with the provisions of this Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principles of this Act and that the non compliance did not affect substantially the result of the election¹².

Belgore JSC (as he then was) in *Buhari v. Obasanjo* held that, a petitioner must prove that there was non-compliance with the Electoral Act and also has substantially

¹¹ Senate Amends Electoral Act to Legalise Card Readers, E-Voting. Thisday Newspaper of 31/3/2017. Available at <https://www.thisdaylive.com/index.php/2017/03/31/senate-amends-electoral-act-to-legalise-card-readers-e-voting/>. Accessed on 19/4/2018, at 3.06pm.

¹² S. 139 (1) of the Electoral Act, 2010 (as amended).

affected the result of the election.¹³ What are the yard sticks or the acid test of knowing when an election is conducted substantially in compliance with the Electoral Act? The Act did not provide for what constitute substantial compliance or non-compliance with the Electoral Act. Sagay postulates that; “It is clear that the provision on substantial compliance in section 146 of the Electoral 2006 which is in *pari materia* with Section 139 of the Electoral Act, 2010, is conjunctive in nature. For an election not to be invalidated, (i) it must comply substantially with the provisions of the Act and (ii) non-compliance, (whether substantial or insubstantial) must not affect substantially, the result of the elections. In other words, any election has to clear two hurdles in order to be valid; (i) it must comply substantially with the provisions of the Act; (ii) where there was any non-compliance, no matter how insignificant, it must not have substantial effect on the result.”¹⁴

Therefore, a petitioner will succeed if he can establish either of the following:

- (a) Substantial non-compliance with the Act, only. Or (b) substantial effect on the result by any degree of non-compliance, no matter how trivial.

However, majority of the decisions of the election petition cases including the apex court were in most instances required the petitioners to proof all the two requirements, that Substantial non-compliance with the Electoral Act and also the substantial non-compliance must have affected the result of the election substantially before petitioner succeed. Therefore, since the use of the card reader was introduced by INEC, any petitioner whose grounds of petition includes non-use of the smart card reader will be erroneously required to proof substantial non-compliance with the Electoral Act and also

¹³ (2005) 50 WRN 1 at P. 178.

¹⁴ Sagay, I. The Proper Construction of ‘Substantial Compliance’ in S. 146(1) of the Electoral Act, 2006.

has to show that the non-compliance has substantially affected the result of the election. This heavy burden of proof will no doubt affect petitioners who in future election will challenge the outcome of the poll base on non-use of the smart card reader machine.

Secondly, Section 49 of the Electoral Act, 2010 (as amended) that deals with manual accreditation of voters if not amended in the Act will result to serious challenge to the use of the smart card reader machine in future election. It is of note that all the judgments regarding non use of the smart card reader machines relied on this very section to uphold the elections. Despite the inability of the manual accreditation of voters to stop or minimize electoral fraud before, during and after the election the apex court relied on it against the devices that check mate electoral malpractices through Biometric finger print data verification of all intending voters. Kekere-Ekun J.S.C in her lead judgment commended INEC for the innovation of the Card Reader machine to bolster the transparency and accuracy of the accreditation process and to maintain the democratic norm of one man one vote by preventing multi-voting by a voter.

Nevertheless, Section 49 of the Electoral Act 2010 which provides for manual accreditation of voters is extant and remains a vital part of the Electoral Law.¹⁵ Thirdly, the section of the Act which provides that, an act or omission which may be contrary to an instruction or directive of the INEC or of an officer appointed for the purpose of the election but which is not contrary to the provisions of this Act shall not of itself be ground for questioning the election”¹⁶. This very section will cause serious challenge to the operation and sustainability of the smart card reader as well as the independent of the INEC. During the 2015 General Elections the commission

¹⁵ *Nyesom v. Peterside* (2016) 2 S.C.N.J (Pt 1) 208.

¹⁶ S. 139 (2) of the Electoral Act, 2010 (as amended).

Headquarters' directive and guideline for use of the Smart Card Reader Machines was jettisoned by the Resident Electoral Commissioners of Rivers and Akwa-Ibom State.¹⁷ It shows that there was no unity of purpose within the Electoral Commission.

2) Issues relating to failure of the devices and knowledge gap by INEC staff; Incidences of failure of the machine to verify voters and knowledge gap on how to operate the devices by INEC staff abound during the 2015 general elections. This challenge will post serious danger to the smooth operation of the smart card reader in future election.

3) Challenge of power supply; Though the SCRM uses low power voltage to operate, however, issues relating to power failure were reported in 2015 general elections. The card reader system was used for the first time in the 2015 polls and INEC made provision for failure of the machine. Three key steps were identified¹⁸:

- a. Designing the card reader for extended use in the field to address concerns around battery life.
- b. Providing backup card readers and batteries for quick deployment from the ward level.
- c. Agreeing with political parties in discussion of election rules that should a complete failure occur then voting would be re-scheduled for the following day.

The question is that where complete failure of the machine occurred can the politicians agree for re-scheduling of the election for the next day.

3) Attitudes of desperate politicians and INEC corrupt staff; Nigerian politicians' desperate attitudes of out smarting opponents and corrupt INEC staff will post serious

¹⁷ Idayat, H. "An appraisal of the Legal Framework for the Conduct of the 2015 General Elections: Matters Arising" Centre for Democracy and Development (CDD).

¹⁸ Nigerian Civil Society Situation Room (2015) "Question and Answers" Available at www.situationroom.placng.org. Accessed on 5/3/2018, at 4.05pm.

challenge to smooth operation and sustainability of the devices in providing credible election. Many corrupt INEC staff most especially those working in Rivers State Electoral Commission were sacked due to corruption cases.

4) Violent acts of politicians and thugs; Political violence in Nigeria has been part of the election process and culprits were not prosecuted to serve as deterrent to others. Influential politicians on the days of elections hired thugs to harass voters at polling units with various types of weapons and at times snatch election materials.¹⁹ INEC finds it difficult to prosecute suspects who committed electoral offences before, during and after election. Recommendations were made to the Government to establish separate body that will prosecute suspects that violated electoral laws.

4.4 Factors that will lead to change in Supreme Court Decision in Wike v Peterside

The Supreme Court of Nigeria being the apex court its judgment is final and no avenue for appeal. As the pinnacle of the judicial system the apex court has final say on any point of law.²⁰ In the words of late Justice Oputa JSC (rtd):

The picture of law and its technical rules triumphant and justice prostrate may no doubt have its admirers. Nevertheless, the spirit of justice does not reside in forms of formalities, or in technicalities, nor is the triumph of the administration of justice to be found in successfully picking one's way between pitfalls of technicality. Law and all its technical rules ought to be but a handmaid of justice and legal inflexibility (which may be becoming of law) may, if strictly followed, only serve to render justice grotesque or even lead to outright injustice. The court will not endure that mere form or

¹⁹ Report of the Electoral Reform Committee (2008) Vol. 1 Main Report, Pg 108. Available at <https://www.scribd/document/85483790/Electoral-Reform-2008>. Accessed on 30/9/2017, at 3.25pm.

²⁰ Sections 232 and 233 of the Constitution of Federal Republic of Nigeria 1999 (as amended).

fiction of law, introduced for the sale of justice, should work a wrong, contrary to the truth and substance of the case before it.²¹

In the same light, despite the fact that the Judgment of the apex court is final, situations might arise for the review of the judgment of the Supreme Court. The following are the situations: (1) To correct clerical error (which is not review per se); (2) Judgment was obtained through fraud; (3) Supreme Court may revisit its judgment under Order 8 Rule 16 of Supreme Court Rules to correct clerical errors or omissions or gaps to give meaning to the judgment of the court and not to vary it.

However, in *Johnson v. Johnson*²² the Supreme Court exercised power to overrule itself due to serious defect it uncovered in the ruling. Coker JSC delivering the Court's judgment felt remorse reviewing a stand point which influenced the laws of Nigeria for over 12 years a decision that was reached per *incuriam* which inflict hardship and injustice upon generation in the future if not corrected. Similarly, this case of *Nyesom v. Peterside* may fall into same trap of reviewing in view of manifest weight of evidences in favor of the petitioner. Therefore, with all due respect to the justices of the apex court the instant case under review was obtained in error and there is absolute need for reviewing the judgment.

The reasons why the judgment is not justifiable and need to be reviewed are stated below:

1. Error of literal interpretation and reliance on analogue procedure of accreditation of voters as provided under Section 49 of the Electoral Act, 2010 (as amended). The judgment of the apex court relied on manual accreditation of voters which is prone to

²¹ *Federal Civil Service Commission & Ors., Laoye* (1989) 2 NWLR (Pt. 106) 253.

²² (1972) 7 NSCC 82.

rigging against smart card reader whose capacity to minimize rigging was well appreciated by even the justices of the same court. The Supreme Court failed and refused to see the incontrovertible evidence of over-voting contained in the Independent National Electoral Commission's Card Reader accreditation reports and awarded victory to those who in fact, did not win elections. The Supreme Court agreed that the use of card readers for voter accreditation was provided for in the INEC Approved Guidelines and Regulations for the conduct of the 2015 elections, yet they refused to attach any probative value to it because, in their own words, "the device was never intended to supplant, displace or supersede the Voters' Register".²³

Falana contended that the amended 2015 version of Section 52 of the Electoral Act, 2010 (as amended) wherein INEC was authorized to use any method of Election. Although the National Assembly had approved funds for the purchase of the card reader machines in the Appropriation Act of 2014. The immediate past chairman of the INEC, Professor Attahiru Jega was summoned to the Senate to justify the introduction of the card reader for voters' accreditation. In taking up the challenge, Professor Jega demonstrated the use of card readers and its capacity to eliminate electoral fraud perpetrated at the accreditation stage of an election. At the end of the exercise, the Senate was compelled to endorse the use of card reader for the 2015 general election.

Thereafter, the Electoral (Amendment) Bill 2015, which sought to legitimize the use of card reader, was unanimously passed by both chambers of the National Assembly. The Bill was signed into law by former President Goodluck Jonathan on March 20,

²³ Ekeke, C. The Activism of A Reactionary Supreme Court. Available at <http://saharareporters.com/2016/02/10/activism-reactionary-supreme-court-chinedu-ekeke>. Accessed on 6/5/2018, at 3.06pm.

2015.²⁴ Similarly, Sagay in his write up postulated that if all the card reader does is to enhance, improve and protect the capacity of the voters', it could not in any sense have deposed, dethroned the voters Register as Nweze JSC asserted in *Okereke v. Umahi*²⁵. The card reader was intended to and did strengthen the application and efficacy of the Electoral Act, by ensuring a credible election for the benefit of Nigerians.²⁶

Yebisi in her write up on the issue of review of judgment of the Nigerian Supreme Court made comparison of Ghana Supreme Court and that of Nigeria. In Ghana under rule 54 of the Supreme Court Rules spells out the grounds for review as: 1) Exceptional circumstances which have resulted in a miscarriage of justice; 2) Discovery of new and important matter or evident which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when decision was given.²⁷

The instant case of *Wike v. Peterside* falls within the above two situation and therefore, Nigerian judiciary should learn lesson from Ghana. The judgment is not justifiable by any standard if one considers preponderance or balance of probabilities.

2. Issue regarding burden of proof of substantial non-compliance with the Electoral Act, 2010: In the instant case of *Wike v. Peterside*²⁸ Kekere-Ekun in her lead judgment stated that the case of 1st and 2nd respondents at the Tribunal was hinged on substantial non-compliance with the provisions of the Electoral Act, 2010 (as amended), Manual for

²⁴ S. 52 (1) (b) of the Electoral (Amendment) Act 2015, PLAC Available at <http://placng.org/wp/wp-content/uploads/2016/04/factsheet.pdf> Accessed 7/02/2017, at 8.22pm.

²⁵ *Okereke v. Umahi & Ors.* (2016) SC 1004/2015 Available at <http://lawnigeria.com/court-judgments/2016-JUDGMENTS/OKEREKE%20V.%20UMAH%20&%20ORS.html>. Accessed on 7/12/2016, at 4.15pm.

²⁶ Sagay, I. (2016) Rivers Governorship Poll verdict is farewell to election petitions. The Nation online paper of 17th April, 2016. Available at <http://thenation.net/rivers-gov-poll-verdict-farewell-election-petitions-says-sagay/>. Accessed on 10/2/2017, at 4.18pm.

²⁷ Rule 54 of Supreme Court of Ghana (C1 16) 1996.

²⁸ (2016) 2 S.C.N.J (Pt. 1) 208 at 281.

election officials, INEC approved guidelines and Regulations and also by corrupt practices which included acts of thugs, intimidation, harassment of voters, snatching of electoral materials, lack of result sheets, deliberate resort to manual accreditation to manipulate results, non collation of results at ward collation centers, arbitrary allocation of figures in electoral forms, etc. He further contended that the petitioner must prove all the two grounds of petition to succeed. Thus, the grounds are: a) that the corrupt practice or non-compliance took place; and (b) that the corrupt practice or non-compliance substantially affected the result of the election.²⁹

However, with due respect to the justices of the apex court to request the petitioner to prove all the two standards of proof is wrong and not the intendment of the law. The petitioner is expected to prove one of the two; either substantial non-compliance with the Electoral Act or the non-compliance has substantial effect on the result. Once the petitioner prove one of the two the burden of proof will shift to the respondent to disprove the assertion made by the petitioner. In light of the above Sagay contended that it is clear that the provision on substantial compliance in section 146 of the Electoral Act, 2006 which is *pari materia* with section 139 (1) of the Electoral Act, 2010, is conjunctive in nature. For an election not to be invalidated, (i) it must comply substantially with the provisions of the Act and (ii) non-compliance, (whether substantial or insubstantial) must not affect substantially, the result of the elections. In other words, any election has to clear two hurdles in order to be valid; (i) it must comply substantially with the provisions of the Act; (ii) where there was any non-compliance, no matter how insignificant, it must not have substantial effect on the result.³⁰ Therefore, a

²⁹ Section 139 (1) of the Electoral Act, 2010 (as amended).

³⁰ Sagay, I. (2016) Rivers Governorship Poll verdict is farewell to election petitions. Op. cit.

petitioner will succeed if he can establish either of the following: (a) Substantial non-compliance with the Act, only or (b) substantial effect on the result by any degree of non-compliance, no matter how trivial.

Sagay further held that our Courts have in a majority of cases been operating under the great misapprehension that a petitioner has to establish in every case, not only that there has been a substantial non compliance with the Electoral Act but also that the substantial non compliance must have substantial effect on the result of the election. This is absolutely wrong.³¹ Thus, in *Buhari v Obasanjo*³², Belgore JSC (as he then was) made the following statement:

The burden on petitioners to prove that non-compliance has not only taken place but has also substantially affected the result [must be] fulfilled.

There must be clear evidence of non-compliance, then that non-compliance has substantially affected the election.

This principle of how to prove non-compliance was borrowed from the case of *Johnson v. Simpson*³³

In fact, the Supreme Court's view in the case of *Ojukwu v Onwudiwe*³⁴, is that there was substantial compliance and therefore the need arose to establish, that the insubstantial non compliance, affected the outcome of the election. Similarly, in the case of *Buhari v. Obasanjo*, *Nsofor JCA*, correctly interpreted Section 135 (1) of the 2002 Electoral Act, which was in *pari materia* with section 139 (1) of the Electoral Act, when he stated thus: "I have above elaborately dealt with and anxiously, painstakingly

³¹ Ibid.

³² [2005] 50 WRN 1 at p.178

³³ (1975) QB 151

³⁴ [1984] 1 SC NRL 247 at 305-6

considered some of the relevant statutory provisions of the Electoral Act, 2002, the *fons et origio* of a free and fair election in the country in search of and seeking a democratic governance in a free world. And armed with and guided by the principles of law, and fortified thereby vide Lord Denning in *Morgan v Simpson*: If the election was conducted so badly that it was not substantially in accordance with the law as to election (Electoral Act, 2002) the election is vitiated irrespective of whether the result was affected or not.

3. Issue of serious violent acts that took place before, during and after the Rivers State Governorship 2015 Election is capable of annulling the election. In the case of *Nmwole v. Iwuagwu*³⁵ the Court of Appeal held that it is not only the breach of the Electoral Act that constitutes non-compliance, all acts capable of placing obstacles on the way or obstructing willing voters and candidates are acts of non-compliance. Similarly, Sagay contended that:

I could not understand how the verdict was arrived at, despite the murder, mayhem, chaos and devastation almost amounting to a catastrophe, displayed on television, reported in all Newspapers in all its gory details; after the damning reports of International and Local Observers who barely survived their mission. It was the worst shock ever created by a Supreme Court decision since I was knowledgeable enough to follow and understand Court judgments.³⁶

In fact, this decision of the apex court supposed not to stand and not justifiable considering the violence that took place.

³⁵ (2004) 15 NWLR (Pt. 895) 61.

³⁶ Sagay, I. (2016) Rivers Governorship Poll verdict is farewell to election petitions. Op. cit.

4.5 Conclusion

There is absolute necessity to revisit this instant case of *Wike v. Peterside* and review the decision for justice and posterity sake. The judgment is not justifiable by every standard. Rivers State Governorship 2015 was carried out under serious violent condition that forced members of opposition parties to stay in door without voting and this violent act of thugs was proved beyond reasonable doubt at the Tribunal stage. Even for this violence acts alone the election supposed not to stand. Therefore, the reasons adduced by the apex court against the use of smart card reader are not justifiable by all standards. Above all the amended version of the 2015 Electoral Act that authorized INEC to use any method of election has no doubt legalized the use of the smart card reader machine.

CHAPTER FIVE

SUMMARY, CONCLUSION, FINDINGS AND RECOMMENDATIONS

5.1 Introduction

This chapter is the conclusion part of the research. Thus, it provides summary, conclusion, enumerate possible findings and make recommendations.

5.2 Summary

The research was carried out on Critique of the Supreme Court decision in the case of Wike v. Pterside on the use of smart card reader in Election. The petitioner challenged the declaration of the second respondent at the Rivers State Governorship Election Petition Tribunal, and the case was decided in favor of the petitioner by calling for fresh election. Thereafter, the respondent/appellant challenged the decision of the tribunal at the Court of Appeal and the court upheld the tribunal decision. However, at the Supreme Court the decision of the Court of Appeal was upturned and declared the appellant as duly elected Governor of Rivers State.

The two lower courts' judgments relied heavily on the Smart Card Reader introduced by INEC in 2015 general elections and merit of the petition against the result declared. Legal issues bordering on Sections 49 and 138 (1) (b) (c) and (2) of the Electoral Act 2010 (as amended) that deals with manual accreditation of voters and grounds of petition respectively were interpreted in purposive ways without taking into consideration their literal meanings.

The apex court accepted the submission of the appellant's counsel wherein he submitted that grounds of the petition which included non-compliance with the subsidiary legislations made by INEC was outside the purview of Sections 138 (1) (b) of

the Electoral Act 2010 (as amended). However, this section can be interpreted in purposive way to mean the Smart Card Reader Machine which main purpose is to improve the standard of accreditation of voters and stop electoral fraud is not against the provisions of the Electoral Act 2010 (as amended). The new devices have even improved the credibility and transparency of the election by minimizing rigging during registration, accreditation and counting process of the elections. Surprisingly, the apex court commended the efforts of the INEC but further concluded by saying the only method known to law is the manual accreditation of voters as provided by section 49 of the Electoral Act 2010 (as amended). However, Section 153 of the Electoral 2010 (as amended) provides that; “The Commission may, subject to the provisions of this Act, issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of this Act and for its administration thereof. The golden rule of interpretation of statutes is that where the words used in a statute are clear and unambiguous they must be given their natural and ordinary meaning unless to do so would lead to absurdity or inconsistency with the rest of the statutes, as per Uwais, CJN (as he then was).¹ Similarly, Section 5 of the Third Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides that the Commission shall have power to organize, undertake and supervise all elections... Thus, INEC derived its power from the Constitution and Electoral Act 2010 to issue election guidelines and regulations for elections. And violation of the subsidiary legislation which are meant to improve the credibility and transparency of an election is a ground for election petition.

The justices of the Supreme Court failed to evaluate the facts objectively, most especially the credibility of the new devices in providing free, fair and credible election

¹ *Ibrahim V Barde* (1996) 9 NWLR (Pt. 474) 513 at 517 B – C.

which is the main essence of the whole Electoral Act, 2010 (as amended). Similarly, the Supreme Court relied on strict interpretation of the Electoral Act, 2010 (as amended) without looking at the absurdity it will bring to the entire democratic ideal of ‘one man one vote’.

Surprisingly, the Supreme Court commended INEC for the introduction of the Smart Card Reader Machines but concluded that despite its efficacy in stopping electoral fraud the new devices cannot, logically, depose or dethrone the Voters’ Register whose juridical roots are firmly entrenched in the Electoral Act. Thus, the reasons adduced by the apex court against the use of smart card reader were not justifiable in view of the weight of evidence.

Furthermore, to test the reliability of the manual accreditation, the research applied the four steps involved in Mischief rule of interpretation of statutes to the accreditation process as provided by Section 49 of the Electoral Act 2010 (as amended) and discovered that the manual accreditation of voters was defective in curing the intendment of the legislatures. Thus, the four steps are; 1) what was the common law position before the making of the statute that deals with manual accreditation? 2) What is the mischief and defect the manual accreditation of voters intended to cure as provided by Section 49 of the Electoral Act 2010 (as amended)? 3) What remedy has parliament resolved and appointed to cure the mischief; and 4) The true reason of the remedy. What was the intention of the legislature when the Section was made into law? It was observed that manual accreditation voters have not provided the needed control toward minimizing electoral fraud. Therefore, the mischief or the defect intended by the legislatures in enacting the law was not cured. Therefore, any effort made by INEC to

cure those deficiencies should be applauded and embraced by all and sundries. There was no any conflict between section 49 of the Electoral Act, 2010 and the smart card reader machine. This is so because the main essence of the Electoral Act is to provide credible, free and fair election.

The golden rule of interpretation of statutes is that where the words used in a statute are clear and unambiguous they must be given their natural and ordinary meaning unless to do so would lead to absurdity or inconsistency with the rest of the statutes, as per Uwais, CJN (as he then was).² There is inconsistency and conflict between Section 138 and 153 of the Electoral Act, 2010, therefore it behooves on the justices to avoid relying on the strict literal interpretation of the section. Section 138 (2) of the Electoral Act provides that an act or omission of the Commission or its officials cannot be a ground for petition while Section 153 of the Act as stated above conferred power on INEC to issue election guidelines and regulations. Similarly, Section 5 of the Third Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides that the Commission shall have power to organize, undertake and supervise all elections... Thus, INEC is conferred with both Constitutional and Electoral Act power to issue election guidelines and regulation. And violation of the subsidiary regulations which are meant to improve the credibility and transparency of an election is a ground for election petition.

Therefore, the decision of the Supreme Court in *Wike v. Peterside* cannot be justified in view of the manifest errors of judgment, preponderance of evidence and on balance of probability supposed to be reviewed for justice and posterity sake.

² Ibrahim V Barde (1996) 9 NWLR (Pt. 474) 513 at 517 B – C.

5.3 CONCLUSION

Democracy as a system of government based on the acquisition of authority from the people with its laudable values, such as sovereignty of the people, institutionalization of the rule of law, the emphasis on the legitimacy of rulers; the availability of the choices through competitive election process and cherished values and accountability in governance are far from achieving them due largely to the fraudulent manipulation of the election process by the political class.

History of Nigerian electoral process was highly bedeviled by election malpractices, before, during and after elections, (including the court process). Thus, history has shown that concerted efforts by previous and current governments to reform and improve the electoral process have not provided the desired result.

That both the Tribunal and Court of Appeal decisions relied on the Smart Card Reader in view of the fact that the devices has strengthened the application and efficacy of the Electoral Act by ensuring a credible election for the benefit of Nigerians.

The prospects of the Smart Card Reader Machines technology are very bright in view of its reliability, people confidence and credibility in deepening democracy.

The Rivers State Election Petition Tribunal and Court of Appeal in their respective judgments relied on the efficacy and reliability of the Smart Card Reader Machine in providing credible election. Legal issues bordering on Sections 49 and 138 (1) (b) (c) and (2) of the Electoral Act 2010 (as amended) that deals with manual accreditation of voters and grounds of petition respectively were interpreted in purposive ways without taking into consideration their literal meanings. This progressive approach adopted by the two lower courts must be appreciated in view of the fact that interpreting

those sections in their literal ways will result to absurdity and inconsistency to the whole issue of providing free, fair and credible election.

The apex court relied on strict interpretation of the Electoral Act 2010 (as amended) without looking at the absurdity it will bring to the entire democratic ideal of ‘one man one vote’.

There is absolute necessity to revisit this instant case of *Wike v. Peterside* and review the decision for justice and posterity sake. The judgment is not justifiable by every standard. Rivers State Governorship 2015 election was carried out under serious violent condition that forced members of opposition parties to stay in door without voting and this violent act of thugs was proved beyond reasonable doubt at the Tribunal stage.

In Conclusion, therefore, the reasons adduced by the Supreme Court against the use of smart card reader are not justifiable by any standard. Above all the amended version of the 2015 Electoral Act that authorized INEC to use any method of election has no doubt legalized the use of the smart card reader machine.

5.4 Findings

The research work which was based on the ‘A Critique of the use of smart card reader conduct of Election in Nigeria: A case study of *Wike v. Peterside*’ made the following findings:

1. Manual accreditation of voters as provided for under Section 49 of the Electoral Act, 2010 (as amended) was found not reliable in providing the desired result of free, fair and credible accreditation process. For example, the Tribunal and the Court of Appeal have

used Purposive approach to Section 49 and 138(1) (b) & (c), (2) of the Electoral Act 2010 (as amended) in annulling and upholding the decision respectively. The Supreme Court in its decision used strict literal interpretation of Section 49 and 138 (1) (b) (c) and

2. Without looking at the absurdity and inconsistency of the judgment. The reason adduced by the apex court that manual accreditation of voters as provided by Section 49 of the Electoral Act 2010 (as amended) supersede the INEC electoral guidelines and regulations that introduced the smart card reader machine is defective and not justified in view of the creditability of the accreditation devices. The judgment of the apex court relied much on technicalities of the law and not facts before the court. This shows that, the judgment was against the preponderance of evidences and therefore should be reviewed for justice and posterity sake.
3. That it is not the breach of the Electoral Act 2010 (as amended) constitutes non-compliance, all acts capable of placing obstacles on the way or obstructing willing voters and candidates from voting are acts of non-compliance.

For example, the Supreme Court interpreted wrongly section 139 (1) of the Electoral Act 2010 (as amended) that deals with substantial non-compliance with the Act and substantial effect on the result of the election. A petitioner can either prove substantial non-compliance or effect on the election. The apex court shifted all the two burden of proof to the petitioner/respondent.

4. That Section 52 of the 2015 amended version of the Electoral Act 2010 (as amended) granted power to INEC to use any form of Election, thus, the use of the smart card reader was legalized by the amendment made into law on 20th of March, 2015 before the

election. None of the counsel canvassed this section of the Electoral Act and also justices of the apex court were not aware of the new section.

5. Smart Card Machine are likely to face following challenges: Legal issues, snatching of the machines by thugs, acts of desperate politicians, failure of the machines, knowledge gap of INEC staff, power and network failure.

5.5 RECOMMENDATIONS

The following recommendations are proffered in order to actualize the review of the Supreme Court decision in the case of *Wike v. Peterside*:

- a) Section 49 of the Electoral Act 2010 (as amended) that deals with manual accreditation of voters be amended in the Act and incorporate the use of Smart Card Reader in view of the fact that the former has failed to provide the desired result of minimizing election rigging. Thus, the amended portions of the Electoral Act 2010 be made public by giving copies of the amendments to all political parties, courts of law and institutions of higher learning.
- b) Section 139 of the Electoral Act 2010 (as amended) be amended to include all acts capable of placing obstacles on the way or obstructing willing voters and candidates from voting are acts of non-compliance. The burden of proof of substantial non-compliance and effect on election result as stated in section 139 be modified and specified clearly that a petitioner is expected to proof one of the burden. Thus, the apex court in their respective judgments should use purposive approach while interpreting sections of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and

Electoral Act 2010 (as amended) to avoid creating absurdity and inconsistency and ensure remedy for achieving free, fair and credible election.

- c) That in view of the brighter prospects of the smart card reader machine technology, its reliability, building peoples' confidence and credibility in deepening democracy the use of the device should be made into law.
- d) There should be creation of awareness and continues training of INEC staff in view of the challenges of legal issues, snatching of machines by thugs, the acts of desperate politicians, failure of the machines, knowledge gap of INEC staff, power failure, network failure, etc, the smart card reader machines is to face in future election be addressed squarely. The pro-activeness of the enforcement agents must be strengthened in order to be able to face the reality of the new challenges.

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