

THE PROOF OF CRIMINAL ALLEGATION IN ELECTION PETITIONS: A CRITIQUE OF THE TRADITIONAL APPROACH

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ABSTRACT

One of the evidential issues in election petitions is the requirement that criminal allegations be proved beyond a reasonable doubt. Ostensibly, the position of the Nigerian judiciary stems from the provisions of the Evidence Act, which relates to the standard of proof in civil or criminal cases. Using analytical research, with data sourced from a review of decided cases, the paper sought to interrogate the issues surrounding the application of the status quo - proof beyond a reasonable doubt to an election petition and the herculean evidential burden on a petitioner to prove. The paper critiques the traditional approach of applying the criminal standard of proof to election petitions and argues for a lower standard based on the preponderance of evidence to allow for judicious determination of election disputes filed at the election tribunals. In conclusion, the paper argued for re-evaluating the traditional approach to proving criminal allegations in election petitions. It advocated for reforms that enhance electoral justice, explicitly providing that the standard of proof applicable to an election petition is the preponderance of evidence.

Keywords: Burden of Proof, Criminal, Election Petition, Evidence, Standard of Proof.

1.0 Introduction

Election petition matters are peculiar because of their political undertone.¹ The domain and operation of election petitions are *sui generis*, that is, in a class of their own, though is a specie of civil proceeding.² However, election petitions cannot be submitted to the ordinary regular court for adjudication. The only procedure permissible for challenging the validity of election results is through an election petition.³ Therefore, an election petition is a formal complaint presented to a court or tribunal for enquiry into the validity or otherwise of a candidate's return.⁴ They are 'conducted under the peculiar provisions of relevant electoral laws and are not particularly related to the ordinary rights and obligations of the parties concerned.'⁵ It requires strict compliance with the provisions of the law in instituting, maintaining and defending a

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¹ *INEC v Uboh* (2000 - 2002) LREC 3 CA.

² *Anyanwu v PDP* [2020] 3 NWLR (Pt. 1710) 134, 168-169; *Nyesom v Peterside* [2016] 5 SCM 81, 109.

³ *Ayantola v AC* (2008) 3 LREC 718 CA.

⁴ *ANPP v INEC* [2004] 7 NWLR (Pt. 871) 16, 55; *Orubu v NEC* [1988] 5 NWLR (Pt.94) 323.

⁵ *ANPP v INEC* [2010] 13 NWLR (Pt. 1212) 549, 604.

petition. Failure to comply with the law, unlike in ordinary civil proceedings, which may be regarded as mere irregularity, could result in fatal consequences.⁶

Meeting the legal threshold of evidential burden in election petitions is another important aspect of the electoral dispute resolution process. The manner in which the burden of proof is applied and the standard of proof can significantly impact election petition outcomes. The evidential burden and level of proof in election petitions vary by jurisdiction, with petitioners frequently encountering considerable hurdles in meeting the high thresholds set by the courts for criminal claims.⁷ In Nigeria, the petitioner bears the burden of proof in election petitions, which require detailed and factual evidence to support their claims, proving that the election was tainted by irregularities, electoral law violations, or the winning candidate's ineligibility. The law requires petitioners to not only plead material facts but also lead evidence supporting their claims. This sums up the evidential burden on election petitioners.

The necessity for proof to support election petitions is critical to their success. The petitioner is responsible for presenting evidence on issues such as substantial non-compliance, corrupt practices, malpractices, or other grounds specified in the Electoral Act. Failure to adduce evidence can result in the dismissal of the petition. While the issue of who bears the burden of evidence is uncontroversial, the standard of proof is the subject of considerable debate. Based on analysing presidential petition cases, Hatchard identifies three approaches: applying the criminal standard of proof, the petitioner's obligation to establish the case by a preponderance of the evidence, or using a mixed or hybrid model - an intermediate standard.⁸

The dispute on the standard of proof in election petitions in Nigeria centres on two primary approaches - the necessity of establishing proof beyond reasonable doubt and the consideration of the balance of probabilities.⁹ The crux of this dispute or disagreement lies in whether the criterion of proof beyond reasonable doubt should apply to election petitions. In criminal prosecutions, the standard of proof beyond reasonable doubt is commonly employed. This places the responsibility on the prosecution to establish the guilt of the accused with a high level

⁶ *Akinloye v Araoye* (2009) 27 WRN 167, 176; KP Ikoroha, *Modern Nigerian Election Petitions and Appeals Law* (Kings Bench Division Publishers Ltd, 2021) 1-5.

⁷ AO Oluwadayisi and E Olowononi, 'Nigeria's Presidential Election Petitions and the Burden of Proof: A Review and Critique of *Atiku v. Buhari* (2019).' [2021] Vol. 1(1) IJCLLR, 17. 18-19.

⁸ J Hatchard, 'Election Petitions and the Standard of Proof.' [2015] 27 DLJ, 291, 294-297.

⁹ ST Hon, *Law of Evidence in Nigeria* (3rd edn., Pearl Publishers International Ltd, Port Harcourt, 2019) 295-345; AM Adebayo, *Evidence Act 2001: Annotated with Cases* (3rd edn, Princeton Publishing Company, Ikaja, 2012) 267-280.

of certainty.¹⁰ Conversely, the balance of probability is frequently employed in civil disputes, wherein the responsibility lies with the party asserting the claim to demonstrate its higher likelihood than other possibilities.

Generally, an Election Petition takes the form of a civil proceeding such that the standard of proof is on the balance of probability. But where criminal allegations are made, the standard of proof takes the tradition obtained in criminal trials, which is proof beyond reasonable doubt. Thus, the court has taken this traditional approach by strictly applying the criminal standard of proof once criminal allegations are raised in an election petition. In fact, in *Ikpeazu v Otti*,¹¹ it was the position of the Supreme Court that the law had not changed, and where allegations contained in a petition are criminal, the standard of proof is beyond a reasonable doubt. This position is not unique to Nigeria. In some common law jurisdictions, a higher standard is needed to prove fraud in civil matters, for example, in cases of lifting the corporate veil.

However, the traditional approach, as seen in a review of decided cases, especially those of the Supreme Court, imposes a greater evidential burden on a petitioner who is required to prove the allegations beyond reasonable doubt. Additionally, there is no legal basis for the court to continue with the approach that criminal allegations in the election petition must be proved as obtainable in other criminal proceedings. Therefore, this paper intends to critically examine the standard of proof where an allegation of crime is made in an election petition by exhuming the corpus of jurisprudential analysis and case precedents to suggest a departure from the traditional approach being criticised. The question the power wants to address further in the paper is: should the general principle of proof of crimes under the Evidence Act not apply to proof of electoral crimes?

2.0 Conceptual Framework - Legal Principles Governing the Standard of Proof

In legal proceedings in Nigeria, the standard of proof is a flexible concept that varies depending on the circumstances of each case. The courts have the discretion to adapt the standard to fit the specific facts and issues, ensuring that the ultimate decision is fair and just as governed by the Evidence Act 2011. Generally, in civil cases, the burden of proof “lies on the petitioner who would fail if no evidence at all were given on either side.”¹² Notably, in election petitions, the onus of proof lies on the Plaintiff (Petitioner) to establish the claims by leading credible,

¹⁰ JA Agaba, *Practical Approach to Criminal Litigation in Nigeria*, (3rd edn, Bloom Legal Temple, Abuja, 2015) 739-750

¹¹ (2016) LPELR-40055(SC) 16-17.

¹² Evidence Act, s132; *Mark v Chukwuemeka* (2015) LPELR-40708(CA) 37-38.

admissible and sufficient evidence and satisfy the tribunal (court) that based on the evidence and the material facts supplied, he is entitled to the reliefs sought. In other words, a petitioner must provide credible and admissible evidence to prove the facts upon which he bases his reliefs.¹³ The respondent then has the opportunity to rebut this evidence. This standard is lower than the criminal standard of proof beyond a reasonable doubt but higher than mere speculation or conjecture.

The other standard is proof beyond reasonable doubt regarding all criminal proceedings.¹⁴ The rationale for judicial adoption of the proof ‘beyond reasonable doubt’ in criminal proceedings is to “safeguard the liberty and freedom of any person standing trial for the commission of an offence.”¹⁵ This is predicated on the fact that an accused is presumed innocent and cannot be convicted until proven guilty.¹⁶ This means that ultimately, at the end of the proceeding, the State must prove the accused person's guilt beyond a reasonable doubt.

3.0 Application of Criminal Standard of Proof to Election Petition

The Nigerian legal system has long established the principle of reasonable doubt in criminal allegations.¹⁷ It provides that the burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.¹⁸ Although applying this evidential burden to ordinary civil cases seems understandable, its application to the election cases¹⁹ imposes a herculean evidential burden on a Petitioner.²⁰ From all intent and purposes, an election petition is neither civil nor criminal but is *sui generis*. They are not ordinary civil cases. This was explicitly stated by the Supreme Court in *Abubakar v Yar'adua*²¹ when it held that it is no longer a moot point that an

¹³ *Buhari v INEC* (2008) LPELR-814(SC) 48.

¹⁴ JA Agaba, *Practical Approach to Criminal Litigation in Nigeria*, (3rd edn, Bloom Legal Temple, Abuja, 2015) 739-750.

¹⁵ JU Dahiru, ‘A Rethink on the Standard of Proving Criminal Allegations in Election Petitions under Nigerian Law.’ 29 JLPJ [2014] Vol. 29, 109.

¹⁶ 1999 Constitution, s36(5)

¹⁷ Evidence Act, s135(1); M Odugbemi, ‘The Need to Reconsider Standard of Proof of Criminal allegations in Election Petition’ <<https://www.thecable.ng/the-need-to-reconsider-standard-of-proof-of-criminal-allegations-in-election-petition>> accessed 26 September 2022.

¹⁸ Evidence Act, s135(2).

¹⁹ When an allegation of criminal activity is raised in an election petition, the standard of proof necessary is proving the accusation beyond a reasonable doubt - *Ararume v INEC* (2019) LPELR-49572(CA) 62-63.

²⁰ T Yebisi, NO Odiaka and J Omidoyin, ‘The Need and Utility of Electoral Offences Tribunal in Nigeria’ paper presented at the 53rd Nigeria Association of Law Teachers (NALT) Annual Conference, held at Bayero University, Kano, February 2022. 6.

²¹ (2008) LPELR-51(SC) 22; *Udom v Umana* (No. 1) [2016] 12 NWLR (Pt. 1526) 179; *PDP v Ezeonwuka* [2018] 3 NWLR (Pt. 1606) 187.

election petition is *sui generis*, that is to say, it is in a class by itself, governed by "its own unique constitutional and statutory provisions." In *AD v Fayose*,²² the Court of Appeal was emphatic that the constitutional immunity clause only applies to ordinary civil and criminal proceedings and not election-related matters, which is a special proceeding of its kind. Therefore, there is no basis in law for using the criminal standard of proof in the context of an election petition. As Dahiru submitted, that section relates only to civil or criminal and not 'in any proceedings where a criminal allegation is made which could include *sui generis* proceedings like election petitions which the courts have always maintained to be a proceeding that is neither civil nor criminal.'²³

The rules of interpretation are clearly defined: when the language employed in a statute is direct, unequivocal, and lacking in ambiguity, it is imperative to ascribe to the terms their customary and straightforward connotation.²⁴ This approach serves to avoid construing laws in manners that deviate from the original intentions of the lawmakers. Moreover, the '*expressio unius est exclusio alterius*' principle posits that explicitly mentioning one thing inherently excludes every other element not expressly expressed.²⁵ Section 135(1) of the Evidence Act only mentioned civil or criminal proceedings and not proceedings that are *sui generis*. That is the extent of this Evidence Act stipulation. The fact that an electoral petition charges a crime does not specifically state or imply that the evidentiary standard of proof changes to proof beyond a reasonable doubt.

This paper does not dispute the legal requirement of establishing proof beyond reasonable doubt, a standard that applies exclusively to criminal trials. In criminal trials, proof beyond reasonable doubt should always be the standard of evidence. However, the specific procedure for electoral justice outlined in the 1999 Constitution and Electoral Act is distinct from what is available in regular/usual court procedures. It is distinguishable from criminal law and procedures because an election petition mainly challenges an election process and outcome. At this point, a fundamental issue that needs clarification is whether a petitioner can successfully prove allegations of electoral malpractices that complicate criminality. Election petitions do not charge respondents with violating electoral laws. It is a civil matter²⁶ where crime is the main

²² (2004) LPELR-10794(CA), 14-15.

²³ JU Dahiru, (n 15) 115.

²⁴ *EM-Intl Systems (Nig) Ltd v FCMB Ltd* (2019) LPELR-50896(CA) 8-10.

²⁵ *Mazeli v Mazeli* (2012) LPELR-19945(CA) 19; *Gov. of Imo State v Delu Ent (Nig) Ltd* (2021) LPELR-54724(CA) 29-30

²⁶ Election petition proceedings are generally regarded as civil proceedings. *Ike v Ofokaja* [1992] 9 NWLR (Pt. 263) 43, 63.

issue at the state; therefore, it is not a criminal trial per se.²⁷ The respondents are not standing trial under specific criminal law, which requires proving the ingredients or elements²⁸ of the offences beyond a reasonable doubt to secure a conviction.²⁹ Therefore, it remains to be seen how an election tribunal can conclude that an offence has been committed when the respondents are not standing trial.³⁰ In *Danbaba v Tambuwal*, Oho (JCA) questioned the propriety or otherwise of strictly adhering to the standard of proof by asking that since Election Petition Proceedings are said to be sui generis (neither criminal nor civil proceedings), within the strict ambit of Section 135(1) of the Evidence Act, if it is still appropriate to apply the highest form of proof to Election Petition Proceedings?³¹

Proof beyond a reasonable doubt for a criminal allegation, according to Kuteyi and Ogunfolu,³² is not a set standard in civil trials; rather, it depends on the particular facts and circumstances of each case. They noted, relying on the decision of *ASESA v Ekwenem*,³³ that if the allegation of crime is not the main issue but just a mere incidental to the suit, the requirement of establishing proof beyond reasonable doubt may be waived. Undoubtedly, most criminal complaints in election petitions are ancillary or incidental to the fundamental claims that elections were marred or tainted by irregularities and violations of the Electoral Act and necessarily did not involve a consideration or determination of the central claims. An ancillary claim refers to a claim that is secondary or subsidiary in a legal proceeding, meaning it is not the main dispute but rather supports the judgement or outcome of the primary action.³⁴ On this score, in *Nwobodo v Onoh*,³⁵ Obasaki (JSC) declared that when a party's involvement in a

²⁷ The petitioner argues that the violation of a provision in the Electoral Act has occurred rather than any of the respondents being accused of infringing criminal or penal laws. The matter pertains exclusively to an electoral concern, necessitating a preponderance of evidence standard to determine the validity of the petitioner's claim.

²⁸ *Ikechukwu v A.G., Imo State* (2014) LPELR-23776(CA) 36-37.

²⁹ To obtain a conviction, it is vital to establish and provide evidence for each element of the offence in question. Suppose the prosecution cannot prove the existence of any of the elements required for the offence in question. In that case, the accused can be acquitted by either the trial or appellate court: *Agboola v State* [2013] 11 NWLR (Pt 1366) 619, 641. The legal system recognises various methods of establishing the elements of a crime, including eyewitness testimony, voluntary confessions, and circumstantial evidence.

³⁰ An election petition aims to prove that the purported election and result were invalid. *Ezeke v Dede* [1999] 5 NWLR (Pt. 601) 80, 91-92.

³¹ (2019) LPELR-48814(CA) 48-62.

³² OS Kuteyi and AO Ogunfolu, 'Burden of Proof' in AL Akintola and AA Adedeji, *Nigerian Law of Evidence* (University Press Pls, Ibadan, 2006) 261.

³³ [2001] FWLR (Pt. 51) 2024.

³⁴ *Nabore Properties Ltd v Peace-Cover (Nig) Ltd* (2014) LPELR-22586(CA) 29.

³⁵ 10 WRN [2004] 27, 131-132.

criminal act is not directly in issue in the process, the standard of proof necessary for the petitioner to prevail in such proceedings is the balance of probabilities.

4.0 Challenges of the Traditional Approach

Election petitions are *sui generis*; they are between civil and criminal proceedings. The best standard of proof would probably be one between beyond reasonable doubt and balance of probabilities. But that has proved to be a problem in practice, where courts have gone for the ‘in-between’ standard of proof. Determination of election petitions, as established in *Uchieze v Ezenagu*³⁶ is based on positive and credible evidence that led to the election being fundamentally in breach of the law. Thus, petitioners in election petitions are obligated to provide substantial evidence in support of their claims by calling witnesses and tender in evidence all the necessary documents used at the election.³⁷ There is no controversy about the onus of proof being on the person who alleges it through the presentation of credible evidence. The law is trite and instructive to the effect that he who asserts must prove.³⁸ Potential sources of this evidence are witness testimony, documentary evidence, and expert reports analysing electoral data.³⁹

Testimony from witnesses in election petitions is essential for establishing the factual basis of the case in court. Witnesses offer testimony or evidence based on their knowledge or experiences regarding the election under scrutiny.⁴⁰ Witnesses in election petitions comprise party agents and voters,⁴¹ security officers,⁴² experts,⁴³ and other individuals possessing relevant information regarding the election procedure or irregularities. They are willing or summoned to provide testimony in court to support the petitioner's claim. These individuals

³⁶ [2005] 16 NWLR (Pt. 952) 543, 571.

³⁷ *Obun v Ebu* [2006] All FWLR (Pt. 327) 419, 442; *Iniama v Akpabio* [2008] 17 NWLR (Pt.1116) 225, 335.

³⁸ *Purification Technique (Nig.) Ltd v Jubril* [2012] 18 NWLR (Pt. 1331) 109, 146.

³⁹ TA Aguda, *The Law of Evidence* (4th edn, Spectrum Books, Ibadan, 1999) 1; AL Akintola, ‘Judicial Evidence’ in AL Akintola and AA Adedeji, *Nigerian Law of Evidence* (University Press Pls, Ibadan, 2006) 1-4; C Osisioma, ‘Determination of the Adequacy of Evidence in Litigation: Quantity or Quality?’ [2014] 2(1) JCINL, 146; ST Hon, (n 9) 1-5; *Lawal v UBN Plc* [1995] 2 NWLR (Pt. 378) 407, 422.

⁴⁰ <<https://www.law.cornell.edu/wex/witness>> accessed 10 May 2024.

⁴¹ *Akinlabi v Joshua* (2015) LPELR-41850(CA) 21-24, it was held that in election petition, the acceptable evidence is that from polling agents or persons (voters) physically present at such polling units. Therefore, a voter or party agents are vital witness. A vital witness is a witness who knows something significant or has first-hand information or direct dealing with a matter. *Ochiba v State* (2011) LPELR-8245(SC) 37.

⁴² *Nnadi v Ezike* [1999] 10 NWLR (Pt. 622) 228, 238 on security agents tendering results given to them at polling units.

⁴³ Expert analyses of election materials may be provided in expert reports to substantiate the petitioner's assertions. A Basiru ‘Expert Evidence in Electoral Litigation in Nigeria: A Critical Appraisal’ [2017] 10 NBJ 11; ST Hon, (n 9) 618.

may be requested to furnish details regarding particular occurrences, anomalies, or breaches of electoral legislation during the election, as outlined in their sworn written statements⁴⁴ filed with the petition. Furthermore, they may undergo cross-examination from the opposing party's legal team to assess the credibility and veracity of their evidence.⁴⁵

Witness testimony in election petition proceedings in Nigeria encounters multiple challenges. A major concern arises from the stringent legal obligation that every allegation must be proved polling unit by polling unit. Petitioners are responsible for providing relevant electoral documents and summoning witnesses who observed the violations at the polling units to testify within the limited trial period.⁴⁶ The requirement presents a challenging obstacle for petitioners, as seen by the dismissal of multiple election petition cases due to insufficient evidence.⁴⁷ Moreover, the limited duration of 21 days for petitioners to collect evidence and file the petition adds further complexity to the procedure, making it challenging to satisfy the rigorous burden of proof required by the courts. In addition, courts tend to dismiss witness testimonies not filed within the 21-day timeframe along with the petition.⁴⁸ The rigorous adherence to procedural standards has resulted in the disqualification of witnesses who failed to present their sworn witness statements to the court when filing the petition, which has posed further challenges for petitioners in properly presenting their case. These challenges underscore the intricate nature and legal obstacles encountered by plaintiffs while presenting witness testimony in election petition proceedings in Nigeria, thereby influencing the resolution of these disputes.

Other fervent discussions focus attention on hearsay evidence, tendering of documents, and computer-generated evidence that tend to challenge electoral litigation in Nigeria. The issue of hearsay evidence is important, as courts in Nigeria tend to treat testimonies other than those from agents at the polling units as hearsay. The Evidence Act prohibits hearsay evidence except in specific circumstances. However, in practice, proving the exceptions can be complex, leading to challenges in admitting such evidence. This emphasises the need for direct evidence from

⁴⁴ RP Olatubora, *Election Litigation in Nigeria* (2nd edn., Aderemi Olatubora & Co., Abuja/Akure, 2022) 292-304

⁴⁵ ST Hon, (n 9), 384

⁴⁶ R Tarfa, 'Key Issues and Challenges of Electoral Tribunals in Nigeria.' <<http://www.rickeytarfa.com/wp-content/uploads/2015/02/key-issues-and-challenges-of-electoral-tribunals-in-nigeria.pdf>> accessed 05 June 2022.

⁴⁷ K Leke and T Alatise, 'Burden of Proof in Election Petition in Nigeria and the Implication of Section 137 of the Electoral Act, 2022.' [2023] 14 (2) NAUJILJ, 26.

⁴⁸ RP Olatubora, (n 44) 304. In the 2023 presidential election petition, the court rejected 10 out of 13 witnesses presented by Peter Obi because their witness statements were not filed with the petition: *Obi v INEC* (2023) LPELR-61532(SC).

witnesses in the specific polling units involved.⁴⁹ Additionally, the proper tendering of documents requires document makers to testify and be cross-examined to ensure authenticity and reliability.⁵⁰ Moreover, tendering documents require a witness to provide an explanation and relation to the specific case area for which the document was tendered. This is to prevent the dumping.⁵¹ Moreover, issues may arise regarding the admissibility of electoral documents that are not correctly certified.⁵²

Also, the admissibility of computer-generated evidence, such as accreditation data, can be contentious,⁵³ as the courts require proper certification and adherence to legal procedures.⁵⁴ According to Basiru and Aso,⁵⁵ the insistence of the Supreme Court in *Oyetola v INEC*⁵⁶ that the Bimodal Voter Accreditation System (BVAS) report is not enough to prove overvoting has implications for computer-generated evidence. This, to them, formed the precedent upon which the court determined the 2023 presidential petition in *Atiku v INEC*⁵⁷ and other decisions.⁵⁸ It also shows that the judiciary, especially the Supreme Court, still relies heavily on the traditional approach of proving overvoting. It requires a voter register, BVAS machines, result sheets and a witness to demonstrate over-voting.⁵⁹ These challenges highlight the complexity and importance of evidence presentation in electoral disputes in Nigeria.

Aside from common issues of hearsay evidence and computer-generated evidence, another major issue is expert evidence, a crucial component in election petition cases. Expert evidence validates allegations and provides specific knowledge to bolster legal arguments. Expert witnesses can significantly strengthen a petitioner's case by understanding intricate technical

⁴⁹ KP Ikoroha, (n 6) 228.

⁵⁰ Evidence Act, s83(1), 254-256.

⁵¹ *Alapa v INEC* (2015) LPELR-41787(CA) 43-46.

⁵² *Azudibia v Ogunewe* (2003) LPELR-7226(CA) 15-16.

⁵³ KP Ikoroha, (n 6) 244-245; FO Orbih, 'New Trends in the Law of Evidence in Nigeria: Front-loading and Computer Generated Documents.' [2018] 4 SPLJ, 1-22; E Iwegbulam, 'Admissibility of Computer Generated Evidence in Nigeria: Conceptual Difficulties and Legal Implications.' [2021] 11(1) NBA, 28-44.

⁵⁴ *Kubor v Dickson* [2013] 4 NWLR (Pt. 1345) 534; AO Ajileye, *Electronic Evidence* (Revised Edn., Samok Printers, Ilorin, 2019); JO Okpara and Others, 'Admissibility of Electronic Evidence in Criminal Trials in Nigeria and the Challenges of New Crimes.' [2023] 1 AGORA-IJJS, 28.

⁵⁵ SA Basiru and OA Aso, (n Technology and Nigeria's Electoral Act 2022: The Gap Between Expectation and Reality.' [2024] 2(1) LBJ, 1, 22-24.

⁵⁶ [2023] 11 NWLR (Pt. 1894) 125, 168, 170, 171, 175.

⁵⁷ (2023) LPELR-61556(SC)

⁵⁸ Such as *Ombugadu v Sule* (2024) LPELR-61642(SC); *Yusuf v INEC* (2023) LPELR-61470(CA); *Oghayerio v Sunday* (2023) LPELR-61574(CA); *Nnachi v INEC* (2023) LPELR-61283(CA); *Danbaba v INEC* (2023) LPELR-61488(CA); *Olatunde v INEC* (2023) LPELR-61409(CA); *Nana v INEC* (2023) LPELR-61512(CA); *Babayo v INEC* (2023) LPELR-61521(CA) and *Nurudeen v Oyetola* (2023) LPELR-60093(CA).

⁵⁹ SA Basiru and OA Aso, (n 357) LBJ, 1.

matters related to election procedures, electoral legislation, and adherence to standards.⁶⁰ By introducing authoritative proof, they increase the likelihood of substantiating claims and influencing the outcome of the case. Udoh's critique of the judiciary's treatment of expert evidence is that it is an imposition of stringent requirements of qualifications and quality of testimony, and the limitations exceed the legislative intent. He further notes that this approach "may discourage experts from offering their insights, potentially limiting access to valuable expertise."⁶¹ However, when one considers that one David Njorga, who has no professional certification in information and communication technology (ICT), was presented as an expert in a presidential petition, will reveal the court's insistence that the expert witness is qualified and their opinion is relevant, reliable, and based on sound methodology.⁶²

5.0 Evidentiary Inadequacy of the Applicability of Criminal Standard of Proof to Election Petition

The 1999 Constitution established the National and State Houses of Assembly Election Tribunals (with original jurisdiction to hear and determine petitions as to whether any person has been validly elected as a member of the National Assembly or the House of Assembly of a State), Governorship Election Tribunal (original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor of a State) and the Court of Appeal sitting as the Presidential Election Tribunal (any person has been validity elected to the office of President or Vice-President under this Constitution) to the exclusion of any court or tribunal.⁶³

It must be noted that EPT is not vested with criminal jurisdiction. So, an election petition cannot form the basis for the commencement of criminal proceedings. It is even beyond the jurisdictional competence of EPT to try any offence.⁶⁴ A tribunal can only, at best, advise INEC

⁶⁰ T Ojo, *Essentials of Electoral Laws, Practice and Procedure in Nigeria* (Bar and Bench Publishers, Abuja, 2021) 370-374.

⁶¹ E Udoh, 'Enhancing the Value of Expert Evidence in Nigerian Electoral Matters: Striking a Balance for Fair and Effective Resolution.' [2003] <<https://www.linkedin.com/pulse/enhancing-value-expert-evidence-nigerian-electoral-matters-emem-udoh>> accessed 14 May 2023

⁶² <https://thenationonline.net/breaking-court-strikes-out-atikus-kenyan-ict-experts-evidence-on-server/> accessed 14 May 2024.

⁶³ 1999 Constitution, ss285(1)-(2) and 239(1); *Modibbo v Usman* [2020] 3 NWLR 470 at 517, paras. F-H. Furthermore, the Supreme Court in *Dankwambo v Abubakar* [2015] 9 SCM 1 at 22, paras. E-F held that the jurisdiction of Election Tribunal and the Court of Appeal in election matters is derived from the Constitution. See also *Obi v INEC* (2007) LPELR-24347(SC) at 42-43, paras A-A on constitutional provisions establishing and conferring powers on election petition tribunals.

⁶⁴ *Wambai v Donatus* (2014) LPELR-23303(SC) 38-39; *Opia v INEC* (2014) LPELR-22185(SC) 30. In *Agomuo v Ogwuegbe* (1999) 4 NWLR (Pt. 599) 405, 412, the Court of Appeal determined that the tribunal

to prosecute someone for an offence that was mentioned in an electoral petition.⁶⁵ Since the commission of a crime is not the primary issue, the mention of criminal allegations, such as falsification of results, vote buying, bribery of electoral officials and security personnel, thuggery and intimidation of voters, etc., serves primarily to demonstrate that the election was contaminated or vitiated by corrupt practises. It also cannot automatically change an election petition to a criminal proceeding.

Furthermore, in many instances, as held in *Aregbesola v Oyinlola*,⁶⁶ the allegations of crimes are severable, and the purely civil averments can sustain the pleadings in the petition. Since the EPTs have no jurisdiction to entertain the criminal proceedings, they cannot adjudicate over such claims.⁶⁷ The court or tribunal's jurisdiction is limited to deciding issues arising from the pleadings.⁶⁸ The purpose of EPTs is to determine whether an election was correctly conducted to determine the legitimate winner. When the burden of proof for criminal allegations is universally applied, the intended distinctiveness of sui generis nature is diminished. This is unquestionably an incorrect interpretation of the fundamental nature of the Electoral Act, which primarily specifies the grounds for challenging an election rather than determining the culpability or guilt of any party in the petition.

Sadly, this is one of the technicalities or mischiefs erroneously employed by respondents to petitions over the years to scuttle and defeat the object of election petitions. Usually, petitions that allege violations of electoral laws and are appropriately supported by evidence are rejected on the grounds of establishing criminal claims beyond a reasonable doubt. In many instances, documentary evidence that may adequately support and sustain pleadings in a petition is sometimes viewed as being just dumped on the tribunal and is therefore dismissed.⁶⁹ Dumping has already been addressed by the Electoral Act, which provided that originals or CTCs that disclose non-compliance are enough to prove the allegation without the need for oral testimony

does not have the authority to hear criminal cases. As a result, the court overturned the wrongful criminal charges against some of the respondents.

⁶⁵ Electoral Act, s144.

⁶⁶ (2010) LPELR-3805(CA); ST Hon, *Law of Evidence in Nigeria* (n 9) 331

⁶⁷ I Oraegbunam 'Election Petitions in Nigeria: Questioning the Standards of Proofs of Criminal Allegations' in W Egbewole and AO Oluwadayisi (eds) *Electoral Process: Law and Justice* (AkiNik Publications, 2020) 261

⁶⁸ *Dan A. D. Petroleum & Gas Ltd v Jigawa State Govt* (2022) LPELR-57334(CA) 38-39; *ACB Ltd v Elosiuba* (1994) LPELR-22967(CA) 20.

⁶⁹ The holding for a petitioner to present credible witnesses and adequately connect the tendered documents to the relevant aspects of their case during a public court hearing. *Omisore v Aregbesola* [2015] 15 NWLR (Pt. 1482) 205, 280; *Alapa v INEC* (2015) LPELR-41787(CA) 43-46; *FBN Plc v Yegwa* [2023] 4 NWLR (Pt. 1874) 323, 337.

from the party alleging non-compliance.⁷⁰ This standard of proof also placed additional burdens on the petitioner, who had to provide proof through an eyewitness account, circumstantial evidence, or a confession from the accused (respondent)⁷¹ that the respondent engaged in the malpractices or corrupt practices (the criminal charges) themselves or authorised others to do so with their knowledge and permission.⁷²

To Eso (JSC), the purpose of the standard of proof beyond reasonable doubt is to ensure that a person is not found guilty of a criminal offence unless there is evidence that leaves no reasonable doubt about their guilt. The aim is not to absolve a respondent of civil liability or to restrict the civil rights of a petitioner or plaintiff.⁷³ Sagay's argument questioning the standard of proof for criminal allegations such as election fraud, rigging, and falsifying results should not be beyond reasonable doubt due to its potential to undermine the principles of law and justice.⁷⁴ The emphasis on establishing the standard in a criminal case, rather than determining the winner of an election, places an onerous burden on those filing petitions.⁷⁵

6.0 Conclusion and Recommendations

In a democratic society, the integrity of electoral processes is of the utmost importance, and allegations of electoral fraud and other illegal activities are frequently at the core of election petitions. This article provided a thorough analysis of the traditional approach employed to establish criminal allegations in election petitions, emphasising its constraints and the consequences it has on the fairness of legal proceedings and the integrity of electoral processes. The traditional approach requires a high standard of proof beyond reasonable doubt, which makes it very difficult for petitioners to succeed. The courts have extended the criminal standard of proof to cover various allegations. The paper argued that this approach is flawed, as election petitions are *sui generis* and should not be subject to the same criminal standard of proof.

The paper examined the jurisprudence of this standard, its application in different legal systems, and the inherent difficulties petitioners encounter in achieving this rigorous burden of proof.

⁷⁰ Electoral Act, s137. It provides: It shall not be necessary for a party who alleges non-compliance with the conduct of elections to call oral evidence if originals or certified true copies manifestly disclose the non-compliance. In *Atiku v INEC* (2023) LPELR-61556(SC) 59, it was held that a petition must demonstrate in evidence, the originals or CTC of documents they want the Court to rely on for the section to avail them.

⁷¹ *Ojo v State* [2021] 3 NWLR (Pt. 1764) 435, 451; *Ibrahim v State* [2014] 3 NWLR (Pt. 1394) 305, 339.

⁷² *Kalu v Uzor* (2005) LPELR-7476(CA) 25-26; *Omisore v Aregbesola* (2015) LPELR-24803(SC) 175-176.

⁷³ *Nwobodo v Onoh* [2004] 10 WRN 27, 147.

⁷⁴ IE Sagay, *The Enforcement of Electoral Laws and Case Law of 2007 Election Petition Judgments* (Spectrum Books Ltd., 2012) 252

⁷⁵ *Ibid*, 250. See also: *Nwobodo v Onoh* [2004] 10 WRN 27, 147.

Through carefully examining judicial precedents, the paper identified the primary factors that weaken the efficiency of the traditional approach. These factors include the challenges associated with collecting evidence, witness testimony and the strict timelines for filing petitions. In addition, the paper assessed several methods for reforms, such as reducing the level of proof required.

To address the burden and difficulties on a petitioner, any facts bordering on crimes should be accorded a specialised procedure different from what is obtainable in regular civil or criminal proceedings. Therefore, it is suggested that the Electoral Act be amended to provide that proof of any election petition expressly should be by a balance of probability on clear and convincing evidence. A similar provision has already dispensed with calling oral evidence if originals or CTCs manifestly disclose non-compliance, which addresses the issue of dumping, another technical loophole employed to deliberately and maliciously frustrate and scuttle election petitions. Furthermore, the Supreme Court should depart from the binding precedent of proof beyond reasonable doubt for reasons earlier articulated to do substantial justice by applying the balance of probability. This would better serve the ends of justice in the electoral process.

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