IN THE EDO STATE LOCAL GOVERNMENT ELECTION PETITIONS TRIBUNAL
HOLDEN AT BENIN CITY
ON WEDNESDAY THE 27TH DAY OF JUNE, 2018
BEFORE:

HON. JUSTICE U.I. ERAMEH---------- CHAIRMAN
HON. JUSTICE P.A. AKHIHIERO----------1ST MEMBER
HIS HONOUR D.O. ELOGIE ESQ----------2ND MEMBER
HIS WORSHIP E.I. BAZUAYE (MRS.) ----------3RD MEMBER
HIS WORSHIP J. OGBEIDE ESQ----------4TH MEMBER

BETWEEN: **PETITION NO: ELGEP/02/2018**

1. **Ernest Ofeimu Eguaoba**
2. **Action Democratic Party (ADP)** } **----------Petitioners**

AND

1. **Ijeboi Monday**
2. **All Progressives Congress (APC)**
3. **Edo State Independent Electoral Commission (EDSIEC)** } **Respondents**
4. **Returning Officer Ward 5, Owan West Local Government Area, Edo State**

JUDGMENT
DELIVERED BY HON. JUSTICE PETER AKHIMIE AKHIHIERO

The Petitioners instituted this Petition *vide* a Petition dated the 29th of March, 2018 and filed on the same date, seeking the following reliefs:

a. That it be determined that the purported return of the 1st Respondent as elected Councillor for Ward 5 Owan West Local Government in

the Local Government Council Election held on the 3rd March, 2018 is void and the purported election and/or return be nullified;

b. That it be determined that the entire purported Ward 5 Councillorship election held on the 3rd March, 2018 in Owan West Local Government Area, Edo State be nullified and a fresh election be conducted for the Ward;

c. An ORDER of this Honourable Court declaring that the 3rd Respondent (EDSIEC) conducts a fresh election for not following the requisite mandatory 90 days notice by INEC and enshrined in the Electoral Act;

d. An ORDER of this Honourable court declaring that the 3rd Respondent (EDSIEC) conducts a fresh election in Ward 5 Owan West Local Government Area for not following the requisite mandatory 90 days notice by INEC and enshrined in the Electoral Act; and

e. An ORDER of this Honourable Court declaring that the 3rd Respondent (EDSIEC) conducts a fresh election into the Councillorship Wards and Local Government Councils and to give the requisite 90 days notice as enshrined in the Electoral Act.

The Petitioners accompanied their Petition with Witnesses Statements on Oath, List of Documents to be relied on during trial, List of Witnesses to be called during trial and some frontloaded documents which they relied upon.

Upon filing the Petition, the 2nd, 3rd and 4th Respondents were served by personal service, while the 1st Respondent was served by substituted service, pursuant to the order of Court.

Without filing a Memorandum of Appearance, the 1st and 2nd Respondents filed a Reply to the Petition and a Notice of Preliminary Objection dated the 9th day

of May, 2018.With leave of Court, the 3rd and 4th Respondents filed their reply on the 18th day of May, 2018.

Subsequently, the 3rd and 4th Respondents also filed a Memorandum of Appearance in accordance with the rules.

Thereafter, the Petitioners filed their Reply to the 1st and 2nd Respondentsô joint reply and another Reply to the 3rd and 4th Respondents joint reply. In the aforementioned reply to the 1st and 2nd Respondentsô joint reply, the Petitioners also filed a written address on point of law to the Respondentsô Preliminary Objection.

In proof of their case, the Petitioners called six witnesses and the 1st Petitioner testified for the Petitioners. They also tendered Exhibits A, B, C, D, E1 ï E5 and Exhibit F.

On their part, the 1st and 2nd Respondents called three witnesses and the 1st Respondent testified and they tendered Exhibits G, H, I and J through their witnesses.

On behalf of the 3rd and 4th Respondents, the 4th Respondent testified and they tendered Exhibits K and K1.

In a nutshell, the Petitionersô case is that the 1st Petitioner was the Councillorship candidate of the Action Democratic Party (ADP) (2nd Petitioner) for the Owan West Ward 5 Councillorship election which was allegedly conducted on the 3rd of March, 2018, by the 3rd Respondent, the statutory body charged with the responsibility of organizing and conducting all elections into the 18 Local Government Councils in Edo State.

Ward 5 in Owan West Local Government is made up of 13 units *(i.e., Units 1 to 13).*

The 1st Respondent was the Councillorship candidate in Owan West Local Government Election in Ward 5 sponsored by the All Progressives Congress (APC) (2nd Respondent).

The 4th Respondent is an agent of the 3rd Respondent who was charged with the responsibility of conducting the said election in Ward 5, Owan West Local

Government Area, of Edo State in accordance with the provisions of the Electoral Law of Edo State and the Guidelines issued by the 3rd Respondent.

In the discharge of her statutory and constitutional duty to organize, supervise and conduct elections into the Local Government Council in Edo State, the 3rd Respondent hired some ad hoc staff and other officers who were at all times her agents for the purpose of the said election.

On the day of the election, some hoodlums hijacked the sensitive election materials while they were on the way to distribute them to officials of the 3rd Respondent to convey to the various polling units and centers in Ward 5 of Owan West Local Government Area.

The 1st Petitioner and his agent drove to Sabongidda ï Ora Police Station to report the matter and the Divisional Police Officer told them that the Collation Officer or any other official member of EDSIEC must come and make a report before the Police can do anything.

That on the 3rd day of March, 2018, the elections did not hold in the entire Ward 5 of Owan West Local Government Area because the election materials were not available at the various polling units.

That the result of the purported elections which was declared by the 3rd and 4th Respondents on the 3rd day of March, 2018 was false because there was no election in Ward 5. The purported election result sheet was not signed by any of the Petitionersô agents, and the purported results were not given to the Petitioners.

The purported Local Government Council election in Ward 5 in Owan West Local Government Area, Edo State was contrary to the provisions of the Local Government Electoral Law and the 1st Respondent was not duly elected by the majority of the lawful votes cast.

On the part of the 1st and 2nd Respondents, they stated that even though the election did not start at 8.00 am prompt, it started a little after the time and the election was concluded before 4:00pm due to the unavoidable delay in commencement.

They maintained that the election materials were never snatched and that election was conducted in all of the 13 units in ward 5 of Owan West but was

cancelled in two units due to the unruly behaviour of the Petitioners and their supporters.

The result declared by the 3rd Respondent through the 4th Respondent was the true reflection of the votes in the councillorship election in Ward 5 of Owan West Local Government Council.

The election was conducted in substantial compliance with the Electoral Law and the 1st Respondent was elected as the councilor representing Avbiosi ward 5 of the Owan West Local Government Council by a majority of lawful votes. The 3rd and 4th Respondents did the needful in accordance with their statutory duty in declaring the 1st and 2nd Respondents winners of the councillorship election in Avbiosi ward 5 having polled the majority of lawful votes on the 3rd of March, 2018.

On the part of the 3rd and 4th Respondents, the 4th Respondent stated that the elections took place in Units 1 to 13 of Ward 5 in Owan West Local Government Area but the results in Units 1 to 6 were cancelled because of the riots in those units. The results from the remaining units were however accepted.

He maintained that since there were election results from the other units in the ward, he declared the results as contained in **Exhibits "K"** and **"KI"**. He said that the results were declared at the collation center before they were sent to the EDSIEC office at Sabongida Ora.

At the close of evidence, the learned counsel for the Petitioners and the 1st , 2nd ,3rd and 4th Respondents filed their Written Addresses.

In his Final Written Address dated and filed on the 10th of June, 2018, the learned counsel for the 1st and 2nd Respondents, C.I.Aiguobarueghian Esq., raised a preliminary point for determination before the main matter. In his preliminary objection, he submitted that the Reliefs contained in Paragraph 50(c), (d) and (e) of the Petition are incompetent because they border on pre-election matters over which this Tribunal cannot adjudicate.

He submitted that the question of whether or not notice was given for the conduct of election is a pre ï election matter to be determined by the regular courts and not an Election Petition Tribunal.

Furthermore, he maintained that the Petitioners did not plead any facts in that regard neither did they lead any evidence in proof of same. To that extent, he submitted that the said reliefs were not proved and are deemed abandoned. He therefore urged the Court to strike out the reliefs.

Learned counsel further submitted that the Petitioner also made heavy weather of the failure of the 1st and 2nd Respondents to file a formal memorandum of appearance. He posited that this was not fatal to their defence.

He submitted that this petition is *sui generis* and is regulated by the provisions of the **Edo State Local Government Election Law, 2012**. He argued that whereas section 93 thereof provides for the filing of a memorandum of appearance, the failure to file one cannot prevent the Tribunal from hearing a Respondent who filed a Reply. He submitted that the fact of filing a reply is the best evidence of an intention to contest the petition. See: ***Nwobodo v. M.O. Nyiam & Associates (2014) LPELR – 22668 (CA) Per OTISI J.C.A. (PP 14 – 16 Paras E - B).***

Furthermore, learned counsel submitted that **Section 94** of the said law already provided a penalty for failure to file a memorandum of appearance when it stated thus:

> ***"If the Respondent does not enter an appearance as aforesaid, any document intended for the Respondent may be posted upon the tribunal notice board and such posting shall be sufficient notice thereof."***

He posited that the penalty for not entering appearance is that service of processes on him will be done by posting upon the tribunal notice board. He maintained that it is trite law that once a law provides for the punishment for an act, no other punishment can be imposed for its breach. He therefore urged the Court to discountenance the objection of the petitioner as there is no better appearance than the Reply filed and the appearance of counsel during the trial. Learned counsel referred the court to the dictum of the Court in the case of ***Akeredolu v. Omiyale & Ors (2013) LPELR – 22800 (CA)*** where *OREDOLA J.C.A.*stated thus:

> ***"The essence and main purpose of entering/filing memorandum of appearance is simply for the defendant to evince an avowed intention that the suit will be contested or to serve as an indication of awareness regarding subsistence of the action in question. Thus, to my mind, the provision can be treated as being directory and not mandatory. This is more so because as argued by the learned counsel for the 1st Respondent and correctly too, that a defendant shall be at liberty to apply to the court to set aside the services upon him of the writ or other process without or before entering an appearance. Hence, non-compliance with the said procedural provision can be condoned."***

He therefore urged the Court to discountenance the objection and deal with the substantive matter in this petition.

Learned counsel also addressed the objection raised by the petitioners on the alleged late filing of the Reply. He submitted that the joint Reply of the 1st and 2nd Respondent is valid and the Petitionersô objection should be discountenanced.

Thereafter, learned counsel went into a marathon rehash of the evidence adduced at the trial. In the process, he tried to evaluate the evidence of each witness.

On behalf of the 1st and 2nd Respondents, the learned counsel submitted that the sole issue for determination in this petition is as follows:

ñ***Whether from the totality of evidence canvassed, the petitioners have proved beyond reasonable doubt that election was not held in all the 13 units of Avbiosi Ward 5 on the 3rd of March, 2018 taking into cognizance the presumption of regularity of official act of state in Section 145 (1) and 168 (1) of the Evidence Act"***

Arguing the sole Issue, learned counsel submitted that, it is the duty of the Petitioners who brought a petition under **Section 81 (1) of the Edo State Local Government Law** to prove same as they are the ones who will lose if no evidence is called. He relied on the case of: **Buhari v. INEC &Ors (2008) 19 NWLR (Pt. 1120) 246** where it was held thus:

> *"The petitioner who files a petition under* ***Section 145 (1) of the Electoral Act*** *has the burden to prove the grounds. This is because he is the party alleging the grounds and he has a duty to prove the affirmative. He is the party who will lose if no evidence is given on the grounds. If the petitioner does not prove his case under* ***Section 145 (1)*** *of the Act, the action fails."*

Learned counsel pointed out that **Section 81 (1) of ESLGEL** is *impari materia* with **Section 145 (1) of the Electoral Act, 2010.** He maintained that the above is the foundational duties on the petitioners to call evidence in prove of their case before the respondents are obliged to call any evidence in rebuttal of the evidence adduced by the petitioners.

He submitted that once the election result is declared as evidenced in **Exhibits K and K1**, there is a rebuttable presumption of regularity of official acts under **Section 168 (1) of the Evidence Act.** He said that the results must be deemed as proper and *prima facie* correct until proved otherwise and cited the case of: ***Omoboriowo & Ors v. Ajasin (1984) S.C.*** He also referred the Court to the decision of the Supreme Court in the case of: ***Nyesom v. Peterside & Ors (2016) LPELR – 40036 (SC)*** where they stated thus:

> ***"The law is trite that the results declared by INEC enjoy a presumption of regularity. In other words, they are prima facie correct. The onus is on the petitioner to prove the contrary. See: Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941)."***

Counsel queried the quality of evidence adduced by the petitioner to rebut the presumption of regularity. He pointed out that no documents on the conduct of election were tendered by the petitioners even though they listed a horde of documents in paragraphs 36 (NTA video clip), 44 and 49 of the petition.

He submitted that the petitioners withheld these documents because if they had tendered them they would have been adverse to their case. See: ***Section 167 (d) of the Evidence Act, 2011.****Also see* ***APC v. INEC &Ors (2014) LPELR -24036 (SC).***

Addressing the Court on the quality of evidence adduced by the Petitioners, counsel conceded that three out of the seven witnesses testified concerning the area where the results were cancelled. He maintained that the evidence of P.W 2 concerning unit 4, PW 4 concerning unit 5 and P.W.6 concerning unit 2 have no utilitarian value because the elections in those areas were cancelled. He therefore urged the Tribunal to discountenance them.

He referred to the evidence of the P.W.1who testified that there was no election in Unit 11 because materials were not supplied. He said that under cross examination, the same witness stated that he returned all the materials to the 3rd Respondent. He said that there was no concrete evidence to show that indeed, the P.W 1 was ever at unit 11 since nothing whatsoever, tied him to that place. He said there was no appointment letter, no tag, no posting list or even a result sheet signed by him in his official capacity. He maintained that his mere *ipse dixit* will not suffice. That the only way to guarantee that what he said is true is the production of credible documentary evidence. He therefore urged the Tribunal to discountenance his evidence.

Counsel submitted that once the result is declared and an allegation of no voting is made, it is a criminal allegation which must be established and the petitioner is then required to prove beyond reasonable doubt. For this view, he

relied on the case of: ***Waziri v. Geidam & Ors (2015) LPELR – 26046 (CA)*** where it was held as follows:

> ***"An allegation by a petitioner (s) that no voting occurred in certain polling units or Local Government Areas or a constituency e.t.c. but votes were credited to the candidates constitutes a criminal offence under section 123 (1) – (6) of the Electoral Act, 2010 as amended."***

He submitted that Section 123 (supra) is akin to **Section 62 of the Edo State Local Government Law, 2012.** So the burden of proof on the petitioners is proof beyond reasonable doubt. Again, he referred to the decision of the court in the case of: ***Ucha & Anor v. Elechi & Ors (2012) 13 NWLR (Pt. 1317) 330*** where they held as follows;

> ***"In election petition trials, the standard of proof is proof beyond reasonable doubt where the petition is brought on grounds of a criminal nature"***

He submitted that nothing can be more criminal than an allegation of hijack of electoral materials, diversion to a private personôs house, non-voting and subsequent declaration of result. He said that this is more accentuated by the alleged role of the EDSIEC officials who had the duty to diligently carry out their functions without bias; and against whom a breach of official duty is an offence under **Section 62 of ESLGL**.

On the burden of proof on the Petitioner, learned counsel referred to the case of: ***PDP v. Umana & Ors (2016) LPELR – 40040 (SC)*** where the Supreme Court stated thus:

> *"The law is indeed trite that the Petitioners/Respondents who asserted that there was no voting in the affected 18 Local Government Areas of Akwa Ibom State, must prove so by calling at least a registered voter from each of the polling units in each of the wards in the respective Local Government Areas to show that he could not vote during the election conducted on the 11th April, 2015. Not only that, such registered voter must also establish by credible evidence how the lack of voting in the affected Local Government Areas affected the final results of the election to the disadvantage of the Petitioners/Respondents. See:Kakih v. Peoples Democratic Party (2014) 15 NWLR (Pt. 1430) 374 and Ucha v. Elechi (2012) 13 NWLR (Pt. 1377) 330 at 359."*

Counsel submitted that the above authority is very relevant to the instant case. Applying the authority, he pointed out that none of the witnesses especially in the areas where results were declared was a registered voter. He also referred us to the case of: ***INEC &Ors v. Anthony & Anor (2010) LPELR – 12183 (CA)*** and quoted *in extenso* from the judgment of ***Aboki J.C.A.***

He maintained that the minimum requirement in terms of oral evidence is to call one registered voter in the area in dispute, a task which he said the petitioners herein failed to do.

Learned counsel submitted that the above authority also saddles the Petitioners with the duty to subpoena the Electoral Commission to tender the Voters Register since those documents are public documents. He stated that in the present case, the Petitioners were under the erroneous impression that the burden was on the Respondents to prove that there was an election.

He said that although the Petitioners pleaded some documents whose production may have shifted the burden of prove that there was an election to the Respondents; none of those documents were tendered. He said that merely calling non ï voters in units 11 and 13 was insufficient to discharge their burden.

He submitted that from the foregoing, it is obvious that the petitioners have not been able to prove the minimum required of them for the Respondents to lead evidence in rebuttal.

He submitted that the 1st and 2nd Respondents called 4 witnesses including the 1st Respondent to prove the conduct of the election in Avbiosi Ward 5. He said that all their witnesses were voters who voted on the 3rd of March, 2018 in their various units. He said that the elections were peaceful and the results were declared at the units after the close of the election. He said that the 1st Respondent gave a vivid account of how the election materials were distributed at the collation centre, at Ihoro primary school which incidentally was where he voted.

He therefore urged the Tribunal to dismiss the Petition.

In his Final Written Address dated and filed on the 10th of June, 2018, the learned counsel for the 1st and 2nd Petitioners O.S. Elefan Esq. *et al* formulated seven Issues for Determination as follows:

1. ***Whether this Honourable Tribunal can rely on the contradictory testimonies of the witnesses called by the Respondents' witnesses.***

2. ***Whether the Petitioners have adduced sufficient evidence before this Honourable Tribunal to show that election was not conducted in the 13 Polling Units of Ward 5 of Owan West Local Government Area.***

3. ***Whether it was appropriate for the 3rd and 4th Respondents to declare the 1st and 2nd Respondents winners of the purported election.***

4. ***Whether the 1st and 2nd Respondents can amend a material fact during trial.***

5. ***Whether the 1st and 2nd Respondents participation in this trial should be discountenanced as neither the 1st and 2nd Respondents filed a Memorandum of Appearance before this Honourable Tribunal.***

6. ***Whether the 2nd Respondent's reply should be discountenanced as the said reply was filed out of time but without leave of court and non-fulfillment of the penalty thereof.***

7. ***Whether the Petitioners ground for filing the petition is valid in law and can be adjudicated upon by this Honourable Tribunal.***

The learned counsel thereafter argued the Issues ***seriatim*** in his Written Address.

ISSUE ONE:

Whether this Honourable Tribunal can rely on the contradictory testimonies of the witnesses called by the Respondents' witnesses.

On this Issue, learned counsel urged the Tribunal to succinctly evaluate the testimonies of the Respondentsô witnesses in order to identify the material contradictions in the testimonies of their witnesses including the 1st and 4th Respondents.

Concerning the evidence of the RW1, the learned Petitionersô counsel gave ***particulars of material contradictory evidence*** as follows:

i. *While RW1 stated that* ***his party agent as well as the 2nd Petitioner's Agent signed the Polling Unit Result Sheet****, in the* ***1st and 2nd Respondents Reply****, they averred in paragraph 2 particularly line 7 and 8 that the Petitioners' agent* ***refused to sign the result sheets*** *while the* ***4th Respondent stated in his Written Statement on Oath*** *particularly in* ***paragraph 4*** *that the* ***"Petitioners' agents who were in fact very present***

all through the PEACEFUL CONDUCT of the election refused to sign or collect the copies of the Result Sheet".

ii. *While RW1* ***said his party agent followed EDSIEC officials to EDSIEC Office in Sabongidda – Ora to declare the result****, the 4th Respondent under cross examination* ***stated clearly that the result was signed and declared at Ihoro Primary School in Avbiosi by 5pm and was never declared at EDSIEC Office in Sabongidda – Ora*** *while* ***RW2*** *in his testimony under cross examination also stated* ***that the Result was declared at EDSIEC Office in Sabongidda – Ora by 6pm.***

He therefore submitted that RWI is not a credible witness whose testimony should be believed.

Coming to the RW 2, **OMON** FRIDAY, learned counsel listed the ***particulars of material contradictory evidence*** as follows:

i. *While RW2 stated that the* ***Collation Centre*** *for Ward 5 is* ***Umede Primary School,*** *the* ***4th Respondent*** *under cross examination declared that the* ***Collation Centre*** *is* ***Ihoro Primary School****. Furthermore, the 1st Respondent also testified that the Collation Centre is* ***Ihoro Primary School but that election was declared at EDSIEC OFFICE in Sabongidda Ora.***

ii. ***RW2*** *stated in his* ***Written Statement on Oath*** *that the election was concluded at about* ***3pm*** *and the result declared at EDSIEC Office in Sabongidda – Ora, but under cross examination he said that elections rounded up at about* ***6pm*** *while the 4th Respondent under cross examination stated clearly that the result was signed and declared at Ihoro Primary School in Avbiosi by* ***5pm*** *and was never declared at EDSIEC Office in Sabongidda – Ora.*

iii. *During cross examination, RW2 stated* ***that the 1st Respondent was at his Polling Unit 8 at Avbiosi Old Site at 9am,*** *while* ***the 1st Respondent*** *unequivocally stated* ***that he was at Avbiosi New Site (Polling Unit 2)***

from 7:30am to 1pm while restating that he never left Polling Unit 2 until after 1pm when the riots allegedly commenced.

Concerning the RW 3, **OHONYON JOY,** counsel listed the ***particulars of material contradictory evidence*** to be as follows:

i. *While the RW3 described herself to be **OHONYON JOY** in her Written Statement on Oath and testimony before the Tribunal, she tendered her purported **Voter's Card (EXHIBIT I)** which carries a totally different name **OHONYON JOY OLO.***

ii. ***RW3** stated in her testimony **that agents to both parties (All progressive Congress and Action Democratic Party) signed the Result Sheet** while in the **Reply** filed by the **1st and 2nd Respondent, they averred that the Petitioners' agents refused to sign the result sheets.***

Coming to the 1st Respondent, **IJEBOI MONDAY,** counsel again listed the ***particulars of material contradictory evidence*** to be as follows:

i. *While in 1st and 2nd Respondents' Reply, it was stated that election could not start at 8am, that it started a little after 8am, under cross examination, the 1st Respondent stated that election started by 7:30am and he was accredited at 7:30am.*

ii. *The 1st and 2nd Respondents Joint Reply particularly in **paragraph 6 stated that elections were conducted in all the thirteen units of Ward 5 except two units where the results were cancelled**. The above assertion was also made in **paragraph 7** of the 1st Respondent's Witness Statement on oath. But under cross examination, **the 1st Respondent claimed that the election result was cancelled in five Polling Units.***

iii. *While the 1st Respondent claimed to be at **Polling Unit Two (Avbiosi New Site) between the hours of 7:30am to 1PM** on the day of the election, the **RW2 claimed that the 1st Respondent was at Polling Unit 8 (Avbiosi Old Site) around 9am.***

iv. *While the 1st Respondent claimed in his* ***Witness Statement on Oath that elections were cancelled in only two polling units****, under* ***cross examination,*** *he stated that* ***elections were cancelled in six polling units.*** *Whereas in paragraph 8 of their Reply, the 3rd and 4th Respondents stated that* ***"there was no reported case of violence or any other case that was capable of voiding or calling for cancellation on that day of election",*** *the 4th Respondent stated under cross examination* ***that election was cancelled as a result of violence and rioting in six polling unit and that he even called the Police to restore law and order.***

v. *The 1st Respondent testified under cross examination that he was at EDSIEC Office in Sabongidda – Ora when the result was declared and stated further that his party agents and himself signed the result in EDSIEC office in Sabongidda – Ora after the declaration of result. Whereas the 4th Respondent who claimed to have declared the purported election result repeatedly insisted that the result was declared in Ihoro Primary School at Avbiosi New Site but never declared at EDSIEC Office in Sabongidda – Ora.*

vi. *The 1st Respondent testified under cross examination that materials were distributed to all the 13 polling units at EDSIEC Office in* ***Sabongidda – Ora*** *whereas the 4th Respondent claimed to have joined the SPO to distribute the same election materials to the 13 polling units at* ***Ihoro Primary School in Avbiosi New Site.***

On the evidence of the 4th Respondent, **OGEDENGBE U. PETER,** learned counsel listed the ***particulars of material contradictory evidence*** to be as follows:

i. *While Exhibit K1 shows that there was cancellation of polling units 1 – 6, the 1st and 4th Respondent testified under cross examination that violence and rioting led to cancellation of elections in Polling Units 1 – 6;*

ii. *In paragraphs 4, 8 and 11, 4th Respondent reiterated* ***that the election was peaceful*** *whereas under cross examination the 4th Respondent*

claimed that violence and rioting disrupted the process which led him to invite the Police and also cancelled the result of the election which he initially claimed was peaceful;

iii. *The 4th Respondent testified that he declared the entire ward election result at* ***5pm at Ihoro Primary School, Avbiosi (Collation Centre)*** *while the RW3 testified that election rounded up at* ***6pm in his Polling Unit.***

iv. *While the 4th Respondent testified that the election* ***was almost concluded before rioting and violence took place at Polling Unit 1 – 3 at about 2:30PM****, the 1st Respondent testified* ***that the rioting and violence started shortly after 10:20AM at the same Polling Unit with the 4th Respondent where the latter sat as the Returning Officer.***

After highlighting the particulars of material contradictions, the learned counsel embarked on what he termed an ñ***appraisal of contradictory material evidence supported by case law".***

He submitted that a material fact is a fact that a reasonable person would recognize as germane to a decision to be made, as distinguished from an insignificant, trivial, or unimportant detail. He maintained that the testimonies of the witnesses as well as that of the 1st and 4th Respondents contradict each other on several material facts. He stated that till date, the 1st and 4th Respondent are yet to agree on the actual time the thugs allegedly rioted and violently attacked Polling Units 1 ï 6.

That while both 1st and 4th Respondents claim to have been physically present during the said riot, the 1st Respondent testified ***that the rioting took place shortly after he voted at 10:20AM at the commencement of the voting process while the 4th Respondent disagreed with his position testifying that the alleged rioting took place shortly after 2PM when the voting was coming to an end.***

Furthermore, he stated that while the 1st Respondent maintained that he never left his Polling Unit (Polling Unit 2 at Avbiosi New Site) during the election period until 1PM, the RW2 claimed to have been with the same 1st Respondent at Polling Unit 8 at Avbiosi Old Site.

Again, the 4th Respondent claimed to have declared the result only at the Collation Centre of Ward 5, Ihoro Primary School in Avbiosi whereas the 1st Respondent, RW1 and RW2 claimed that the result was declared at EDSIEC office in Sabongidda ï Ora.

He submitted that the Respondents and their witnesses could not agree on over fifteen contradictory material evidences and each of them seemed to be telling a different story of the same event.

On the effect of such material contradictions, learned counsel referred to the decision of the Court of Appeal in: ***EKEZIE V. STATE (2016) LPELR – 40961 (CA)*** where they stated thus:

> ***"it is now well stated in law that where a trial court is faced with substantial and/or fundamental contradictions between the evidence of a witness at the trial and his previous statement(s) on material issue crucial to the determination of the case in hand, the evidence of such witness would be regarded as unreliable, and the court is left with only one option, namely; that it is unsafe to act on such unreliable evidence. In this vein, the court is obliged to reject both the previous statement(s) as well as the evidence of the witness before the court. A trial court is not allowed to pick and choose between two (2) versions or sets of evidence."***

He also referred to the case of: ***ONUBOGU V. THE STATE (1974) 9 SC*** *1;* and **Section 233(c) of the Evidence Act 2011**.

Counsel submitted that by the provision of ***Section 45 (5) of Edo State Local Government Electoral Law 2012 (as amended)***, the announcement of a ward result should be at the Ward Collation Centre. He maintained that the contradictory testimonies of the witnesses as to where the purported ward 5 resulted was announced and declared raised a great doubt on whether a result was ever declared at all.

He therefore urged this Tribunal to discountenance the testimonies of the Respondents and all their witnesses on the basis of their contradictions on a plethora of material facts.

ISSUE TWO:

Whether the Petitioners have adduced sufficient evidence before this Honourable Tribunal to show that election was not conducted in the 13 Polling Units of Ward 5 of Owan West Local Government Area.

Learned counsel submitted that in proof of their case, the Petitioners called six witnesses and the 1st Petitioner to show that elections did not hold in Ward 5.They also tendered EXHIBITS E1 ï E5.

Like the 1st and 2nd Respondents, he also embarked on a rehash of the evidence adduced by the Petitioners.

Learned counsel submitted that in an Election Petition, the burden of proof is on the Petitioner and the standard of proof is generally on a preponderance of evidence and balance of probabilities. See ***LONGE V. FBN PLC (2006) 3NWLR, Pt. 967 @ Pg. 228 (CA); and AUDU V. GUTA (2004) 4NWLR, Pt. 864 @ Pg 463 (CA).***

He submitted that the Petitioners, through the un-punctured testimonies of their credible witnesses, have sufficiently discharged the burden on them. He maintained that from the Respondentsô Written Addresses, it is crystal clear that they failed to discharge the burden required of them by law.

He said that assuming but not conceding that the Petitionersô case is weak, the Respondents cannot rely on the weakness of the Petitionersô case in order to succeed. That a party must prove his case on credible evidence of his witnesses and not the weakness of the opposition. See: ***IMAM V. SHERIFF (2005) 4NWLR, Pt.***

914 80 (CA). SEE ALSO ELIAS V. OMOBARE (1982) 5 SC 25. Also are: AGBI V. OGBEH (2006) 11 NWLR, Pt. 990 @ Pg. 65 (SC).

He referred to the Respondentsô submission that the Petitioners failed to tender the **Voters' Register** to show that elections did not hold by citing the case of: ***INEC & ORS v ANTHONY & ANOR (2010) LPERLR, 12183 CA*** and submitted that it is evident from the averments of the 1st and 2nd Respondentsô pleadings particularly **paragraph 8 that election was canceled only in two polling units whereas upon tendering EXHIBIT K1 by the 4th Respondent, it was clear that election was allegedly cancelled in six (6) polling units while the pleadings of the 3rd and 4th Respondents, particularly paragraph 8, states that there was no reported case of violence or any other case capable of voiding or calling for cancellation of the election**.

He submitted that it is trite law that no matter the oratory of counsel or the oral testimony of witnesses, it cannot change the documents before court. See the case of: ***ARCHIBONG V. EDAK (2006) 7NWLR, Pt. 980 @ Pg 485 (CA).***

On Issue Two, he finally submitted that the Petitioners have placed sufficient evidence before this Honourable Tribunal to show that election was not conducted in the 13 Polling Units of Ward 5 of Owan West Local Government Area.

ISSUE THREE:

Whether it was appropriate for the 3rd and 4th Respondents to declare the 1st and 2nd Respondents winners of the purported election.

Learned counsel submitted that the 1st and 4th Respondents testified that elections in Polling Unit 1 ï 6 were cancelled due to rioting and violence. He said that although this piece of evidence contradicts **paragraph 4 and 11 of the 4th Respondent's Witness Statement on Oath and paragraph 8 of the Joint reply of the 3rd and 4th Respondents, and also, paragraph 8 of the 1st and 2nd Respondents Joint Reply and paragraph 9 of the 1st Respondent's Witness**

Statement on Oaths; by the provisions of ***Section 43 of the Edo State Local Government Electoral Law, 2012 (as amended),*** they ought to have postponed the elections in Polling Units 1 ï 6 to the next date.

He pointed out that Ward 5 of Owan West has just thirteen (13) polling units and the 4th Respondent stated that six (6) out of the thirteen polling units did not exercise their franchise on that day. He said that over 62% of the registered voters in the Ward are from the affected six Polling Units.

He contended that section 43 of Edo State Local Government Electoral Law, 2012 (as amended) was enacted to ensure that eligible voters are not denied of their rights to vote. He therefore submitted that the 4th Respondent ought to have declared the election inconclusive.

Learned counsel submitted that a close examination of EXHIBIT K1 revealed that there is no record of the number of accredited or registered voters on it if actually the polling results were already coming to the collation centre as alleged by the respondents. He referred to the testimony of the 4th Respondent that accreditation was complete and voting was concluded before the rioting and violence started. That the rioting and violence started while collation of results was ongoing in the affected six polling units. He questioned that if this piece of testimony is true and correct, why did EXHIBIT K1 not carry the number of accredited voters in the respective polling units especially when accreditation was long completed before the alleged rioting started?

He submitted that no election took place at all in all the polling units of Ward 5 and it was inappropriate for the 3rd and 4th Respondents to declare the 1st and 2nd Respondents as winners of the purported election even as elections did not take place in 6 out of 13 polling units of Ward 5.

ISSUE FOUR:

Whether the 1st and 2nd Respondents can amend a material fact during trial.

Learned counsel submitted that an Election Petition is *sui generis* and not strictly a civil proceeding and it is conducted under the peculiar provisions of the relevant electoral law. See the case of: ***BUHARI V. YUSUF (2003) 6SC, Pt. II,***

156 @ Pg. 154. See also AWUSE V. ODILI (2004) 8NWLR, Pt. 876, 481 (CA); EHUWA V. O.S.1.E.C (2006) 18NWLR, Pt. 1012, 544.

He posited that ***Section 98 (1) b of Edo State Local Government Electoral Law, 2012 (as amended***) forbids such amendments as the 1st and 2nd Respondents sought to make. He quoted the provision as follows:

> ***"After the expiration of the time limited by Section 94 of this Law for filing the reply, no amendment shall be made thereto alleging that the election of the person, if any, for whom the seat of office is claimed in the petition was undue, or (saving anything which may be done under the provisions of subsection 2 of this section) effecting any SUBSTANTIAL ALTERATION IN OR ADDITION TO THE ADMISSIONS or the denials contained or the facts and grounds set out in the reply."***

He submitted that the proposed amendment sought to be effected by the 1st and 2nd Respondentsô Counsel is a material fact that goes to the root of the petition itself and referred to the case of: ***NGIGE V. OBI (2006) 14NWLR, Pt. 999, 1 (CA). SEE ALSO YUSUFU V. OBASANJO (2003) NWLR, Pt. 847, 554 (SC) and PDP V. HARUNA (2004) 16NWLR, Pt. 900, 597 (CA).***

Furthermore, he submitted that the 1st Respondent cannot orally amend their Witness Statement on Oath. That Section 114 of the Evidence Act, 2011 (as amended), provides the proper procedure for amendments. To wit: that the aforementioned Witness Statement on Oath initially sworn before the Commissioner for Oaths and any further amendments to the already sworn depositions shall be re-sworn before the Commissioner for Oaths. He contended that an oral amendment to the 1st Respondentôs Witness Statement on Oath amounts to a rape of the judicial process, practice and procedures.

However, he submitted that this same material fact sought to be amended by the 1st Respondent resoundingly corroborated paragraph six (6) of the 1st and 2nd Respondentsô Joint Reply. He pointed out that the said the paragraph 6 of the reply was never amended neither did they seek to amend it.

He said that the case of the 1st and 2nd Respondents was initially built on the material facts that elections were cancelled in only two polling units. He maintained that the proposed amendment is an afterthought and a complete U ï turn having realized that the depositions were at variance with EXHIBIT K and K1 frontloaded by the 3rd and 4th Respondents.

He concluded that the 1st Respondent cannot amend a material fact during trial.

ISSUE FIVE:

Whether the 1st and 2nd Respondents participation in this trial should be discountenanced as neither the 1st and 2nd Respondents filed a Memorandum of Appearance before this Honourable Tribunal.

Learned counsel referred to ***Section 93 of the Edo State Local Government Electoral Law, 2012 (as amended)*** which provides thus:

> ***"Where the Respondent intends to oppose the Petition, he SHALL, within such time after been served or deemed to be served with the Petition, or, where an order has been made under sub – section (2) of Section 91 of this Law, with such other time (if any) as may be stated in that order, enter appearance by filing in the Registry a Memorandum of Appearance and stating that he intends to oppose the petition giving the address of his solicitors, if any, stating that he acts for himself, as the case may be, and either case giving and address for service within five kilometers of a Post Office in the Judicial Division and the name of its occupier, at which documents intended for the Respondent may be left."***

He maintained that from the above provision, the Law mandates the 1st and 2nd Respondents to file a Memorandum of Appearance before filing any other process in this suit. That Section 93 gives no room for the Respondents to choose whether or not to file a Memorandum of Appearance. He reiterated that an Election Petition is not strictly a civil proceeding but is *sui generis.*

He submitted that the world ñshallò as defined in the Interpretation Act connotes a mandatory exercise. The word ñshallò when used in a statute denotes a

mandatory act and admits of no discretion. See: ***NATIONAL ASSEMBLY V. CCI CO. LIMITED (2008) 5NWLR, PT. 1081 (519) @ 540, PARA G – D.***

He submitted that when a law prescribes the mode in which a thing is to be done, it is only that method that must be followed, and any act to the contrary is a nullity**.** See: ***ORAKUL RESOURCES LIMITED V. NCC (2007) 16 NWLR, Pt. 1060 (270) @ 302, para D – GT, 303 para C – G.***

Learned counsel submitted that the Memorandum of Appearance is the foundation upon which other processes are based and filing a Reply without a memorandum of appearance amounts to what the **Great lord Denning called "putting something on nothing and to expect it to stand".** He maintained that the process is incompetent and amounts to nothing.

He submitted that **Section 94 of EDO STATE LOCAL GOVERNMENT ELECTORAL LAW, 2012 (AMENDED)** is not a sanction for failure to file a Memorandum of Appearance but to provide for the posting of processes on the tribunal notice board in case the Respondent failed to enter appearance to defend a petition.

He submitted that the 1st and 2nd Respondents cannot hide under the above provision of the law not to do what the law mandated them to do.

ISSUE SIX:

Whether the 2nd Respondent's reply should be discountenanced as the said reply was filed out of time but without leave of court and non-fulfillment of the penalty thereof.

Learned counsel submitted that the Reply filed by the 2nd Respondent should be discountenanced because it was filed out of time, without leave of court and without paying the appropriate fees to this Tribunal.

Counsel informed the Court that the 2nd Respondent was served with the Petitionersô petition on the 11th day of April, 2018 and filed a reply to the Petition on the 9th day of May, 2018 without leave of court. He submitted that same was filed out of time without leave of Court and should be discountenanced.

He urged the Tribunal to protect itself from abuse and prevent a litigant from abusing its process. See: ***UGESE V. SIKI (2007) 8NWLR, Pt. 1037 (452) CA.***

Here again, learned counsel pointed out that an Election Petition is *sui generis* and the special procedure provided by statute must be followed. See the cases of***: BUHARI V. YUSUF (2003) 6SC, Pt. II, 156 @ Pg. 154. See also AWUSE V. ODILI (2004) 8NWLR, Pt. 876, 481 (CA); EHUWA V. O.S.1.E.C (2006) 18NWLR, Pt. 1012, 544.***

He therefore urged the Tribunal to discountenance the reply filed by the 2nd Respondent and all participation by the 2nd Respondent in the trial as her default of not filing a competent reply as well as not entering any appearance leaves the court with only one option ï to resolve that the 2nd Respondent did not contest the petition.

ISSUE SEVEN:

Whether the Petitioners' grounds for filing the petition are valid in law and can be adjudicated upon by this Honourable Tribunal.

Learned counsel submitted that the grounds upon which the Petitioners filed their Petition are as follows:

a. ***That election did not hold in any of the 13 polling units in the entire Ward 5 of Owan West Local Government Area of Edo State.***
b. ***The 1st Respondent was not duly elected by a majority of lawful votes cast at the Owan West Ward 5 Councillorship election held on the 3rd of March, 2018.***
c. ***That the 1st and 2nd Respondents at the same time of the election were not qualified to participate in the said election ab initio.***
d. ***The purported just concluded Local Government Council Election by the 3rd Respondent held on the 3rd March, 2018; in Edo State in accordance with Section 21 of Edo State Electoral Law which stipulates Notice of the date of Election into the Local Government Councils in Edo State is Illegal, Null***

and Void as it is inconsistent with Section 30 of the Electoral Act, 2010 (as amended) which provides for 90 days Notice of Election date.

He submitted that the grounds upon which an Election may be questioned in **Section 81 of the Edo State Local Government Electoral Law, 2012, (amended)** are as follows:

a. ***That the person whose election was question as at the time of the election was not qualified or was disqualified from being elected as a member of a Council.***
b. ***That the election was voided by corrupt practices or offences against this law.***
c. ***That the respondent was not duly elected by a majority of lawful votes at the election.***
d. ***That the petitioner was validly nominated but was unlawfully excluded from the election.***

He submitted that a succinct examination of the Petitionersô grounds of petition and **Section 81 of the Edo State Local Government Electoral Law, 2012, (amended)** shows clearly that this Honourable Tribunal is vested with the jurisdiction to entertain the grounds in this petition particularly ***grounds a, b and c***. See the cases of: ***P.D.P v HARUNA (2004) 6 NWLR (PT. 920) 56 CA; and AYOGU v NNAMANI (2006) 8 NWLR (PT. 981) 164 CA.***

He urged the Tribunal to resolve this Issue in favour of the Petitioner.

The learned counsel for the 3rd and 4th Respondents, A.Ayo Esq. adopted their Final Written Address of counsel. In his address, he formulated a sole Issue for Determination thus:

"WHETHER THERE WAS AN ELECTION OR NOT AT WARD 5 IN OWAN WEST LOCAL GOVERNMENT AREA ON THE 3RD DAY OF MARCH, 2018."

In his address, learned counsel submitted that the election took place on the 3rd of March, 2018 at Ward 5 in Owan West LGA.He stated that the evidence of the 4th Respondent which was unshaken during cross-examination established this fact. He accordingly highlighted the relevant parts of the evidence of the 4th Respondent.

He maintained that in order to prove an election, it is necessary to call at least one voter from each polling unit or a presiding officer or electoral official who participated in the election. See: ***Hon.Dr. Fidel Ayogu vs. Dr. Chimaroke Nnamani & Anor. (2006) 8 NWLR (Pt.981) 160 at 186-187.***

He submitted that where a party alleges that there was no voting, he must call at least one voter from each polling unit to show that he could not vote in the polling unit because there were no voting materials or electoral officials to preside over the election. See: ***Hon.Dr. Fidel Ayogu vs. Dr. Chimaroke Nnamani & Anor. (2006) supra per. Bulkachuwa JCA.***

Learned counsel submitted that in this case, the Petitioner did not adduce evidence to prove that there was no election held at Ward 5 in Owan West LGA.

He submitted that the 3rd and 4th Respondents called the Returning Officer, Mr.Peter Ogedengbe to prove that voting took place in Ward 5 in Owan West LGA.

He submitted that since the Petitioner did not discharge the burden on them to prove that there was no election, the burden of proof cannot shift to the 3rd and 4th Respondents to prove that there was an election. See: ***Boni Haruna vs. Adamu Modibbo (2004) 16 NWLR (Pt.900) 487 at 556-577.***

He submitted that the evidence of the thugs hijacking the election materials amounted to hearsay because the witnesses all alleged that they were told about the hijacking.

He urged the Tribunal to dismiss the Petition for lack of merit.

Upon receipt of the Petitionerôs Final Written Address, the learned counsel for the 1st and 2nd Respondents filed a Reply on Point of Law.

In his Reply on Points of Law, the learned counsel for the 1st and 2nd Respondents submitted that it is the Tribunal that is saddled with the duty of appraisal/evaluation of evidence and ascription of probative value thereto. See ***Ukejevs.Ukeje(2014)11NWLR(Pt1318)384;Kim v. State (1992)4 NWLR Pt 233 p. 17Sanusi v. Ameyogun (1992) 4 NWLR Pt.237P.527;***and **Egharevba v. F.R.N. &Ors (2016) LPELR – 40045 (SC).**

He posited that since the duty of evaluation of evidence is exclusively bestowed on the Tribunal, he will not join the Petitioners in the evaluation of evidence and ascription of weight as they demonstrated in some paragraphs of their Written Address. He submitted that most of what the petitioners narrated are not the true reflection of the evidence of the witnesses before the Tribunal. He therefore urged us to discountenance same in the evaluation of evidence and ascription of weight while determining the issues in this petition.

He submitted that the legal burden in this petition lies on the petitioner and it does not shift an inch. That the Respondentsô are only obliged to give evidence in rebuttal after the Petitionersô have proved the cardinal fact that there was no election in the 13 units of Avbiosi ward 5 in Owan West Local Government Area. He said that since the petitioners have failed to prove their case, the Respondents have nothing to prove. See: **Elias v. Disu & Ors (1967) LPELR -25114.**

He submitted that election can only be postponed to the next day if the cancellation will substantially affect the result. He said that where the effect is infinitesimal as in this case, the returning officer can declare a winner based on the result recorded.

He maintained that the burden to prove that the cancellation was substantial enough to affect the eventual result rests on the petitioners. He said that this burden can only be lifted by tendering the voters register so that the Tribunal can ascertain the number of registered voters in the affected area. He referred to the case of: **ABUBAKAR VS. YAR'ADUA** (2008) 19NWLR (Pt.1120) 1 at 155 where NI KI TOBI JSC stated thus:-

> ***"Election results are presumed by law to be correct until the contrary is proved. It is however a rebuttable presumption. In other words, there is a***

rebuttable presumption that the result of any election declared by a returning officer is correct and authentic and the burden is on the person who denies the correctness and authenticity of the return to rebut the presumption. See OMOBORIOWO vs. AJASIN (1984) 1 SCNLR 108, JALINGO VS. NYAME (1992) 3 NWLR (Pt 231) 530. FINEBONE VS. BROWN (1999) 4 NWLR (Pt 600) 613, HASHIDU VS. GOJE (2003) 15 NWLR (Pt. 843) 352 and BUHARI vs. OBASANJO (2005) 13 NWLR (Pt.941) 1.

In the case of BUHARI VS. OBASANJO supra at page 222, EJIWUNMI JSC of blessed memory stated:-

"..The onus lies on the appellant to establish first substantial non-compliance. Secondly, that it did or could have affected the result of the election. It is after the appellants have established the foregoing that the onus would shift to the respondents to establish that the results was not affected.ò

He submitted that the Petitioners have not established substantial non ï compliance so there is no need to proceed to the necessity of showing how the non-compliance could have affected the result of the election. He said that it is only after this that the Respondent will be required to prove that the result was not affected.

We have carefully considered all the processes filed in respect of this Petition together with the arguments of learned counsel for the parties on all the Issues formulated together with the preliminary objections and other ancillary issues.

The essence of a preliminary objection is to terminate at infancy, or to nip in the bud, without dissipating unnecessary energies in considering an unworthy or fruitless matter in a courtôs proceedings.

In other words, it forecloses hearing of the matter in order to save time. See: ***Efet vs.I.N.E.C. (2011) 7 NWLR (Pt.1247) 423; and A.P.C. vs. I.N.E.C. (2015) 8 NWLR (Pt.1462) 531 at 541.***

Furthermore, where there is a preliminary objection, that objection should be determined first before going into the substantive matter. See: ***A.P.C. vs. I.N.E.C. (2015) 8 NWLR (Pt.1462) 531 at 541.***

In the event, we will deal with the preliminary objection and other ancillary matters before we determine the main issues in this Petition.

In this petition, it is worthy of note that both the Petitioners and the 1st and 2nd Respondents raised one form of preliminary objection or the other.

The first preliminary objection raised by the learned Counsel for the 1st and 2nd Respondents was that the Reliefs contained in Paragraph 50(c), (d) and (e) of the Petition are pre-election matters over which this Tribunal cannot adjudicate.

He submitted that the question of whether or not notice was given for the conduct of an election is a pre ï election matter to be determined by the regular courts and not an Election Petition Tribunal and that the Petitioners did not plead any facts nor lead any evidence in proof of same. He submitted that the said reliefs were not proved and are deemed abandoned and he urged the Court to strike them out.

For the avoidance of doubt Paragraphs 50(c), (d) and (e) of the Petition state as follows:

> ñ***S.50(c) An ORDER of this Honourable Court declaring that the 3rd Respondent (EDSIEC) conducts a fresh election for not following the requisite mandatory 90 days notice by INEC and enshrined in the Electoral Act;***
>
> ***(d) An ORDER of this Honourable court declaring that the 3rd Respondent (EDSIEC) conducts a fresh election in Ward 5 Owan West Local Government Area for not following the requisite mandatory 90 days notice by INEC and enshrined in the Electoral Act;***
>
> ***(e) An ORDER of this Honourable Court declaring that the 3rd Respondent (EDSIEC) conducts a fresh election into the***

Councillorship Wards and Local Government Councils and to give the requisite 90 days notice as enshrined in the Electoral Act.

Upon a careful examination of the three reliefs enumerated above, it is evident that they relate essentially to the requirement of the 90 days notice as stipulated in the Federal Electoral Act.

Going through the entire gamut of the evidence adduced at the trial, it is clear that the Petitioners did not lead any evidence in respect of the failure to give notice or to comply with the period of 90 days as stipulated under the Electoral Act. It is settled law that averments in pleadings do not amount to evidence. Where evidence is not led in support of averments, they are deemed abandoned unless same has been admitted by the defendant/respondent. See: ***Aregbesola vs. Oyinlola (2011) 9 NWLR (Pt.1253) 458 at 594***. Even where a particular averment is admitted, a Petitioner may nevertheless be required to tender some evidence in proof of such facts. See: ***Buhari vs. Obasanjo (2005) 2 NWLR (Pt.910) 241 at 351***.

We agree entirely with the submission of the learned counsel for the 1st and 2nd Respondents that the reliefs are deemed abandoned. We therefore uphold the preliminary objection on the said reliefs and they are accordingly struck out.

The Petitioner also raised an objection on the failure of the 1st and 2nd Respondents to file a formal memorandum of appearance. He posited that this was fatal to their defence.

On this objection, we are of the view that the failure to file a memorandum of appearance is a mere irregularity which is not fatal to the defence of the 1st and

2nd Respondents. More so, we do not see how the failure to file a memorandum of appearance has prejudiced the case of the Petitioners.

In the case of: ***Salvador vs. INEC (2011) 2 LRECN 136 at 142***, the Court of Appeal, Lagos Division held that the non- filing of a Memorandum of Appearance shall not bar the Respondent from defending the election petition if the Respondent files his reply to the petition within a reasonable time.

In the case of: ***Akeredolu v. Omiyale & Ors (2013) LPELR – 22800 (CA)*** rightly relied upon by the learned counsel for the 1st and 2nd Respondents, ***OREDOLA J.C.A***. opined that:

> ***"The essence and main purpose of entering/filing memorandum of appearance is simply for the defendant to evince an avowed intention that the suit will be contested or to serve as an indication of awareness regarding subsistence of the action in question. Thus, to my mind, the provision can be treated as being directory and not mandatory."***

See also the case of: ***Buhari vs. Obasanjo (2005) 2 NWLR (Pt.910) 241 at 351***.

In the instant case, the 1st and 2nd Respondents filed their reply to the petition so the failure to file a memorandum of appearance is not fatal. The objection of the Petitioners in this regard is therefore overruled.

The Petitioners also raised an objection that the 2nd Respondentôs reply should be discountenanced as the said reply was filed out of time but without leave of court and non-fulfillment of the penalty thereof.

This objection against the Reply of the 2nd Respondent appears rather curious because from our records, the 2nd Respondent did not file a separate reply. What we have in the file is a joint Reply filed by the 1st and 2nd Respondents. However, the Petitioner has alleged that The 2nd Respondent was served with the Petitionersô petition by the Bailiff of this Honourable Tribunal on the 11th day of April, 2018 and the 2nd Respondent filed her reply to the Petition on the 9th day of May, 2018 without leave of court.

By the combined provisions of sections 91(2) and 96(1) of the Edo State Local Government Electoral Law, 2012, the Respondents are expected to file their Reply within 21 days of service of the Petition on them.

Incidentally, the 2nd Respondent has not disputed this allegation of filing out of time without the leave of the Court. By their silence, we are inclined to believe that the Petitionersô objection is valid. Moreover, from the proof of service in the Tribunalôs file, it is apparent that the Reply was in fact filed out of time.

It is settled law that Election Petitions are *sui generis.* Election matters are time bound hence the timelines stipulated under the rules are sacrosanct. In effect, any process filed out of time is incompetent and is liable to be struck out. See the decision of the Supreme Court in the case of: ***Omisore vs. Aregbesola (2015) 15 NWLR (Pt.1482) 205 at 229.***

In the instant case, since the 2nd Respondentôs Reply was not filed within the time stipulated under the rules, it is liable to be struck out and it is accordingly struck out.

Having dealt with the foregoing preliminary matters, we will delve into the substantive matter.

Upon a careful examination of the Issues formulated by the learned Counsel for the parties, we are of the view that they appear quite germane to the petition. However, some of the Issues are rather verbose and repetitive. In the event we have distilled 4 Issues for Determination as follows:

1. ***Whether local government election was conducted in Ward 5 in Owan West Local Government Area of Edo State on the 3rd of March, 2018;***

2. ***Whether there were material contradictions in the evidence of the witnesses called by the Respondents.***
3. ***Whether the 1st and 2nd Respondents can amend a material fact during trial;***
4. ***Whether it was appropriate for the 3rd and 4th Respondents to declare the 1st and 2nd Respondents winners of the purported election.***

We will proceed to determine the Issues *seriatim.*

ISSUE 1:

Whether local government election was conducted in Ward 5 in Owan West Local Government Area of Edo State on the 3rd of March, 2018.

In order to determine this issue, it will be expedient to first determine the preliminary issue of the burden of proof in this type of election petition. This is in view of the controversy generated during the trial on the issue of burden of proof.

While the Petitioners asserted that the burden is on the Respondents to prove that elections were held in Ward 5 in Owan West Local Government Area of Edo State on the 3rd of March, 2018, the Respondents maintained that the burden is on the Petitioners to prove that the elections were not conducted in the Ward on that day. What then is the legal position?

There is a general presumption of regularity. That things were rightly and properly done. This is expressed in the Latin maxim: ***Omnia praesumuntur rite esse acta*** (all things are presumed to have been done rightly and properly). As it relates to official acts, this general presumption of regularity is enshrined in ***section 168(1) of the Evidence Act, 2011*** which provides thus:

> ***"Section 168(1) When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with."***

Consequently, once an official result is declared as evidenced in **Exhibits K and K1,** there is a rebuttable presumption of regularity of official acts in line with **Section 168 (1) of the Evidence Act.** The result is deemed as proper and *prima*

facie correct until proved otherwise. See the case of: **Omoboriowo & Ors v. Ajasin (1984) S.C.** cited by learned counsel**.**

The Supreme Court reaffirmed this legal position in the recent case of: **Nyesom v. Peterside & Ors (2016) LPELR – 40036 (SC)** where they stated unequivocally thus:

> ***"The law is trite that the results declared by INEC enjoy a presumption of regularity. In other words, they are prima facie correct. The onus is on the petitioner to prove the contrary. See Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941)."***

Also in the case of: ***Ngige vs. INEC (2015) 1 NWLR (Pt.1440) 281 at 289***, the Supreme Court held ***that there is a rebuttable presumption that any result declared by a returning officer is authentic and correct and the burden of rebutting that presumption is on the person who denies its correctness***.

See also the case of: **Buhari v. INEC &Ors (2008) 19 NWLR (Pt. 1120) 246** appropriately relied upon by the learned counsel for the 1st and 2nd Respondents**,** where the Court held thus:

> *"The petitioner who files a petition under* ***Section 145 (1) of the Electoral Act*** *has the burden to prove the grounds this is because he is the party alleging the grounds and he has a duty to prove the affirmative. He is the party who will lose if no evidence is given on the grounds. If the petitioner does not prove his case under* ***Section 145 (1)*** *of the Act, the action fails."*

As the learned counsel rightly observed, **Section 81 (1) of ESLGL** is *impari materia* with **Section 145 (1) of the Electoral Act, 2010.** Thus, the burden is on

the Petitioners to adduce evidence to establish their case before the Respondents can become obliged to call any evidence in rebuttal of the evidence adduced by the Petitioners.

The 4th Respondent who is the returning officer in Ward 5 in Owan West Local Government Area of Edo State, has declared the 1st Respondent as the duly elected councilor in Ward 5 as evidenced in **Exhibits K and K1**.The declaration is presumed valid and it is thus incumbent on the Petitioners who asserts otherwise to rebut same.

In the celebrated case of: ***PDP vs. Umana (No.1) (2016) 12 NWLR (Pt.1526) 299 at 300,*** the Supreme Court held that the onus is on the Petitioner to prove the allegation of disenfranchisement of voters or non-voting.

See also the following authorities on the point: ***Kakih vs. PDP (2014) 15 NWLR (Pt.1430) 374;*** and ***Ucha vs.Elechi (2012) 13 NWLR (Pt.1317) 330.***

From the foregoing authorities, it is crystal clear that the burden is on the Petitioners to prove that the elections were not conducted in Ward 5 of Owan West Local Government Area on the 3rd of March, 2018. When the Petitioners have discharged this burden, it will now be incumbent on the Respondents to rebut same.

The question now is whether the Petitioners have adduced sufficient evidence before this Tribunal to prove that election was not conducted in Ward 5 of Owan West Local Government Area on the said date.

To rebut the presumption, it is settled law that the Petitioner must call voters as witnesses to show that they did not vote in the disputed units on the said day and also tender the voters register, to show that there was no accreditation of voters, voting and counting of votes. See the following decisions on the point: ***Nnaji vs.Agbo 2 EPR 846; Onoyom vs. Egari (1999) 5 NWLR (Pt.603) 416; and INEC vs. Anthony (2011) 7 NWLR (Pt.1245) 1 at 4.***

In the case of: ***INEC vs. Anthony (2011) 7 NWLR (Pt.1245) 1 at 4, Augie JCA*** emphasised thus:

"It is settled that a petitioner relying on this ground must prove so by calling at least a registered voter from each of the polling booths in each of the wards in the constituency."

Again in the case of ***PDP vs. Umana (No.1) (2016) 12 NWLR (Pt.1526) 299 at 300,*** the Supreme Court stated thus:

> ***"The law is indeed trite that the Petitioners/Respondents who asserted that there was no voting in the affected 18 Local Government Areas of Akwa Ibom State, must prove so by calling at least a registered voter from each of the polling units in each of the wards in the respective Local Government Areas to show that he could not vote during the election conducted on the 11th April, 2015. Not only that, such registered voter must also establish by credible evidence how the lack of voting in the affected Local Government Areas affected the final results of the election to the disadvantage of the Petitioners/Respondents. See Kakih v. Peoples Democratic Party (2014) 15 NWLR (Pt. 1430) 374 and Ucha v. Elechi (2012) 13 NWLR (Pt. 1377) 330 at 359."***

In proof of their case, the Petitioners called six witnesses and the 1st Petitioner .They also tendered EXHIBITS E1 ï E5.

In order to ascertain whether the Petitioners discharged the burden on them it will be expedient to carefully examine the evidence adduced in that regard.

The Petitioners first witness was one **Alfred Olagunju** who claimed to have been engaged as a polling agent by EDSIEC in Unit 11. This witness was not a voter in unit 11 as a matter of fact he did not tender any voterôs card.

The next, was **Edukpe Daniel Ehichioya** who testified that he was commissioned to monitor the election in unit 4 of Avbiosi Ward 5. He admitted that because he was in unit 4 he did not know what happened in other units in the ward but he heard that thugs hijacked the election materials hence no materials got

to Unit 4. He tendered his voterôs card but it is not certain whether he was supposed to vote in Unit 4.

Oikelome Akhigbe testified as **PW3.**He said that he was commissioned to monitor the election in unit 13 of Avbiosi Ward 5. He made allegations of non-voting in unit 13 including how he was told that hoodlums and thugs hijacked the election materials.

Under cross examination he admitted that he was not a voter in unit 13 but an agent of the petitioners. His voting booth was in Unit 2.

The PW 4 was one Ekeinde **Ohije Abiodun.** He stated that he was commissioned to monitor the election in unit 5 of Avbiosi Ward 5.He tendered his voterôs card as a prospective voter in Unit 5. He narrated how he was also told that hoodlums and thugs hijacked the election materials.

Ohimai Elijah was the fifth Petitionersô witness. He was commissioned to monitor election in unit 11 of Avbiosi Ward 5. Under cross examination, he admitted that his voting unit is 8 and that unit 8 and 11 are not in the same place.

Femi Oyakhilome testified as the PW 6. He tendered his voterôs card and narrated how he was informed that hoodlums and thugs hijacked election materials.

Finally, the 1st Petitioner testified and tendered the following documents:

(i) 1st Petitioners votersôcard ï **Exhibit "E".**

(ii) Membership card ï **Exhibit "E1".**

(iii) Nomination Form ï **Exhibit "E2".**

(iv) Form M ï **Exhibit "E3".**

(v) Lawyers Letter ï **Exhibit "E4".**

(vi) Nomination Form ï **Exhibit "E5".**

The 1st Petitioner stated that although he was registered to vote in Unit 4, on the day of the election he moved round all the 13 units in Ward 5 and there was no elections held in any of the 13 units. He said that he witnessed the hijacking of the election materials and made a report of the incident at the Sabongidda Ora Police Station.

Upon a careful scrutiny of the evidence adduced by the Petitioners, it must be observed that the Petitioners did not lead evidence to sustain the standard of

proof incumbent on them as established by the line of authorities already considered in this judgment. They called six witnesses whose evidence could barely cover two units. Even on the basis of one voter as a witness from each unit, they were clearly in deficit of witnesses.

They did not call at least one voter from each of the 13 polling units or a presiding officer or electoral official from the unit. See: ***Hon.Dr. Fidel Ayogu vs. Dr. Chimaroke Nnamani & Anor. (2006) 8 NWLR (Pt.981) 160 at 186-187;*** INEC ***vs. Anthony (2011) 7 NWLR (Pt.1245) 1 at 4.***

Furthermore, they did not tender the voters register, to show that there was no accreditation of voters, voting and counting of votes. See the following decisions on the point: ***Nnaji vs.Agbo 2 EPR 846; Onoyom vs. Egari (1999) 5 NWLR (Pt.603) 416; and INEC vs. Anthony (2011) 7 NWLR (Pt.1245) 1 at 4.***

Another worrisome aspect of the Petitionersô case is that apart from the 1st Petitioner who testified that he witnessed the snatching of the election materials, all the other witnesses gave hearsay evidence of what they were told by other people who never testified before us.

Section 38 of the Evidence Act, 2011 stipulates that: ***"Hearsay evidence is not admissible except as provided in this Part or by or under other provisions of this or any other Act."***

In election petitions, hearsay evidence is clearly inadmissible. See: ***Doma vs INEC (2012) 13 NWLR (Pt.1317) 297; Hashidu vs. Goje (2003)15 NWLR (Pt.843) 352.***

In the Supreme Court in the case of: ***Ikpeazu vs.Otti (2016) 8 NWLR (Pt.1513) 38 at 57, Galadima JSC*** observed thus:

"The same goes for PW 20 whose bulk of testimony was hearsay. He gave evidence of alleged malpractices across the 3 Local Govt. Areas of the State that he did not visit. Such hearsay evidence qualifies it as unreliable as it is not in tune with the provision of section 38 of the Evidence Act."

Again the issue of hijacking and snatching of election materials raises the issue of the commission of offences. It is settled law that once an allegation of crime is made in a civil matter it must be proved beyond reasonable doubt. See: ***section 135(1) of the Evidence Act, 2011***.

In the case of: ***Ucha & Anor vs. Elechi & Ors (2012) 13 NWLR (Pt. 1317) 330*** the Court held thus:

> ***"In election petition trials, the standard of proof is proof beyond reasonable doubt where the petition is brought on grounds of a criminal nature"***

Furthermore, once an allegation of no voting is made and the result is declared, a criminal allegation is established and the petitioner is required to prove it beyond reasonable doubt. In the case of: ***Waziri v. Geidam & Ors (2015) LPELR – 26046 (CA***), the Court held that:

> ***"An allegation by a petitioner (s) that no voting occurred in certain polling units or Local Government Areas or a constituency e.t.c. but votes were credited to the candidates constitutes a criminal offence under section 123 (1) – (6) of the Electoral Act, 2010 as amended."***

Upon a careful evaluation of the evidence adduced by the Petitioners, I am of the view that they have not discharged the burden on them to prove that the elections were not conducted in Ward 5 of Owan West Local Government Area of Edo State on the 3rd of March, 2018. The Petitioners having failed to establish their case, the Respondents do not have any obligation to prove that the election was conducted.

We therefore resolve Issue 1 in favour of the Respondents.

Having resolved Issue 1 in favour of the Respondents, we are of the view that the resolution of Issues 2 and 3 which border on alleged ***material contradictions in the evidence of the witnesses called by the Respondents*** and the ***amendments effected by the 1st and 2nd Respondents during trial*** have no practical value in this petition. It will be a mere academic exercise to go into such issues.

In the case of: ***Plateau State vs. Attorney General of the federation (2006) 3 NWLR (Pt.967) 346 at 419, Niki Tobi JSC*** stated thus:

> ***"A suit is academic where it is merely theoretical, makes empty sound, and of no practical utilitarian value to the plaintiff even if judgment is given in his favour."*** This definition was also followed in the case of: ***Odedo vs Oguebego (2015) 13 NWLR (Pt.1476) 229 at 251***.

In the event we hold that Issues 2 and 3 have been overtaken by events.

ISSUE 4:

Whether it was appropriate for the 3rd and 4th Respondents to declare the 1st and 2nd Respondents winners of the purported election.

Under this Issue, the Petitioners forcefully contended that since the 1st and 4th Respondents testified that elections in Polling Unit 1 ï 6 were cancelled due to rioting and violence, by the provisions of ***Section 43 of the Edo State Local Government Electoral Law, 2012 (as amended),*** they ought to have postponed the elections in Polling Units 1 ï 6 to the next date. He concluded that it was not appropriate for the 3rd and 4th Respondents to declare the 1st and 2nd Respondents winners of the purported election based on the results from 7 out of the total 13 units in the Ward.

To further fortify his arguments, the learned counsel for the Petitioners informed the Tribunal that over 62% of the registered voters in the Ward are from the 6 Polling Units whose results were cancelled. He pointed out that these voters were denied the exercise of their franchise on that day.

We must confess that this issue looks quite formidable on the face of it. But on close scrutiny, it will be observed that the parties did not join issues on the nullification of the election results in the 6 Units. As a matter of fact going through the entire gamut of the Petitioners pleadings, there is no where he mentioned the fact that 6 Units were cancelled. His case on his pleadings and his evidence was that elections did not take place in any of the 13 Units in Ward 5 of Owan West Local Government.

For the avoidance of doubt Relief (b) of the Petition states as follows:

> ***"That it be determined that the <u>entire purported Ward 5</u> Councillorship election held on the 3rd March, 2018; in Owan West Local Government Area, Edo State; be nullified and a fresh election be conducted for the Ward"(underlining, ours)***

Thus the petition was contested on the crucial issue of whether or not elections were held in the entire Ward 5 and not just some units. The issue of cancellation of 6 Units, disenfranchisement of 62% of the voters appears to be an afterthought and a sudden summersault. This will be quite overreaching at this stage.

It is settled law that parties are bound by their pleadings, See: ***Kyari vs. Alkali (2001) 11 NWLR (Pt. 724) 412 at 433-434.***

Although in the course of the trial, evidence was led on the cancellation of Units 1 to 6, there was no formal application to amend the pleadings to fall in line with the evidence. It is trite law that evidence led in respect of facts not pleaded goes to no issue. See: ***Okoko vs. Dakolo (2006) 14 NWLR (Pt.1000) 401 at 422.***

The submission of learned counsel for the Petitioners that over 62% of the registered voters in the Ward are from the 6 Polling Units whose results were cancelled is not borne out of the pleadings or even the evidence adduced at the trial. It is simply coming out of the blues. It is settled law that the address of counsel no matter how brilliant can never supplant or supplement the evidence adduced at the trial. See: ***Vassilev vs. Paas Industry Ltd. (2000) 12 NWLR (Pt.681) 347 at 355; and Sanyaolu vs. INEC (1994) 7 NWLR (Pt. 612) 600 at 611.***

We therefore resolve this Issue in favour of the Respondents.

Having resolved all the Issues in this Petition in favour of the Respondents, ***we hold that the Petition lacks merit and it is accordingly dismissed with N10, 000.00 (ten thousand naira) costs in favour of each Respondent.***

HON. JUSTICE U.I. ERAMEH (CHAIRMAN),

HON. JUSTICE P.A. AKHIHIERO

HIS HONOUR D.O. ELOGIE ESQ.

HIS WORSHIP E.I. BAZUAYE (MRS.)

HIS WORSHIP J. OGBEIDE ESQ.

O.S.Elefan Esq. & D.O.Enereba Esq…… Counsel for the Petitioners

C.I.Aiguobarueghian Esq……..…Counsel for the 1st & 2nd Respondents

A.Ayo Esq……..….Counsel for the 3rd & 4th Respondents