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INTERROGATING THE BURDEN OF PROOF IN ELECTION PETITION IN NIGERIA AND TWO OTHER JURISDICTIONS: GHANA AND KENYA

SUNNY MENE PIATE
POSTGRADUATE RESEARCH STUDENT
FACULTY OF LAW
ABIA STATE UNIVERSITY – UTURU
sunnypiate@aksu.edu.ng, sunnymenepiate@gmail.com

ABSTRACT
The paper interrogates the burden of proof in election petition in Nigeria. The objective of the study was to examine the burden or onus of proof required of a petitioner in proving his petition before the electoral tribunal vis-à-vis the ground(s) alleged and relied on by the petitioner for challenging the election/return of the respondent and interrogates same with the position and practice in other jurisdictions particularly Ghana and Kenya. The research method adopted is doctrinal. Findings from the study revealed among other things, that the failure of the electoral process to instill confidence has practically converted the tribunals/courts into another electoral ombudsman. Electoral jurisprudence is founded on the presumption of regularity of election results declared by the electoral umpire which implies that the law takes for granted that a credible election has been conducted which is why election tribunals/courts insist upon that presumption. This tends to lend judicial validity to the view that challenging the outcome of an election through the legal process is a mere formality. The invidious consequence of undue judicial subsidization of the presumed winner of an election and the electoral umpire to the detriment of the petitioner is that legal justice can scarcely redress electoral injustice. Also, the common law rules on the burden of proof apply with same force to election disputes in Nigeria, Ghana and Kenya. The study recommended among other things that while post-election cases should continue to be the exclusive preserve of election tribunals/courts, technical justice must not be allowed to affect the essence of ensuring only people with genuine mandate get the return ticket as winner of the election.

Keywords: Burden of proof, Common law, Election petition, Non-compliance, Petitioner

Introduction

In **Ogboru V Uduaghan,** the court held that the word election is a generic term. It is a process which embraces the entire gamut of activities ranging from accreditation, voting, collation, recording it on relevant INEC forms and declaration of results. The purport of this decision is that for an election known to law to have taken place, all these constituents elements of an election must be shown to have taken place. Where this is the reverse, it affects the conclusion of the election necessitating a challenge by way of election petition. Section 130 **Electoral Act 2022** provides that the procedure for challenging election under the Act is by way of an election petition complaining of either undue election or undue return. **Section 133 Electoral Act2022** provides that an election petition may be presented by a candidate in an election or political party that participated in the election. In **Ngige V INEC,** the court held that there is a rebuttable presumption that any election result declared by a returning officer is correct and the burden of rebutting that presumption is on the person who denies its correctness. Arising from this, burden of proof refers to the legal requirement that one party in a law suit must prove their case. Essentially, the burden of proof sets the standard that a party must meet to win their case. So, interrogating the burden of proof in

election petition, mean critically examining the legal requirement that a petitioner (i.e the person challenging the election result) must meet to prove their claims. This involved analyzing the specific evidence required, the standard of proof (ie Beyond Reasonable Doubt or Preponderance of Evidence) and the potential challenges or limitations that petitioners may face in fulfilling these requirements.

Election disputes are highly sensitive and controversial, so much that the process of disposing them seems as if the judiciary itself is on trial. Indeed, of recent, the Nigerian judiciary has come under severe attack for the handling (or mishandling) of Election petitions. A substantial number of Nigerians have questioned the role of the judiciary as a true arbiter in electoral matters because to them, election petition is aimed to open a window of justice to the petitioner. They equally wonder why in spite of the apparent and manifest cases of electoral malpractices and non-compliance, the tribunal/court have continued to throw out election petition cases for want of proof (Piate, 2021). One of the problem that has dealt a fatal blow on election petition in Nigeria is the case of corruption of judicial officers who preside over election petitions. Corruption within the judiciary undermines the very essence of a fair and impartial legal process, eroding the fundamental principles upon which justice is built. The consequences are far-reaching, affecting individuals, communities and the overall integrity of the rule of law.

Another issue in election petition is the doctrine of substantial compliance. In simple, plain language, it is about substantially following the guidelines and laws as stipulated in the conduct of election. It appears that the burden of proof for the ground of non-compliance with the provision of the Act has been rendered too heavy for the petitioners to handle (Akinbiyi, 2023). From the purport of **Section 135(1) of Electoral Act 2022**, it appears that it is the tribunal/court, the ones, to give terminal interpretation of what constitute substantial and therefore any litigant for election dispute is at the mercy of their interpretation. More difficult is where a petitioner is saddled with proving non-compliance in Gubernatorial or presidential election in which a polling unit by polling unit analysis of non-compliance is very difficult, if not impossible. The time bound nature of election matters make the situation even more complicated. One would wonder how a petitioner who has only 21 days after the declaration of election result to file the election, to gather as much witnesses, documents and other processes in a bid to establish non-compliance. It is within this context that the study seek to examine the burden or onus of proof required of a petitioner in proving his petition before the electoral tribunal vis-à-vis the ground(s) alleged and relied on by the petitioner for challenging the election/return of the respondent and interrogate same with the position and practice in other jurisdictions particularly Ghana and Kenya. In view of the above, the study seeks to answer these questions, who bears the burden of proof in election petition? What are the requirements of proof of each ground by election tribunal/courts in Nigeria? What are the challenges confronting the discharge of the burden of proof in election petition? The scope of the study is from 2022 when the recent substantive electoral law was enacted in Nigeria till date. However, resort shall be made to decision of court made prior to 2022 with respect to burden of proof in election petition in Nigeria where it is found to be relevant and also compared same with the burden of proof in other jurisdictions particularly Ghana and Kenya.

Theoretical Explication of the Discourse

The Marxist theory is adopted to provide the theoretical underpinning of this discourse. The theory arose in reaction to the western liberal theory of the state which contends that the state is an independent force and a neutral observer that cater for the interest of every member of the society. According to the theory, the state is the product and a manifestation of the irreconcilability of class antagonism. As Engels (1842) succinctly put it:

> The state is a product of society at a certain stage of development, it is the entangled in an insoluble contradiction

> with itself that it has split into irreconcilable antagonisms which it is powerless to dispel. But in order that these antagonism might not consume themselves and society in fruitless struggle, it become necessary to have power, seemingly standing above society, that would alleviate the conflict and keep it within the bounds of "order" and this power, arisen out from it, is the state.

The Marxist theory of law is generally identified with the following three underlying assumptions: that law is a product of evolving economic forces; that law is a tool used by a ruling class to maintain its power over the lower classes; that in the communist society of the future, law as an instrument of social control will wither away and finally disappear (Aguda, 1992). As noted by the Marxists, the state is an instrument in the hands of the ruling class. Thus, it capture becomes inevitable. State capture here mean shaping the formation of the basic rules of the game (i.e. laws, rules, decrees and regulations) through illicit and non-transparent private payment to public officials. Essentially, the Marxist contention is anchored on the dialectical-materialist thesis of Karl Marx which places premium on economic condition of society as the base upon which other superstructure of the society including the political and legal system rest (Ake, 1981).

The utility of this theory to the study is that the approach helps to illuminate and highlights the fact that the dominant privileged group dominates both the economy and the polity (and by extension the legal system) and that the fierce struggle to win and control state power and use same for the personal economic advantage of politicians that is at the root of all electoral frauds and malpractice in Nigeria and equally the *casus beli* of the legal tussles that follow most elections. This position is corroborated by Kawu (2008) who opined that the court is one of the main pillars of class society, and when the chips are down, they would retreat into the mode which aids the survival of their class project. The import of the Marxist orientation is that those who hold the levers of power and dominate other superstructures of society (including the judiciary) are likely to capture or procure favourable judgements and rulings for themselves or their group.

APPRAISAL OF THE BURDEN OF PROOF IN NIGERIA-CUM-OTHER JURISDICTIONS OF GHANA AND KENYA

It is a settled principle of law that the grounds enlisted in **Section 134(1) Electoral Act 2022** are the foundation of the subject matter or substantive jurisdiction of the tribunal/court. Thus, where a petition is brought outside these grounds, the tribunal/court lack jurisdiction to entertain it **(see Madukolum V Nkemdilim)**. Moreover, when a law provide a particular way or method of doing a thing, unless such a law is altered or amended by legitimate authority, whatever is done in contravention of it amounts to a nullity **(see Friday V Gov. of Ondo State)**. Since there is a presumption of genuiness of results and the return of an election, a petitioner bears the burden of rebutting that correctness through proof of each and every of the grounds relied on. **Section 134(1) Electoral Act 2022** provides for the ground on which an election may be challenged. These includes: (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 provision of this Act; or (c) that the respondent was not duly elected by majority of lawful votes cast at the election.

With respect to **Sub-section (a) of 134(1) of the Electoral Act,** to contest for any elective position under this Act, the law expects that you must not only meet the qualification as set out in **Sections 65, 106, 131 and 177 of the Constitution of the Federal Republic of Nigeria, 1999(as amended)** but must not also be in breach of **Sections 66, 107, 137 and 182**

of the same constitution. The most appropriate time of ascertainment of the qualification of the person whose election is being question, is the time of election **(see Emeluwa V Onuigwe)**. Cases that border on a challenge that a candidate is not qualified to contest an election are contested more on documentary evidence than on the vivo voice and or affidavit evidence of witnesses. The petitioner must prove through evidence of an intention by the candidate to circumvent the provisions of the constitution. The following issues have come up before the tribunal/court in petition seeking to challenge an election on this ground: the age of the person returned from the election, forged/falsified certificate presented to the election body (i.e. INEC) and allegation of conviction.

Age is one of the qualifying factors for contesting an election both under the Constitution and the Electoral Act. **Sections 131(b), 177 and 65 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)** prescribes the age of thirty years for a person for election to both the office of President, Governor and the Senate, while **Section 106** prescribes twenty-five years for both the House of Representatives and House of Assembly of a State. So where there is any discrepancy in the age of a candidate, it must have a bearing on the Constitutional requirement before it can have the effect of disqualifying him. Where a petitioner alleged that there are two or more different documents all alleging that candidate returned as the winner bear an age different from the age submitted to INEC, the tribunal/court is bound to consider whether there is any effect on the age requirement set by the constitution. In **Maihaja V Gaidam**, the Supreme Court held that the petitioner must prove by evidence of an intention by the candidate (i.e. the Respondent) to circumvent the provisions of the Constitution.

Forged/Falsified certificate presented to INEC has met the tribunal/court in plethora of cases in which the truthfulness of the certificate presented by candidate to INEC is put to question. Akinbiyi (2023) opined that judicial decision reveals two arms of decisions especially on the standard of proof required. In the first arm, the presentation of a forged or falsified certificate qualifies as a criminal offence and must be proved beyond reasonable doubt. Whenever, it is the allegation that a candidate to an election forged a certificate and not that he presented a false certificate, it is criminal and, it has been held that it must be proved beyond reasonable doubt. The import of this is that a person who alleges that a candidate presented a forged certificate is directly alleging that such a candidate have made a false document knowing it to be false, and with intent that it may be acted upon as genuine to the end of qualifying him to stand in for the position he has been nominated to contest. This is clearly in the nature of crime, which places on the petitioner the burden to establish same beyond reasonable doubt. This position is lent credence by **Section 135(1) of the Evidence Act 2011** which provides that if the commission of a crime by a party to any proceedings is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. **Section (2)** goes further to say that the burden of proving that any person has been guilty of a crime or wrongful act is subject to **Section 139 of the Evident Act**, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.

The second arm, however holds that since election matter are *sui generis*, forgery or falsification of certificates is not on the same pedestal as the crime of forgery as provided in our criminal legislation (Akinbiyi, 2023). Therefore the standard of proof is on the balance of probabilities or preponderance of evidence. This position corroborates the decision in **Chidi Ibe & Anor V Hon Raphael Nnanna Igbokwe** where the court of Appeal noted that the word "forgery" was not use in strict legal sense of criminal code but in the general sense of obtaining advantage by unfair means over and above others. Consequently, the requirement of proof beyond reasonable doubt does not arise as the allegation is not the one of forgery but falsehood to INEC. In either of the position above, it is agreed that to prove the allegation, the genuine document from which the forgery was made must be produced and the issuing

Authority (i.e. the body that has the exclusive power to determine whether the certificate presented was forged) must be called to give evidence **(see APC V PDP).**

On allegation of conviction, it has been contested before the court that indictment or conviction for a crime is a bar to the qualification of a candidate to an election. In **Abubakar V INEC**, it was held that whenever, it is the allegation that a candidate to an election was convicted for a crime and was ineligible to run for an office, the burden of proof is on the petitioner to produce by evidence a formal charge or information filed against him in a criminal court of competent jurisdiction, as well as a fair trial and evidence of conviction.

With respect to **Subsection (b) of 134(1) of the Electoral Act 2022** which provides that the election was invalid by reason of corrupt practices or non-compliance with the provision of this Act, the **Electoral Act 2022** has made elaborate provisions on the procedures and processes that should be complied with to effect a successful election. So the petitioner could approach the tribunal/court under this ground praying the tribunal to nullify the election for reason of corrupt practices or non-compliance with the provision of the Act. The enormous burden of proving non-compliance with the Act was succinctly stated in **Section 135(1) Electoral Act, 2022** which 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/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.

The Supreme Court in **CPC V INEC** held that:

> This court has consistently held that for a petition to succeed on non-compliance with the provision of the Electoral Act, the petitioner must prove not only that there was non-compliance with the provisions of the Act but that the non-compliance substantially affected the result of the election.

Thus, the petitioner has the burden to prove that first, there was non-compliance with the Act, and that the non-compliance substantially affected the result of the election **(see Aminu & Anor V INEC & Ors and Akut& Ors V Rwang& Ors)**. On the part of the Respondent, all he needs to show is that the election was conducted substantially in accordance with the principles of this Act. also, in **Ucha V Chief Elechi**, the supreme court held: where the petitioner complains of non-compliance with provisions of the Electoral Act, he has a duty to prove it polling unit by polling unit, ward by ward and the standard required is proof on the balance of probabilities. He must show figures that the adverse party was credited with as a result of non-compliance. It is only then that the respondents are to lead evidence in rebuttal.

The burden appear to be heavy on the petitioner and more difficult is where a petitioner is saddled with proving non-compliance in a Gubernatorial or Presidential election in which a polling unit by polling unit analysis of non-compliance is very difficult, if not impossible. Again, the time-bound nature of election matter makes the situation even more complicated. One would wonder how a petitioner who has only 21 days after the declaration of election result to file his petitioner, to gather as much witnesses, documents and other processes all in a bid to establish non-compliance. It appears that until an election tribunal/court decides that non-compliance with the provisions of the Electoral Act has substantially affected the result of an election, the election remains valid. This mean that it is only the tribunal/court have power to decide the validity of an election conducted by Election Management Body/Authority under the Statute.

The last ground is contained in **Subsection (c) of 134(1) Electoral Act 2020** which provides that the respondent was not duly elected by majority of lawful votes cast at the election. For Akinbiyi (2023) and Ikoroha (2021) complaint of this nature is a call to comparison and contrast. For them, the registered voters, the total number of vote cast, and the votes received by each candidate must be tallied in order to prove the claim. The onus is on the petitioner to present the numerical data from the declaration of the result of election, naming the ward/wards of the constituency where the alleged errors were made. The petitioner is also required to place the particulars of the result of polling stations which they would want the tribunal/court to nullify out of the votes allocated to the declared winner.

The following are some of the allegations that have come before the tribunal/court in proof of petition brought under this ground. They include but not limited to (a) that election did not hold, where the petitioner is to establish by evidence, the number of polling units which must be strong enough to affect the results. (b) That there was falsification of election results as returned by the commission. The petitioner must call party agents in the polling units and there must be in existence of two results – one that is genuine and the one that is considered falsified. The onus of producing the said two results is on the petitioner. That is EC8A which is the statement of results of poll from polling stations, must be challenged in Evidence. (c) That voters were not allowed to vote or were disenfranchised. In **Udom V Umana**, the court held that the disenfranchised voters must give evidence to established the fact that they were registered but not allow to vote, voters card and voters register for the polling unit must be tendered and all disenfranchise voters must testify to show that if they were allowed to vote, the petitioner would have won the election. In **Buhari V INEC**, the Supreme Court held that the petitioner must tender in evidence all necessary documents used at the election, call witnesses to the illegality or unlawfulness of the vote cast and prove that it substantially affected the results of the election.

Comparatively, the Common Law rules on the burden of proof apply with the same force to election disputes in Ghana and Kenya. That is, the burden of proof is regulated by the general provisions of the Common Law as codified in the **Ghana Evidence Act, 1975 (NRCD 323)** and the **Kenyan Evidence Act 2009 (CAP 80).** This is to the effect that, where a petitioner alleges non-compliance with electoral laws, the petitioner must first prove that there has been such non-compliance by introducing evidence to that effect, thereafter, the petitioner must satisfy the court that the non-compliance has adversely affected the validity of the election results. It is after a petitioner has successfully surmounted the hurdles that the onus of the proof shifts to the respondent. Therefore, it is incumbent upon a petitioner to first and foremost establish firm and credible evidence of an Electoral Commission departure from the prescription of the law, that the burden shift and keep shifting until the court reach a determination.

Proof in civil trials in Ghana is provided under **Sections 10, 11, 12 and 14 of theEvidence Act of 1975 (NRCD 323).** These sections on the burden of proof, burden of persuasion and burden of producing evidence which also apply in election petitions provide as follows: **Section 10(1)** provides that, for the purpose of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal/court; **Subsection (2)**, the burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact by a preponderance of probabilities or by proof beyond reasonable doubt. **Section 11(1)** provides that for the purpose of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against the party. **Subsection (4)** provides that in other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence, a reasonable mind could conclude that the existence of the fact was more probable than its non-existence; **Section 12(1)** provides that except as otherwise provided by law, the burden of persuasion

requires proof by a preponderance of the possibilities. **Subsection (2)** provides that a preponderance of possibilities means the degree of certainty of belief in the mind of the tribunal/court of fact by which it is convinced that the evidence of a fact is more probable than its non-existence. **Section 14** provides that except as otherwise provided by law, unless and until it is shifted, a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting.

In **Amalgamated Bank Ltd V Fraga Oil Ghana Ltd & 5 Ors, June 14, 2012, Suit No H1/66/2011,** the Court of Appeal stated the position of the law, Per Douse J A as follows: "Our law is based on the adversary system in which he who alleges must prove what he alleges. This is reduced into legislative terms by **Section 11(1) and (4) of the Evidence Act 1975 (NRCD 323).** In **Hon Paul Evans AIDOO V Dr Kwaku Afriyie & the Electoral Commission of Ghana (2021)** where the petitioner asserted that he obtained 265 votes of the Asawinso Community '2' polling station and certain irregularities and/or non-compliance with C.I.127. The issue for determination was: (a) whether or not non-compliance with the lead down procedure in the collation of the parliamentary election results in the SefwiWiawso constituency so as to render the results null and void; (b) whether or not the petitioner was valid and duly elected as member of parliament if the parliamentary election results for Asawinso Community Centre '2' polling station are added to results from all the polling station in the SefwiWiawso Constituency; and whether or not the 2nd respondent complied with the provisions of the **Public Elections Regulations 2020 (C.I. 127)**.

The court held that the law is that he who asserts must prove. Accordingly, in law, the petitioner has the burden of persuasion on each of these assertions throughout, on the preponderance of the probabilities. Arising from this, the court also held that the 2nd respondent (Electoral Commission) to a large extent complied with the provision of C.I. 127 in the 7th December 2020 Parliamentary Election held in the SefwiWiawso Constituency. The few breaches of C.I. 127 that occurred in the instant case were not fundamental and the breaches did not cause substantial injustice to the petitioner so as to result in the nullification of the said Parliamentary Election Results. In fact, the said breaches have since been remedied. Accordingly, the petitioner's prayer for the nullification of the SefwiWiawso parliamentary election conducted and supervised by the Electoral Commission, due to non-compliance with the **Public Election Regulations 2020 (C.I. 127)** is declined. Also, from the totality of the evidence on record, the petitioner has failed, on the preponderance of the probabilities, to provide his assertion that he obtained 265 votes of the Asawinso Community Centre '2' polling station. Accordingly, the petitioner's prayer for declaration that it is the petitioner, rather than the 1st respondent that was duly elected as member of parliament for the SefwiWiawso Constituency effective the 6th day of January 2021 till the 5th day of January 2025, the tenure of the 8th parliament of the Republic of Ghana is declined. The petition fails in total and same is accordingly dismissed.

In **John Dramani Mahama V Electoral Commission & Nana Addo Dankwa Akufo-Addo (2020) SC** where the issue for determination was: (a) whether or not the petition discloses any reasonable cause of action; (b) whether or not based on data contained in the declaration of the 1st respondent and the 2nd respondent as president-elect, no candidate obtained more than 50% of the valid votes cast as required by **Article 63(3) of the 1992 Constitution;** (c) whether or not the 2nd respondent still met the **Article 63(3) of the 1992 Constitution** threshold by the exclusion or inclusion of the Techiman South Constituency presidential election results; (d) whether or not the declaration by the 1st respondent dated 9th December, 2020 of the result of the presidential election conducted on the 7th December, 2020 was in violation of **Article 63(3) of the 1992 Constitution** and (e) whether or not the alleged vote padding and other errors complained of by presidential election results of 2020.

The court held that: "we concluded this judgment by emphasizing that the petitioner did not demonstrate in any way how the alleged errors and unilateral corrections made by the

1st respondent affected the validity of the declaration made by the chairperson of the 1st respondent on the 9th December, 2020 as already stated in this judgment." The petitioner has not produced any evidence to rebut the presumption created by the **Publication of C.I. 135** for which his action must fail. We have therefore no reason to order for a re-run as prayed by the petitioner as in relief (f). We accordingly dismiss the petition as having no merit.

With respect to Kenya, **Section 83 of the Electoral Act 2011**, set the standard of proof for election petition in Kenya. The Section provides that:

> No election shall be declared to be void by reason of non-compliance with any law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.

The test to be applied in **Section 83 of the Election Act 2011** was a disjunctive one and not conjunctive one. Proof of either of the two limbs under Section 83 of the Election Act was sufficient to nullify an election, unlike under English Law which is conjunctive where the term and is use in similar provision in the **English Act.** The conjunctive term has also been used in the election Laws of various Common Wealth Countries such as Nigeria, Ghana, Zambia, Tanzania and Uganda.

In **Raila Odinga & Ors V Independent Electoral and Boundaries Commission & Ors (2017) EKLR**, the Supreme Court of Kenya explained the disjunctive application of **Section 83 of the Election Act** to be that an election can be nullified if it showed either that the elections were not conducted in accordance with the Constitution and the written law relating to the election or that the non-compliance affected the result of the election. In other words, a petitioner who proves that conduct of election in question substantially violated the principles laid down in the Constitution as well as other written law on election, will on that ground alone void an election. A petitioner will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in the Constitution as well as other written law on election, it was so fraught with irregularities or illegalities as to affect the result of the election.

In **Mohammed Mahamud Ali V Independent Electoral and Boundaries Commission (2019) KESC 58 (KLR)**, the appellant appealed to the Supreme Court to overturn a Court of Appeal decision that upheld the election of the 3rd respondent as the member of National Assembly for Changamwe Constituency in the 2017 election. Initially, the appellant filed a petition in the High Court, citing various electoral irregularities, including improper influence, issuance of multiple ballot papers and discrepancies in the number of vote cast. He also claimed that some ballot papers were not signed or stamped by presiding officers. Despite acknowledging some irregularities, the High Court ruled that they were not significant enough to annul the election, and the petition was dismissed with cost. Dissatisfied with the High Court decision on the matter; the appellant further appeal to the Court of Appeal and Supreme Court, arguing that the irregularities should have resulted in the election being nullified. The issue for determination was: (a) whether the electoral illegalities and irregularities proven by the appellant warranted the nullification of election results, (b) in an election petition, when could the burden of proof shift.

The Supreme Court held that, the proven irregularities were insufficient to nullify the election. The appellant proved a single instance of improper influence in which an IEBC official assisted a lady to vote in favour of the 3rd respondent, a single form that the presiding officer failed to countersign an the corrections that were made in it and one polling station where the number of the vote cast exceeded the number of the registered voters. The appellant failed to show how those discrepancies affected the results garnered by the 3rd respondent, Procedural or Administrative irregularities and other errors occasioned by human

imperfections were not enough by and of themselves, to nullify an election. Elections were not perfect and errors, so long as they were minimal, should not be considered to affect the will of the people. The Court also held that in an election petition, the burden of proof remained at all times with the appellant. An appellant was under an obligation to discharge the initial burden of proof before the respondents were invited to bear the evidential burden. Where a party alleged non-conformity with the electoral laws, the appellant had to not only prove that they had been non-compliance with the law, but such non-compliance affected the outcome of the elections. Upon discharging the burden, the respondent would bear the burden of proving the contrary. The evidential burden of proof remained with the appellant at all times and that was the legal position regarding the questions of burden of proof in election petitions.

Cases on election petitions in Africa and other Common Law jurisdiction give credence to the notion that in such cases where a petitioner seeks to annul an election or a declaration pertaining to an election he bears the legal burden of proof throughout **(Atiku Abubakar V Yar' Adua; Odinga V Uhuru Kenyatta, Opitz V Wrzesnewskji and Besigwe V Museveni Yoweri)**. In the Uganda case of **Besigwe V Museveni Yoweri & Electoral Commission of Uganda**, the Supreme Court held that the burden of proof in election petitions as in other civil cases is settled, it lies on the petitioner to prove his case to the satisfaction of the court. In **Atiku V Yar' Adua** case, the Supreme Court of Nigeria held that the burden of proof is on the petitioner to prove not only non-compliance with the Electoral Law, but also that the non-compliance affected the entire results of the election. The Supreme Court of Ghana adopted the same principle in the Presidential petition titled **Akufo-Addo, Bowmia&ObetsibiLamptcy V Mahama & Electoral Commission**. In **Ackah V Pergah Transport Ltd per Adinyira JSC (as he then was)**, the Supreme Court held that it is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fall.

From the evaluation of the discourse-cum-perusal of judicial authority, the major findings can be summarised to include: (a) the insistence of our Electoral Petition Tribunal/Court that proof of criminal allegations in election petition must be proved beyond reasonable doubt base on the provision of **Section 135(1) of Evidence Act, 2011,** is reading to the Section what is not there. This is because the provisions clearly qualified any proceedings where allegation of crime is made in civil and criminal proceedings. It excludes Election Petition which the court has held to be *sui generis*. The function of the court is to declare and not to give the law. (b) Adherence to technicalities over and above substantial justice appears to have made tribunals/courts shut their eyes at whatever injustices that may be occasioned by their strict adherence to the wordings of the statutes thereby making tribunals/courts judges to dished out rulings/judgements that do not correspond in most cases with the general aspirations and yearnings of the electorate. (c) The new legal regime of time limit for hearing and determination of election petition although appeared to have cured the mischief occasioned by long and protracted litigation has now become a conduit pipe for denial of fair hearing. (d) The principle that where a petitioner found his petition on non-compliance with relevant provision of the Electoral Act must prove not only that the non-compliance was substantial but also that it substantially affected the result of the election appears too rigid and pose serious obstacle to proof of election founded on non-compliance.

Finally, the study seek to make contribution to the existing literature on burden of proof in election petition cases by examining the specific things a petitioner in an election petitions ought to prove with respect to the ground or grounds upon which he relied on while filing his petition before an election petition tribunal. This is made more particularly relevant because for each of the grounds for questioning an election under **Section 134 of Electoral Act 2022** requires specific element or ingredient to be proved by the petitioner for him to

succeed. Comparative studies of burden of proof in election petitions across different jurisdiction help to identify best practices and inform the development of international standards for electoral integrity.

Conclusion

The paper interrogates the burden of proof in election petition in Nigeria and two other jurisdictions of Ghana and Kenya and concludes that the failure of the electoral process to instill confidence has practically converted the tribunals/court into another electoral ombudsman. Electoral jurisprudence is founded on the presumption of regularity of election results declared by the electoral umpire, which implies that the law takes for granted that a credible election has been conducted which is why election tribunals/courts insist upon that presumption. This tends to lend judicial validity to the view that challenging the outcome of an election through the legal process is a mere formality. The invidious consequence of undue judicial subsidization of the presumed winner of an election and the electoral umpire to the detriment of the petitioner is that legal justice can scarcely redress electoral injustice.

The way forward is that while post-election cases should continue to be the exclusive preserve of Election Tribunals/Courts, technical justice must not be allowed to defeat the essence of ensuring only people with genuine mandate get the return ticket as winner of election.

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