THE BURDEN OF PROOF OF NON-COMPLIANCE AND THE SUBSTANTIALITY RULE IN ELECTORAL CONTESTS IN NIGERIA AND THE USA

Charles Azubuike Obodozie*

Abstract

A petitioner in an election petition has the burden of proof of non-compliance, but such non-compliance must also be shown to have substantially affected the result of the election. This burden of proof is very difficult to discharge as decided cases have shown. Electoral jurisprudence is often founded on the presumption of regularity of election results as declared by the electoral umpire, which implies that the law takes for granted that a credible election has been conducted. This tends to lend judicial validity to the view that challenging the outcome of an election through the legal process is an exercise in futility. The consequence of this undue judicial protection of the declared winner and the electoral umpire to the detriment of the petitioner is that legal justice has scarcely redressed electoral injustice. This rebuttable presumption of the regularity of elections and results no longer serves the ends of justice in our electoral process. The purpose of electoral laws is to obtain a correct expression of the intent of the voters. This paper seeks to show that the presumption of regularity and the application of the substantiality rule is herculean, unreasonable and unfair, and proposes a departure to a lower standard. It recommends reforms that enhance electoral justice by using video evidence to prove the signing of election results like form EC8A by party agents, automatic electronic transmission of results and a review of the substantiality rule so that proved cases of fundamental non-compliance should vitiate the results of the election.

Keywords: *Burden of Proof, Election, Petition, Non-Compliance, Substantiality Rule.*

1. Introduction

Elections in Nigeria are essentially a struggle for power to determine who would control the wealth of the country, by the politicians who are mostly corrupt, and who have no other means of livelihood other than politics and its financial benefits. It has therefore become literally a fight for survival, and a fight to the death. Those who win political power become rich and famous overnight, while those who lose it become poor and forgotten. So, politicians do everything to win power, and even more to retain it. As President Obasanjo once described it,

* LL.B (Hons) B.L. is a practicing lawyer, and the Principal Partner in Obodozie Law Firm, Onitsha. Phone: 08033816026. Email: charlesobodozie@gmail.com.

elections in Nigeria are a do or die affair. This struggle for power has often led to civil crisis, military coups, and even a civil war. Politicians, with the connivance of INEC, have always failed to comply with the relevant electoral laws in their bid to win elections by all means. However, the courts and tribunals do not only require proof non-compliance, but also proof that the non-compliance complained of substantially affected the result of the election, which is a difficult burden and sometimes an impossible task.

The 2022 Electoral Act sought to lighten the burden by bringing in technology for accreditation using BVAS and electronic transmission of results. It also tried to remove the need to call oral evidence where the non-compliance is manifest on the face of the document. But the recent cases of *Oyetola v. INEC*,[1] *Atiku v. INEC*[2], and *Obi v. INEC*[3] made mincemeat of the whole reforms as the election tribunals again took refuge in the presumption of regularity, which placed an onerous burden of the proof of non-compliance on the petitioners, and also the substantiality rule, to dismiss most of the petitions. A study of the judgments in these cases would reveal that the decks were stacked against the petitioners and there was no way they could have got justice under the prevailing regime of the burden of proof.

2.0. **Burden of Proof in Election Petition in Nigeria**

On whom lies the burden of proof in an election petition in Nigeria? By virtue of section 131(1) of the Evidence Act, 2011, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The burden of proof in election petition cases, just like in other civil cases is on the person questioning the results of an election to prove his claim. In *Ngige v. INEC,*[4] the court held that there is a rebuttable presumption that any election result declared by a returning officer is correct and the burden of rebutting that presumption is on the person who denies its correctness. However this burden shifts from side to side, and at each time in the case, rests on the party whose case would fail if no further evidence is led in the case. See *Awuse v Odili*.[5]

[1] (2023) 11 NWLR 71
[2] (2023) 19 NWLR 711 - 760
[3] (2023) 19 NWLR 761 - 1652
[4] (2015) 1 NWLR (Pt. 1440) 281
[5] (2015) 1 NWLR (Pt. 1440) 281

2.1. **Burden to prove that election took place**

The person who asserts that election took place i.e. the respondent has the onus placed on him to prove that fact. When a petitioner makes the usual submission and allegation of fact that elections did not in fact hold, and as such the declaration of the respondent as winner was unconstitutional, the respondent usually responds with assertions of fact that elections actually held which he achieves by the presentation of the result with the official seal and stamp of the electoral official. It therefore behooves on the respondent to prove by evidence that elections actually held especially when the petitioner has made out a prima facie case.

2.2. **Burden to Prove a Claim for a Declaration that the Petitioner Won the Election**

In an election petition, where, by the pleadings of a party without more, he claims for a declaratory relief, it cannot be deemed to have been established even where it was admitted by the adverse party. For example where in an election petition the petitioner alleged that the Respondent, who was declared as the winner and returned elected in the questioned election, did not score a majority of the lawful votes cast at the said election but rather that it was the petitioner that scored majority of the lawful voted cast and should be declared as the winner of the said election. He must prove that he polled the majority of the votes cast, and won the election.

3.0.**The Burden of Proof of Non-Compliance in Nigeria**

3.1.Section 134 (1)(b) of the Electoral Act, is that a petitioner may question the validity of an election on the ground of corrupt practices or non-compliance with the Electoral Act. This article shall however focus on the second limb of Section 134 (1)(b), which is that the election was invalid due to non-compliance with the Electoral Act. Non-compliance is a term of very wide significance and embraces all violations of the Electoral Act or the regulations which affect the validity of an election or the return but does not include corrupt practices.[6]

Where there is an interplay of facts which go to establish corrupt practices with other cases of non-compliance, an election tribunal or court reserves the power, at the trial, to separate the constituent offenses of corrupt practices from cases of non-compliance and consider either case separately, so as not to confuse the standard of proof for corrupt practices with the standard of proof required to establish cases of non-compliance. See *Omisore v Aragbesola*.[7]

[6] See Goyol v INEC (2011) 2 LRECN 420; Buhari v Obasanjo (SC), [2005] All FWLR (Pt 273) 1.
[7] [2015] 15 NWLR (Pt 1482) 205.

Non-compliance with the Electoral Act covers such things as outright violation of the Act and regulations made under the Act, proven manipulation of the electoral process to confer on one or more candidates undue advantage to the detriment of others, and other forms of malpractices or irregularities, such as over-voting or other material allegations that voters were disenfranchised through the use of illegal or manipulated voters' registers, failure or neglect to provide voting materials or absence of designated polling stations.[8] But it does not include non-compliance with directive or instructions of the Commission or its officials. See *INEC v Oshiomole*.[9]

3.2.**Non-compliance and the burden of Proof in Nigeria**

The onus is on a petitioner challenging the validity of an election on the ground of non-compliance with the Electoral Act and guidelines issued by the Commission for the conduct of the election to establish his case by credible evidence. In discharging this onus, the petitioner is required to rebut the presumption in favour of the correctness of the result of the election declared by the Commission.[10] In *Udom v Umana*[11] the Supreme Court held that this presumption is not rebuttable by mere presumptuous postulations or rhetorical questions but only by cogent, credible and acceptable evidence. In the absence of any credible evidence to rebut this presumption, an election petition predicated on this ground will surely fail.

In order to obtain the nullification of any election on this ground, the petitioner has to prove first, the particular breaches or infractions of the Electoral Act, and second, that the non-compliance substantially affected the result of the election.[12] According to section 135 (1) of the Electoral Act 2022, as amended:

> "An election shall not be liable to be invalidated if it appears to the tribunal that the election was conduct substantially in accordance with the principle of the Act and that non-compliance did not affect substantially the result of the election."

The burden on the petitioner to prove non-compliance is three-fold. In *Waziri v Geidam &,*[13] the court held that for the petitioners to succeed in their allegation of non-compliance, they must first,

[8] See *Fannami v Bukar* [2004] FWLR (Pt 198) 1210; *Imah v Malarina* (1999) 3 NWLR (Pt 596) 545.
[9] (2008) 3 LRECN 649 at 705
[10] *Nwole v Iwuegbu & Ors* (2005) 16 NWLR (Pt 952) 543; *Onye v Kema (*1999) 4 NWLR (Pt 598)198
[11] [2016] 12 NWLR (Pt 1526) 179 at 227-228, paras. H-D.
[12] *Okechukwu v INEC* [2014] 17 NWLR (Pt 1436) 255; *Omisore v Aregbesola* [2015] 15 NWLR (Pt 1482) 205.
[13] [1999] 7 NWLR (Pt 630) 227 CA.

plead in their petition the kind of non-compliance alleged. Clear and precise pleading is necessary to sustain the evidence in proof of such allegations. Second, they must tender cogent and compelling evidence to prove that such non-compliance took place in the election. Third, that the non-compliance substantially affected the result of the election, to the detriment of the petitioner.

In *Isiaka v Amosun,*[14] the alleged evidence of non-compliance affected only 12 polling units out of 1672 polling units that were being contested. This was held to be insufficient to negatively affect the election and the return of the 1st respondent. In *Lanto v Wiwo,*[15] it was found after a painstaking evaluation of the evidence that the petitioner was only deprived, by a human error, of 2 (two) votes as demonstrated. It was accepted by the election tribunal and all parties that if the two votes were added to the total votes won by the appellant it would not change the result of the election. The Court of Appeal therefore held that the appellant had failed to satisfy that the votes denied him, by mistake, prevented him from getting majority votes in his favour, and for that reason, the appeal must fail. However, the Court of Appeal stressed the point that if two (2) votes would have changed the result of the election, certainly the election would have been vitiated and election voided on that score.

To be able to overturn the result of an election, the petitioner has a duty to prove the alleged non-compliance polling unit by polling unit, ward by ward. The Supreme Court held in *Ladoja v Ajimobi,*[16] that a petitioner, who complains of non-compliance with the electoral process in specific polling units, has the onus to present evidence from eye witnesses at the various polling units who can testify directly in proof of the alleged non-compliance. See also *Gundiri v Nyako.*[17]

A petitioner may call a polling agent, a ward supervisor assigned to the polling units by his political party, or even the polling agent or ward supervisor of his opponents, where they have useful evidence that will assist his case.[18] He may even rely on police officers or officials of the Commission such as the Presiding Officers, and Polling Staff, where they have useful and direct evidence that will assist him in proving his case.[19]

[14] [2016] 9 NWLR (Pt 1518) 417 at 441 – 442, paras. F-A.
[15] [1999] 7 NWLR (Pt 610) 227 CA
[16] [2016] 10 NWLR (Pt 1519) 87 at 136, paras. A-B
[17] (n 16, @134)
[18] *Okechukwu v INEC* [2014] 17 NWLR (1436) 255; *Sijuade v Oyewole* [2012] 11 NWLR (Pt 1311) 280 at 299
[19] See *Ibrahim v Ogunleye & Ors.* [2012] 1 NWLR (Pt 1282) 489.

In *INEC v Oshiomole*,[20] to establish his case, the petitioner subpoenaed two (2) officials of the Commission, one of whom was the Head of Operations in the State Office of the Commission. He testified as PW47 and tendered results of polling units, all statutory forms for collation of the result of the governorship election in the twelve (12) Local Government Areas in contention. He also produced bags of ballots cast in the election which were counted on the orders of the election tribunal in open court. The election tribunal believed the evidence of PW47, and the avalanche of documentary evidence tendered and other witnesses called by the petitioner. Consequently, it was held that the petitioners had proved their case on the preponderance of evidence before the tribunal. Where the non-compliance comprises of mere infractions of the Electoral Act, which do not amount to electoral offences, the standard of proof shall be on the balance of probabilities, as in all civil cases. It was held in *INEC v Oshiomhole*[21] that the standard of required of a petitioner to prove non-compliance which does not involve any crime is on the preponderance of credible evidence before the election tribunal. All the petitioner needs to establish is that his story is more likely to be true than the respondent's.

3.3. Section 137 Electoral Act 2022: No need for oral evidence when non-compliance is manifest

Section 137 of the Electoral Act 2022 provides that:

> "It shall not be necessary for a party who alleges non-compliance with the conduct of elections to call oral evidence if originals or certified true copies manifestly disclose the non-compliance."

However, the above provision has not absolved a petitioner of the need to lead credible evidence to prove non-compliance. It only provides that oral evidence may not be necessary if and only if the originals or certified true copies of the documents tendered manifestly disclose the non-compliance. Otherwise oral evidence is necessary to demonstrate the documents, and tie them to the non-compliance. In *Oyetola v INEC*[22] the Court held as follows:

> "Section 137 of the Electoral Act only applies where the non-compliance alleged is manifest from the originals or certified true copies of documents relied on. In the

[20] (n 9)
[21] ibid
[22] (n 1)

> instant case, neither Exhibit BVR nor any other documents relied on by the Appellants remotely disclosed, non-compliance with the provisions of the Electoral Act. Hence the section cannot be of any assistance to them. In the circumstance, they still had a duty to call witnesses who witnessed the alleged acts of non-compliance to testify."

3.4. Only a practice which is contrary to the electoral act can be a ground to question an election

A pertinent point to note is that By Section 134(2) of the Electoral Act, 2022, only an act or omission which is contrary to the Electoral Act, 2022 can be a ground for questioning an election. Thus, complaints relating to non-compliance with provisions of the Regulations and Guidelines or the Manual of Election Officials are not legally cognizable complaints for questioning an election. In *Nyesom v Peterside*,[23] the Supreme Court held as follows:

> "While the Electoral Commission is duly conferred with powers to issue regulations, guidelines or manuals for the smooth conduct of elections, so long as an act or omission regarding such regulations or guidelines is not contrary to the provisions of the Act itself, it shall not of itself be a ground for questioning the election."

3.5. Nature of the INEC Result Viewing (IReV) Portal and whether the unavailability of election results on the IREV portal can be a ground to nullify an election

IReV is not a collation system. The Supreme Court, in *Oyetola v INEC*[24] made it clear that there is a difference between a collation system and the IReV portal though both are part of the election process. Whereas the collation system is made up of the centres where results are collated at various stages of the election, the INEC Result Viewing Portal is to give the public the opportunity to view the polling unit results on election day.

What this means is that where the IREV portal fails, it does not stop the collation of results which up to the last election was manually done. The failure or malfunctioning of the IREV only deprives

[23] (2016) 66 NSCQR (Pt 3) 1325; see also Jegede v INEC (2021) LPELR-55481(SC) at 25– 26 at paras. A – D.
[24] (n 1)

the public and even election administrators and monitors the opportunity of viewing the portal and comparing the result collated with the ones transmitted into the IREV.

The Regulations and Guidelines and the INEC Manual stipulated to the effect that hard copies of election results shall be used for collation exercise. Thus, it's only when no such hardcopies of the election results are in existence, that electronically transmitted results or results from the IREV should be used to collate results. By virtue of Paragraph 91(1) of the Regulations, the Forms EC8A and EC60E constitute the bedrock nay "the building blocks" for any collation of results.

In *Atiku v. INEC,*[25] the Supreme Court held that the electronic transmission of results of an election is not expressly stated anywhere in the Electoral Act, but was only introduced by INEC in its Regulations and Guidelines, 2022, and in the INEC Manual for Election Officials, 2023, and that by Section 134(2) of the Electoral Act, 2022, only an act or omission which is contrary to the Electoral Act, 2022 can be a ground for questioning an election.

3.6.**Non-compliance and the Substantiality Rule**

In addition to proving that the alleged acts or omissions of non-compliance occurred, the onus is on the petitioner to prove that the alleged non-compliance affected the final result of the election to his detriment, he has a duty to prove to the election tribunal or court that the non-compliance affected *substantially the result of the election.*[26]

Where the court, based on the strength and quality of evidence from the petitioner, comes to the conclusion that there was non-compliance but finds that it was not substantial enough to nullify the election, the petition will be dismissed for want of proof. But where the petitioner proves that the alleged acts of non-compliance were substantial and that they affected the election result substantially, the onus shifts to the respondents to prove that the conduct of the election complied substantially with the principles of the Electoral Act and other lawful guidelines issued to regulate the conduct of the election.

Unless the petitioner effectively discharges the onus on him to show how the breaches affected or could have affected the result of the election, the burden of proof will not shift to the respondents

[25] (n 2); See also *Dayyabu v. INEC* (2023) LPELR-61547(CA).
[26] *APGA v Uba* (2012) 1 LRECN 358 at 404; CPC v INEC (2011) 4 LRECN 170 at 211; *Fayemi v Oni* (2011) 4 LRECN 455; *Chime v Onyia* [2009] All FWLR (Pt 480) 673; *Ucha v Elechi* (2012)1 LRECN 281 at 305.

to show that the election substantially complied with the Electoral Act.[27] See *Abubakar v Yar' Adua.*[28] Failure by a petitioner to prove such allegations and show how they affected the election negatively will defeat his case. He can only succeed where the non-compliance is of a degree which substantially affected the election result, and the respondent is unable to show that the conduct of the election did not substantially affect the result.[29] In *INEC v Oshiomole* [30] after evaluating the evidence in the case, the election tribunal found that the petitioners had creditably discharged the onus to establish their case. Sadly for the respondents, the Court of Appeal found that they failed to provide credible evidence to rebut the evidence of PW47, the Commission's Head of Operations in Edo State, who testified for the petitioners. The Court of Appeal, Therefore, confirmed the decision of the Tribunal that the petitioners proved the allegations of multiple voting and accreditation, which substantially affected the election result.

One thread established by case law is that it is the total effect of the non-compliance on the election result that determines the success of any election petition founded on this ground. No matter the magnitude of the alleged non-compliance, the burden is on the petitioner to tie same to the effect of such irregularity or non-compliance to the result of the election. The law is that once the petitioner is unable to tie the non-compliance, even if proved, to the result of the election, the petition is bound to fail. In *Buhari v Obasanjo*[31] the court held that the nullification of the result in Ogun State did not affect the overall result of the election in the Federation.

What is needed to sustain an election petition on this score is a substantial non-compliance which affected the result of the election, not just a trivial breach of the Electoral Act with little or no visible impact on the election result. It was also held in *Buhari v Obasanjo*[32] that the failure of two officials of the Commission to take the oath of loyalty contrary to the Electoral Act 2002, *per se,* will not lead to the nullification of an election. Also, the non-certification of voting materials, *per se,* is not enough to set aside an election unless where it is shown that it substantially affected the result of the election.[33]

---

[27] Buhari v Obasanjo [2005] All FWLR (Pt 273) 1 at 145; APGA v Uba (2012) 1 LRECN 358; Okechukwu v INEC [2014] 17 NWLR (Pt 1436) 255 at 308-309, paras. G-A.
[28] [2009] All FWLR (Pt 457) 1 at 147, C-G; INEC & Ors v Oshiomole & Ors (2008) 3 LRECN 649 at 702,. F-G.
[29] Oke & Anor v Mimiko & Ors (No.2) [2014] 1 NWLR (Pt 1388) 332 at 391-392 paras, Per Onnoghen JSC.
[30] (2008) 3 LRECN at 702.
[31] (2005) 1 LRECN 235; [2005] 2 NWLR (Pt 910) 241.
[32] (2005) 1 LRECN 235; [2005] 2 NWLR (Pt 910) 241.
[33] ibid

4.0. Burden of Proof in the United States Electoral Contests

In Election Contests in the United States of America, under the Federal Contested Elections Act, of 1969[34] the burden is on contestant to prove that the election results entitled him to contestee's seat, even where the contestee fails to answer the notice of contest or otherwise defend (*Tunno v Veysey*).[35]

4.1. Position in the United States of America on non-provision of ballots and cancelled votes

In the United States of America, where a contestant in a contested election case makes a claim to a seat, it carries with it the implication that the contestant will offer proof of such nature that the House of Representatives acting on his allegations alone, could seat the contestant.

Under the contested elections statute, a contestant has the burden of resisting a contestee's motion to dismiss, prior to the submission of evidence and testimony, by presenting sufficient evidence that the election result would be different, or that contestant is entitled to the seat. Thus, in the 1971 California election contest of *Tunno v Veysey*[36], the House of Representatives committee report recommended dismissal of the electoral contest where the contestant merely alleged that election officials had wrongfully and illegally canceled the votes of 10,000 potential voters, without any evidence as to how these potential voters would have voted. The committee report noted the following burden of presenting evidence:

> "Under the new law then the present contestant, and any future contestant, when challenged by motion to dismiss, must have presented, in the first instance, sufficient allegations and evidence to justify his claim to the seat in order to overcome the motion to dismiss."

The report continued:

> "The major flaw in the contestant's case is that he fails to carry forward with his claim to the seat as required by the precedents of the House of Representatives and the Federal Contested Elections Act. A bare claim to the seat as the contestant makes in his notice of contest without substantiating evidence ignores the impact

[34] 1969 2 USC ss 381 et seq.
[35] H. Rep. No. 92–626 at 3. Online report <https://www.congress.gov/104/crpt/hrpt852/CRPT-104hrpt852.> accessed 27 March 2025
[36] ibid

> of this requirement and any contest based on this coupled with a request for the seat to be declared vacant must under the precedents fail. The requirement that the contestant make a claim to the seat is not a hollow one. It is rather the very substance of any contest. Such a requirement carries with it the implication that the contestant will offer proof of such nature that the House of Representatives acting on his allegations alone could seat the contestant.
>
> "That the contestant in the present case fails to do this is quite clear. If all of his allegations were found to be correct he would still not be entitled to the seat. It is perhaps stating the obvious but a contest for a seat in the House of Representatives is a matter of most serious import and not something to be undertaken lightly. It involves the possibility of rejecting the certified returns of a state and calling into doubt the entire electoral process. Thus the burden of proof placed on the contestant is necessarily substantial."

The House agreed to a resolution dismissing the contest.

4.2.**Burden of Establishing Claim to Seat in the USA**

Also, in the USA, merely showing that some voters have been precluded from voting through errors of the election officials does not satisfy the contestant's burden of establishing his claim for the seat.

Thus in the above cited 1971 California election contest of *Tunno v Veysey*[37], the contestant alleged that the election officials had wrongfully and illegally canceled the registration of approximately 10,000 voters. However, the contestant did not show how these potential voters would have voted, and the election committee, after expressing a hesitancy to invalidate an election under these circumstances, held that the contestant had not carried through on his burden of establishing his claim to the seat under the Federal Contested Elections Act and the precedents of the House.

4.3.**Standard of "Fair Preponderance of Evidence''**

In an election contest in the USA, a contestant has the burden of proof to establish his case, on the issues raised by the pleadings, by a fair preponderance of the evidence.

[37] ibid

In *Scott v Eaton*,[38] a 1940 California contest, an elections committee summarily ruled that a contestant had not established by a fair preponderance of the evidence that the contestee had violated a California statute or the Federal Corrupt Practices Act, or that any such violation directly or indirectly prevented contestant from receiving a majority of votes cast.

4.4. The Substantiality Rule in the USA: Burden of Showing that the Results of an Election Would Be Changed By the Non-Compliance

In the absence of a showing that the results of the election would be changed, lack of knowledge of registration laws and improper enforcement by officials charged with their administration are not such irregularities as will void the results of an election in the USA.

In *Wilson v Granger*,[39] a 1948 Utah contest, the majority report of the Committee on House Administration acknowledged "widespread and numerous errors and irregularities in many parts of the district," but nevertheless upheld the 104 vote lead of the contestee because the correct result of the election was not affected by the irregularities shown. The House agreed to a resolution dismissing the contest.

Where the contestant alleges that procedural requirements in an election have not been complied with, he has the burden of showing that, due to fraud and irregularity, the result of the election was contrary to the clearly defined wish of the constituency involved. In *Clark v Nichols*,[40] a 1943 Oklahoma contest, the Committee on Elections determined that the contestant had proven certain irregularities relating to the failure of local officials in certain precincts to keep registration books and to comply with various administrative requirements imposed by state law, but dismissed the contest for failure of the contestant to bear the burden of showing fraud and irregularity by any election official whereby contestant was deprived of votes. An elections committee will recommend dismissal of a contest where there is no evidence that the election was so tainted with the misconduct of election officers that the true result cannot be determined.

In the 1951 Pennsylvania contested election case of *Osser v Scott*,[41] the contestant contended, as stated in the report, that he was unable to have "honest-to-goodness Democrats file for minority

[38] [Deschler's Precedents, Volume 2, Chapters 7 - 9] [Chapter 9. Election Contests]

[39] ibid
[40] ibid
[41] ibid

inspector (poll watchers)" and that the Republican Party "will register persons as Democrats in order to file them for minority inspector and to complete the election board." However, the committee recommended dismissal, which the House subsequently agreed to, because no evidence was presented to show "that the election was so tainted with fraud, or with the misconduct of the election officers, that the true result cannot be determined."

4.5. The Substantiality Rule in Evidence Compelling Examination of Ballots in the USA

To entitle a contestant in an election case in the USA to an examination of the ballots, he must establish (a) that some fraud, mistake or error had been practiced or committed whereby the result of the election was incorrect, and a recount would produce a result contrary to the official returns; and (b) that the ballots since the election have been so rigorously preserved that there has been no reasonable opportunity for tampering with them.

In *O'Connor v Disney*,[42] a 1932 Oklahoma contest, a committee on elections refused to conduct a partial recount where contestant had failed to sustain the burden of proving fraud or irregularities sufficient to change the result of the election, and of proving such proper custody of ballots as to reasonably prevent tampering with them.

5.0. The Substantiality Rule and Vitiating Non-Compliance

The rule that a petitioner must establish that the particular non-compliance proved was substantial enough to affect the result of the election, is called the substantiality rule.

5.1. It has however been strongly argued in many cases, though unsuccessfully, that it is not in all cases that a petitioner is expected to establish that the particular non-compliance was substantial enough to affect the result of the election.

Many jurists are also of the opinion that where acts or omissions, which amount to non-compliance, are so fundamental that the alleged non-compliance vitiates the electoral process and its outcome, or the result, in such circumstances, there should be no burden on the petitioner to establish that the non-compliance substantially affected the election result. If the election suffers a vitiating vice which renders it null and void, in such circumstances, there should no obligation, anymore on the petitioner to prove that the non-compliance affected the result of the election.

[42] ibid

This principle of a vitiating vice rendering an election null and void without proof by the petitioner that the vitiating vice affected the result of the election has however only elicited the approval of the Supreme Court in either dissent judgments, or as mere *obiter*. For example, in *Buhari v INEC*[43] the petitioner challenged the presidential election in the 2007 general election on the ground that it was invalid by reason of non-compliance with the Electoral Act 2006, among other grounds. The non-compliance proved at the trial was that the election was conducted with ballot papers that were not serialized and also not bound in booklets as prescribed by section 45 of the Electoral Act 2006, same as section 44 of the Electoral Act 2010, as amended. The Supreme Court after an exhaustive review of previous decisions on non-compliance, the party having the onus of proof, and the standard of proof required to establish the case, by a majority decision of four (4) against three (3) Justices, held that the petitioner had not proved non-compliance that was substantial enough to invalidate the result of the election. Oguntade JSC, one of the three justices that delivered a dissenting judgment in the case (with Onnoghen and Muktar JJ.SC) however held a contrary view. His Lordship held that the approach of the Supreme Court in such cases, was wrong and therefore needed to be re-visited. He preferred the approach of the Supreme Court, per Coker JSC in *Swem v Dzungwe*,[44] where it was held that if a court is satisfied that the petitioner had established an alleged non-compliance which might affect the result of an election but was unable to say whether the compliance, in fact, affected the result, the non-compliance would be held as proved and the onus of proof would shift to the respondent to show that the said non-compliance did not affect the result of the election. He therefore concluded that the substantiality rule, as applied by courts of law presently, puts a heavy burden on the petitioner and is "unduly favourable to him and lenient to the respondent who is the perpetrator of the disobedience."

Concerning the non-compliance alleged in *Buhari's case*[45], Oguntade JSC, found that the respondents, by their traverse admitted that the election was conducted with ballots not bound in booklets and which did not have any serial numbers contrary to section 45 of the Electoral Act 2006. He therefore, held that the said non-compliance being of a fundamental character rendered the ballots invalid because, as opined by him, the use of invalid ballots for the election constituted

[43] [2008] 19 NWLR (Pt 1120) 246; (2009) 3 LRECN 1 at 170

[44] (1966) NMLR 297 at 303, (1966) CLR 2(A) SC

[45] (n 43)

non-compliance that was so fundamental that it violated the principles of the Electoral Act. He held further that the Court of Appeal should have nullified the said election for this reason without placing the burden on the petitioners to show how the non-serialization of the ballots papers and non-binding of the said ballots papers in booklets substantially affected the result of the election. According to him, the said act "was a condition precedent to the holding of the election" without which it was impossible to have a valid election. He reasoned that an invalid ballot paper cannot yield a valid vote. He further held thus:

> "An invalid ballot paper cannot yield a valid vote. Clearly, therefore, the petitioner/appellant in my view succeeded in making the case that non-compliance with section 45 (1) of the Election Act 2006 substantially affected the result of the election."

Both Muktar and Onnoghen JJ.SC concurred with Oguntade JSC on whether the case established by the petitioner required the application of the substantiality rule. On whether the appellant had discharged the onus to prove that the alleged non-compliance substantially affected the election, Onnoghen JSC, held thus:

> "I hold the view that it has. There are non-compliances that go straight to the fundamentals of an election thereby affecting the condition precedents to the holding of an election while others may just affect the result of the election where one had been validly held. In other words, some non-compliance may render an election void in which case there is no result of the election to be substantially affected by the non-compliance while the others may substantially affect the result of an election validly conducted."

In essence, the purport of the dissenting judgments of the three (3) Justices of the Supreme Court was that where a petitioner has established a fundamental breach which negates the principles of the Electoral Act, it constitutes a substantial breach which does not place on the petitioners the onus to prove whether or not the breach substantially affected the result of the election.[46] The reason for the above reasoning of their Lordships is that the non-compliance rendered the election a nullity *ab initio*, and thus, obviated the necessity to further establish how it affected the election.

[46] Na-Bature v Mahuta (1992) 9 NWLR (Pt 263) 85; (1992) 1 LRECN 1

In effect, no valid election was conducted *ab initio* that could be subjected to the substantiality rule.

5.2.In *Oke v Mimiko* (No. 2),[47] a decision of the Supreme Court, Onnoghen JSC, in his concurring judgment, still stuck to his views, hitherto expressed in *Buhari's case,*[48] that there is a class of non-compliance that does not call for the application of the test of substantiality, such as when an election is conducted with an invalid voters' register.

Nonetheless, he agreed with the lead judgment that, in the instant case, the injection of names in the voters' register, illegally, did not bring the case of the petitioners within that class of non-compliance which absolutely vitiates an election *ab initio.*

Until these weighty judicial opinions on the non-applicability of the substantiality rule to certain cases of non-compliance receive the affirmation of the majority opinion, of the Supreme Court, applying the substantiality rule to petitions predicated on non-compliance with the Electoral Act still remains good law to be followed by all courts in Nigeria.

6.0. Conclusion

6.1. Summary of Findings

In the course of this research, the following findings were made. (1) The burden of proof placed on the petitioner by the Electoral Act and the Evidence Act is enormous, and there is a need to amend both laws to ensure substantial justice to all the parties. INEC should share the burden to prove that it conducted an election properly and that the result reflected the lawful votes cast. (2) The courts have misinterpreted and misapplied the substantiality rule to include cases where the non-compliance proved is so fundamental as to vitiate the election.

6.2. Recommendations

Based on the above findings, the following recommendations and suggestions are made for reform:

1. Video evidence of the signing of result sheets by polling agents: Under the electoral law the best proof that an election was conducted is the original result or the certified true copy thereof

[47] [2014] 1 NWLR (Pt 1388) 332 at 391-392 paras.. Per Onnoghen JSC.
[48] (n 43)

> of form EC8A, etc. The said form EC8A, etc recorded by INEC and signed by the polling and collation agents of the parties are therefore admissions that the election took place and that the result is authentic. And it has been held that the said form signed by such agent binds the agent and the party. See *Gundiri v Nyako.*[49] Thus signature of the party agent authenticates the result, and he cannot turn around to deny the contents of the result sheet. Therefore the said result sheet or form EC8A, etc. produced by INEC is an admission by the parties of the genuineness of the result. For where the result tendered or certified by INEC does not bear the signature of the party agent, it is worthless and inadmissible, and even if admitted, it has no weight simply because it was not signed or made or acknowledged by the parties as their admission of the results.

Thus the signed EC8A, EC8B etc, are akin to confessional statements or acknowledgement by the party agents of the signatures as their own. And just as is the case with confessional statements in criminal trials, in an election petition, where the electoral official or INEC or the respondent tenders in evidence a result sheet or form EC8A etc, signed by the petitioner's agent, the respondent is simply relying on the signature as the petitioner's agent's acknowledgment or admission or confession of the result as being made by him.

It is therefore recommended that there be a requirement of tendering a video evidence of the making and taking of the result sheet, and it's signing by the party agents to prove that it was indeed signed by them, and that it was signed voluntarily. Thus a respondent and INEC should produce a video evidence of how the election result was made and signed before the result tendered or certified by INEC can be presumed as regular, and taken to be correct.

It should be noted that INEC and the declared winner already have a burden to prove that election was conducted, and that a winner emerged which burden can only be discharged by tendering the result sheet. This further requirement of tendering the video of the making and taking of the result sheet, showing the polling agents, and the INEC presiding officer, signing same will shift the burden of proof of compliance to INEC as the similar burden to prove the voluntariness of confessional statements, is presently placed on the police. No petitioner has the enormous powers of INEC which is similar to that of the police, so INEC should bear the burden to prove that the agents actually signed the result sheets without duress, since it is an admission by the agents that

[49] [2014] 2 NWLR (Pt 1391) 211.

the result sheet is correct, which admission is binding on the petitioner, and therefore it should be treated as a confessional statement which in effect it is.

2. CCTV: Another recommendation is that CCTV cameras should be mounted at polling stations, local government, senatorial, state and national collation centers, to monitor the movement of men and materials on election days. This CCTV recording should be tendered by the respondents where the petitioner alleges non-compliance, thuggery, violence, etc. The burden should also be on the respondents to tender the recordings, since they would be installed by INEC, and therefore would be their property, and in their possession. This will help to prove if there was ballot snatching intimidation, disenfranchisement, etc., as polling stations and collation centers have become crime scenes, so the goings on should be documented in video to avoid denial.
3. Body Camera: Another recommendation is that electoral officials should be made to wear body cameras or bodycams, throughout the day of the election, not just at the polling station but wherever they go, so that all their movements, actions and conversations would be monitored. This will show if they did anything wrong or conspired with politicians to subvert the election. It would show where they went, who they met, what they said and what they did. It would show them altering the results, if they attempt to do so.
4. Automatic electronic transfer or transmission of results: Results should automatically and electronically transferred or transmitted to party offices, candidate campaign offices, High Courts, Courts of Appeal, Supreme Court, Police, Army, NBA and other observers, UN, EU, AU, ECOWAS, etc. emails or systems or websites, to create duplicate copies which can be retrieved to confirm the final result posted by INEC, is also recommended.
5. NBA, EU, AU, and other observers should be allowed to observe vote counting and collation.
6. Paragraphs 12(2) and 15 of the first schedule to the Electoral Act 2022 should be properly interpreted and applied by the courts to fix the burden of proof on the respondent to prove that the petitioner's claim is incorrect, where he is complaining of undue return and claiming the seat or office, and when he is alleging that he had the highest number of valid votes cast, and for the respondent to plead the votes he objects to and the reason for the objection and also the burden to prove that the petitioner is not entitled to succeed.

7. The Burden of proof should be on the slightest evidence: It is also recommended that the burden of proof should be at the slightest evidence or allegation backed with a certified true copy of the result, video recording, bodycam, CCTV or affidavit. The burden should then shift on the production of these materials which should be produced by INEC at the tribunal.
8. BVAS should be for both accreditation and voting: BVAS should be reconfigured to not only accredit voters, but also to record their votes immediately. It should act as a voting machine.
9. Immediate certification of election results, form EC8A, EC8B and EC8C, EC8E by the presiding officers at the polling unit, local government, state and national collation centers.
10. There is a need to review the authorities applying the substantiality rule to proved cases of fundamental non-compliance which should vitiate the results of the election in line with the will of the people, the intendment of the Electoral Act, and common sense.