

**IN THE FCT AREA COUNCIL APPEAL TRIBUNAL
HOLDEN AT ABUJA
BEFORE THEIR LORDSHIPS**

**HON. JUSTICE SULEIMAN BELGORE
HON. JUSTICE YUSUF HALILU
HON. JUSTICE JUDE O. ONWUEGBUZIE**

**CHAIRMAN
MEMBER I
MEMBER II**

**PETITION NO: FCT/ACET/EP/13/2022
APPEAL NO: FCT/ACEAT/AP/30/2022
DATE: 28/10/2022**

BETWEEN:

ABDULAHI SULEIMAN SABO

} APPELLANT

AND

- 1. SARKI HAMIDU**
- 2. ALL PROGRESSIVE CONGRESS (APC)**
- 3. PEOPLES DEMOCRATIC PARTY (PDP)**
- 4. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC)**

} RESPONDENTS

JUDGMENT

By way of prefatory remark it would be recalled that on 12/02/2022 the 4th Respondent (INEC) conducted Chairmanship election for Kuje Area Council of the FCT. At the

election the 3rd Respondent (PDP) fielded Appellant (Abdullahi Suleiman Sabo) as its candidate while the 1st Respondent (Sarki Hamidu) was the candidate of the 2nd Respondent (APC). At the close of the election specifically on the 13th of February, 2022, the 4th Respondent declared the Appellant the winner having scored a total vote of 13,301 while other candidates including 1st Respondent who scored total votes of 7,694 were declared the losers. The Appellant was consequently issued with Certificate of Return.

Dissatisfied with that return, the 1st and 2nd Respondents filed a petition i.e. FCT/ACET/EP/13/2022 at the Lower Tribunal. The petition is dated 3rd day of March, 2022 and filed on 4th March, 2022. The ground of petition are three (3)

(1) The Appellant was not duly elected by majority of lawful votes.

(2) The election was invalid by reason of corrupt practices.

(3) The election was invalid by reason of non-compliance with the provision of the Electoral Act.

Upon being served with the petition, the Appellant then respondent, filed his reply on the 23rd of March, 2022. For all the above you can see pages 1-590 of volume 1 of the Record of Appeal.

After days of lengthy trial, the Tribunal below on 30th August, 2022 delivered its Judgment, found for the petitioners, and set aside the return of the Appellant as winner of the Chairmanship election, it then ordered that supplementary election be held in a number of polling units. See pages 1280-1429 of volume 2 of the Record of Appeal.

Aggrieved by that decision, the Appellant lodged an appeal to this Appeal Tribunal. They filed two notices of Appeal, 1st and 2nd dated 31st August, 2022 and 16th September, 2022 respectively. The 1st notice of Appeal was withdrawn and struck out while the 2nd notice of Appeal remains the live one. The Brief of Argument of the Appellant was filed on 12th October, 2022 while the 1st and 2nd Respondents filed their own Brief of Argument on 19th of October, 2022. The 3rd and 4th Respondents filed no Brief of Argument i.e. PDP and INEC, they both conceded this appeal.

On the 19th of October, 2022 we heard this appeal. Mr. S. T. Ologunorisa SAN who argued the appeal on behalf of the Appellant adopted the Appellant Brief of Argument, proffered oral reply to the 1st and 2nd Respondents Brief of Argument and urged us to allow the appeal and set aside the Judgment of the Lower Tribunal.

By way of adumbration, the learned SAN submitted as follows:

"This case was fought on BVAS, and the Respondent build their case on the malfunctioning of the BVAS, so they want the entire election cancelled. The lower Tribunal concluded that the BVAS did not work and went ahead to nullify the election.....the Lower Tribunal did not evaluate the evidence of the witnesses, nowhere in the Judgment is this done, they never said we believe PWZ or PWY."

Replying orally to the Brief of Argument of the 1st and 2nd Respondents, learned Silk referred to page 1421 of the Record and quoted part of the Judgment of the Lower Tribunal as it relate to the evidence of DW16, he then submitted that since DW16 evidence was rejected for being hearsay it means no evidence upon which the Tribunal based their decision. He urged this appeal tribunal to so hold and allow the appeal.

Similarly, Mr. Sarafa Yusuf of Counsel to 1st and 2nd Respondents adopted their Brief of Argument and urged us to dismiss the appeal. By way of adumbration, he submitted as follows:

"If they agreed that the provision of BVAS in the MANUAL is illegal, the implication is that when put aside with the evidence of DW16 then it means that the election is conducted in contravention of the Electoral

Act.....Since voters were not allowed to vote because BVAS stopped, it means the election was not conducted in line with the provisions of the Electoral Act."

He urged us to dismiss the appeal.

Like I said before the 3rd and 4th Respondents all agreed that this appeal should be allowed.

We have considered this appeal. The Appellant submitted three (3) issues for determination. The three (3) issues are:

(1) Whether the trial Tribunal was right in overruling rather than sustaining the Appellant's objection to the admissibility of Exhibits P1 - P42, P43 - P54, P55 - P70, P21 - P143, P144 - P184, P185 - P196, P197 - P216 and P217 - P226, P227 - P250, P251 - P257 and D19 and D20.

(2) Whether the 1st and 2nd Respondents as Petitioners proved the non-use or breakdown of BVAS machines deployed for the election by the 4th Respondent and irrespective of the answer to this, whether the mandatory use of BVAS machine was a requirement under the substantive law applicable to the election, namely the Electoral Act, 2010 (as amended). (Grounds 5, 6, 7 and 8 of the Notice of Appeal).

(3) Whether the 1st and 2nd Respondents proved their case to warrant the Tribunal entering Judgment for them and

nullifying the return of the Appellant while at the same time also nullifying the election in several polling units and ordering supplementary election thereat. (Grounds 3, 4, 9, 10, 11 and 12 of the Notice of Appeal).

The 1st and 2nd Respondents formulated two (2) issues for determination. They are as follows:

(1) Whether the lower Tribunal was not right when it overruled the objection raised to documents tendered by the 1st and 2nd Respondents. (Distilled from Grounds 1 and 2 of Notice of Appeal).

(2) Whether the lower Tribunal was not right when it nullified the return of the Appellant and ordered supplementary election in some polling units. (Distilled from grounds 3 to 12 of Notice of Appeal).

For all their submissions the learned SAN Ologunorisa cited the cases of **WIKE VS. PETERSIDE (2016) NWLR (PT. 1512) page 453; ABACHA VS. FEDERAL REPUBLIC OF NIGERIA (2006) 4 NWLR (PT. 970) 239 at Pp. 309 - 310, paras. H - A; OMOWORARE VS. OMISORE (2010) 3 NWLR (PT. 1180) 58 at P. 114, Paras. G-H.; SOKOTO & ANOR VS. INEC & ANOR. (2020) 1 SC (PT. VI) 1 at Pp 19 - 20; TABIK INVESTMENT LTD VS. GTB (2011) 17 NWLR (PT. 1276) 240 at P. 262, Paras. A-D.....;**

On the other hand, Mr. Sarafa Yusuf relied *inter alia* on the following cases **AJADI VS. AJIBOLA & 10 ORS. (2004) 16**

NWLR (PT. 898) 91 at 170, para. F; ANDREW VS. INEC (2018) 9 NWLR (PT. 1625) 507 at 563 Para. D; FALEKE VS. INEC (2016) 18 NWLR (PT. 1543) 61; CPC VS. INEC (2011) 18 NWLR (PT. 1279) 493 at 542 Paras. G-H; INEC VS. OSHIOMOLE (2009) 4 NWLR (PT. 1132) 607 at 662 - 663; BUHARI VS. OBASANJO (2005) 13 NWLR (PT. 941) Pg. 1, OMISORE & ANOR VS. AREGBESOLA & ORS. (2015) LPELR-24803 (SC).

On his part Mr. I. S. Mohammed for the 4th Respondent (INEC) cited to us the case of **OMOJALI VS. DAVID (2019) 17 NWLR (PT. 1702)**.

In our view, only two issues are apt for determination. They are the 2nd and 3rd issues as framed by the Appellant's Counsel.

(2) Whether the 1st and 2nd Respondents as Petitioners proved the non-use or breakdown of BVAS machines deployed for the election by the 4th Respondent and irrespective of the answer to this, whether the mandatory use of BVAS machine was a requirement under the substantive law applicable to the election, namely the Electoral Act, 2010 (as amended). (Grounds 5, 6, 7 and 8 of the Notice of Appeal).

(3) Whether the 1st and 2nd Respondents proved their case to warrant the Tribunal entering Judgment for them and nullifying the return of the Appellant while at the same time also nullifying the election in several polling units and

ordering supplementary election thereat. (Grounds 3, 4, 9, 10, 11 and 12 of the Notice of Appeal).

The two issues are to be dealt with together.

The 1st and 2nd Respondents' Petition filed on 4th March, 2022 challenged the return of the 1st Appellant on the following grounds:

(1) The Appellant was not duly elected by majority of lawful votes cast at the election;

(2) The election was invalid by reason of corrupt practices; and

(3) The election was invalid by reason of non-compliance with the Electoral Act.

See page 3 of Vol. 1 of the Record of Appeal.

The 1st and 2nd Respondents pleaded that Bimodal Voter Accreditation System (BVAS) machines deployed by the 4th Respondent did not work in most places and that some others worked but stopped working and that as a result many voters in several polling units in some wards of the Kuje Area Council of the FCT could not be accredited and did not or could not vote on the day the Chairmanship election for the Council was held.

62 witnesses were called in prove of this alleged fact.

However, under cross-examination, many if not all of these petitioners' witnesses admitted having no knowledge of how the BVAS machines worked and or when it stopped working or even what the machines are used for. This admission runs through their evidence under cross-examination as can be gleaned from pages 998 - 1192 of Vol. 2 of the Record. For instance, under cross-examination, PW1, Hassan Haruna, admitted when asked if he knows how accreditation is done as follows:

"That's not my work, I don't know"

See page 999 of Vol. 2 of the Record.

Under cross-examination by Counsel to the 3rd Respondent, PW3, Saidu Ibrahim, when asked if he knew how BVAS electronic devices operate, stated as follows:

"Yes I don't Know"

See page 1008 of Vol. 2 of the Record.

Similarly, when PW4 was cross-examined at page 1013 of Vol. 2 of the Record as to whether he knew the operation and failure of BVAS machine, he said he did not know. In the same vein, at page 1114 of Vol. 2 of the Record. PW44, Ibrahim Abdulkareem, when being cross-examined by Counsel to the

3rd Respondent confirmed that he does not know how BVAS machine works or fails and while being cross-examined by learned Counsel to the 4th Respondent herein, PW44 in answer to a question whether he knew when the BVAS machine which he claimed stopped working, actually stopped working, said:

"I don't know actually when BVAS stopped working."

See also, the evidence of PW5, PW20, PW33, PW35, PW36, PW38, PW41, PW46, PW50, PW53, PW55 in this regard.

Now, in its Judgment, the lower Tribunal had this to say about the BVAS at pages 1415 - 1428 of Vol. 2 of the Record of Appeal.

"The Petitioners in their petition and through witnesses proved that Bimodal Voter Accreditation System (BVAS) machines stopped working before accreditation of many registered voters who were on the queue in 21 polling units. The total number of registered voters in the said 21 polling units is 30,488.

The Petitioners also proved that at Bimodal Voter Accreditation System (BVAS) did not work at all in 10 Polling Units. The total number of registered voters in these Polling Units is 8,403. The Petitioners through eye witnesses were able to prove that voters were not accredited before voting at 3 point.....

.....it suffices to state that the complaint of the Petitioners could be summarized that the 1st Respondent was not duly elected by majority of lawful votes cast at the election and that there was non-compliance with the Electoral Act, 2010 (as amended)."

The Tribunal further held:

"What we are concerned with at this juncture is; are the allegation true or not true, was the use of BVAS a condition precedent before the declaration of the result? We have noted that the 1st and 2nd Respondents who never tagged their reply to the petition as "cross petition"; assumable, there exist anything in that context. Well the allegations made by the Petitioners were in sum worth denied vehemently denied vehement in their reply to the petition.

It is instructive to note that the 3rd Respondent in a bid to speak to his averment called one witness whom this Honourable Tribunal designated as DW16. DW16 is one Salisu Aliyu who adopted his witness deposition on the 20th day of August, 2022. It was his evidence that he is a staff of the ICT Department of the 3rd Respondent and he knows that the 3rd Respondent now uses a device called Bimodal Voter Accreditation System (BVAS) to authenticate and verify voters. All voters have to be accredited with the BVAS.

Further, he stated that the 3rd Respondent as usual recruits and trains staff for the purposes of conducting the elections. Some of the recruited and trained staff are called Registration Area Technical Support (RATECHS). He further stated that BVAS machines were deployed for the election and that the 3rd Respondent in the conduct of the Kuje Area Council election held on 12th February, 2022 used the BVAS for accreditation of voters and the BVAS used worked efficiently.

Under cross-examination, Mr. Sarafa Yusuf the Counsel to the Petitioners asked DW 16:

QUESTION: You rely on information supplied to you by official of INEC in each polling unit in making this your statement?

Answer: Yes, my lord."

They went further:

"This witness, without buttressing any further argument of his testimony before the Tribunal, comes within the legal ambit of hearsay evidence. Hearsay evidence is not admissible in law and the implication of such evidence is for the Court or Tribunal to reject same. While summarizing the submission of the Petitioners, whom we agree with, on his submission of hearsay evidence, we

adopt it, in furtherance of our holding that the 16th Respondent witness did not give eye witness account of what happen on the 12 of February, 2022.

The point we are to deal with now is, was the election conducted in substantial compliance with the electoral Act or the Manual for Election Official 2022? This is the only bases why we would not temper with the results that flows from the election if there is adequate compliance of the Electoral Act and the manual for the conduct of 2022 Election. See TAKORI VS. MATAWALE (2020) 17,181 paras H-B, PDP VS. INEC (2014) 17 NWLR (PT. 1437) 525 at 568.....

.....It is now on this bases we shall then look at each of the documents tendered before this Honourable Tribunal whether they have indeed made out a case worthy of establishing the claim before this Honourable Tribunal. Parties should note that we shall not be considering these exhibits in sequence as tendered by the parties. In Gaube, Gwargwada, Rubochi, Yenche, Kuje, Kabi, Kwaku, Gudun Karya, Chibiri and Kujekwa Wards the petitioners tendered exhibits P1 to P279 of form EC8A. In exhibit P43, the form shows registered voters of 1209 and accredited voters of 43 but the scores of each party was "zero". In Exhibit P45, accredited voters was 13, and "zero" for each of the parties, similar situation applies to Exhibit P46, P47, P48, P50 there was no accredited voters and the 3rd Respondent never filled FORM 40G....."

Further, the Tribunal held:

***"We are aware that the 3rd Respondents Manual for Election official which we have taken note of, speaks clearly of the use of BVAS, which means, BVAS is a mandatory condition before the making and entries of result marked in the series of INEC form EC8Aes tendered before this Tribunal by the Petitioners.....
.....
.....
....."***

The case of FALEKE VS. INEC (2016) 18 NWLR (PT. 1543) 61, wherein the apex Court per Kekere-Ekun, JSC held as follows:

"It is not disputed that pursuant to section 160(1) of the Constitution, INEC has the constitutional power to regulate its own procedure or confer powers and impose duties on its officers for the purpose of discharging its functions. Section 73 empowers the Commission to publish in the Gazette, Guidelines for Elections "which shall make provisions for the step by step recording of the poll in the electoral forms as may be prescribed..." while section 153 empowers the Commission to issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of the Electoral Act and for it

administration. I agree with the finding of the lower Court at page 1608 of the record that the above provisions give statutory backing to the Manual as a subsidiary legislation and that where it is found to be relevant, its provisions must be invoked, applied and enforced."

In arriving at the decision above, Kekere-Ekun, JSC relied on the pronouncement of Adekeye, JSC in CPC VS. INEC (2011) 18 NWLR (PT. 1279) 493 at 542 paras G-H that:

"By force of law. The Independent National Electoral Commission has the, duty of conducting elections. Besides the constitutional provisions, it is guided by the Electoral Act, 2010 (as amended) and the Election Guidelines and Manual issued for its officials in accordance with the Act. These documents embody all steps to comply with in the conduct of a free, fair and hitch free election.

It is our view that these allegations are better answered by the party who conducted the election, sued before us as the 3rd Respondent and we would wonder if the 3rd Respondent complied with the regulation of the use of BVAS for the conduct of the 2022 Election, and the BVAS Report which would have corroborated the forms EC8A, unfortunately, these questions are left unanswered, leaving us with the testimony of the Petitioners

witnesses, hence the 3rd Respondent sole witness evidence had been declared as hearsay evidence.....

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Understandably, this may have been the underpinning reason why the 1st and 2nd Respondents prayed for specific "declaratory reliefs" in their reply to the petition, as they know that the burden of proof rests on the party (whether plaintiff or defendant), who substantially asserts the affirmative of the issue. i.e., they (Respondents) wants us to accept that the result are the true outcome of the 12th February Election, they should have tendered the BVAS accreditation result outcome or report and their failure, leaves us with no choice but to agree with the petitioners that they have established their claim before us.

It is our view that the outcome of the election which led to this petition has not for the slightest imagination been done in compliance with the Electoral Act and the Manual for the conduct of election 2022, in fact, BVAS machine were never used for the accreditation of voters, as such, we cannot rely on the said result.

It is for these reasons we hold that the Petitioners have established their claims and Judgment is hereby entered in favour of the Petitioners as per their claim."

From the above quoted portion of the judgment of the Tribunal below, it is patently obvious and clear beyond any equivocation that they upturned the declaration and return of the Appellant as the winner of the election on the basis that the petitioners (now 1st and 2nd Respondents) proved that the BVAS did not work or malfunction or was not used in some polling units on the election day which according to the Tribunal below amounted to improper or lack of accreditation which occasioned NON-COMPLIANCE with the provisions of the Electoral Act, 2010.

We agree with Ologunorisa SAN when he wrote at paragraph 4.2.6, page 29 of their Brief of Argument:

"The foregoing pronouncement forms the fulcrum of the Judgment of the trial Tribunal, as most of the other things said in other parts of the Judgment were mere rehash of the pleadings, evidence and submissions placed before the trial Tribunal. There is no doubt that the use or non-use of BVAS particularly in view of the provisions of the Manual for Election Officials, 2022, is largely instrumental to the decision taken by the trial Tribunal."

The above being the case, it means this appeal has to be decided on a narrow compass. What is the implication of improper use or non-use at all of BVAS on any election day? In answering the above question, the learned SAN submitted at

pages 33 - 35, paragraphs 4.2.20 - 4.2.26 of the Brief of Argument as follows:

"Importantly too, another clear and undisputable fall out of the pronouncement of the lower Tribunal elaborately reproduced above is that by the pronouncement, the trial Court saw and treated the use of BVAS as being mandatory and that failure to deplore and use it for the conduct of election is fatal, especially having regard to provisions of the Manual for Election Officials, 2022. It is our humble but very firm submission that assuming without conceding that the 1st and 2nd Respondents succeeded in proving that BVAS machines were not used or malfunctioned or failed during the election in any polling unit, the use or non-use of BVAS machines is not a requirement under the relevant substantive law that governed the election in this case.

The pertinent question to ask is - what is the substantive law or legislation that governed the conduct of the Kuje Area Council Chairmanship election held on 12th February, 2022? In ROSSEK VS. ACB LTD (1993) 8 NWLR (PT. 312) 382, the Supreme Court settled the question of which substantive law governs a cause of action. In that case, the apex Court held that it is the substantive law at the time the cause of action arose. See also, ZUBAIR VS. KOLAWOLE (2019) 3 SC (PT. IV) 110 at Pp. 145 - 146.

In this instant case, as at the time the election was conducted on 12th February, 2022 and when the 1st and 2nd Respondents filed their petition on 4th March, 2022, the extant law was the Electoral Act, 2010 (as amended). Not the Electoral Act 2022 which, together with the Manual, has now made the use of BVAS mandatory or compulsory. In fact in the Pre-Conference Report at page 998 of Vol. 2 of the Record, the lower Tribunal while stating the three (3) issues for determination in the Petition had given clear indication that the Electoral Act 2010 (as amended) shall apply, given the way issue 3 therein was couched.

More so, in two (2) other cases, namely, Petition Nos. EP/02/2022 and EP/06/2022, the lower Tribunal ruled on Tuesday 26th July, 2022 that the Electoral Act, 2010 (as amended) is the organic or substantive law to be applied to the cases whose cause of action accrued prior to the enactment of the Electoral Act 2022.

Under the relevant substantive law, i.e. the Electoral Act, 2010 (as amended), accreditation was required to be done manually and there is nothing known as BVAS whatsoever.

Thus, Section 49(1) and (2) of the Electoral Act, 2010 (as amended) provides as follows:

"(1) A person intending to vote with his voter's card, shall present himself to a Presiding Officer at the Polling unit in the constituency in which his name is registered with his voter's card.

(2) The Presiding Officer shall, on being satisfied that the name of the person is on the register of voters, issue him a ballot paper and indicate on the Register that the person has voted."

With the state of the law at the time the election was conducted and this Petition was filed, BVAS was yet to be recognized, let alone made mandatory by law for the conduct of the election. Therefore, no matter what was in the Manual by which officials of the 4th Respondent were mandated to conduct the election, non of its provisions can override the provisions of the Electoral Act 2010 (as amended) pursuant to which the election was conducted. In other words, even if the 4th Respondent had by the provisions of the Manual instructed its officers to use BVAS for purpose of accreditation of voters and the latter had failed to comply, that cannot be fatal to the election as the provisions of the Manual cannot override the provisions of the Electoral Act 2010 (as amended) which expressly require manual accreditation.

Thus, in IZE-IYAMU & ANOR VS. INEC & 2 ORS. (2017) 7 SC 90 at P. 158, the Supreme Court, per OKORO, JSC held as follows:

"Let me state that Manuals, Guidelines and Regulations made by the Electoral Body in aid of smooth conduct of elections are to be observed by both ad-hoc and permanent staff of INEC for the good of the electoral process. But can such directions take the place of the Electoral Act? The answer is No. Section 138 (2) of the Electoral Act, 2000 (as amended) states:

"138 (2) An act or omission which may be contrary to an instruction or direction of the commission or of an officer appointed for the purpose of the election but which is not contrary to the provisions of this Act itself shall not of itself be a ground for questioning the election.

The above provision is clear and simple. It is improper for parties who have no serious issue to challenge the outcome of an election to resort to trivial issues of ticking to the right and to the left. Election petition should be more serious than that...."

Learned Counsel to the 1st and 2nd Respondent in apparent answer to the question posed earlier, submitted thus:

"It is submitted that the use of BVAS is made mandatory by the above provision and to emphasize the compulsory nature of use of BVAS at the election, where there is mid-way discontinuation of the use of the BVAS due to

sustained malfunction the expected action, by the provision of Paragraph 3.2 (item 4 at page 62) of Manual for Election Officials, 2022 is that supplementary election should be conducted.

It is submitted that where BVAS machine stopped working as a result of which some voters cannot cast their votes, it amount to disenfranchisement. A voter is disenfranchised when his right to vote is taken away. That is to say he claims to be registered but was not allowed to vote. "See NGIGE VS. INEC (2015) 1 NWLR (PT. 1440) 209 at 325.

Thus, disenfranchisement connotes a denial of an electorate's right to exercise his franchise in an election or suffrage. It is further submitted that the effect of disenfranchisement of voters is that the result of election in the Polling Units affected must be cancelled and another election held. See Paragraph 3.2 (item 4 at page 62) of Manual for Election Officials, 2022.

Where BVAS did not work at all or there is no election, it is submitted that supplementary election should be ordered particularly where the number of registered voters in such units is more than the margin of lead between the two leading candidates at the election."

See pages 13 - 14, paragraphs 5.7 - 5.10 of the 1st and 2nd Respondent Brief of Argument.

We have considered the very interesting divergent arguments of both Counsel on both sides of the divide. It is worth repeating in summary form. According to Ologunorisa SAN, where BVAS was not properly deployed, it is not fatal to the election process as it was not rooted in the statutory rules for election. That is, BVAS is not provided for under the Electoral Act, 2010 (as amended) and therefore not mandatory.

But the learned Counsel to the 1st and 2nd Respondent disagreed. He submitted that the use of BVAS is mandatory and where not used, the consequence is fatal as to lead to cancellation of election in the polling units concerned and supplementary election ordered.

It is to the tent of the Appellant's Counsel that we take solace and comfort. With due respect to Mr. Sarafa Yusuf, we do not agree with his submission.

We are not unmindful of the decision of the Courts in **AJADI VS. AJIBOLA & 10 ORS. (2004) 16 NWLR (PT. 898) 91 at 170, para. F; thus:**

"Elections at Adio, Ilupeju, Oko-Ode, Koko and declaration of 229 votes were made by the tribunal due to non-compliance with the Manual for election officials and consequently the Electoral Act. The Manual exhibit X1-X60 was issued based on section 149 of the Electoral

Act for the purpose of giving effect to the provisions of the Electoral Act. The guidelines there must strictly be construed and followed by electoral officials in the process and procedure for the elections" (Underlining ours).

See also ANDREW VS. INEC (2018) 9 NWLR (PT. 1625) 507 at 563 paragraph D, where the Supreme Court held as follows:

"Let me state that manuals, guidelines and regulations made by the electoral body in aid of smooth conduct of the election are to be observed by both ad-hoc and permanent staff of INEC for the good of the electoral process"

In FALEKE VS. INEC (2016) 18 NWLR (PT. 1543) 61, this Honourable Court per Kekere-Ekun, JSC held as follows:

"It is not disputed that pursuant to section 160(1) of the Constitution, INEC has the constitutional power to regulate its own procedure or confer powers and impose duties on its Officers for the purpose of discharging its functions. Section 73 empowers the Commission to publish in the Gazette, Guidelines for Elections "which shall make provisions for the step by step recording of the poll in the electoral forms as may be prescribed..." while section 153 empowers the Commission to issue regulations, guidelines or manuals for the purpose of

giving effect to the provisions of the Electoral Act and for its administration. I agree with the finding of the lower Court at page 1608 of the record that the above provisions give statutory backing to the Manual as a subsidiary legislation and that where it is found to be relevant, its provisions must be invoked, applied and enforced."

All the above authorities recognised the use of BVAS as provided for in the MANUAL i.e. **AJADI VS. AJIBOLA (Supra), ANDREW VS. INEC (Supra), FALEKE VS. INEC**. They all attested to the singular fact that INEC can make rules of procedure for good conduct of election like accreditation, voting, announcement of result etc. but no where in those decision did the Court say, where rules stipulated by INEC in the MANUAL is not followed it becomes FATAL as to lead to cancellation of result. No where did they say so. It seems to us that non adherence to the provisions of Manual especially as in this case, improper use of BVAS, is only an IRREGULARITIES that cannot lead to cancellation of election or result declared. Putting it bluntly, it cannot amount to non-compliance with the provisions of the Electoral Act as to be a valid GROUND for questioning an election by way of a PETITION.

Under the Electoral Act 2010 (as amended) the following are the recognized grounds for challenging an outcome of an election:

- (1) Non-qualification
- (2) Corrupt practices
- (3) Non-compliance with the provisions of the Act
- (4) Not duly elected by majority of lawful votes cast

The non-compliance provided for is in relation specifically with the provisions of the Electoral law and not rules or procedure made by Chairman of INEC in their MANUALS.

We must point it out in Black and White that accreditation of voters is ONLY by the use of voters Register as duly provided for under the Electoral Act 2010 (as amended). The said Statutory Act did not provide for use of BVAS. (It is now provided for under the 2022 Electoral Act). This clearly shows that the legislature knew what they wanted under the 2010 Electoral Act.

It is therefore our firm view that non-compliance with the provisions of Manual as regard BVAS is not fatal and cannot invalidate or vitiate or nullify the result of an election.

In **WIKE EZENWO NYESOM VS. PETERSIDE (2016) 7 NWLR (PT. 1512) 453 at P. 525**, the Supreme Court even while commending the innovation brought about by the introduction of the card reader, an electronic devise akin to the BVAS machine, still held per KEKERE-EKUN, JSC as follows:

"I had stated earlier in this judgment that INECT is to be commended for the innovation of the card reader machine to bolster the transparency and accuracy of the accreditation process and to maintain the democratic norm of one man one vote by preventing multiple voting by a voter. Nevertheless section 49 (1) and (2) of the Electoral Act 2010 (as amended) which provides for manual accreditation of voters is extant and remain a vital part of our electoral law....."

Similarly, in **OGBORU VS. OKOWA (2016) LPELR 48350 (SC)** at **Pp. 36 - 41**, the Apex Court, per ONNOGHEN, JSC (as he then was) held on the status of the card reader vis-a-vis the Electoral Act, 2010 (as amended) and the voters' register as follows:

"It is settled law that the issue of accreditation of voters is governed by the provisions of Section 49(1) and (2) of the Electoral Act, 2010 (as amended). The said Section 49 of the Electoral Act, (supra, has not been amended to accommodate the very recently introduced card reader as conclusive on accreditation.....My understanding of the function of the card reader machines is to authenticate the owner of a voter's card and to prevent multi-voting by a voter. I am not aware that the card reader machine has replaced the voters' register or taken the place of statement of result in appropriate forms.....In relation to accreditation in an election, i am of the view that the card reader machine is an

administrative procedure designed to aid accreditation and the election process. It has not statutory foundation in the election process as at now. The issue of over-voting being the main plank in the case of appellants and having found that it was not made out having regard to the pleadings and evidence, it is clear that the Tribunal was right in dismissing the petition of appellants on the ground, inter alia, that the allegation of over-voting was not proved and the lower Court is equally right in affirming that decision."

It is pertinent at this juncture, to refer to our Judgment in appeal number FCT/ACEAT/AP/27/2022 where we dealt with this same issue of BVAS. This is what we said:

"In our humble view, the nucleus of this issue is not whether or not the BVAS malfunctioned or failed to work properly in some polling units as to affect the result of the election. The main issue is whether the use of BVAS is a constituent element or an integral part of the whole process of the election under the relevant law i.e. Electoral Act 2010 as amended. The quick answer is No. The entire provisions of Electoral Act 2010 has no provision for the use of BVAS. It is only laudably and commendably provided for in the manual as issued by INEC. But non-compliance with the provisions of the manual is not a ground for questioning or challenging an election conducted pursuant to the provisions of the Electoral law. The introduction of BVAS is akin to

introduction of card readers in our electoral process development. And that being the case, an election conducted pursuant to the provisions of the Electoral Act 2010 (as amended) cannot be faulted simply on the ground that the use of it was not in accordance with the provisions of the manual. The case of WIKE VS. PETERSIDE must instantly come into focus here.

Without wasting much time, writing resources and energy on this issue, it is our firm view that whether BVAS failed or not on the election day is not of the moment.....The most important point is that no election can be questioned on ground of non-use of BVAS not to talk of partial use or improper use."

We have no plausible reason to depart from the above view since this election was conducted pursuant to the provisions of the Electoral Act 2010 (as amended) and not Electoral Act 2022 which now provides for the use of BVAS.

In conclusion, we found merit in this appeal. The Judgment of the lower Tribunal is therefore set aside and we as a consequence affirm the declaration and return of the Appellant as the duly elected Chairman of the Kuje Area Council of the Federal Capital Territory Abuja.

**HON. JUSTICE SULEIMAN BELGORE
CHAIRMAN**

**HON. JUSTICE YUSUF HALILU
MEMBER**

**HON. JUSTICE JUDE O. ONWUEGBUZIE
MEMBER**