

IN THE NATIONAL AND STATE HOUSES OF ASSEMBLY
ELECTION PETITION TRIBUNAL
HOLDEN AT ASABA, DELTA STATE

PETITION NO: EPT/DL/SEN/08/2023

TODAY WEDNESDAY, 6TH DAY OF SEPTEMBER, 2023

BEFORE THEIR LORDSHIPS:

HON. JUSTICE CATHERINE OGUNSANYA - (CHAIRMAN)
HON. JUSTICE MAS'UD ADEBAYO ONIYE - MEMBER I
HON. JUSTICE BABANGIDA HASSAN - MEMBER II

BETWEEN:

1. DIDEN MICHEAL PETITIONERS/
2. PEOPLES DEMOCRATIC PARTY CROSS RESPONDENTS

AND

1. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)1ST CROSS RESPONDENT
2. JOEL-ONOWAKPO THOMAS EWOMAZINO
3. ALL PROGRESSIVES CONGRESSCROSS PETITIONERS

JUDGMENT

The events which culminated into the filing of this Cross-Petition can be succinctly put as follows: -

The 1st Cross-Respondent (INEC) on the 25/02/2023 conducted the Delta South Senatorial election. In that election, the 1st Petitioner/Cross-Respondent, Diden Michael, was the candidate of the 2nd Petitioner/Cross-Respondent (PDP). The 2nd Respondent/Cross-Petitioner, Joel-Onowakpo Thomas Ewomazino, who also contested the election was the candidate of the 3rd Respondent/Cross Petitioner (APC). The 1st Cross Respondent (INEC) at the conclusion of the

election returned as elected, the 2nd Respondent/Cross-Petitioner as having scored the majority of the lawful votes cast in the election.

The 1st and 2nd Petitioners/Cross-Respondents i.e., Diden Michael and PDP, being dissatisfied with the return of the 2nd Respondent/Cross-Petitioner as the winner of the election filed a Petition on 17/03/2023 before the Delta State National and State House of Assembly Tribunal against the 1st, 2nd and 3rd Respondents therein who are cited as follows;

1. INEC as 1st Respondent (2) Joel Onowakpo Thomas Ewomazino as 2nd Respondent and (3) APC as 3rd Respondent.
2. The Petition number in that Petition is EPT/DL/SEN/ 01/2023.

Subsequently after the filing of that petition, this present Cross-Petition was filed on 20/3/2023 in respect of the same election and return and was given Petition No. EPT/DL/SEN/08/2023. Howbeit, the sole ground upon which this Cross-Petition is premised is as captured in Paragraph 10(a) at page 4 of the Cross-Petition, which reads: -

“Your 2nd and 3rd Respondents/Cross-Petitioners aver that the ground of this Petition is as follows: -

- (a) That the 1st Petitioner/Cross Respondent, Diden Michael, of the 2nd Petitioner/Cross Respondent party, Peoples Democratic Party (PDP) was at the time of the election not qualified to contest the election.”

The 1st and 2nd Cross-Petitioners by the said Petition at paragraph 22(i) to (vi) of pages 7-8 pleaded as follows: -

WHEREUPON the 2nd and 3rd Respondents/Cross-Petitioners pray this Honourable Tribunal for the following reliefs:

1. A Declaration that by virtue of the provisions of Section 66(1)(i) of the 1999 Constitution (as amended), the 1st Petitioner/Cross-Respondent who has presented forged certificate to the 1st Respondent (Independent National Electoral Commission) is not qualified for election to the Senate of the Federal Republic of Nigeria and is not entitled to claim the seat of the membership of the Senate for Delta South Senatorial District of Delta State.

2. A Declaration that by virtue of the provisions of Section 66(1)(i) of the 1999 Constitution (as amended), the 1st Petitioner/Cross-Respondent who has presented forged certificate to the 1st Respondent (Independent National Electoral Commission) was at the time of election on 25th February, 2023 not qualified to contest the Delta South Senatorial Election.
3. A Declaration that all the votes recorded for the Petitioners/Cross-Respondents in Delta South Senatorial Election held on 25th February, 2023 are invalid and wasted.
4. An Order setting aside or nullifying forthwith the participation of the 1st Petitioner/Cross-Respondent as the 2nd Petitioner/Cross Respondent's candidate in the Delta South Senatorial Election held on 25th February, 2023.
5. An Order disqualifying the 1st Petitioner/Cross Respondent forthwith as candidate in the Delta South Senatorial Election held on 25th February, 2023.
6. Any other or further consequential order or orders of this Honourable Tribunal in the circumstances of this petition.

Upon being served with the Cross Petition on 7/4/2023, the 1st and 2nd Petitioners/Cross-Respondents filed their Reply to the Cross-Petition. The 1st Cross Respondent equally filed its own Reply on 15/4/2023.

The Petitioners/Cross Respondents raised a Preliminary Objection filed, incorporated as part of the Petitioners/Cross Respondents' Reply to the Cross Petition as to whether the Cross Petition is not incompetent and fundamentally defective and enumerated eight grounds upon which the Preliminary Objection was premised. A Motion on Notice dated 27/4/2023 was subsequently filed by the Petitioners/Cross Respondents in the same regard. The Cross Petitioners on 5/5/2023 filed a Written Address in opposition to the grant of the Preliminary Objection.

This Notice of Preliminary Objection embedded in the Petitioners/Cross Respondents' Reply to the Cross petition and their

Motion on Notice dated 27/4/2023 are challenging the jurisdiction of the Tribunal to adjudicate in this Cross Petition.

It is settled law that where a Preliminary Objection challenges the jurisdiction of the Court, the Court must rule on the objection before proceeding to determine the substantive suit. See **Gen. Muhammed A Garba (RTD.) vs. Mustapha Sani Mohammed &ors.(2016) LPELR-40612 SC** and **Yahaya VS. FRN (2007) LPELR-4563 (CA)**

It has also since become elementary that a Preliminary Objection being a threshold application should be considered/determined first. See **Access Bank Plc Vs. Albabamumu International Ltd. & Ors. (2016) LPELR- 41605 (CA)**, **Gusau Vs. APC &ors. (2019) LPELR- 46897 (SC)** and **First Bank Vs. TSA Industries Ltd. (2010) LPELR- 1283 (SC)**

The Tribunal would therefore proceed to consider the said Preliminary Objection earlier referred to and the Motion on Notice on the same issue.

At the risk of verbosity, the motion dated 27/4/2023 seeks the Tribunal to strike out and/or dismiss the Cross Petition for being incompetent and vesting no jurisdiction on the Tribunal to adjudicate thereon. The ground upon which the motion/objection is predicated are as follows: -

- i. The ground of the Cross Petition as well as the reliefs sought therein are outside the jurisdiction of this Honourable Tribunal as provided in Section 285(1)(a) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Section 130(1) of the Electoral Act, 2022.
- ii. The jurisdiction of this Honourable Tribunal is limited to determining whether any person has been validly elected through a Petition complaining of undue election or undue return.
- iii. The present Cross Petition seeks the disqualification of the 1st

Petitioner/Cross Respondent who is not the person elected or returned as the winner of the election.

- iv. The grounds of the Cross Petition as contained in paragraph 10(a) of the Cross Petition is outside the permissible grounds as provided in Section 134(a) of the Electoral Act, 2022 which provides that “a person whose election is questioned was at the time of the election, not qualified to contest the election.”
- v. Diden Michael, the 1st Petitioner/Cross-Respondent, is not the person whose “election is questioned” within the meaning of Section 134(a) of the Electoral Act, 2022.
- vi. The Cross Petition filed in this suit does not question the election of the 1st Petitioner/Cross Respondent and is therefore unknown to law and not supported or provided for under the Electoral Act, 2022.
- vii. Arising from the foregoing, this Honourable Tribunal does not have the jurisdiction to entertain or adjudicate on this Cross Petition.
- viii. The Petitioners/Cross Respondents/Applicants shall urge on the Honourable Tribunal to strike out or dismiss the Cross Petition on the aforesaid grounds.

The motion filed by the Petitioners/Cross Respondents on 27/4/2023 as earlier stated alleged that the cross petition is incompetent and fundamentally defective on the same grounds as earlier set out. Both processes being in *parimateria* shall be considered together.

In the Affidavit filed in support of the motion, the Petitioners/Cross-Respondents/Applicants averred to the following facts which are germane in the determination of the application. It has been averred that it was the 1st Cross Petitioner/Respondent who was returned by INEC as the winner of the election of 25/2/2023 in respect of the Senatorial District in Delta State, the Cross-Petitioners/Respondents have instead of filing their response to the Petitioners/Cross-Respondents’ Petition filed on 17/3/2023 challenging

the return of the 1st Cross Petitioner/Respondent by INEC, they have taken an unusual step in filing this Cross Petition in challenging the qualification of the 1st Petitioner/Cross Respondent to contest the said election despite the obvious fact that 1st Petitioner/Cross Respondent was not the person returned by the 1st Cross Respondent as the winner of the election. It was also stated that the jurisdiction of the Tribunal is limited to determining whether any person was validly elected vide a Petition, complaint of undue election or undue return. Hence, the present Cross Petition seeking the disqualification of the 1st Petitioner/Cross Respondent who was not the person declared elected or returned as the winner of the election is incompetent and robs the Tribunal of its jurisdiction.

The trend of the arguments in the Written Address filed in support of the Application is also not different from the position the Petitioners/Cross Respondents/Applicants has taken as gleaned from the grounds earlier enumerated upon which the Tribunal is being prayed to strike out the Cross Petition.

The sole issue for determination formulated therein is as follows: -

Whether having regard to the Constitutional provisions and other enabling Statutes that conferred jurisdiction on this Honourable Tribunal, the Honourable Tribunal has the jurisdiction to entertain the subject matter of the Cross Petition and grant the reliefs sought in the Cross-Petition.

The provisions of Section 285(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) were commended to the Tribunal to the effect that the Honourable Tribunal was put in place to hear and determine Petitions in respect of whether any person has been validly elected as a member of the National Assembly; or any person has been validly elected as a member of the House of Assembly of a State.

The provision of Section 130(1) of the Electoral Act of 2022 was equally cited and commended to the Tribunal in establishing that Election Tribunals are set up to determine the election or return at an election and such question can only be made in an Election Petition complaining of such an undue election or undue return. The decision in **Dickson V. Sylva (2007) 10 NWLR (pt. 1573) 299** was cited as the position of the law and in that decision the Tribunal was right in stating that it was to adjudicate on the election and return of Hon. Henry Seriake Dickson who was declared elected Governor of Bayselsa State, to determine if he was duly elected and not to adjudicate on the competence to contest of Chief Timipre Sylva who was not declared the winner of the election and not so returned.

It was stressed that the 1st Petitioner/Cross Respondent, Diden Michael, whose qualification to contest the election is the subject matter of this Cross Petition, him not being the person returned as the winner of the election, this tribunal has no jurisdiction to entertain the Cross Petition, as it is evident in the words of the sole ground upon which the Cross Petition has been founded, earlier referred to in this judgment, as being that "Diden Michael was at the time of the election not qualified to contest the election."

Finally, the provision of Section 134(1)(a) of the Electoral Act, 2022 was cited as it limits the jurisdiction of the Tribunal to adjudicate on a person whose election is being questioned as not being qualified to contest at the time of the election, which cannot avail the present Cross Petitioners, as Diden Michael sued was not the one returned as the winner of the election, hence his election cannot be questioned. Therefore this Cross-Petition is submitted to be predicated outside the provision and contemplation of Section 134(1)(a) of the Electoral Act, 2022. Thus, the Cross-Petition is incompetent, unsustainable and liable to be struck out.

In response, the Cross Petitioners/Respondents *vide* their Written Address filed in opposition to the Motion on Notice filed on 27/4/2023, argued that what is at stake is whether the Cross Petition

is competent and clothes the Tribunal with jurisdiction to determine it. They raised firstly the issue that the Petitioners/Cross Respondents/Applicants did not file a Memorandum of Appearance and/or Reply within the purview of paragraphs 9 and 12 of the First Schedule to the Electoral Act, 2022 citing also the provisions of paragraph 12(5) of the First Schedule to the same law which requires a Respondent who objects to the hearing of a petition to file his Reply and state his objection in the Reply, hence the Petitioners/Cross Respondents/Applicants have no Reply to the Cross-Petition: EPT/DL/SEN/08/2023. Hence, the application in contention ought to be struck out.

Digging deep into the nature of the Cross Petition under consideration, it was then contended that it is in respect of the qualification of Diden Michael, 1st Petitioner/Cross Respondent to contest the said election on the platform of PDP. It was submitted that the Cross Petition as filed enjoys the status of a separate existence as that which is accorded a counter-claim in law and can survive alone, even after a withdrawal or dismissal of a petition. A Cross Petition must be filed within the statutory 21 days after the declaration of the result of an election and as well recognized *vide* paragraph 18(7) of the 1st Schedule to the Electoral Act, 2022 as part of the scheduling businesses of the Tribunal during a pre-hearing session.

In response to the Applicants' arguments in respect of their grouse with the Cross Petition, it was submitted that the Applicants are wrong that the qualification to contest the election by Diden Michael cannot be questioned because he was not declared winner in the election, taking the position that an election is more than the declaration of a winner citing the case of **Yar'dua & ors. Vs. Yandoma & ors. (2014) LPELR-2417** and stating that one of the elements of an election is the qualification to participate in it, hence Section 130(1)(a) of the Electoral Act 2022, permits qualification of a

person as a ground to file an election petition and by extension, the Cross Petition.

It was contended that the Cross Petition is not tailored by Cross Petitioners from their arguments to be a challenge or Reply to Petitioners/Cross Respondents own Petition. It is not, being a separate action and independent from Petition No. EPT/DL/SEN/01/2023 and what is being questioned here is not the return of the 2nd Cross Petitioner which is the subject matter in Petition No. EPT/DL/SEN/01/2023 but the qualification of the 1st Petitioner/Cross Respondent to contest the election is what is being questioned. Hence, the decision in **Dickson Vs Sylva** (supra) does not apply as in that case the issue of qualification of the Petitioner was raised by the Respondent in his Reply and not *vide* a Cross-Petition.

In conclusion, it was contended that questioning the qualification of a Respondent to contest an election must be by way of a Cross Petition, citing **Ararume Vs Okewulinu and Ors. (2021) LPELR – 5843 CA** and **Ango Vs Aguda & Anor. (1999) LPELR 66 93 CA** and cited more extensively the decision of the court in **Ibrahim Idris Vs. ANPP (2008) 8 NWLR part 10881 at 97**.

In essence all of the above represent the facts put before the Tribunal in the application and Preliminary Objection in contemplation.

The Tribunal adopt the issues for determination as formulated by learned counsel to both parties in the objection, which are reproduced as follows:

- Whether having regard to the constitutional provision and other enabling statutes that conferred jurisdiction on this Honourable Tribunal, this Honourable Tribunal has the jurisdiction to entertain the subject matter of the Cross Petition and grant the reliefs sought in the Cross Petition.
- Whether the Cross Petition is competent and the Honourable Tribunal has the jurisdiction to determine it.

Since the two issues mean one and the same thing and are only divided by semantics and do flow one into the other, we will consider them together.

The Election Petition Tribunal is a creation of the 1999 Constitution of the Federal Republic of Nigeria (as amended). See Section 285(1)(a) and (b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which provides:

"There shall be established for each State of the Federation and the Federal Capital Territory, one or more election tribunals to be known as the National and State Houses of Assembly Election Tribunals which shall, to the exclusion of any Court or Tribunal, have original jurisdiction to hear and determine petitions as to whether –

- (a) any person has been validly elected as a member of the National Assembly; or*
- (b) any person has been validly elected as a member of the House of Assembly of a State."*

Section 130(1) of the Electoral Act, 2022 also provides: -
"No election and return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as "election petition") presented to the competent tribunal or court in accordance with the provisions of the Constitution or of this Act, and in which the person elected or returned is joined as a party."

Section 134(1)(a) of the same Act provides in unequivocal term as follows;

"An election may be questioned on any of the following grounds–

(a) A person whose election is questioned was, at the time of the election, not qualified to contest the election”

There is a thread that runs through the gamut of the above provisions of the Constitution and Electoral Act and it is this; that Election Petition Tribunals are put in place to adjudicate on complaints which pertain to “undue election” and “undue return” and the only channel for doing so is by a Petition (Section 130(1) of the Electoral Act, 2022). It is also unequivocal that qualification of a candidate to contest an election can only be the subject matter before an Election Petition Tribunal if such a person’s “election is questioned”. See section 134(1)(a) of the Electoral Act, 2022.

The big elephant in the room, as it were, which is the issue in this application begging for determination is whether the qualification of a candidate of a political party who was not declared the winner of an election and was not returned as such a winner can be adjudicated upon before an Election Petition Tribunal and if so whether a Cross Petition being filed in that regard is the vehicle for so doing, given the extant relevant laws. This is the nail that must be hit on its head.

It is not in doubt and indeed settled beyond peradventure that the issue of qualification of a person to contest an election can be a pre-election or post-election matter. See **Dickson Vs Sylva (2017) 10 NWLR (Pt. 1573) 299, 341** and **Dangana Vs Usman (2013) 6 NWLR Pt. 1349 page 50 at 89**.

Having said that, the limit of the jurisdiction of an Election Petition Tribunal as it pertains to the caliber of candidates who contested an election, the qualification to contest thereof the election which can be called to question before an Election Petition Tribunal was most unequivocally settled by the Supreme Court in the case of **Dickson Vs Sylva (2017) 10 NWLR (Pt. 1573) 299, 335-36** where Kekere-Ekun JSC put same in the clearest terms as follows:

“Since Chief Timipre Slyva was not declared the winner of the election and was not so returned, the issue of

questioning his competence to contest the election on any ground before the Tribunal did not arise. It was a pre-election matter that ought to have been pursued through the High Court. I agree entirely with the lower court that the jurisdiction of an Election Petition Tribunal lies within a very compass set out in Section 9(2) of the 2nd Alteration Act to the 1999 Constitution...”

Learned counsel to the Cross Petitioners/Respondents in his address before this Tribunal had contended in his attempt at distinguishing the authority of **Dickson Vs Sylva (supra)** from the instant case, that in **Dickson Vs Sylva (supra)** the problem was that the qualification of the person who lost the election therein (Chief Sylva) qualification was challenged in the Reply to the Petition and not vide a Cross Petition as in this case.

With due respect to the Cross Petitioners' counsel, the Tribunal disagrees intoto with that contention. The question in the most explicit of terms which the Supreme Court put to rest in **Dickson Vs. Sylva** was on the issue of whether the qualification to contest an election of a person who did not win an election can be within the ambit of an Election Petition Tribunal to adjudicate upon, and not the nature of the process employed in bringing such a challenge.

The counsel to the Cross-Petitioners also in his address relied heavily on the decision in **Ibrahim Idris Vs ANPP (supra)** in his contention that the court in that case had held, citing with approval the position of the trial Tribunal in the matter, that it is a Cross-Petition which is the relevant originating process by which the non-qualification or disqualification of a candidate who did not win an election can be brought before an Election Petition Tribunal.

It is pertinent if not imperative that this Tribunal distinguishes the relevance of that authority to the case at hand by bringing to the fore the following facts as can be gleaned from the facts which played out in that matter i.e **Ibrahim Idris Vs. ANPP**, as follows;

1. The Appellate court in that matter had no Cross Petition before it to adjudicate upon same in any regard;
2. The trial Tribunal itself had no Cross Petition before it upon which it could have adjudicated;
3. All that the trial Tribunal and Appellate Court said were obiter they gave in passing an opinion that a Cross Petition could be used in challenging such a qualification.

It has become necessary for this Tribunal to state in the most explicit and indeed unequivocal terms that a Cross Petition no matter how well couched and presented as long as it is with respect to the qualification of a candidate who did not win an election and not duly return as winner falls outside the ambit of adjudication of an Election Tribunal, given the provisions of the enabling laws set out earlier in this judgment, which govern the jurisdiction of Election Petition Tribunals.

The above position taken by this Tribunal is fortified by the position of the Author of the book **“Objections to Jurisdiction and Arguments in Election Petition Litigations”** by Polycarp Dama Datau, Esq. when he at pages 108 and 109, paragraphs 2.4.11 stated:

“A cross petition is an attempt by a Respondent to file a petition to a declaration made in its favour. It runs per contra to section 130 and paragraphs 12(2) and 15 of the First Schedule to the Electoral Act, 2022. It is not open to a Respondent to use the procedure under paragraph 15 of the First Schedule to the Electoral Act 2022 to challenge his own return or that of a petitioner under any guise whatsoever, ‘cross-petition’ inclusive.”

This Tribunal is also bound by the doctrine of *stare decisis* to follow the position of the Supreme Court in **Dickson and Sylva (supra)** earlier referred to as to the position that an Election Tribunal has no jurisdiction to adjudicate over the qualification of a candidate who did not win an election and never returned as such.

The position in that case i.e **Dickson's** case makes so much sense given the relevant provisions of Constitution of this nation and the enabling laws delimitating the jurisdiction of this Tribunal to issues enumerated therein earlier set out in the judgment. We dare say at this stage, that it is cast in stone that an Election Petition Tribunal cannot adjudicate on the qualification of a candidate to contest an election who was not returned as the winner of an election, no matter the originating process used to present such a case. Such a matter ought to have been dealt with at the Pre-Election stage being a Pre-Election matter.

In the light of the foregoing, the Tribunal resolves the issues for determination in the objection under consideration in favour of the Petitioners/Cross Respondents and consequently upholds the objection in question, grants the application under consideration and strikes out the Cross Petition as incompetent.

It is pertinent at this stage to observe that a plethora of legal authorities have held that where a Preliminary Objection is upheld i.e successful, the court will not go ahead to hear the matter on the merits as the matter will be struck out. See **AGF VS ANPP & Ors. (2003) LPELR – 630 SC; GALADIMA VS TAMBAL AND ORS (2000) LPELR – 1302 SC; UNIVERSAL PROPERTIES LTD. VS PINNACLE COMMERCIAL BANK AND ORS. (2022) LPELR 57 808 SC; NWOSU VS. PDP & ORS. (2018) LPELR -44386 (SC).**

In the case of **CHIEF EMMANUEL OSITA OKEREKE VS ALHAJI UMARU YAR'ADUA AND ORS 2008 LPELR – 2446 SC** the Supreme Court had the following to say: -

"A motion by which a Respondent challenges the competence of a suit and the Jurisdiction of the court (otherwise called a Notice of Preliminary Objection) is a special procedure whereby the Respondent contests the competence of a suit and Jurisdiction of the court and if upheld has the effect of terminating the life of the suit

by its being struck out. See Galadima Vs Tambai (2000) 6 SCNJ Pt. 1 196 at 207; (2000) 11 NWLR Pt. 6771”.

Having said that, the Tribunal is mindful of the fact that Election Petition matters are *sui generis* and this trial Tribunal in the hierarchy of courts in Election matters of this phylum i.e National Assembly is at the penultimate step of the ladder. Hence, it finds its expedient to at this stage still consider the said Cross Petition on its merits. See **NWOSU VS PDP AND ORS 2018 LPELR – 44386 SC.**

There is also an application dated 3/5/2023 filed by the Cross Petitioner seeking that this Honourable Tribunal strike out the following processes filed in this Petition to wit –

1. Reply to the Cross-Petition filed on 7/4/2023, marked Petition no EPT/DL/SEN/01/2023.
2. 1st Respondent’s Reply to Cross-Petition filed 18/4/2023 marked EPT/DL/SEN/01/2023
3. And for such further order(s) as the Hon. Tribunal may deem fit to make in the circumstance of this case.

A painstaking perusal of the grounds upon which the application is premised and the Cross Petitioner’s grouse with the above stated processes reveals that the present Cross Petition is marked EPT/DL/SEN/08/2023 but was earlier marked EPT/DL/SEN/01/2023. Two processes are also marked as processes in “Petition No. EPT/DL/SEN/01/2023. However, both processes referred to above ought not to be part of the present file and record in respect of this Cross Petition, the Cross Petitioner having been misled by the markings of the Cross Respondents’ Reply to the Cross Petition filed on 7/4/2023 and the said 1st Respondent’s Reply to Cross petition filed on 15/4/2023 as Petition No. EPT/DL/SEN/01/2023.

Also, according to the Applicants/Cross-Petitioners, the said process dated 7/4/2023 marked Petition No. EPT/DL/SEN/01/2023 was served on 1st Cross Petitioner through the 2nd Cross Petitioner without an order of the Tribunal for substituted service having been granted. Similarly, it is also being contended that the process referred

to above filed on 18/4/2023 also marked as part of Petition No. EPT/DL/SEN/01/2023 was filed out of time and not accompanied by list or copies of documentary evidence, list of witnesses and the written statements on oath of witnesses. Hence from the above, the Cross-Petitioners have been misled and heavily prejudiced by the marking of the two processes as part of EPT/DL/SEN/01/2023 by the Respondents to the Cross Petition and the improper service and impropriety of the said processes.

In the 22 paragraphed affidavit in support filed along with the application, the applicants also averred to facts to the effect that the Applicants/Cross Petitioners had applied for issuance of Pre-Hearing notice on 10/4/2023, as by 15/4/2023 none of the Cross Respondents replies had been served upon them. Only for the Applicants/Cross-Petitioners upon conducting a search of the file, discovered the said two processes which Applicants/Cross Petitioners believe ought not to be filed in the said Case File in this matter not being in respect of this Petition No "EPT/DL/SEN/08/2023."

Sometime in April, 2023, after the filing of Pre-Hearing Notice, the Cross Petitioners brought it to the notice of their counsels that they were served with the processes complained of while insisting that the said processes are not, cannot and should not be in respect of this Cross Petition as it bears a different Petition No. from this Cross Petition. Furthermore, the Cross Respondent's Reply to Cross Petition filed on 7/4/2013 marked EPT/DL/SEN/01/2023 was served at the All Progressives Congress Secretariat in Asaba, through the 2nd Respondent which is not the address for service stated by the Cross Petitions at the time of filing the Cross Petition, as their address for service which is A. H. Lawal and Co, No.1, Obi Francis Street, by Asaba Specialist Hospital, Asaba and it is the Applicants belief that the said process was also served without an order of court for substituted service granted in EPT/DL/SEN/01/2023 as no such order was granted in this Cross Petition.

The rest of the facts averred to are in respect of the process of 15/4/2023 not having been filed with list of or copies of documentary evidence, lists of witnesses and written statements on oath and being filed out of time and they (Cross Petitioners/Applicants) believe it was not filed in respect of this Cross Petition having been marked No. EPT/DL/SEN/01/2023 and not this Cross Petition which carries No. EPT/DL/SEN/08/2023 and ought not to be in this file, hence the Tribunal ought to exercise its jurisdiction to strike out both processes, the Cross Petitioners having been misled since they expected service of processes on their counsel, hence the Applicants were not appropriately served and could not file replies to the two processes.

In the written addresses which accompanied the application the sole issue for determination in essence is: “whether the application ought to be granted”. All the arguments proffered in the consideration of the said issue are well encapsulated in the ground for bringing the application the Tribunal had summarized earlier and also the further facts averred to vide the affidavit in support of the application.

Importantly, learned counsel to the Cross Petitioners submitted that the Cross Petition is marked by the Registrar of the Honourable Tribunal and served on all the Respondents as Petition No EPT/DL/SEN/08/2023 and in law where the Registrar has fixed a Suit No. for an originating summon, such is presumed to be regular in line with Section 168 Evidence Act 2011. All other arguments made therein in respect of service of the process of 7/4/2023 and lack of the accompanying list of documents or copies and list of witnesses had earlier been well articulated by this Tribunal earlier.

In the counter affidavit filed on 15/5/2023 in response to the application under consideration, the sum total of the facts averred to therein is to the effect that the Petitioners/Cross-Respondents had filed their Petition with Petition No. EPT/DL/SEN/01/2023 on 17/3/2023, which was served on the 2nd and 3rd Respondents/Cross-Petitioners who decided to file on 21/3/2023 a Cross Petition carrying the Petition No: EPT/DL/SEN/01/2023. Also, the process dated

7/4/2023 filed by the Petitioners/Cross-Respondents is a Reply to the Cross Petition also containing a Preliminary Objection which was served on all the parties.

It was subsequently after their filing, they i.e the Petitioners/Cross Respondents were informed by the Secretary of the Tribunal that the Cross Petition was given a different Petition number i.e EPT/DL/SEN/08/2023. It was further averred that during Pre-Hearing it was the Cross Petitioners/Applicants counsel himself who informed the Tribunal of the mix up of the two processes in the file and the Presiding Justice of the Tribunal advised counsels to go to the Registry of the Tribunal and sought out the said processes from the court's file being an administrative issue which ought not to be done in open Court.

In the written address filed with the Petitioners/Cross-Respondents' counter affidavit, it was contended that the motion under examination was incompetent having not complied with the provisions of paragraph 5 of the Election Judicial Proceedings Practice Direction 2022 as to the paper size on which the processes to be filed in election petition matters ought to be filed, also prescribed the font type to be employed and at least 1.5 line spacing and urged the Tribunal to strike out the Application as being invalid since the space in between the lines are less than 1.5 commending to the Tribunal the case of **APC Vs Adeleke 2023 2NWLR Pt. 1868, page 309** on the mandatory requirement to comply with the Election Judicial Proceedings Practice Direction, 2022.

It was also argued that paragraphs 8 – 22 of the supporting affidavit ought to be struck out as they constitute arguments, opinion, and legal conclusions and contravene Section 115 of Evidence Act, 2011 which in law must be complied with, citing the decision in **Izedonmiven Vs UBN PLC 2012 6 NWLR Pt. 1295 1 at 46** where the Court of Appeal interpreted Section 115(1) of the Evidence Act, 2011 by virtue of the word "shall" which made it mandatory for the provision to be complied with, hence this Tribunal ought to strike

out the said identified paragraphs which have contravened the above provision.

With regard to the merits of the contents of the application, it was submitted in the clearest of language that, any omission, mistake, inadvertence as to the arrangement of suit Nos. in the filing of processes in this Petition and where they were served was that of the Registry of the Tribunal which errors cannot be visited on the Petitioners/Cross Respondents and cannot in law invalidate the process filed by the party. The decision in **Adeleke Vs Adisa and Ors. (2020) LPELR – 51202 CA**, was cited, submitting that the present Petitioners/Cross-Respondents ought not to be punished for same. It was contended that this application is time wasting and an abuse of the scarce time of the Tribunal considering the *sui generis* nature of election Petition matters.

In essence the above represents the facts put before the Tribunal in the above matter and addresses of counsels thereon.

The Tribunal begins by stating that the sole issue for determination formulated by learned Cross Petitioners/Applicants' counsel well captures what is at stake in this application which in few words is – "*Whether this application ought to succeed*" and we dare add: "*given the circumstances of the matter.*"

There is no doubt given the facts before this Tribunal that there were errors made in this Petition in relation to the numbering/marking of the Petition and also the issues as to where some of the processes were served. The salient question to be answered is whose mistake, inadvertence or negligence these were? It is upon this fulcrum that the consideration and determination of this application stand.

The Holy Scriptures in the Book of *Ezekiel Chapter 18 Verse 20* puts it most succinctly thus;

"The soul that sinneth, it shall die..."

It is no doubt, a settled principle and attitude/practice of courts never to penalize a litigant for the fault, mistake or inadvertence of a counsel and by extension where it is the mistake of the Court/Registry

such error must not be visited on the litigant. See **ALRAINE SHIPPING AGENCIES NIG. LTD./CROSS MARINE SERVICE & ORS. VS NIG. SHIPPERS COUNCIL & ANOR. (2017) LPELR – 41860, AGBODIKE VS AGBODIKE (2016) LPELR 40953 CA; IBEKURE AND ORS VS AZUBIKE (2016) LPR – 4054 CA; STERLING BANK PLC VS P. A. OYOYO (2016) LPELR – 41551 CA; OKPE VS FAN MILK & ANOR. (2016) LPELR 42562 SC.**

In this instant case, the Cross Petitioners/Applicants from the length and breadth of their affidavit filed in support of this application, have not alleged in unequivocal terms or in any regard that it was the duty of the litigant or his counsel to apportion case numbers or marking matters (petitions) at the time of filing an originating process and rightly so. Paragraph 3 of the First Schedule to the Electoral Act 2022, provides for all the steps a Secretary of an Election Petition Tribunal must take upon the presentation of a Petition to such a Secretary. From the provisions of the above law, once a Petitioner or his counsel has paid the requisite filing fees, it is the Secretary of the Tribunal that is in charge of any administrative steps taken in respect of that Petition. Without fear of contradiction, the Tribunal holds that it lies within the exclusive preserve of the Secretary of the Tribunal and other Registrars/Staff he or she may delegate with any necessary task to give Number to a Petition filed.

In this application, it could be most absurd to hold the litigant or his counsel responsible for whatever anomaly that occurred as to the numbering or marking ascribed to the instant Cross Petition. The logical explanation for this misunderstanding can only be that since the Cross Petition was filed after the service of Petition No. EPT/DL/SEN/01/2023 over the same election and return, there was confusion as to whether it should bear the same marking with the earlier Petition or not.

Cross Petitioners/Applicants claim they were misled by this error. The Tribunal wishes to observe that parties in this Cross Petition joined issues most squarely as to what is at stake. We see no

prejudice the Applicants has suffered. Moreover, it must also be mentioned that service of a process in election petition matters, like other civil suits, is the exclusive preserve of the Tribunal/Courts through its bailiff. Hence, again any error as to where the process of 7/4/2023 was served cannot be visited on any litigant especially when the 1st Cross Petitioner got notice of the process served on him and had even taken steps after the alleged improper service. With regard to whether an order for substituted service was sought and granted before the process of 7/4/2023 was served, we believe it is a ship that had sailed, as the Cross Petitioners/Applicants had taken other steps in the matter after being served with the process.

Furthermore, by the provisions of *paragraph 53(1) of the First Schedule to the Electoral Act 2022*, such non-compliance as to rules of practice of the nature complained of will not vitiate the proceedings.

Now, *Paragraph 54 of the First Schedule to the Election Act 2022* provides: -

"Subject to the express provision of this Act, the practice and procedure of the Tribunal or the Court in relation to an election petition shall be nearly as possible, similar to the practice and procedure of the Federal High Court in the exercise of its Civil Procedure Rules and shall apply with such modifications as may be necessary to render them applicable having regard to the provisions of this Act, as if the petitioner and the respondent were respectively the plaintiff and the defendant in an ordinary civil action."

By the above provision, the provisions of the Federal High Court Civil Procedure Rules 2009 also apply to practice and procedure in Election Petition matters.

Order 51, Rules 1 and 2 of the Federal High Court Civil Procedure Rules 2009 provide: -

(1) Where in beginning or purporting to begin any proceeding or at any stage in the course of or in

connection with any proceeding, there has by reason of anything done or left undone, been failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and if so treated, will not nullify the proceedings, or any document, judgment or order therein.

(2) the Court may on the ground that there has been such a failure as mentioned in sub-rule (1) of this rule and on such terms as to cost or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein, or it may exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.”

In the light of all of the above, this Tribunal declares that even if the Petitioners/Cross Respondents failed to obtain the order of court for substituted service, it only amounts to an irregularity which cannot vitiate any part of the proceedings or process served, more so, when the applicants had taken steps thereafter.

This Tribunal finds no merit in the application at hand. The issue for determination is resolved in favour of the Petitioners/Cross-Respondents and it is dismissed, as the Tribunal finds that the said processes are competent.

Having cleared the above out of the way, parties in this suit exchanged pleadings and Pre-hearing sessions were held, at which Issues for determination were settled as follows: -

1. *Whether as at the time of the election, Diden Michael was qualified to contest the election in issue.*

2. *Whether this Honourable Tribunal has the jurisdiction to entertain the instant Cross-Petition challenging the qualification of the 1st Petitioner who was not the person returned as the winner of the election.*
3. *Whether a Cross Petitioner can file a Cross Petition on ground outside those statutorily provided for under section 134(1)(a) of the Electoral Act, 2022.*
4. *Whether the Cross Petitioners have proved their allegation that the 1st Petitioner presented forged certificate to the 1st Respondent in order to aid him fulfill the constitutional requirements to contest for the office of Senate of the Federal Republic of Nigeria.*

Parties called their respectively witnesses and tendered various exhibits. At the end of their respective cases, Learned Senior Counsels representing the parties filed written addresses containing their final arguments in this case and adopted them with some measure of adumbration and judgment was reserved.

The live processes in this matter are as follows –

1. Cross-Petition dated 20/3/2023.
2. Petitioners/Cross Respondents Reply to the Cross Petition dated 7/4/2023.
3. 1st Respondents/Reply to Cross Petition dated 15/4/2023.

The case for the Cross Petitioners in their Cross Petition and totality of the evidence oral and documentary can be summarized as follows:-

The 1st Petitioner/Cross Respondent contested the election at hand on the platform of the 2nd Petitioner/Cross Respondent which is now under consideration. The sole ground upon which the Cross-Petition was premised was that the 1st Petitioner/Cross Respondent at the time of contesting the election was not qualified to contest the said election. The Cross Petitioners in their bid to sustain the ground upon which the Cross Petition is premised led evidence to the effect that the WAEC certificate with candidate number 4112012052

presented by Diden Michael, the 1st Petitioner/Cross Respondent, to INEC in respect of the said election, was forged.

The Cross Petitioners' 1st witness (hereafter referred to as CP1) one Amina Miango, gave evidence in chief as a Principal Legal Officer in the Legal Drafting and Clearance Department of the Independent National Election Commission (hereinafter referred to as INEC). She testified that she was on subpoena to produce some documents and give evidence in relation to this case.

The bulk of her testimony is that towards the conduct of the 2023 election, INEC published the personal particulars of candidates seeking to contest the National Assembly elections and the personal particulars of Diden Michael as well as other candidates were published in Delta South Senatorial District. The documents put in evidence through this witness are as follows; (1) Exhibit 1, which is INEC Form EC9 of Diden Michael with documents attached in respect of 2023 election into the Senate of National assembly; and (2) Exhibit 2, INEC Form CF001 for Diden Michael also with documents attached in respect of the 2015 election into the Delta State House of Assembly.

It was also her testimony under cross examination corroborating the evidence of CP3, Chief Panama Emmanuel, a member of APC and friend of the 2nd Cross-Petitioner (hereinafter referred to as CP3) that his party, All Progressive Congress (hereinafter referred to as APC) upon the name of Diden Michael being published as one of the candidates to contest the election in contention in this Petition, applied to INEC for the CTC of the certificates of Diden Michael which they obtained and it is the further evidence of the CP3 that his party engaged the services of one Rok Global Innovation to verify the said WAEC result of Diden Michael.

This witness testified that after the conduct of the election in question, INEC returned the 2nd Cross-Petitioner as the winner of the election having the highest total number of votes cast. The Cross-Petitioners disputed the claim of the Diden Michael that he scored the

highest number of votes and testified he (Diden Michael) was not even qualified to contest the election. The two inconsistent dates of birth of Diden Michael are 16th August, 1978 as against the 26th June, 1963 on the said forged certificates in question.

The witness, CP3 testified in essence that the feedback from WAEC over the said result was that the result was forged since it bore a difference in respect of Diden Michael date of birth from date of birth on the actual WAEC certificate issued by WAEC to Diden Michael.

CP2 one Kate Ukachi Ibeh (hereinafter referred to as CP2) is a subpoenaed witness at the instance of the Cross-Petitioners to produce documents and give evidence. Through CP2 the following documents were put in evidence. Exhibit 3, a letter from Rok Global Innovations with INEC as the recipient dated 25/6/2022 by which the author of the said letter sought verification of result of Diden Michael. Exhibit 4 is a letter from WAEC dated 28/6/2022 in respect of the quest for the verification of the WAEC result of Diden Michael. It is dated 28/6/2022. Finally, Exhibit 5, which is a copy of WAEC certificate Screen Print of Diden Michael, was also put in evidence.

CP2 under cross examination agreed that WAEC computer system is fully automated and any one can access their data after paying a fee and receive a screen copy of WAEC certificate, adding that WAEC no longer issues a replacement or new results to replace an old one no matter the error noticed on the certificate. This witness identified the contents of Exhibit 5 as authentic and genuine as it regards Diden Michael. It was also her testimony that exhibit 2 which is a WAEC certificate issued to Diden Michael by WAEC is also authentic and genuine.

CP3 on his part under Cross-Examination like CP1, responded that the INEC official confirmed that the form of a candidate for an election i.e his personal particulars are presented to INEC by the political party on whose platform a candidate runs. CP3 continued his testimony under cross examination by Ayo Asala SAN that his party (APC) by 27/6/2022 had received the certified true copy of the

personal particulars of Diden Michael from INEC. This witness, CP3, testified that he is aware that the 2nd Respondent/Cross-Petitioner filed an action in the Federal High Court in respect of the personal particulars of Diden Michael. He identified a document he was shown i.e a Notice of Discontinuance filed by the 2nd Cross Petitioner discontinuing the action filed in the Federal High Court but stated he had no knowledge of same. He insisted that Diden Michael has not been consistent as to his date of birth in filling of his form sent to INEC.

He, CP3, stated that it is not true Diden Michael swore to a declaration on oath correcting his date of birth wrongly stated by WAEC nor is he aware that in Exhibit 1 the WAEC certificate in focus is genuinely issued by INEC. He added that the allegation against Diden Michael is as to his forged WAEC certificate but upon discovery of the forgery by himself or his party, APC did not report the forgery to the police nor is he aware if Diden Michael has been prosecuted or convicted over the forgery alleged. He testified that he could not say if 1978 to 2015 is 35 years apart but agreed a person born in 1978 can in 2015 be qualified to run for Senate or House of Representative as he will be 45 years of age. CP3 stated he never during the investigation of the forgery or the investigation conducted by Rok Innovation know if PDP who presented Diden Michael documents was ever contacted.

Now to the case for the Petitioners/Cross-Respondents. The 1st Cross-Respondent (INEC) did not call any witness in this case.

The case for the Petitioners/Cross Respondents in the pleadings and evidence before the Tribunal in essence is that, the 1st Petitioner/Cross Respondent, Diden Michael, contested the Delta South Senatorial election in question in 2023. At the end of the election, the 1st Cross Petitioner was declared the winner of the election. Being dissatisfied with the election and return at the election, the Petitioners/Cross Respondents filed an Election Petition before the Election Petition Tribunal contesting the outcome of the said Election.

The 1st Petitioner/Cross Respondent denied the allegation against him in the Cross Petition that he was not qualified to contest the election in question and he denied forging his WAEC Certificate. He claimed he filled his INEC Form EC9 and attached thereto his WAEC Certificate with Candidate No. 4112012052 with date of birth therein being August 16, 1978 and not June 26, 1963. In 1999, the 1st Petitioner/Cross Respondent stated he sat for the WAEC examination at the end of which he was issued a certificate No. 4112012052. It was upon the issuance of the Certificate by WAEC he discovered his date of birth was erroneously stated by WAEC as August 16, 1978 instead of 26/3/1963.

Diden Michael to correct the error swore to an affidavit in that regard on 6/4/2006. A copy of the affidavit was forwarded to WAEC. Diden Michael submitted his WAEC certificate and the affidavit sworn to on 6/4/2006 was also forwarded to his party (PDP) for onward transmission to INEC. According to the 1st Petitioner/Cross Respondent, the only WAEC Certificate issued to him was submitted to PDP who presented it to INEC and it is that with Candidates No. 4112012052 with date of birth of August 16, 1978. The said Diden Michael dissociated himself from the WAEC Certificate with June 26, 1963 as his date of birth. He claimed he never submitted that Certificate to INEC and his actual date of birth is 26/3/1963 and not June 26, 1963.

He claimed to have become aware of the WAEC Certificate bearing his date of birth as 26/6/1963 after he emerged as the winner of the Primary election conducted by his party (PDP), 2nd Petitioner/Cross Respondent. One of the aspirants with whom he contested the Primaries of his party for that office filed a suit vide Suit No. FHC/ABJ/CS/810/2022 raising the issue. The suit was eventually withdrawn and struck out.

The present Cross Petitioners similarly filed a pre-election suit at the Federal High Court, Asaba in Suit No. FHC/ASB/CS/1129/2012 in which the APC and Joel Onowakpo Thomas were claimants, alleging

he forged a WAEC certificate he presented to INEC but the Claimants in the Suit i.e. 1st & 2nd Cross Petitioners filed a Notice of Discontinuance of the suit.

Diden Michael thereafter took steps to unravel the mystery of the said fake certificate the 2nd and 3rd Cross Petitioner paraded by applying for the certified true copy of Form EC9 presented on his behalf to INEC by PDP, his party in respect of the Delta South Senatorial District election under consideration only to discover upon being given a Certified True Copy of this Form EC9 and documents attached by PDP and a close study of the said form revealed in addition to his WAEC Certificate submitted to INEC there is another certificate with the same particulars but with different date of birth i.e. 26/6/1963 which he never submitted or presented to INEC. Diden Michael is not aware of the origin of the certificate with 26/6/1963 in it as his date of birth and how it found its way into INEC records.

Upon further enquiry from PDP, his party, who submitted his form EC9, he learnt his particulars in Form CF001 and Form EC9 and attached documents presented to INEC in 2014 and 2022 did not include the WAEC Certificate bearing 26/6/1963 as his date of birth.

Diden Michael claimed he has no reason to submit any other WAEC Certificate to INEC apart from the one issued by WAEC since both dates of birth i.e. 16/8/1978 and 26/6/1963 on the two certificates meet the minimum age limit of 35 years of age as prescribed by the Constitution as the minimum age required to contest for office of Senate or the 25 years of age for House of Assembly member even in 2015. He denied forging any certificate and stated he was qualified to contest the election under scrutiny and not disqualified from contesting it. That he was not even aware originally that APC had applied to INEC for the CTC of his personal particulars.

The Petitioners/Cross-Respondents' witness, CR1, was a subpoenaed witness named Sani Adamu (herein after referred to as CR1) He was subpoenaed to produce documents which he did. The documents put in evidence by the CR1 are as follows: -

1. INEC Form CF001; i.e particulars of personal information of Diden Michael, submitted to INEC in 2014 for the 2015 Delta State House of Assembly General Election; and
2. INEC Form EC9; i.e particulars of personal information submitted by Michael Diden, 1st Petitioner in 2022 for the 2023 Senatorial Election

The 2nd witness of the Petitioners/Cross-Respondents, CR2, is Etih Godspower Oritsebugbemi who shall hereinafter be referred to as CR2. It was through this witness the following documents were put in evidence; to wit –

1. Exhibit 7, i.e a Notice of Discontinuance filed in Suit No: FHC/ASB/1129/1022 between APC and Joel OnowakpoThomas Vs INEC, PDP and Diden Michael
2. Exhibit 8, i.e an affidavit as to correction of date of birth sworn to by Michael Diden on 6/4/2006.
3. Exhibit 9, i.e a certified true copy of INEC Form CF001 submitted to INEC in 2014 for 2015 House of Assembly Election.
4. Exhibit 10, i.e a certified true copy of INEC Form EC9 submitted to INEC in 2022 for the 2023 General Election into Delta South Senatorial seat.

CR2 in his evidence in chief testified that he is a Personal Assistant to the 1st Petitioner/Cross-Respondent and he was involved in the filling and submission of the said 1st Petitioners' particulars and attached documents, i.e INEC Form CF001 and INEC Form EC9 submitted to INEC through PDP (2nd Petitioner/Cross Respondent) in 2014 and 2022. His evidence is on all fours with the pleadings of the Petitioners/Cross-Respondents earlier summarized.

Counsels to the parties filed their respective written addresses, wherein they placed their arguments before the Tribunal. The Cross-Petitioners on their part in their final written address filed on 30/6/2023 raised a sole issue for determination, to wit:-

"Whether from the totality of evidence led, the Cross-Petitioners have proved the allegation of presentation of

forged certificate to INEC against the 1st Petitioner/Cross Respondent (Diden Michael)”

The 1st Cross Respondent in its Final Written Address filed on 25/6/2023 also raised one issue for determination, to wit:-

"Whether the 1st Petitioner/Cross-Respondent was at the relevant time, qualified to contest Delta South Senatorial election held on Saturday, 25th February, 2023 considering the peculiar, fact, circumstances and totality of evidence led in this cross petition."

The Petitioners/Cross-Respondents on their part formulated four issues for determination, to wit;

1. *Whether the allegation of forgery of documents attached to the Petitioner's personal particulars in INEC Forms CF001 and EC9 submitted to the 1st Respondent through the 2nd Petitioner in 2014 and 2022 are pre-election matters outside the jurisdiction of this Honourable Tribunal;*
2. *Whether the Cross-Petition which alleged the presentation of forged documents in INEC Forms CF 001 and EC 9 submitted by the 1st Petitioner to the 1st Respondent in 2014 and 2022 respectively, is not caught by the Statute of Limitation and thereby statute-barred;*
3. *Whether the Cross-Petitioners who are not aspirants and did not participate in the primaries elections leading to the nomination of the 1st Petitioner as the candidate of the 2nd Petitioner, can institute an action on the basis of documents submitted by the 1st Petitioner as contained in the INEC Form EC9; and*
4. *Whether having regard to the totality of oral and documentary evidence before this Honourable Tribunal, the Cross-Petitioners have proved the allegation of presentation of forged documents against the 1st Petitioner/Cross-Respondent as required by law.*

Since issues (1), (2) and (3) formulated by the learned senior counsel to the Petitioners/Cross Respondents border on the jurisdiction of this Tribunal to entertain the Petition *abinitio*, the

Tribunal will consider these issues first and we find it expedient to consider the arguments of learned senior counsels to the Cross-Petitioners and Petitioners/Cross-Respondents on those issues together. We wish to observe that Learned Senior Counsel to the 1st Cross-Respondent (INEC) in his written address had nothing to urge the Tribunal on the said issues.

Learned Senior Counsel to Petitioners/Cross-Respondents, Ayo Asala SAN submitted in essence that the Tribunal has no jurisdiction to entertain the Petition as the issues raised are in respect of allegation of the forgery of documents attached to the 1st Petitioners personal particulars in INEC Forms CF001 and EC9 submitted to the 1st Respondent's (INEC) through the 2nd Petitioner (PDP) in 2014 and 2022 respectively, as they are pre-election matters, citing the decision in **APC Vs Umar (2010) All FWLR (Pt. 1033 743) at 755** where the Supreme Court took the position that any preparation or process embarked upon by a political party in preparation for an election or prior to the election can as well be regarded as pre-election as opposed to post-election. They further cited the decision in **APP Vs Obaseki (2022) 13 NWLR (Pt. 184) page 1** where the Supreme Court settled the position that issues of disqualification, nomination, substitution and sponsorship of candidates for an election precede election and are pre-election matters in view of section 285(14)(c) of the 1999 Constitution (as amended).

It was the contention on behalf of the Petitioners/Cross-Respondents that paragraphs 10, 11, 12 and 13 of the Cross-Petition reveal that the ground upon which the Cross-Petition is premised i.e that the 1st Petitioner/Cross-Respondent was not qualified to contest the election is on an alleged submission/presentation of forged certificates to 1st Cross Respondent in 2014 and 2022 in INEC Forms CF001 and EC9 is a pre-election matter and the evidence of Cross-Petitioners' witnesses CP1, CP2 and CP3 is to the effect that the allegation of presentation of forged certificate in INEC Forms CF001 and EC9; related to events which occurred before the election i.e that

the personal particulars of the said 1st Petitioner/Cross-Respondent was obtained by 2nd Cross-Petitioner sometime in June 2022 which CP3 also admitted that as at 27/06/2022, the Cross-Petitioners had already sought and obtained the CTC of personal particulars – Form EC9 of the said 1st Petitioner/Cross-Respondent, Diden Michael.

The Provisions of Section 29(4) and (5) of the Electoral Act, 2022 were commended to the Tribunal to the effect that the particulars of a candidate who submitted his/her personal details and submitted documents therewith can be applied for and obtained from INEC upon payment of a prescribed fee for issuance of CTC of such documents within 14 days and any aspirant who participated by paragraph (5) of Section 29 of the Electoral Act, 2022 is entitled to same if he has information on reasonable believe that such particulars or information is false and can file a suit at the Federal High Court against such a candidate seeking a declaration that the said information contained in the affidavit is false.

It was contended that the Cross Petitioners were aware of this procedure and did file an action in that regard before the Federal High Court on 7/7/2022 vide suit No. FHC/ABJ/CS/1129/, between **APC & Anor VS INEC & others** which action the Cross/Petitioners on their own volition discontinued on 16/7/2022 as evident in Exhibit 7, citing the decision in **Akinlade Vs INEC (2020) 17 NWLR Pt. 1754439** and **PDP Vs Daniel** to the effect that the position of the law as it stands today is that which was expressed in **Atiku Abubakar & Anor Vs INEC & Ors. SC/1211/2019 of 15/11/2019** to the effect that disqualification of a candidate on ground of false information on his form CF001 is a pre-election matter by virtue of Section 285(4) of the 1999 Constitution (as amended).

It is submitted that the procedure for venting any grievance on such a point is provided for in section 31 (which is now section 29 of the Electoral Act, 2022), hence it was submitted that all the issues of allegation of presentation of forged document in this case are related to events that took place before the election and specifically provided

for in Section 29(5) of the Electoral Act 2022 and that it is the Federal High Court that has jurisdiction to entertain same, being a pre-election matter.

Learned Senior Counsel to the Cross-Petitioners in their final written address filed on 30/6/2023 submitted that the above position by the Petitioners/Cross-Respondents is not the correct position in this Cross-Petition and commended to the Tribunal the decision in **PDP Vs Uche & Ors.(2023) LPELR- 5964 (SC)** as it is clear from the ground the Cross-Petition is predicated, that it is anchored on the provision of section 66(1)(i) of the 1999 Constitution (as amended) which disqualifies anyone who has presented a forged certificate to INEC on the basis of becoming a member of the Senate and thus in this Cross-Petition all the reliefs sought are hinged thereon i.e section 66(1)(i) of 1999 Constitution (as amended).

It was contended therefore that the Cross-Petition borders on Constitutional qualification and not a pre-election matter since section 134(1)(a) of the Electoral Act certainly permits an election to be questioned on the ground of qualification with the provisions of Section 134(3) thereof restricting the said qualification criteria to constitutional requirements, including section 66 of the Constitution.

Learned Senior Counsel to the Cross-Petitioners, Robert Emukpoeruo, SAN distinguished the cases of **APC Vs Umar (Supra)** and **APP Vs Obaseki** cited by the Petitioners/Cross-Respondents on the grounds that the former was decided in respect of the conduct of a political party's congress which is different from this case, a claim of presentation of forged certificate to INEC and in the latter case the dictum of the Supreme Court was made in context of the case found to be anchored on substitution and moreover the ground of the Petition in that case is that of unlawful exclusion and not qualification to contest as in this case.

Similarly, it was contended that in Akinlade's case, what was in contention was disqualification by making false deposition in Form CF001 and not as in this Petition presentation of a forged certificate to

INEC. Further still, it was observed that Akinlade's case being a 2019 decision was not decided in respect of section 134(3) of the 2022 Electoral Act.

The next issue for determination which this Tribunal finds it is expedient to consider sequel to the above issue just reviewed and which it believes should be taken in such sequence is whether the Cross Petitioners lack the *locus standi* to bring this Cross Petition. The Petitioners/Cross Respondents submitted that the Cross Petitioners do not possess the *locus standi* to bring this Cross Petition. The arguments advanced by them in that regard is the fact that the Cross-Petitioners not being aspirants and having not taken part, participated or contested the Delta South Senatorial District Primary Election organized by 2nd Petitioner/Cross-Respondent (PDP) in which the 1st Petitioner/Cross-Respondent, Diden Michael emerged as the candidate for PDP upon his nomination; hence such absence of *locus standi* robs the Court of requisite jurisdiction to entertain the Cross-Petition, *locus standi* being a condition precedent and fundamental to the determination by the court of a suit, hence it is a threshold issue and goes to the root of the Tribunal's jurisdiction.

The decision in **Nwankwo and Anor. Vs Ononeze 2009 NWLR Pt. 1132671 at 707** was commended to the Tribunal together with the provisions of section 29(5) of the Electoral Act 2022 wherein it is provided that it is an aspirant who participated in the primaries conducted by his political party i.e in this case by the 2nd Petitioner/ Cross Respondent who have *locus standi* to sue and the Cross-Petitioners have not shown they were aspirants that participated in the primary election conducted by 2nd Petitioner/Cross-Respondent which led to the nomination of the 1st Petitioner/Cross-Respondent.

The decision in **Maihaja Vs Gaidam (2018) 4 NWLR Pt. 1610 4521 at 482** was commended to the Tribunal to the effect that to be clothed with *locus standi*, a candidate of a political party must have been screened, cleared by his political party and participated at

the said primaries hence anyone who did not participate in the primaries could be classified conveniently as an interloper with no real interest in the processes.

It was stressed in the Petitioners/Cross-Respondent's address that the Cross-Petitioners, not being aspirants in the PDP primaries in which Diden Michael contested also not being members of PDP, the 2nd Cross-Petitioner whom in the Cross-Petition was described as a member of APC (2nd Cross-Petitioner) and who clearly did not participate in or contest in the primaries has no *locus standi* to bring this suit under the Electoral Act as only an aspirant who participated in an Election can challenge the qualification of a candidate in respect of documents presented to INEC in Form EC9. The case of **SDP & Anor. V. INEC and Ors. (2023) LPELR – 59836 SC** where the Supreme Court in pronouncing in respect of who can initiate or undertake legal proceedings for the purpose of determining whether a certificate presented by a person to INEC is a forged certificate or not, stated that it does not include any person who did not participate in the said primaries who is a meddlesome interloper.

Learned senior counsel to the Cross-Petitioners' response to the issue as to whether the Cross-Petitioners have the required *locus standi* submitted that the Petitioners/Cross-Respondents' position just stated also is based on a faulty premise, since the Cross-Petition is found on the ground of Constitutional qualification as provided in section 134(1)(a) of the Electoral Act 2022, hence the *locus standi* to present the Petition is provided for in section 133(1) of the Electoral Act which permits a candidate in an Election or a political party who fielded a candidate in an election to present a petition, thus the Petitioners being a candidate and political party who fielded him participated in the election and are eligible to bring the Cross-Petition having the *locus standi* to do so.

Learned senior counsel distinguished the decision in SDP's case from this one in that it does not support the issue of *locus standi* as the action was dismissed on the fact that it was instituted on the

provisions of section 285 of the 1999 Constitution which provides for political parties challenging actions, decisions or activities of INEC with the court taking the position that as it pertains to who can initiate an action of such a nature of pre-election suit in relation to primaries. Section 29(5) of the Electoral Act 2022 has limited such persons to aspirants who participated in the election hence, it is not on all fours with this case and thus section 29(5) of the Electoral Act, 2022 is inapplicable to this case, this Cross-Petition not being a pre-election matter.

Submitting on the issue whether this Petition is statute barred, Learned Senior Counsel to the Petitioners/Cross-Respondents argued that the Cross-Petition having not been filed within 14 days when the cause of action arose on 24/6/2022 when INEC (1st Cross-Respondent) published the names of candidate for Delta South Senatorial District in the 2023 General Election hence the petition is statute barred. The provision of section 285(9) of the Constitution (as amended) was the premise upon which the said submission was hinged which provides not later than 14 days to file a pre-election matter from the date of the occurrence of the event, decision or action.

It was maintained that this Cross Petition was clearly filed outside the window prescribed in law for so doing hence this Cross Petition is statute barred having been filed outside the period stipulated, it has thus lapsed due to effluxion of time. The Tribunal was urged to look at the Cross Petition and other processes and evidence on record and determine when the wrong was committed which gave rise to the cause of action in a bid to compute the time prescribed for bringing the action under the relevant law to determine if the petition is statute barred, citing **Alausa V. PDP & Ors. (2020) LPELR – 4959 CA** and **Asaboro Vs Pool Nig. Ltd. (2017) All FWLR Pt. 884 Pt.1726** and the case of **Besory Vs Ochinke(2023) NWLR Pt. 1884 545** as to the fact that a pre-

election matter must be instituted not later than 14 days after the event in line with section 285(9) of the Constitution.

It was contended that in this Cross Petition, the cause of action arose on 24/6/2022 when the particulars of the said Diden Michael was published by INEC as a candidate for the election under review hence the time for Cross Petitioners to file an action began to run on that day and which time to file an action that Diden Michael presented a forged certificate to INEC for the said election lapsed on 7/7/2022 i.e 14 days after 24/6/2022 when his name was published by INEC, with this instant case being filed on 20/3/2023 when paragraph 11 of the Cross-Petition states 24/6/2022 as the date when Diden Michael's name was published; it was submitted is in clear violation of section 285(9) of the Constitution having been filed 8 months after the cause of action arose, hence the Cross-Petitioners even if they had a cause of action, it has lapsed, citing **Bello V. Yusuf (2020 ALL FWLR (Pt. 1037) 854.**

Any complaint it was submitted in relation to the allegation of presenting a forged certificate to INEC is similarly statute barred for the same reason in view of the limitation provision of Section 285(9) of the 1999 Constitution (as amended).

The position of the Cross Petitioners in essence is that the Cross-Petition is hinged on the constitutional breach by presenting forged certificate, frowned at under section 66(1)(i) of the Constitution, in view of section 134(1) of the Electoral Act, hence it is not statute barred.

Resolutions of Issues 1, 2 and 3.

The Tribunal finds it convenient and indeed an expedient place to start to examine the provisions of sections 29(1) – (6) of the Electoral Act, 2022 and the provisions of section 66(1)(i) and section 285(9) of the 1999 Constitution of Nigeria (as amended) as they come into play in determining the said issues.

Section 29(1) to (5) of the Electoral Act, 2022 provide: -

(1) Every political party shall, not later than 180 days before the date appointed for a general election under this Act submit to the Commission, in the prescribed forms, the list of the candidates the party proposes to sponsor at the elections, who must have emerged from valid primaries conducted by the political party.

(2) The list or information submitted by each candidate shall be accompanied by an affidavit sworn to by the candidate at the Federal High Court, High Court of a State or Federal Capital Territory, indicating that he or she has fulfilled all the constitutional requirements for election into that office.

(3) The Commission shall, within seven days of the receipt of the personal particulars of the candidate, publish same in the constituency where the candidate intends to contest the election.

(4) Any person may apply to the Commission for a copy of nomination form, affidavit and any other document submitted by a candidate at an election and the Commission shall, upon payment of a prescribed fee, issue such person with a certified copy of document within 14 days.

(5) Any aspirant who participated in the primaries of his political party who has reasonable grounds to believe that any information given by his political party's candidate in the affidavit or any document submitted by that candidate in relation to his constitutional requirements to contest the election is false, may file a suit at the Federal High Court against that candidate seeking a declaration that the information contained in the affidavit is false.

(6) Where the Court determines that any of the information contained in the affidavit is false only as it

relates to constitutional requirements of eligibility, the Court shall issue an order disqualifying the candidate and the sponsoring political party and then declare the candidate with the second highest number of valid votes and who satisfies the constitutional requirement as the winner of the election.

Section 285(9) of the Constitution provides

"Notwithstanding anything to the contrary in this Constitution, every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the vent, decision or action complained of in the suit."

Section 66 (1) (i) of the Constitution provides –

"(1) No person shall be qualified for election into the Senate or House of Representative if –

.....
(i) *he has presented a forged certificate to the Independence National Electoral Commission."*

Learned senior counsel to the Petitioners/Cross-Respondents submitted, we dare say most vehemently, in effect that the substance of the Cross-Petition is a pre-election matter and the Tribunal is robbed of the jurisdiction to entertain same. Part of the consideration of his arguments hinges on the provision of Section 29(4) and (5) of the Electoral Act 2022 earlier reproduced and Section 285(9) of the Constitution.

A combined reading of the above Sections 29(4) and (5) of the Electoral Act 2022 and section 285(9) of the Constitution reveals that any person can apply to INEC seeking any of the documents e.g, a copy of nomination form, affidavit etc. submitted by a candidate at an election upon payment of a fee within 14 days of the name of the candidate having been published in line with section 29(3) of the

same Act and institute an action in respect of any falsehood therein before the Federal High Court.

Ayo Asala SAN had contended that the Cross Petitioners were aware that the Federal High Court was the legal forum where they could vent any grievance such as that which they have made the grundnorm of their petition i.e that the Petitioner/Cross Respondent presented forged certificate to INEC in furtherance of his quest for the office contested for, in view of the fact that the Cross Petitioners had *vide* a suit No. FHC/ASB/CS/1129/2022 sought to litigate the issue of the alleged presentation of forged certificate by the said Diden Michael, but discontinued same, hence the matter is a pre-election matter. On the other hand, the Cross-Petitioners in their pleadings and evidence before the Tribunal did not dispute that 1st Cross Petitioner did file the said action and discontinued same.

It has now become pertinent to answer the question as to who can institute an action under section 29(5) of the Electoral Act 2022. The Tribunal had earlier set out verbatim the provisions of that law. A few particulars will be highlighted from the said provision and set out hereunder as follows –

1. Such a proposed litigant must have been a co-aspirant in the primaries conducted by their party with the person whose information or particulars were presented to INEC.
2. Such a person who is alleged to have presented a false information or document must have emerged as his political party's candidate.

This Tribunal observes that the 1st Cross Petitioner from the pleadings and totality of evidence of all the parties in this Petition does not fit the description or possess the requisite credentials to litigate under section 29(5) of the Electoral Act 2022, he not being an aspirant in the said primaries of the PDP in question nor is he a member of that party. So PDP cannot be said to be "his political party" as provided in the very wordings of section 29(5) of the Electoral Act 2022. It is obvious from the wordings of the Electoral Act, Section 29

(5) thereof that it can only avail an aspirant who belongs to the same political party as a candidate who at the primary election conducted by the party such candidate was the person who emerged as the candidate of their political party which party primaries election, they both contested in.

While the Tribunal agrees totally with the Petitioners/Cross-Respondents' position that in line with the provisions of section 29(5) of the Electoral Act 2022, litigations in line with party primaries can only be litigated before the Federal High Court howbeit such litigation can only be amongst aspirants who belong to the same party and contested in the same primaries of their same party and is a pre-election matter.

Learned senior counsel to the Cross Petitioners had contended that the Cross Petition is based on a Constitutional issue citing Section 66(1)(i) of the Constitution and section 134(1) of the Electoral Act 2022 and that the Cross Petitioners clearly have *locus standi* over it.

In Latin, the term *locus standi* simply means "place to stand" and in everyday parlance, it refers to the legal right of a person natural or not, to sue. It affects the jurisdiction of a court. It is trite that one of the fundamental constituents of determining the competence of a Court is that the subject matter of the case is within the jurisdiction of the Court. See **PDP & ORS. V. EZEONWUKA & ANOR. (2017) LPELR-42563 (SC), AG FEDERATION V AG LAGOS STATE (2017) LPELR-42769 (SC)**

In election petition matters, the *locus standi* of a party to present a Petition has been infinitely linked to a person's entitlement to present a petition as provided for under section 133(1) of the Electoral Act, 2022 which include vide subsection (1)(a) thereof, he must be "a candidate in an election". Thus, it is unequivocal that the present Cross Petitioners belong to that category of persons who can bring a Petition.

Learned Senior Counsel to the Petitioners/Cross Respondents in his address limited his arguments to whether the Cross Petitioners

had the *locus standi* to bring a pre-election suit. The Tribunal adopts its earlier position that the Cross Petitioners not being a member of PDP from which the 1st Petitioner emerged, they could not have litigated the issue of alleged presentation of a forged document by Diden Michael to the INEC before the Federal High Court.

It must be re-emphasized that our Courts have long decided that internal political activities and intra party relations of a political party cannot be questioned by a person who is not a member of the party, hence the doctrine of the meddlesome interloper who cannot be accommodated to litigate under Section 29(5) of the Electoral Act, 2022 is apposite. See the case of **SDP & ANOR VS INEC & ORS (SUPRA)**. The nomenclature nose y parker is also apt in referring to such person.

This Tribunal also adopts its earlier submissions and conclusions as contained and ruled upon in this judgment in respect of the Motion dated 3/5/2023 and comes to the same findings over this issue treated.

Now with regard to whether the action is statute barred or not. The position of the law is clear that a cause of action accrues in bringing an action as in this case this Cross Petition upon when the wrong was committed or the event or series of acts occurred which culminate into enough facts upon which an action can be predicated.

The Senior Counsel to the Cross Petitioners did try to submit that this action is premised on the constitutional requirement under Section 66(1)(i) of the Constitution which forbids the presentation of a forged certificate to INEC which the said Diden Michael is alleged to have done and is justiciable before the Election Petition Tribunal.

A combined reading of section 134(1) of the Electoral Act, 2022 and section 66(1)(i) of the Constitution which is the substance upon which the ground of the Cross Petition is premised, shows that it is not a valid ground upon which this present Cross Petition stands. The Tribunal again adopts its consideration, findings and position in its holding on the motion dated 3/5/2023.

The Tribunal has found that ordinarily a petition is well founded under section 66(1)(i) of the Constitution, i.e in view of the Provisions of section 133(1)(a) of the Electoral Act, i.e that a candidate in an election petition can present a petition. However, having said that, the Tribunal cannot but adopt its earlier position in this judgment in respect of the motion challenging the jurisdiction of this Tribunal to hear this Cross-Petition, upon the premise that this Cross Petition is instituted against a person who did not win the election and was neither returned as the winner, thus the Cross Petitioners would not have the *locus standi* to bring this Cross Petition, and we so hold.

At this stage, the Tribunal needs to stress that section 285 of the Constitution does not envisage a situation where a Petition such as this present Cross Petition in this case would be presented against a person who did not win an election. In **Buhari & Anor. Vs. Yusuf & Anor. (2003) LPELR – 812 SC at Pages 29 – 30 paras B - B** the court put it most succinctly in its interpretation of Section 133 of the Electoral Act (in *pari materia* with section 133 of the Electoral Act 2022) this way;

"It is manifest that Section 133 of the Act places no obligation on a petitioner(s) to make any candidate who lost an election or any political party, whether of a candidate elected or returned or of a candidate who lost or which may not have fielded any candidate for the particular seat, a respondent other than the statutory respondents envisaged under subsection (2) as identified in this judgment."

The Court of Appeal most aptly in **Ize-Iyamu Vs. ADP & Ors (2021) LPELR – 54292 (CA) Pg. 55 paras D-F**, stated

"Only the winner of an election and the statutory body or its staff or other person who participated in the conduct of an election are necessary respondents to an election petition or appeal. The law only envisages an

election petition to be between a loser as the petitioner and a winner as the respondent"

See also **APC Vs, PDP & Ors (2015) LPELR – 24887 (SC)**.

This Tribunal follows the above decision in addition to its earlier consideration in the same regard in respect of the applications/objections earlier upheld in this Petition. We find that the Cross Petitioners have no *locus standi* to bring this Cross Petition. It therefore follows that the law as it stands today in **PDP Vs. INEC (2023) LPELR – 60457 (SC)** is that no provision has been made for a person or party to inquire into the eligibility of a candidate to contest an election on the platform of another party and thus there exists no recourse in law which makes an Election Petition Tribunal to be a forum for such litigation.

We resolve issues 1, 2 and 3 in favour of the Petitioners/Cross Respondents.

Arguments in relation to Issues 4, i.e;

"Whether having regard to the totality of oral and documentary evidence before this Honourable Tribunal, the Cross-Petitioners have proved the allegation of presentation of forged documents against the 1st Petitioner/Cross-Respondent as required by law."

Learned senior counsel to the Cross Petitioners had argued that the ground upon which the Cross Petition is founded is Section 134(1)(a) of the Electoral Act 2022 as provided for in Section 66(1)(i) of the 1999 Constitution (as amended) i.e that the 1st Petitioner/Cross Respondent was not qualified at the time of the Election to contest for the election in dispute and that it is upon that fulcrum the Cross Petitioners' legal arguments hinged. It was contended that the Cross Petitioners have shown in the pleadings that in 2014 and 2022 the said Diden Michael had presented to INEC WAEC Senior School Certificate in respect of the May/June 1999 examination with Candidate Number 4112012052 which bear his date of birth as June 26, 1963 which Certificate is forged.

It was the position at the trial that upon receipt from INEC of CTCS of the 1st Petitioner/Cross Respondent's INEC Form CF001 and EC9 in respect of the 2015 and 2023 elections, the Cross Petitioners discovered part of the documents thereof was a WAEC Certificate in the name of Diden Michael (1st Petitioner/Cross Respondent) with his date of birth therein as June 26, 1963.

It was submitted that the only burden of proof to be discharged by the Cross Petitioners in this Cross Petition is the claim that the said Diden Michael's Certificate is a forgery and to prove that the said Certificate was presented to the INEC and that it was the Diden Michael that presented the Certificate and that the two ingredients must be proved beyond reasonable doubt. The decision in **Maihaja Vs. Gardam (2017) LPELR – 42474 (SC)** was commended to the Tribunal in the above regard.

With respect to the Cross Petition i.e proof that the Certificate in question was forged, the decisions in **Babalola Vs. State (1989) 4 NWLR (Pt. 115) 264 at 271** and **ACN Vs. Lamido & Ors (2011) LPELR – 9174 CA** were commended to the Tribunal to the extent that forgery includes a document which tells lies about itself or where it is purported to have been issued by lawful authority or testifies as to any fact or event which is untrue as established by the Supreme Court in **Smart Vs. State (1974) LPELR – 3076 (SC)**.

Learned Senior Counsel to the Cross Petitioner referred to the document in issue with the name of Diden Michael with candidate number 4112072052 allegedly issued by WAEC which bears June 26, 1963 as the candidate's date of birth which was attached to Diden Michael's INEC Forms EC9 and CF 001 respectively which are part of exhibits 1 and 2 in this Petition and submitted that the said WAEC Certificate is untrue and tells lies about itself and thus qualifies as a forged document within the ambit of Smart's case especially in view of the existence of the certificate of Diden Michael with Candidate's date of birth as August 16 1978 and particularly as it was submitted that in both exhibits 1 and 2 before the Tribunal there are two WAEC Results

of Diden Michael with the same features except with different dates of birth with one as August 16 1978 and the other June 26, 1963 and that it is the CP2's evidence on exhibits 4 and 5 that WAEC has disclaimed the Certificate with June 26, 1963 as Diden Michael's date of birth.

It was again contended that the Petitioners/Cross Respondents had tried under cross examination of CP2 to confuse issues in making the Cross Respondents' said witness to identify only one certificate in exhibits 1 and 2 which is not the forged certificates, without indicating two different certificates, each are attached to the said Exhibits 1 and 2 and that this further reveals that the 2nd Certificate deliberately not shown to CP2 is not authentic, not being issued by WAEC and is a forgery. The Cross Respondents having stated that in Exhibit 4, WAEC stated the date of birth of the candidate, Diden Michael, as August 16, 1978.

Cross Respondents commended to the Tribunal the decision of the Court in **APC Vs. Obaseki (2022) 2 NWLR (Pt. 1814) 273 at 305** where the Court recognized the disclaiming of the University of Ibadan, University Degree Certificate and the A Level result disclaimed by WAEC which was attached to INEC Form, as sufficient proof that they were forged certificates.

It was also contended that there is proof that Diden Michael presented exhibits 1 and 2 for the 2023 and 2015 General Election with these two forged Certificates attached which were produced in Court by CP1 an official of INEC who also tendered same as documents produced from proper custody of INEC.

The evidence of Cross Petitioners' witnesses were commended to the Tribunal to the extent that APC applied and obtained upon publication of the particulars of candidates for the said election from INEC the Certified True Copies of Diden Michaels INEC Nomination forms and accompanying documents pursuant to Section 29(1) of the Electoral Act 2022 which became available to INEC because 1st Petitioner/Cross Respondent submitted them is conclusive evidence of

the act of presentation by 1st Petitioner/Cross Respondent to INEC of same and being CTCs are presumed genuine and authentic in view of Section 146 and Section 145 (c) of the Evidence Act 2011 and in law, there is no need to call the officials who certified same. See **Wasiu & Anor. Vs. Gologolo & Ors. (2019) LPELR – 48755 CA** but the Cross Petitioners have taken a step further to call an official of INEC who testified that the documents reproduced bear the stamp of INEC on Diden Michael personal particulars, hence this is proof that the said Diden Michael presented forged WAEC Certificates to INEC with his personal particulars.

On the Petitioners/Cross Respondents contention that they do not know anything about the WAEC Certificate with Diden Michael as a candidate with June 26 1963 as his date of birth – the Petitioners/Cross Respondents, stressing they have no knowledge of the said forged document, it was submitted that there is no proof that the said Diden Michael presented it to INEC, as Exhibits 8, 9 and 10 put in evidence, it was submitted, have no probative value and are inadmissible because CR2 who put them in evidence is not the maker of the documents which are an Affidavit of Correction of date of birth sworn to by Diden Michael and Affidavit of Personal particulars of the said Diden Michael. The Tribunal was urged to give no probative value to Exhibits 8, 9, and 10, citing the decision in **Flash flex Odds Ltd Vs. Akatugba (2001) 9 NWLR (Pt. 7174) 6 at 43** submitting that Exhibit 8 which seeks to correct the date of birth of Diden Michael from August 16 1978 to March 26 1963 is of no consequence as in law only an issuing authority can effectively change the names appearing in a Certificate citing **PDP Vs. Degi-Eremienyo (2021) 9 NWLR (Pt. 1781) 274 at 290 para D-E** amongst other authorities.

It was further contended that the Cross Petitioners need not prove in law that it was Diden Michael who forged the WAEC Certificate but only that he presented a forged Certificate to INEC thus the Petitioners/Cross Respondents arguments that the forged WAEC Certificate does not aid Diden Michael in meeting the age limit

requirement for the office he contested as whatever the dates of birth on the said Certificates read he is still eligible to contest and did not benefit from the alleged forgery, citing the Supreme Court case of **Saleh Vs. Abah (2017) 12 NWLR (Pt. 1578) 100 at 153 SC and Garo Vs. Gwarzo 30 (2008) 1 LRECN at 239**. In the alternative to the position of the law in **Saleh V. Abah** supra, Cross Petitioners submitted that the fact that INEC received the forged Certificate in 2014 and in 2022 with the personal particulars of Diden Michael resolves any doubt about the 1st Petitioner's knowledge of the forged WAEC Certificate and his role in presenting it.

It was then submitted that the Petitioners/Cross Respondents contention that Diden Michael did not personally submit the Certificates to INEC is of no moment as he cannot attempt to dodge his responsibility as the political party is only a courier to get the particulars to INEC.

It was equally contended that the Petitioner/Cross Respondents had failed to absolve the 1st Petitioner of responsibility for presenting the forged certificate as by the Provisions of Section 29 of the Electoral Act he is the one who applied for the Form and responsible for the affidavit and other documents he submitted as a candidate therewith.

It was then contended that there is evidence that WAEC did not issue the forged Certificate. No evidence can detract from it in Exhibits 1 and 2 which contain a WAEC Certificate with June 26 1963 as the date of birth and on the strength of Exhibits 4 and 5, it was not issued by INEC and it does not matter if the forged certificate aids the said Diden Michael or not as to his age qualification for the desired office.

Under Section 65 of the Constitution the disqualifying provision is different from presentation of forged certificate to INEC in Section 66 (1)(i) of the same Constitution citing the case of **Wasiu & Anor Vs. Gololo & Ors (supra)** in the regard that a person may be

qualified to run under Section 65 of the Constitution but present a forged certificate under Section 66(1)(i) of the same Constitution .

In Reply on point of law, learned senior counsel to the Petitioners/Cross Respondent relying on paragraph 4(5)(b) of the First Schedule to the Electoral Act, 2022 submitted before the Tribunal that the statements on oath of the two Cross Petitioners witnesses are incompetent and should be discountenanced having not been filed at the time the Cross Petition was filed even the evidence of a subpoenaed witness not filed with the Cross Petition is incompetent. The decision in **ANDP VS INEC & ORS Suit No. CA/A/EPT/406/2020** following the decision in **PDP Vs. Okogbo** and others that a witness statement on oath not frontloaded and filed upon presentation of a petition is incompetent. See also **APC Vs. Marafa (2020) 6 NWLR (Pt. 1721) 583 at 423.**

On the evidence of CP2, it was submitted on behalf of Diden Michael that under cross examination the CP2 testified that the Certificate attached to Exhibits 1 and 2 bearing the name of Diden Michael is authentic but that the date of birth on the other Certificate was tampered with not forged citing the decision in **Okoko Vs. Dakolo (2006) LPELR – 2461 (SC)** in making a distinction between tampering with a document and forging a document, the earlier will have the effect of the document being unreliable while the latter document is nullified completely, hence the CP2's evidence did not prove the document is forged. It was submitted that Exhibits 9 and 10 are not public documents since they are from the PDP and need not be certified.

Now, Forgery is defined to mean "The act of making a false document or altering a genuine one for same to be used. See Blacks Laws Dictionary 8th Edition, on what forgery is. See also **Joe Odey Agi SAN Vs. Peoples Democratic Party and Ors. (2016) LPELR – 42578 (SC).**

The complaint of the Cross Respondents in this Cross Petition can be gleaned from the sole ground upon which the petition is found

i.e that the 1st Petitioner/Cross Respondent, Michael Diden is not qualified to contest the election under consideration upon the premise that he presented a forged certificate to INEC in respect of 25/2/2023 election into the Delta South Senatorial seat of Delta State.

The provisions of sections 65(1)(a) and section 66(1)(i) of the Constitution thus come into play. They provide as follows:-

65(1) Subject to the provisions of section 66 of this Constitution, a person shall be qualified for election as a member of –

(a) The Senate, if he is a citizen of Nigeria and has attained the age of thirty-five years.

66(1) No person shall be qualified for election to the Senate or the House of Representatives if –

(i) He has presented a forged certificate to the Independent National Electoral Commission.

See also **Etim & Anor. Vs. Akpan & Ors. (2019) LPELR – 48681 (CA)**. The burden of proof of an allegation of forgery which is a crime is on the person who alleges same in an election petition. See **Maihaja Vs. Gaida (2017) LPELR – 42474 (SC)**.

The burden of proof in cases of this nature thus sits squarely on the shoulder of the person who alleges same upon the evergreen principle of law that he who alleges must prove. To succeed on an allegation of forgery, the following must be proved. (1) The existence of a document or writing (2) That the document or writing was forged. (3) That the forgery was by the person being accused (4) That the party who made it knew that the document or writing was false; (5) The party allegedly intended the forged document to be acted upon as genuine. See **Maihaja Vs. Gaida supra**.

Learned Counsel to the Cross Petitioner had commended to the Tribunal that all the Cross Petitioners need prove is that the forged certificate presented to INEC was false and not that it was the 1st Petitioner/Cross Respondent in this case that forged the document on

the authority of **Saleh Vs. Abah (2017) 12 NWLR (Pt. 158) 100 at 153.**

Let the Tribunal observe straightaway that in **Saleh Vs. Abah supra**, the document in question had already been adjudged as a forged certificate and the candidate already disqualified from contesting the primary election hence it is inapposite to this case.

It will not be out of place to examine certain documents tendered as Exhibits in this case in a bid to explain the nature of same and highlight certain features and characteristics of same as well, which will throw more light on how the Tribunal should view such documents in ascribing probative value to them.

(1) Exhibit 1 comprises of the INEC Form EC9, an affidavit in support of the personal particulars of Michael Diden submitted to INEC in respect of his seeking election into the Delta State Federal Constituency. Part of Exhibit 1 are documents attached which include A WAEC Certificate with candidate no. 4112012052 with date of birth of the candidate on it as August 16 1978. Also part of the documents that constitute Exhibit 1 is another WAEC Certificate with date of birth June 26 1963. Yet another document which constitutes part of Exhibit 1 is an Affidavit as to Correction of Date of Birth sworn to by the said Michael Diden on 6/4/2006, it was sworn to, to correct the date of birth in his WAEC Certificate which bears 16/8/1978 as his date of birth to be an error and gives his date of birth as 26/3/1963.

Exhibit 2 is Form CF001, another affidavit in support of the personal particulars of Diden Michael seeking office in respect of his run into the Delta State House of Assembly in 2014. This Exhibit 2 also has like Exhibit 1 part of its constituents being the copy of his WAEC Certificate Candidate No. 4112012052 with his date of birth therein being stated as August 16 1978.,

Also as part of Exhibit 2 is another WAEC Certificate with the Michael Diden date of birth as June 26 1963. Again, there is a copy of a sworn affidavit of Correction of Date of Birth, a replica of that earlier

referred to as part of Exhibit 1 correcting his date of birth on the WAEC Certificate, giving his real date of birth to be 26th March 1963.

While giving evidence, CP2, Mrs. Kate Ukachi Ibeh, a staff of WAEC had testified to the effect that the authentic certificate issued by INEC are in Exhibits 1 & 2 and the said printout of the WAEC Certificate Exhibit 5 is amongst those documents. She did identify the WAEC Certificate in the said Exhibits as authentic as well as the documents which reveal that the PDP, i.e 2nd Cross Respondent/Petitioner, engaged services of one Rok Innovation to inquire into the authenticity of Michael Diden's WAEC certificate to which WAEC gave them a response. It was also her evidence that WAEC does not give correction to any Certificate containing errors anymore.

It was the evidence of CP1, Amina Miango, an Officer of INEC, that she is aware that it is the political party in the process of nomination of a candidate for the party who submits their personal particulars to INEC and that it was true INEC had cleared Diden Michael for the elections, both for his run in 2015 and 2023, upon documents submitted to INEC in Exhibits 1 and 2.

Certain facts from the pleadings and evidence of witnesses in this Cross petition remain uncontroverted, they are –

1. A copy each of the purported forged certificate was part of the documents in Exhibit 1 and Exhibit 2 respectively especially Exhibit 1 being the Form EC9, housing the personal particulars of 1st Respondent Diden Michael in respect of run for the 2023 Senate.
2. The forged certificate with June 26, 1963 as Diden Michael's date of birth, by its every content, carry all the same information as that which CP2 identified as genuine except that it bears June 26, 1978 as the date of birth of Diden Michael. Rhe said authentic certificate puts Diden Michael `s date of birth as August 16, 1978.

3. For more particularity and clarity, there is no evidence, Diden Michael did not sit for the said WAEC Examination. There is no evidence, the scores credited to him in the Certificate are not genuine i.e fabricated or altered.
4. The only other difference is that the said forged WAEC Certificate has a fancy border made around it and the genuine certificate does not.
5. It is also not in doubt that by the arithmetic of subtraction whether the said Diden Michael was born on March 26 1963, the date he swore to have been born in Exhibit 8 or June 26 1963 the date in the allegedly forged WAEC Certificate or August 16 1978 the date in the authentic WAEC Certificate, all these dates, if Diden Michael was born on any of them he would have still been qualified in terms of his age at those respective dates to contest into the office of House of Assembly of a State in 2014 or Senate in 2023 in view of section 65(1)(b) and (a) respectively of the 1999 Constitution (as amended).

Learned senior counsel to the Cross Petitioners on their part submitted that the above dates have no consequence as long as he presented the forged Certificate to INEC.

In other words what learned senior counsel to the Cross Petitioners is submitting in effect is that the 1st Petitioner/Cross Respondent did not need to know the certificate was forged when he presented same to INEC and that it does not matter if the date of birth on it was not an asset to him i.e did not aid him in qualifying in respect of the required age he was to be as prescribed by section 65(1) of the 1999 Constitution as amended.

In simply *lingua*, what the Cross Petitioners are proposing by the above submission is that presenting a forged certificate to INEC within the purview of section 66(1)(i) of the Constitution is akin to strict liability offence.

What is a strict liability offence and when does it exist?

In both tort and criminal law, a strict liability offence exists when a Defendant is liable for committing the action regardless of what his/her intent or mental state was when committing the action. See Legal Information Institute at <https://www.law.cornell.edu>>net.

Wikipedae explains strict liability thus “In Criminal Law, strict liability for which mens rea does not have to be proven in relation to one or more elements comprising the *actus reus*, although intention recklessness or knowledge may be required in relation to other elements of the offence.

In other words, the “*mens rea*” i.e the mental element of the offence is excluded. This Tribunal with respect does not subscribe to the above position of the Cross Petitioners.

In **Abubakar Vs. INEC (2020) 12 NWLR (Pt. 1737) 37, 172-173 para H-H**, the Supreme Court per Kekere Ekun JSC held thus

“If there is any discrepancy on the age of a candidate, it must have bearing on the constitutional requirement before it can have the effect of disqualifying him.....”

It was held in this case that there must be evidence of an intention by the candidate to circumvent the provisions of the Constitution.

There is no gainsaying from the above that for a candidate to have presented a forged certificate to INEC within the purview of section 66 (1)(i) of Constitution, he must have known the certificate was forged when he presented same to INEC and the certificate must be so presented to INEC to secure an advantage as in this case to be qualified in age to contest an election. He must have some *mens rea*. We so hold.

In the case of **Abdullahi & Anor Vs. Ahmed & Ors**, it was held that the falsification, the infraction must relate to the very point in which the qualification depends. What is good for the goose is also good for the gander; the alleged forged document as in this case must be presented to relate to the very part which the qualification as

to age touches on as the offending evidence in this case is the date of birth of the candidate, with the *mens rea* being a mind to secure an advantage to age in order to be eligible to contest. In other words, the “*mens rea*” i.e the mental element of why a forged certificate is presented cannot be excluded.

In this instant case, the 1st Petitioner/Cross Respondent it is crystal clear had nothing to gain by submitting two WAEC Results with contrasting dates of birth. We agree as a Tribunal with learned senior counsel to the Petitioners/Cross Respondents, it makes no sense for Diden Michael to shoot himself in the foot for no reason at all by submitting two WAEC Certificates to INEC over the same examination with different dates of birth belonging to him. It just makes no sense! It must be noted that the affidavit correcting his age i.e exhibit 8 was sworn to as far back as 2006 i.e long before he contested elections in 2014 and 2023 so it cannot be said to be a document made for the purpose of the elections of 2014 and 2023. In law, it can be safely said it is a document made with no *malafide* and no purpose to serve.

The issue of what a man’s correct age is, is one personally within his own knowledge, thus even if WAEC was still issuing corrections of errors in Certificates, which it is in evidence of CP2 that they no longer do, WAEC would still have required Diden Michael to give them his correct age in correcting same, such information being one not in the personal knowledge of WAEC who could not have been privy to the date Michael Diden was born.

Certain pieces of evidence in this case call for caution, when trying to determine any culpability or otherwise of the 1st Petitioner/Cross Respondent in the saga of an alleged presentation of forged certificates, put succinctly as follows –

1. CP2 led evidence that anyone, for a fee, can access WAEC’s site to get a copy of a Certificate;
2. From the procedure INEC, vide Section 29 of the Electoral Act 2022 has adopted, which CP1 confirmed, it is a political party

that submits its candidate's personal particulars and the attached documents to INEC, not the candidate personally;

3. While CP1 and CP3 gave evidence that the APC, 3rd Respondent, applied for the personal particulars of Diden Michael from INEC which Certified true copy of same was released to them, they, CP1 & CP3, did not state with any particularity the documents which accompanied the Form EC9 given to the APC to investigate the personal information of Diden Michael.
4. The said Diden Michael, the Tribunal observes, had truly nothing to gain and everything to lose by submitting both certificates with contrasting dates of birth to INEC. It does not pass the Sniff Test that a person will be that naïve, in fact, out rightly stupid, to do so, worse still twice, i.e in 2014 and 2022!!! Something untoward was up definitely. How can one be that self destructive to himself!!!
5. The likelihood of INEC clearing Diden Michael in 2014 for the House of Assembly election and in 2022 for the Senate election, with two forged WAEC Certificates each attached to his nomination Forms without detection, is slim in the Tribunal opinion and close to zero i.e nada i.e nothing.

All of the above raise reasonable doubt in the Tribunal's mind as to the culpability or liability of the 1st Petitioner/Cross Respondent in presenting a forged certificate to INEC in respect of his quest to run in the Delta South Senatorial election in Delta State. In law, all reasonable doubt ought to be resolved in favour of the 1st Petitioner/Cross Respondent. See **Hajara Mohammed Vs. State (2016) LPELR – 41328 (CA)**.

In the light of all of the foregoing, the Tribunal has reached the irresistible conclusion that Issue 4 must be resolved in favour of the Petitioners/Cross Respondents.

The Cross Petitioners having neither proved the ground upon which the Cross Petition is founded nor proved the entitlement to the

reliefs they seek, their Cross Petition, even on the merits, is hereby dismissed.

Cost assessed at N500,000.00 against the Cross Petitioners and in favour of each of the 1st and 2nd Petitioners/Cross Respondents.

Hon. Justice Catherine Ogunsanya

(Chairman)

06/09/2023

Hon. Justice Mas’ud Adebayo Oniye Hon. Justice Babangida Hassan

Member I

06/09/2023

Member II

06/09/2023

APPEARANCES

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