

IN THE AREA COUNCIL ELECTION APPEAL TRIBUNAL
OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT ABUJA

HON. JUSTICE S.B. BELGORE - CHAIRMAN
HON. JUSTICE Y. HALILU - MEMBER I
HON. JUSTICE J.O. ONWUEGBUZIE - MEMBER II

APPEAL NO: FCT/ACEAT/AP/28/2022
PETITION NO: FCT/ACET/EP/15/2022

BETWEEN:

1. SHUAIBU MATO
2. ALL PROGRESSIVE CONGRESS (APC) } **APPELLANTS**

AND

1. ISAH M. BABA
2. PEOPLE'S DEMOCRATIC PARTY (PDP) } **RESPONDENTS**
3. INDEPENDENT NATIONAL ELECTORAL
ELECTORAL COMMISSION (INEC) }

JUDGMENT

The 3rd Respondent, Independent National Electoral Commission (INEC) on the 12th February, 2022 conducted Councillorship Election for Kabi Ward of Kuje Area Council of the Federal Capital Territory, Abuja. At the said Election, the 1st Appellant (Shuaibu Mato) was the candidate of the 2nd Appellant (All Progressive Congress), whereas the 1st Respondent was the candidate of the 2nd Respondent (Peoples Democratic Party). At the end of the said Election, the 3rd Respondent declared the 1st Respondent, candidate of the 2nd Respondent Winner of the said Election.

The 1st and 2nd Appellants dissatisfied with the result of the Election, filed a Petition on the 4th day of March, 2022 before the Trial Tribunal. The 1st and

2nd Respondents filed a joint Reply. The 3rd Respondent filed a Reply on the 12th April, 2022. The said Petition can be found at pages 1 – 43 of the Records of Appeal.

From the result of the Councillorship Election for Kabi Ward as declared by the 3rd Respondent, the following scores were allegedly scored at the Election:

- | | | |
|-----------|-------------------|-------------------|
| 1. | <i>ADC</i> | <i>1</i> |
| 2. | <i>APC</i> | <i>261</i> |
| 3. | <i>PDP</i> | <i>444</i> |

By ordinary mathematical calculation, the difference between votes scored by the Appellants and that of the 1st and 2nd Respondents according to declaration made by the 3rd Respondent is 183.

It is on the basis of the said result that the 3rd Respondent returned the 1st Respondent as the winner of the Election.

The Trial Tribunal on the 25th day of August, 2022 delivered its Judgment at pages 31 to 332 of the Records of Appeal. In the said Judgment, the Trial Tribunal dismissed the Petition of the Appellants.

Dissatisfied with the outcome, Appellant further filed Notice of Appeal against the Judgment of the Trial Tribunal. The said Notice of Appeal with grounds is at pages 333 to 339 of the Records of Appeal.

Appellants filed their brief of argument dated the 6th October, 2022 on the 8th October, 2022. In the said brief of argument, the following issues were distilled for determination;

- 1. Whether the Trial Tribunal was right when it admitted and placed reliance on Exhibits “D7”, “D9”, “D10”, “D11”, “D12” and “D13” which were not frontloaded and tendered without leave of the Trial Tribunal (Distilled from grounds 1 and 2).*
- 2. Whether the Trial Tribunal was right when it refused to nullify the Election of the 1st Respondent as Councilor of Kabi Ward of Kuje Area Council. (Distilled from grounds 3, 4, 5, 6, 7 and 8).*

On the part of 1st and 2nd Respondents, a joint brief of argument was filed on the 19th October, 2022 wherein the following issues were formulated;-

- 1. Whether the Trial Tribunal was not right to have admitted and relied on Exhibits “D7”,*

“D9”, “D10”, “D11”, “D12” and “D13”, which were not frontloaded and tendered without the leave of the Trial Tribunal. (Distilled from grounds 1 and 2).

2. Whether the Trial Tribunal was not right when it refused to nullify the Election of the 1st Respondent as Councilor of Kabi Ward, Kuje Area Council (Distilled from ground 3, 4, 5, 6, 7 and 8).

The fuller arguments on the issues are contained in pages 220 to 241 of the Records of Appeal... there is therefore no gain in saying that it would serve no meaningful purpose reproducing the said argument, hook, line and sinker when we can always make reference to same where necessary in resolving the

legal imbroglio between the Appellants and Respondents.

We have observed that the issues afore-formulated by Appellants and Respondents are same in form and character.. we therefore adopt issue no. 1 as our issue for determination. The issue is, *whether the Trial Tribunal was right when it admitted and placed reliance on Exhibits “D7”, “D9”, “D10”, “D11”, “D12” and “D13” which were not frontloaded and tendered without leave of the Trial Tribunal.*

To establish its petition, a total of 8 witnesses were called by the Petitioners, whereas the 1st and 2nd Respondents called a total of five (5) witnesses.

3rd Respondent Independent National Electoral Commission (INEC) did not call any witness.

The evidence of Appellants' witnesses can be found at pages 21 to 285 of the Records of Appeal. In the same analysis, the evidence of Respondents' witnesses can be found at pages 287 to 307 of the Records of Appeal.

It is instructive to note that aside PW8 who is the 1st Appellant, all other witnesses called by the Appellants and Respondents were adjudged to be Polling Unit Agents.

Permit us to note by way of emphasis, the position of the law with respect to results of an Election declared by Independent National Electoral Commission (INEC). Such a result enjoys a presumption of regularity. In other words, they are prima facie correct. The onus is on the Petitioner to prove the contrary.

The cases of *BUHARI VS. OBASANJO (2005) 13 NWLR (Pt. 941)*;

AWOLOWO VS. SHAGARI (1979) 6 – 9 SC and

NYESOM VS. PETERSIDE & ORS (2016) LPELR 40036 (SC) are instructive and apt on this point.

The position of the law on the use of Smart Card Reader or in this case BVAS in an Election and whether the regulations, guidelines and manuals for Election issued by Independent National Electoral Commission (INEC) must be in accordance with the provision of the Electoral Act and the Constitution has been lucidly put to rest in plethora of judicial decision.

See *NYESOM WIKE VS. PETERSIDE (2016) LPELR – 40036 (SC)*.

From the evidence of the Petitioners' witnesses, their contention only is on the malfunction of the BVAS Machine hence arguments on deprivation of prospective Voters from voting since accreditation could not be done using the BVAS Machine hence their contention that the Election of 1st Respondent as Councilor of Kabi Ward, Kuje Area Council be nullified and supplementary Election be conducted in Kabi Ward of Kuje Area Council be conducted in Takwa Polling Unit; Kabin-Kasa Primary School, Gumayi Polling Unit, Duda Polling Unit and Achimbi Polling Unit.

Certified true copy of Form EC8series for the Polling Units aforementioned by Petitioners and Independent National Electoral Commission (INEC) Official receipts for certified true copy payment were tendered by the 1st and 2nd Respondent Counsel

from the Bar and admitted in evidence and marked Exhibits “D1” – “D6” respectively, as can be found at page 287 of the Records of Appeal.

Let us briefly run to a part of the argument of learned counsel for the Petitioners on the use of Bimodal Voter Accreditation System (BVAS) and its effect with respect to the Election in issue.

It is the contention of learned counsel that the use of BVAS is mandatory by the provisions of the law i.e paragraph 3.2(item 4 at page 62) of Manual for Election Officials 2022, and that where BVAS failed to work due to sustained malfunction, a supplementary Election shall be conducted.

Learned counsel further submitted, that where BVAS stopped midway before accreditation of all Voters on the queue or did not work at all hence

Election not concluded, Supplementary Election should be ordered especially where the number of registered voters in such a Unit is more than the margin of lead between the two leading candidates at the Election.

Learned counsel further submits, that where the question is that of non-compliance with the Independent National Electoral Commission (INEC) Manuel and Guideline, it is a complaint against Independent National Electoral Commission (INEC) that conducted the election.

FANNAMI VS. BUKAR (2004) ALL FWLR (Pt. 198) 1210, 1238, 1239 was cited.

Learned counsel argued, that the result declared at Duda Primary School Polling Unit Code 005 is the result of those who voted before BVAS stopped

working, and that lines 32 of page 306 of Records of Appeal supports the case of the Appellants that after accreditation of some voters, BVAS stopped working and the remaining voters who had not been accredited could not vote.

It is therefore true, that submission of learned counsel that the allegation of the Appellants that BVAS stopped working before the conclusion of accreditation and those yet to be accredited by the time of the stoppage could not vote in Duda Primary School Polling Unit has been proved.

Learned counsel also argued, that when there is a dispute as to what took place or did not take place at the Polling Unit, the evidence of the Polling Agent or any other person who was present at the Unit and

who personally witnessed and saw the events there is vital.

BUHARI VS. OBASANJO (2005) 13 NWLR (Pt. 941) Page 1;

OMISORE & ANOR VS. AREGBESOLA & ORS (2015) LPELR – 24803 (SC) were cited.

Learned counsel further contend, that in compliance with the above position of Supreme Court, the Appellants called eye witnesses who testified regarding what they saw at their respective Polling Units during the conduct of the Election. Agents of the Appellants and registered voters in the affected Polling Units were called by the Appellants.

Learned counsel argued, that it has been consistently reiterated by the Supreme Court that for a petition to succeed on non-compliance with the provisions of

the Electoral Act, the Petitioner must prove not only that there was non-compliance with the provision of the Act but that same substantially affected the result of the Election. In other words, the Petitioner has two (2) burdens to prove:-

1. That the non-compliance took place.
2. That the non-compliance affected the result of the Election.

The decision in the cases of ***BUHAR VS. (INEC) (2008) 19 NWLR (Pt. 1120) 246 at 435;***
BUHARI VS. OBASANJO (2005) 13 NWLR (Pt. 941) 1 at 80 were cited.

It is the submission of learned counsel, that the presumption enjoyed by the result declared by the 3rd Respondent is a rebuttable one and the Petitioners

have successfully rebutted same by the testimony of PW1 to PW8. Presumption of law is in fact a preliminary rule of law which may disappear in the face of rebutted evidence. *CHIEF AFE BABALOLA (Ed): Law and Practice of Evidence Page 361.*

Learned counsel contends, that the case of the Appellants was that there was accreditation of some voters and those accredited voted before the breakdown of BVAS and the remaining voters could not be accredited and therefore did not vote.

Learned counsel further submits, that this is, with due respect, misconception of the law. PW7 was not only an eye witness of what happened at Gumayi Primary School Polling Unit Code 004, he was one of the Independent National Electoral Commission

(INEC) Officials that conducted the Election. He was subpoenaed and on the basis of the subpoena, testified as to what happened at the Polling Unit. The law is clear that an eye witness who participated in the conduct of Election at a Polling Unit can testify on what happened at the Unit.

Learned counsel further argued, that the Trial Tribunal totally misconceived the case of the Appellants. It is not the case of the Appellants that nobody voted, the case of the Appellants was that many potential voters who were on the queue waiting to vote could not cast their votes because Bimodal Voter Accreditation System (BVAS) stopped working and they could not be accredited. It is therefore wrong for the Trial Tribunal to hold that because PW3, PW4 and PW5 stated that those accredited voted, their evidence shows that there was

election. Counsel also submits that were willing eligible voters were not allowed to cast their votes because Bimodal Voter Accreditation System (BVAS) stopped working before their accreditation, the Election in such Polling Unit is not in compliance with Electoral Act.

Counsel contends, that it is the evidence of this witness that the Trial Tribunal held to be hearsay simply because he said Independent National Electoral Commission (INEC) Officers told him BVAS did not work. It is possible that Independent National Electoral Commission (INEC) Officers would not have at some points informed everybody at the Polling Unit that BVAS was not working. Will Independent National Electoral Commission (INEC) Officers not give some explanation as to why voting could not be done.

Learned counsel submits, that considering the totality of evidence of PW6, the witness gave evidence of what he say happened at Takwa Polling Unit where he served as Agent to the Appellants and his evidence is not hearsay as erroneously held by the Trial Tribunal.

Learned counsel concludes by urging this Tribunal to resolve the issues in favour of the Appellants and grant the reliefs sought by the Appellants in their Petition for the following reasons:

- i. The Appellants proved their case on preponderance of evidence.
- ii. Evidence of DW5 supported the case of the Appellants in Duda Polling Unit which has 1,304 registered voters more than the margin of

leading between the 1st Respondent and 1st Appellant.

- iii. Witnesses called by the Appellants are eye witnesses who gave credible evidence.
- iv. Presumption of regularity of result declared by 3rd Respondent was successfully rebutted by the Appellants.
- v. Evidence of PW7 an Assistant Presiding Officer 3 of Gumayi Primary School Polling Unit, gave credible evidence that after accreditation of 3 voters BVAS stopped working and the remaining voters on the queue could not cast their votes.
- vi. There was substantial non-compliance with Electoral Act at Takwa Kabin-Kasa Primary

School Polling Unit, Gumayi Polling Unit, Duda Polling Unit and Achimbi Polling Unit.

On their part, learned counsel for the 1st and 2nd Respondents contended the fact that it is not a mandatory requirement of paragraph 12(3) of the First Schedule to the Electoral Act, 2010 (as amended) that copies of the documentary evidence to be relied on by the 1st and 2nd Respondents must be accompany their reply.

Learned counsel for the 1st and 2nd Respondent, respectfully urge this Honourable Appeal Tribunal to hold that paragraph 12(3) of the First Schedule of the Electoral Act, 2010 (as amended) did not provide for any sanction for non-compliance and that it is the Evidence Act, 2011 that governs admissibility of documentary evidence and that failure to frontload

Exhibits “D7”, “D8”, “D9”, “D10”, “D11”, “D12” and “D13” respectfully does not render them inadmissible and that the Trial Tribunal rightly admitted them in evidence and acted on them in its Judgment.

Learned counsel submits, that the Appellants failed to discharge the burden of proof placed on them by law in allegation of disenfranchisement. The Appellants alleged disenfranchisement in Kabin-Kassa Primary School, Gumayi Polling Unit, Duda Polling Unit and Achimbi Polling Unit. For the Appellants to succeed in the allegation of disenfranchisement, the Appellants are required to summon all the disenfranchisement voters in the Polling Units in question to testify and satisfy the following:-

- i. The disenfranchisement voters must give evidence to establish the fact that they were registered but were not allowed to vote.
- ii. The voter's cards and the voters register for the Polling Units must be tendered, and
- iii. All the disenfranchisement voters must testify to show that if they were allowed to vote, their candidate would have won the Election.

Counsel further submits, that the Appellants failed to proof the non-functioning of the Bimodal Voter Accreditation System (BVAS) machine and the alleged disfranchisement of voters and that the Trial Tribunal rightfully affirmed the Election of the 1st Respondent as the Councilor of Kabi Ward.

Learned counsel concludes by urging this Honourable Appeal Tribunal to hold as follows:-

- i. That the Trial Tribunal rightfully admitted Exhibit “D7”, “D9”, “D10”, “D11”, “D12” and “D13” in evidence and properly acted upon them since the failure to frontload them does not rendered the documents inadmissible.
- ii. That the Appellants failed to discharge the burden of proof placed on them in their Petition and the Trial Tribunal properly affirmed the Election of the 1st Respondent.

We shall now look at the issue of Bimodal Voter Accreditation System (BVAS) and disenfranchisement and what a Petitioner raising the issue of disenfranchisement ought to do for success to be attained. The Election under review was conducted under the 2010 Electoral Act. There is no argument about that.

Similarly, there is no provision for use of BVAS under the 2010 Electoral Act as amended.

Independent National Electoral Commission (INEC) cannot engage in any form of violation of the Electoral Act and the Constitution which will be tantamount to subverting the Electoral Process hence eroding public confidence in it and the process.

As a statutory body established by law, it must operate within its limit of power vested on it by the Constitution and the Electoral Act.

Independent National Electoral Commission (INEC) cannot by its operational manuals and guidelines give itself powers not given to it by the Constitution or the Electoral Act or introduce as part of the Election Process procedure that are contrary to the

express provision of the Constitution and the Electoral Act.

Anything so done in contravention of the Constitution and Electoral Act remains null and void, the introduction of the use of BVAS Machine not placed for under 2010 Electoral Act inclusive.

See the case of ***SARUMARI & ANOR VS. NDUME & ORS (2019) LPELR – 48875 (CA)***.

Supreme Court in the case of ***IKPEAZU VS. OTTI & ORS (2016) LPELR 40055 (SC)*** put to rest the fact that where over voting or non-accreditation as in the instant case is sought to be established without reference to the Voter's register of the affected Local Government Areas, as in this case, same is bound to fail.

It is instructive to note that under the 2010 Electoral Act, the use of Electronic voting machine is prohibited.

See Section 52(1)(a) of the 2010 Electoral Act.

May we make it abundantly clear, that an act or omission which may be contrary to an instruction or Election Manual drawn up by the Commission or of an Official appointed for the purpose of an Election but which is not contrary to the provisions of Electoral Act or the Constitution shall not of itself be a ground for questioning the Election.

See Section 138(2) of the Electoral Act, 2010.

We therefore hold; that the issue of BVAS which Petitioners have made heavy weather of cannot be a ground for questioning the Election in question, use of BVAS having not been provided for under the

2010 Electoral Act but mentioned on the guidelines for Election Manual prepared by Independent National Electoral Commission (INEC) Chairman and his people and which cannot override the provision of the Electoral Act and the Constitution.

You cannot put something on nothing and expect it to stand *UAC VS. MCFOY*.

Next is the issue of disenfranchisement.

Prove of disenfranchisement of a voter at an Election is normally attained by the registered voter giving evidence backed by tendering his voter's card in evidence and voters register of the Unit showing the disenfranchised voter is a voter in the Polling Unit and that his name is in the voters register was not ticked or accredited as having not voted at the Election.

On this, we rely on the case of *PDP VS. INEC & ORS (2011) LPELR – 8831 (CA)*;

EMMANUEL VS. UMANA & ORS (2016) LPELR – 40037 (SC).

From the evidence before us; the voters registers of the affected Polling Units in question were not tendered, neither were the so-called disenfranchised persons all called as witnesses to show their names on the voters registers of the respective Polling Units ticked or not.

Thus, we must say, is most fatal to the case of the Petitioners.

The law cannot command an impossibility.

We cannot speculate on the number of persons allegedly disenfranchised. Petitioners have clearly

failed to prove their petition as it were, hence unable to show that the declaration and return of the 1st and 2nd Respondent as Winners of that Election for the Councillorship of Kabi Ward, Kuje Area Council was done in error. We resolve the formulated issue in favour of the Respondents.

The Judgment of the Trial Tribunal therefore, cannot be faulted in any form.

For the avoidance of doubt, we hereby affirm the Judgment and further state that the declaration and return of the Peoples' Democratic Party (PDP) and her Candidate (Isa M. Baba) is hereby re-affirmed.

HON. JUSTICE S.B. BELGORE
(CHAIRMAN)
20TH OCTOBER, 2022

HON. JUSTICE Y. HALILU
(MEMBER I)
20TH OCTOBER, 2022

HON. JUSTICE J.O. ONWUEGBUZIE
(MEMBER II)
20TH OCTOBER, 2022

APPEARANCES

Kwaidu Inua Saleh, Esq., with Usman Sani S., Esq.,
Abdulhakeem Adamu, Esq. – for the Appellants.

A.J Adagami, Esq. – for the 1st and 2nd Respondents.

Esther Agbaje, Esq. – for the 3rd Respondent.