

**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/19/2022
APPEAL NO: FCT/ACEAT/AP/27/2022
DATE: 20/10/2022**

BETWEEN:

**1. BALA TUKURA
2. ALL PROGRESSIVES CONGRESS (APC)** } **APPELLANTS**

AND

**1. BITRUS ROBO
2. PEOPLES DEMOCRATIC PARTY (PDP)
3. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC)** } **RESPONDENTS**

JUDGMENT

The 3rd Respondent on the 12th February, 2022 conducted Councillorship Election for Gudun Karya Ward of Kuje Area Council of the Federal Capital Territory. At the said Election,

the 1st Appellant was the candidate of the 2nd Appellant. The 1st Respondent was the candidate of the 2nd Respondent. At the end of the said Election, the 3rd Respondent declared the 1st Respondent, candidate of the 2nd Respondent winner of the said Election.

The 1st and 2nd Appellants dissatisfied with the result of the Election, filed a Petition dated and filed on the 4th day of March, 2022 before this Honourable Tribunal. The 1st and 2nd Respondents filed a joint Reply. The 3rd Respondent filed a Reply dated and filed 12th April, 2022. The Respondents did not accompany their separate Replies with copies of documentary evidence they sought to rely on.

By the result of the Councillorship Election for Gudun Karya Ward was declared by the 3rd Respondent, the following scores were allegedly scored at the Election:

i. TUKURA BALA	APC	431
ii. BITRUS ROBO	PDP	1033

By ordinary mathematical calculation, the difference between votes scored by the Petitioners and that of the 1st and 2nd Respondents according to declaration made by the 3rd Respondent is 602. It is on the basis of the said result that the 3rd Respondent returned the 1st Respondent as the winner of the election.

The Appellants not satisfied with the declaration of the 1st Respondent as the winner of the said election filed a petition before the trial Tribunal. The Petition is at pages 1 to 52 of record of appeal. The trial Tribunal on the 25th day of August, 2022 delivered its judgment at pages 355 to 440 of the record of appeal. In the said judgment, the trial Tribunal dismissed the Petition of the Appellants.

The Appellants not satisfied with the dismissal of their Petition, filed Notice of Appeal against the judgment of the trial Tribunal. The said Notice of Appeal is at pages 442 to 456 of the record of appeal.

The Appellants called a total of 15 witnesses, PW1 to PW15, to prove their case. The 1st and 2nd Respondents called a total of 5 witnesses while the 3rd Respondents abandoned its Reply to the Petition and did not call any witness.

PW1 is one Saidu Mustapha Dikko, the agent of the Appellants at Adegbe Tashara School Polling Unit of Gudun Karya Ward at the election in issue. See Pages 10 to 11 and pages 266 to 268 of the Record of Appeal.

PW2, Ibrahim Idris, the agent of the Appellants at Buga Primary School Polling Unit of Gudun Karya Ward at the election in issue. See pages 12 to 13 and pages 268 to 271 of the Record of Appeal.

PW3, Usman Abdulsalam, a registered voter at Adegbe Tashara Polling Unit of Gudun Karya Ward at the election in issue. See pages 20 to 21 and 271 to 274 of the Record.

PW4, Yahya Husseini, a registered voter at Buga Primary School Polling Unit of Gudun Karya Ward at the election in issue. See pages 22 to 23 and 275 to 278 of the Record.

PW5, Ibrahim Abdul Karim, the agent of the Appellants at Zaga Butu Polling Unit of Gudun Karya Ward at the election in issue. See pages 16 to 17 and 278 to 281 of Record of Appeal.

PW6, Adamu Abubakar, a registered voter at Zaga Butu Polling Unit of Gudun Karya Ward at the election in issue. See pages 26 to 27 and 281 to 284 of record of appeal.

PW7, Muhammed Salihu Ibrahim, a registered voter at Huni Primary School Polling Unit of Gudun Karya Ward at the election in issue. See pages 24 to 25 and 284 to 287 of Record of Appeal.

PW8, Nuhu Abdullahi Labaran, the agent of the Appellants at Gudun Karya Polling Unit of Gudun Karya Ward at the election in issue. See pages 18 to 19 and 288 to 291 of Record of Appeal.

PW9, Gomo Abubakar, the agent of the Appellants at Huni Primary School Polling Unit of Gudun Karya Ward at the

election in issue. See pages 14 to 15 and 291 to 294 of Record of Appeal.

PW10, Haruna Yusuf, a registered voter at Gudun Karya Polling Unit of Gudun Karya Ward at the election in issue. See pages 28 to 29 and 295 to 299 of Record of Appeal.

PW11, Sani Dahiru, a registered voter at Adegbe Tashara Polling Unit of Gudun Karya Ward at the election in issue. See pages 30 to 31 and 300 to 303 of Record of Appeal.

PW12, Lukman Sule, a registered voter at Huni Primary School Polling Unit of Gudun Karya Ward at the election in issue. See pages 34 to 35 and 303 to 307 of Record of Appeal.

PW13, Salihu Yahya, a registered voter at Buga Primary School Polling Unit of Gudun Karya Ward at the election in issue. See pages 32 to 33 and 308 to 311 of Record of Appeal.

PW14, Danjuma Muktar, a registered voter at Zaga Butu Polling Unit of Gudun Karya Ward at the election in issue. See pages 36 to 37 and 311 to 315 of Record of Appeal.

PW15, Bala Tukura, the 1st Petitioner in this Petition. See pages 46 to 52 and 318 to 324 of Record of Appeal.

The Appellants tendered the following documents:

- i. Agent tag of PW1 admitted as Exhibit P1
- ii. Agent tag of PW2 admitted as Exhibit P2

- iii. Voter's card of PW3 admitted as Exhibit P3
- iv. Voter's card of PW4 admitted as Exhibit P4
- v. Agent tag of PW5 admitted as Exhibit P5
- vi. Voter's card of PW6 admitted as Exhibit P6
- vii. Voter's card of PW7 admitted as Exhibit P7
- viii. Lost or damage PVC replacement admitted as Exhibit P8
- ix. Agent tag of PW8 admitted as Exhibit P9
- x. Agent tag of PW9 admitted as Exhibit P10
- xi. Voter's card of PW10 admitted as Exhibit P11
- xii. Voter's card of PW11 admitted as Exhibit P12
- xiii. Voter's card of PW12 admitted as Exhibit P13
- xiv. Voter's card of PW13 admitted as Exhibit P14
- xv. Voter's card of PW14 admitted as Exhibit P15

Voters Registers for the 5 Polling Units were admitted as Exhibits P16, P17, P19, P20 and P21. The Appellants also tendered Manual for Election Officials, 2022 admitted as Exhibit P22. Form EC8B(1) was tendered by the Appellants and same was admitted as Exhibit P24.

The 1st and 2nd Respondents called a total of 5 witnesses, DW1 to DW5 in their defence. DW1 testified in respect of Gudun Karya Primary School Polling Unit.

DW2 testified as agent of the 1st and 2nd Respondents in respect of Adegba Tashara Polling Unit 005.

DW3 testified as agent of the 1st and 2nd Respondents at Buga Primary Unit 006.

DW4 testified as agent of the 1st and 2nd Respondents at Huni Primary School of Gudun Karya Ward.

Bitrus Robo, the 1st Respondent, testified as DW5.

The 3rd Respondent did not call witness.

On 19/10/22, we heard this appeal. Counsel took turn to adopt their Brief of Arguments and urged us to give judgment in their favours.

The full arguments of Counsel are hereby incorporated into this judgment from the Record of the Court. Learned Counsel to the Appellants Mr. Sarafa Yusuff formulated the following four (4) issues for the determination.

(1) Whether the Trial Tribunal was right when it admitted and placed reliance on Exhibits D1, D2, D3, D4, D5, D6, D8 and D9 which were not front loaded and tendered without leave of the trial Tribunal. (Distilled from grounds 1 and 2).

(2) Whether the trial Tribunal was correct when it held that only trained staff of INEC or BVAS report that can prove functionality of BVAS Machine. (Distilled from grounds 8 and 10).

(3) Whether the testimonies of PW8 and PW10 were hearsay and at variance with Appellants' pleadings. (Distilled from grounds 9 and 11).

(4) Whether the trial Tribunal was right when it held that the Appellants failed to prove their Petition and when it proceeded to dismiss the Petition. (Distilled from grounds 3, 4, 5, 6, 7, 12, 13, 14, 15, 16 and 17).

Learned Counsel to the 1st and 2nd Respondent distilled two issues for determination, to wit:

(1) Whether the trial Tribunal was correct in refusing to Strike out the Replies of the 1st, 2nd and 3rd Respondents, admitted in evidence documents marked as exhibits D1, D2, D3, D4, D5, D6, D7, D8 and D9. (Grounds one and two of the Notice of Appeal).

(2) Whether the trial Tribunal was correct in holding that there is no cogent, compelling and convincing evidence before the Tribunal that BVAS substantially failed to have the effect of nullifying elections in those Polling Units and ordering supplementary election, and did not prove allegations of corrupt practice and non-compliance with Electoral Act (as amended, dismissed the Petition. (Grounds 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the Notice of Appeal).

We find upon a calm view of the issues submitted that only the two (2) issues submitted by the learned Counsel to the 1st and 2nd Respondents are apt and actually up for consideration. We say this because all the four issues identified by the appellants' Counsel can perfectly be

subsumed in the 2 issues distilled by the 1st and 2nd Respondent's Counsel.

ISSUE 1

(1) Whether the trial Tribunal was correct in refusing to Strike out the Replies of the 1st, 2nd and 3rd Respondents, admitted in evidence documents marked as exhibits D1, D2, D3, D4, D5, D6, D7, D8 and D9. (Grounds one and two of the Notice of Appeal).

This is the same as issue 1 of the Appellants' issues submitted for determination. See paragraphs 14, 15, 16, 18 and 19 of pages 3 and 4 overleaf.

ISSUE 2

(2) Whether the trial Tribunal was correct in holding that there is no cogent, compelling and convincing evidence before the Tribunal that BVAS substantially failed to have the effect of nullifying elections in those Polling Units and ordering supplementary election, and did not prove allegations of corrupt practice and non-compliance with Electoral Act (as amended, dismissed the Petition. (Grounds 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the Notice of Appeal).

The above issue also touches on issues 2, 3, and 4 as submitted by the learned Counsel to the Appellants.

ISSUE 1

(1) Whether the trial Tribunal was correct in refusing to Strike out the Replies of the 1st, 2nd and 3rd Respondents, admitted in evidence documents marked as exhibits D1, D2, D3, D4, D5, D6, D7, D8 and D9. (Grounds one and two of the Notice of Appeal).

Appellant grounds one and two of the Notice of Appeal at pages 445 of the Record of Appeal is a complaint that the Respondents breached the provisions of Paragraph 12 (3) of the First Schedule to the Electoral Act, and paragraph 41(8) of the First Schedule to the Electoral Act, having failed to "front load documents" Respondents intend to rely on in their respective Reply, thus, Exhibits D1, D2, D3, D4, D5, D6, D7, D8 and D9 are inadmissible and the respective Reply of the Respondents should be struck out.

At the trial, the Appellants objected to the admissibility of the documents marked as Exhibits D1, D2, D3, D4, D5, D6, D7, D8 and D9 exhibits D1, D2, D3, D4, D5, D6, D7, D8 and D9 on basis that the documents were not front loaded in the 1st and 2nd Respondents Reply, filed motion on Notice for the striking out of the Reply. The trial Tribunal disagreed with the Appellants, held at page 442 of the Record of Appeal, thus:

"In the final analysis and relying on the above authorities interpreting this Paragraph 12(3) of 1st schedule to the Electoral Act, 2010 (as amended), we

hold that the Petitioners motion to strike out the 1st, 2nd and 3rd Respondents reply to the petition lack merit and the two motions are hereby dismissed by this Tribunal."

It is contended by the Appellants in issue one of the Appellants brief of argument that the Appellants are in breach of the provisions of Paragraph 12(3) of First Schedule to Electoral Act, 2010 (as amended) and Paragraph 41(8) of First Schedule to Electoral Act, 2010 (as amended), hence, that exhibits D1, D2, D3, D4, D5, D6, D7, D8 and D9 are inadmissible without the leave of the trial Tribunal, and that the holding of the trial Tribunal that there is no consequence for failure to attach copies of documents relied on by the Respondents is not correct.

Without wasting time, this Honourable Appeal Tribunal decided on same issues in the Cross Appeal filed in Appeal No: FCT/ACEAT/AP/10/2022 - Murtala Usman & Anor Vs. Christopher Zakka & Ors. (unreported), where it dismissed the contention of the Cross-Appellants on similar issues herein and per issue one of the Appellants brief of argument of this instant appeal.

The decision in Cross - Appeal No: FCT/ACEAT/AP/10/2022 (unreported), is still alive, binding on the Appellants. We therefore invoke the decision in the Cross-Appeal No: FCT/ACEAT/AP/10/2022 in resolving this same issue against the Appellants in this instant appeal.

ISSUE 2

(2) Whether the trial Tribunal was correct in holding that there is no cogent, compelling and convincing evidence before the Tribunal that BVAS substantially failed to have the effect of nullifying elections in those Polling Units and ordering supplementary election, and did not prove allegations of corrupt practice and non-compliance with Electoral Act (as amended, dismissed the Petition. (Grounds 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the Notice of Appeal).

This second issue touches on the effect of malfunctioning of BVAS on that election day and the effect it had on the smooth and fairness of the whole electioneering process as to impact positively or negatively on the ground of non-compliance with the provision of the Electoral Law 2010 (as amended).

It is settled law, that where an allegation of non-compliance with the Electoral law is made, the onus lies on the petitioner to first of all establish the non-compliance and secondly that it did or could have affected the result of the election. It is only after the petitioner has established the foregoing, that the onus would shift to the Respondent whose election is challenged, to establish that the result was not affected. It is for the petitioner to establish a case of non-compliance first, before the evidence of the respondent could come into play.

See **SIVEN VS. DZUNGWE (1960) 1 SC NLR 111**. See also **AKINFOSILE VS. IJOSE (1960) SCNL 447**; **BUHARI VS. OBASANJO (2003) 50 WRN 1**; **AWOLOWO VS. SHAGARI (1979) 6-9 SC**.

The alleged non-compliance which the Appellants made heavy weather and furore is actually not provided for in our electoral law.

The law is long settled that where a Petitioner complains of non-compliance with the provisions of the Electoral Act at an election, he or she must prove *inter alia*:

i. There were malpractices and non-compliance with the Electoral Act which prevented him from winning the election. See **KUDU VS. ALIYU (1992) 2 NWLR (PT. 231) 615 at 620**.

ii. The irregularities, malpractices or non-compliance with the Electoral Act, had impacted on the result of the election or that they were done with the knowledge or consent of the 1st and 2nd Respondents in this petition whose return is being challenged. See **OREGUN VS. IGBUEDU (1992) 9 NWLR (PT. 276) 747**; **FALAI VS. OBASANJO (1999) 4 NWLR (PT. 599) 476 at 496**.

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. So we agree with the Lower Tribunal that there is no evidence that BVAS substantially failed to have the effect of nullifying the election in those polling units complained of. This is even putting it most mildly. The most important point is that no election can be questioned on ground of none use of BVAS not to talk of partial use or improper use. This issue is resolved in favour of the 1st and 2nd Respondents.

In conclusion, we hereby dismiss this Appeal, affirm the declaration and return of the 1st and 2nd Respondents as the

winners and elected Councillor for Gudun Karya Ward of Kuje Area Council.

**HON. JUSTICE SULEIMAN BELGORE
CHAIRMAN**

**HON. JUSTICE YUSUF HALILU
MEMBER**

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