

Non-compliance with the Provisions of Sections 73(2) and 51(2) of the Electoral Act, 2022 – How Established

In the Governorship Election Petition Tribunal
In the Edo State Governorship Election
Holden at Benin City

On Wednesday the 2nd Day of April, 2025

Before Their Lordships

Hon. Justice W.I. Kpochi	-	Chairman
Hon. Justice K.B. Yusuf	-	Member
Hon. Justice A.A. Adewole	-	Member

Judges, Governorship Election Petition Tribunal

EPT/ED/GOV/02/2024

Between

- 1. Ighodalo Asuerinme**
- 2. Peoples Democratic Party**

Petitioners

And

- 1. Independent National Electoral Commission (INEC)**
- 2. Okpebholo Monday**
- 3. All Progressive Congress (APC)**

Respondents

(Judgement delivered by the Honourable W.I. Kpochi, J.)

Facts

The 1st Petitioner was sponsored by the 2nd Petitioner as its candidate for the governorship election of Edo State conducted by the 1st Respondent (INEC) on 21st September 2024, wherein eighteen (18) contestants participated. The 2nd Respondent was the candidate of the 3rd Respondent at the election. Upon

conclusion of the election, INEC declared the 2nd Respondent - Senator Okpebholo Monday - as winner of the election with a total score of 291,667 votes, against the 1st Petitioner's 247,774 votes.

It was against this declaration that the Petitioners filed the petition on two grounds to wit: (i) the election was invalid by reason of non compliance with the provision of the Electoral Act, 2022 ("Electoral Act"); (ii) the 2nd Respondent was not duly elected by majority of lawful votes cast at the election.

The ground for non-compliance with the Electoral Act was predicated on two heads, namely: the alleged contravention of section 73(2) of the Electoral Act in 395 polling units resulting from the failure to pre-record the serial numbers and other particulars of result sheets, ballot papers, BVAS machines and other sensitive materials in form EC25B; and the alleged contravention of section 51(2) of the Electoral Act in that the total votes cast as recorded in form EC8A in 133 polling units exceed the total number of accredited voters based on the BVAS record of accreditation. This contravention allegedly comprises of 75 polling units where there was both overvoting and non-prior recording and 58 polling units where there was overvoting only.

Regarding the ground that the 2nd Respondent was not duly elected by majority of lawful votes cast at the election, the Petitioner complained that there were discrepancies in the results for 125 polling units uploaded by the presiding officers to the IREV; that in 10 polling units, scores entered were not found on agent's copies, IREV copies or the certified true copies of the hard copies of the form EC8A; at 21 ward collation centres, the results of 101 polling units were incorrectly collated; the result of 76 polling units of Ikpoba/Okha Local Government Area were excluded from the collated result of the election.

There were various objections filed by parties challenging the petition and reply to the petition. There were also objections to the admissibility of documents. The tribunal deferred ruling on the various motions to delivery of judgement.

In proof of the petition, the Petitioners tendered several exhibits and called 19 witnesses through whom they sought to establish their claim. The 1st, 2nd and 3rd Respondent denied all the Petitioners' allegations in their replies to the petition. The 1st Respondent did not call any witness but relied on the evidence elicited

under cross-examination of PW1 - PW19 and tendered three exhibits. The 2nd Respondent relied on evidence extracted from the PW1 - PW19 while under cross-examination and also called a single witness who was a polling unit agent. The 3rd Respondent called four witnesses who were Local Government collation agents. At the close of the defence, the Honourable Tribunal ordered the parties to file their final addresses.

Issue for Determination

The Tribunal considered the following issues for determination of the petition:

- i. Whether from the totality of the pleadings and evidence, the Petitioners proved that the election of the 2nd Respondent as the Governor of Edo State was invalid by reasons of non-compliance with the provisions of the Electoral Act, 2022?
- ii. Whether from the totality of pleadings and evidence, the Petitioners proved that the 2nd Respondent was not duly elected by a majority of lawful votes cast at the election into the office of the Governor of Edo State?

Arguments

Issue one

In a bid to prove non-compliance under its first ground i.e. contravention of section 73(2) of the Electoral Act, the Petitioners tendered several exhibits in respect of 395 polling units to show the lack of prior recording in the forms before the commencement of voting. The Petitioners submitted that by virtue of section 52 of the Evidence Act, these exhibits were admissible in evidence without the need for oral evidence as an exception to the hearsay rule in section 37 and 38 of the Evidence Act, 2011. They also relied on section 137 of the Electoral Act. The Petitioners argued that through these exhibits and the testimonies of their witnesses, they had established their allegation of non-compliance with section 73(2) of the Electoral Act, 2022. On the contravention of section 51(2) of the Electoral Act, 2022, the Petitioner submitted that the number of votes cast at an election in any polling unit is reflected in the form EC8A, while the record of the number of accredited voters in the polling unit is in the BVAS record of accreditation as contained in the BVAS extracts/screenshots tendered and admitted as exhibits. The Petitioners then argued that there was overvoting in the 133 polling units pleaded in the petition as the total number of votes cast exceeded the number of accredited voters and so the result ought to be cancelled in line with section 51(2) of the Electoral Act, 2022.

In response, the Respondents were in agreement that the election was conducted in substantial compliance with the provisions of the Electoral Act. The 1st Respondent argued that it is the form EC25D that is relevant to establish whether the quantity and serial numbers of sensitive electoral materials were completed and that the said form was neither pleaded nor tendered in evidence by the Petitioners and this was fatal to the Petitioners' case. On the allegation of over voting, the 1st Respondent contended that the Petitioners were expected to tender, amongst others, the voters register used in the election, forms EC8A, the BVAS device and call eye-witnesses to relate each document/device to specific areas of their case, which the Petitioners failed to do.

The 2nd Respondent argued that from the analysis before the Tribunal, when the scores pleaded by the Petitioners were taken into account, even if the Petitioners proved the residue of their allegations in the petition in relation to non-compliance with mathematical accuracy and all the votes which the Petitioners claim were liable to be deducted, they were still incapable of affecting the outcome of the election, let alone substantially. On overvoting, the 2nd Respondent argued that the documents and exhibits tendered by the Petitioners to support their case was simply dumped on the Tribunal with no witness testimony to support the Petitioners' claim.

The 3rd Respondent argued that the testimonies of the Petitioners' witnesses were grossly inadequate as the witnesses were not polling unit agents and could not give direct eye witness evidence as to what transpired at the polling units and failure to call the polling unit agents was fatal to the case of the Petitioners. On the issue of overvoting, the 3rd Respondent argued that the Petitioners had a duty to prove that the overvoting inured to the benefit of the winner of the election.

Issue two

The Petitioners' argument was that the invalidation of the results of the election in the alleged polling units on grounds of non-compliance, as well as the collation of the lawful scores of the parties in the 312 polling units where allegations of incorrect collations or exclusion of polling unit results (as the Tribunal may find proved) will substantially affect the result made at the election and the Petitioners will become winners of the election with 240,234 lawful votes and the 2nd and 3rd Respondents as runner-up with 201,032 votes.

The 1st Respondent contended that none of the Petitioners' witnesses related the exhibits to the specific complaints in their depositions and evidence in open court. The 2nd Respondent's position was that ground two of the petition was based on the hypothesis that the Petitioners will prove the allegation of non-compliance set out under ground one of the petition. On the part of the 3rd Respondent, it contended that the law imposed a duty on a Petitioner to call evidence from the officers who witnesses the exercise at the election ground where votes were cast, counted and/or collated. Finally, the 3rd Respondent submitted that the witnesses called by the Petitioners were incapable of sustaining the claim because they were either Local Government collation agents or ward collation agents of the Petitioners whose testimonies related only to what transpired at the collation centres and not what transpired in the polling units as expected by law.

The Respondents urged the Tribunal to resolve the issues in favour of the Respondents.

Court's Judgement and Rationale

Prior to deciding the first issue, the Tribunal dismissed objections as to sufficiency of pleadings, improper identification of witnesses, allegations of corrupt practices in the petition, admissibility of documents, amendments of witness statements on oaths and want of jurisdiction. The Tribunal, however, upheld the objection as to the introduction of new facts in the Petitioner's Reply.

Deciding the merits of the petition, Tribunal considered the first ground of issue one and found, *inter alia*, that the Petitioners' form EC8As and polling unit booklets were not tendered through proper witnesses that could speak to them. That the witnesses were not polling unit agents who witnessed the election process at the polling units and were not competent to speak to the documents to link them to the allegation by the Petitioners, and in the circumstances, the documents were dumped on the Tribunal. Consequently, failure by the Petitioners to call polling unit agents, presiding officers or even registered voters that witnessed the election at the polling units was fatal to the Petitioners' case aimed at proving non-compliance with section 73(2) of the Electoral Act, 2022.

On overvoting, the Tribunal held that a petitioner who alleges overvoting must satisfy the threshold in **EMMANUEL DAVID OMBUGADU & ANOR v SULE AUDU ALHAJI & ORS (2024) 7 NWLR (PT. 1936) 7 AT 113** which is that "*the documents required to prove overvoting are the voters register, the BVAS machines and the form EC8As.*" Additionally, that *the Petitioner must call eye witnesses to relate each document/device to*

specific areas of his case in respect of which the documents were tendered and show that the figure representing the over-voting inured in favour of the Respondent and if deducted, would have resulted in victory for the Petitioner.

In this case, the Tribunal found that the Petitioners did not tender the hard copies of the form EC8As but downloaded the IREV copy from the 1st Respondent's database and the other documents tendered by the Petitioners were *inter alia* BVAS machines, BVAS screenshots, and voters registers tendered from the bar. The Tribunal noted that the BVAS machines were not activated or put on by any witness to demonstrate or establish their assertion; that these machines remained dormant and were dumped on the Tribunal. As such, it was held that the BVAS machines were of no avail to prove over-voting since the contents were not disclosed or displayed to determine the number of accredited voters from each polling unit that the BVAS machines were deployed to. Consequently, issue one was resolved against the Petitioners.

On issue two, the Tribunal held that *when a Petitioner alleges that the Respondent was not elected by a majority of lawful votes cast, he ought to plead and prove the votes cast at the various polling units, the votes illegally credited to the "winner," the votes which ought to have been deducted from that of the supposed winner in order to see if it will affect the result of the election.* The Tribunal held further *that where grounds such as lack of majority of lawful votes cast or corrupt practices are raised, the thresholds are not contemplated under section 137 of the Electoral Act 2022 and do not apply.*

In the instant case, the Tribunal found that results in 23 polling units were not tendered by the Petitioners; a number of exhibits tendered were not legible and were not authenticated by the 1st Respondent *via* its stamp and, as such, it was difficult to ascribe probative value to the documents. Consequently, the Tribunal held that the Petitioners failed to provide the materials required by law for a dispassionate consideration of the issue of majority of lawful votes cast at the election.

Ultimately the Tribunal found that even if the prayers for the Petitioners' ground 2 were granted, the scores the Petitioners displayed in their petition would still be incapable of guaranteeing the Petitioners the majority of lawful votes cast at the election.

Petition dismissed.

Representation:

Mr. Adetunji Oyeyipo, SAN with others for the Petitioners.
Mr. Abdullahi Aliyu, SAN with others for the 1st Respondent.
Dr. Onyechi Ikpeazu, SAN with others for the 2nd Respondent.
Mr. Emmanuel Ukala, SAN with others for the 3rd Respondent.

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