REVISITING THE STANDARD OF PROOF IN CIVIL MATTERS WHERE CRIME IS ALLEGED BUT NOT CHARGED

By

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Abstract

Since the judgments of the Supreme Court in Nwobodo v Onoh and Ajasin v Omoboriowo in 1983, the issue of standard of proof in a civil matter, especially election petition, of any allegation of facts which constitute crime has been one of the biggest stumbling blocks that a petitioner or even claimant in other civil matters has to confront and overcome to succeed. Should it be the standard required when a person is a defendant of a charge or information (accused person) or the standard in civil cases, that is, on the balance of probability? Section 135(3) of the Evidence Act, 2011 has intervened in this matter to make the standard that of balance of probability. Unfortunately, the Courts, in a trend prevalent in election cases in particular, have refused to follow the provisions of the Act but are stuck to precedents. This article reviewed the provisions of the Constitution and the Evidence Act vis-à-vis the fixation of the Courts with precedents. While supporting that standard of proof must remain beyond reasonable doubt where the defendant is charged with a criminal offence, in view of the presumption of innocence, this article argued that such a standard is not supposed to apply to a case where the allegation of the crime is tangential and the respondent or defendant is not accused under criminal procedure with the possibility of being sentenced. This is more so as the election court, in the case of election petition, has no criminal jurisdiction.

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1.0. Introduction

The challenge of standard of proof in civil matters where crime is alleged but not charged came to the fore in Nigerian litigation jurisprudence following the Supreme Court decision in *Nwobodo v Onoh*[1] which on similar facts was differently decided from *Ajasin v Omoboriowo*[2] following the 1983 General Election. In both cases the petitioner in the election petition made allegations of commission of crimes in the conduct and declaration of result of the governorship election in Anambra and Ondo States respectively. In one of those situations that challenged the public appreciation of the judgments of the Supreme Court, while it dismissed the appeal in *Nwobodo* on the ground that the allegations of crimes were not proved beyond reasonable doubt, it upheld the appeal in *Ajasin* on the basis that the allegations needed not be proved beyond reasonable doubt but that it was enough that they were proved to the level of probability required in civil cases. The same panel heard and determined the two appeals but different lawyers were involved. The major difference in the two cases, apart from the basis differences of the *dramatis personae* and geography, was that while in *Ajasin* the electorate took up arms and violently challenged the declaration of results by the Electoral Commission, the electorate in *Nwobodo* 'went about their businesses' and left the post-election issues to the politicians and their lawyers. Some wondered whether that could have influenced the attitude of the Court or whether the state of pleadings and advocacy of counsel influenced the decision of the Court. Of course, it would be unfortunate if the decision of courts are not based on the facts and the applicable law and legal principles but the amount of violence unleashed by interested parties or the status of the lawyers involved.

[1] (1984) All NLR 1.
[2] (1984) All NLR 105.

The questions have remained. Since then, litigants, especially in election petitions, have literally been put to the sword whenever any allegation or averment is made which implies the commission of crime. Respondent lawyers hop around, with some grinning from ear to ear, and demanding 'proof beyond reasonable doubt'. It is based on the Court's interpretation of section 135 of the Evidence Act, 2011 or rather its predecessor in the repealed Evidence Act which was in the same terms.

2.0.The Constitution on Presumption of Innocence and the Evidence Act on Standard of Proof

The provision on standard of proof is based on the provision of Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999 that

> Every *person who is charged with a criminal offence* shall be presumed to be innocent until he is proved guilty;[3]
>
> Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.

Section 135 of the Evidence Act provides:

> (1) If the **commission of a crime by a party to any proceeding is directly in issue** in any proceeding civil or criminal, it must be proved beyond reasonable doubt.[4]
>
> (2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to section 139 of this

[3] Italics mine to show the beneficiary of the presumption against whom an offence must be proved beyond reasonable doubt. 'Charge' here has the same meaning as 'indictment – a written accusation preferred against a person charging him with an offence or offences before a court of law. It is an information or charge preferred by the State against a person' *Buhari v I.N.E.C.* [2009] All FWLR (Pt. 459) 419, 557 C-D. It means that the Court of Appeal was wrong in *Enechukwu v Nnamani* [2009] All FWLR (Pt. 492) 1087.

[4] Highlight mine for emphasis, being the kernel of the article.

Act, on the persons who asserts it, whether the commission of such act is or is not directly in issue in the action.

(3) In election matters, whether the commission of crime is in issue or not, proof shall be on the preponderance of evidence or balance of probabilities.[5]

One does not contest the provision that the burden of proving that any person has been guilty (culpable) of a wrongful act is, on the person who asserts it whether the commission of such act is or is not directly in issue in the action. It is in line with the general provision that whoever asserts must prove.[6] The challenge is as to what the standard of proof should be where the commission of such an act is not directly in issue in the action and an allegation of crime is not against the respondent whose declaration as a winner of an election or owner of right is being challenged but only made tangentially.

The presumption of innocence of any person charged with crime is one that confers great immunity on a defendant faced with a criminal charge and heavy responsibility on a prosecutor. It is a great safeguard against the malicious and oppressive maligning and possible false accusation of the innocent who are hauled before human beings to be adjudged, condemned and sentenced, sometimes to such ultimate punishment as death. It also throws on the court the grave responsibility expected of it when a person presumed innocent

[5] From this subsection, which is an innovation to eradicate the mischief which this article is concerned with, it means that this article would not have been necessary if Nigerian Courts had chosen to follow the legislative provision in the Evidence Act instead of *'precedent upon precedent'* which has been the undoing of the judicial process in giving substantive justice, especially in electoral matters! See *Emmanuel v Umana* (2016) All FWLR (Pt. 856) 214, 310, Kekere-Ekun, per JSC (now CJN). In the 2023 Presidential election petition, the Supreme Court ignored the subsection but insisted on the old precedents. See *Obi v I.N.E.C.* (NO. 1) [2023] 19 NWLR (Pt. 1917) 1, 260-261; *Atiku v I.N.E.C.* (No.2) [2023] 19 NWLR (Pt. 1917) 761, 874. To avoid this provision, some lawyers, in pursuit of their *sui generis* claim, strangely assert that the Evidence Act does not apply and some of the courts have upheld them!

[6] Section 131, Evidence Act, 2011.

is brought before it and would be leaving the court with a new and despicable tag of guilt as a convict. That is why the law and the Courts have insisted that pronouncing of such guilt should only be by an ordinary court of law not any other person or tribunal.[7] Since an election tribunal or court or even any court dealing with a civil claim has no right to pronounce any person guilty of crime, it follows that it has no jurisdiction to import criminal procedure or standard of criminal trial into its proceedings. It is submitted that whether or not a respondent in a civil matter is guilty of a crime is not a matter for the civil court and it should thus only demand the standard of proof applicable to civil cases in the same way that a court in a criminal trial cannot import civil standard of proof but would demand proof beyond reasonable doubt. The prevalence of crime in society may make some persons to be frustrated with the presumption and the heavy burden placed on the prosecutor, especially when in their view the defendant is guilty and *'there is nothing any person can tell me, I know that he did it. That is his stock in trade'*.[8] It is even more distressing to insist on presumption of innocence when one has been a victim of crime.[9]

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[7] *Federal Civil Service Commission v Laoye* [1989] All NLR 350, 397, Oputa JSC; *Garba v University of Maiduguri* [1986] 2 SC 128, 155 [1986] 1 NWLR (Pt.18) 550, Obaseki JSC; *Buhari v INEC,* (n3) 556F-G.

[8] Paraphrasing a radio jingle of Today FM 95.1 Port Harcourt against prejudice and hate speech.

[9] I once visited the defunct Special Anti-Robbery Squad (SARS) office in Borokiri, Port Harcourt. They had stormed the home of my elder brother, a Chartered Accountant and Justice of the Peace, in my presence with all the intimidating presence you would expect them to show when confronting a terrorist. They were not ready to let me know why they were after my brother. They asked me to come to their office in Borokiri if I must know. Before I got there my brother was sitting on the floor without his shirt. I protested and one called me aside and said I should rather be thankful, that they could kill him and tag him with robbery but they found that it was a civil matter. I was dazed. My brother had settled a matter between a landlord and his tenant and the tenant against whom the verdict was given decided to 'show' both the arbitrator and his landlord. While I was there a lawyer I know strolled in and seemed to know his way around there. When I told him my experience, he said 'Senior after

But it is in the best interest of everyone in the society that there should be presumption of innocence of anyone charged with crime and that the burden of proof should not be flimsy but beyond reasonable doubt before a person would be convicted and smeared with the tar of crime with all its inhibitions. However, one's thesis in this article is that that standard should not be required where a person is not accused of crime which can lead to conviction and thus the commission of crime is not directly in issue. The Courts should not be too anxious to require a standard of proof not required by the law in its urge to exonerate the beneficiary or validate a process which is notoriously smeared with conducts unworthy of its commendation.[10] It should put no greater burden on a petitioner or claimant than what the Constitution and the Evidence Act had provided for.

The Court exists to protect the interests of the petitioner and the respondent and it should always hold the balance equally as provided by the law. As Oputa, JSC put it, 'One aspect of our much vaunted equality before the law is that all litigants, be they private persons or government functionaries, approach the seat of justice openly and without inhibitions or handicap. Each win solely and wholly by, and because of, the strength of his case – its weight on the scale of justice. It is the duty of the Courts to safeguard the rights and liberties of the individual and to protect him from any abuse or misuse of power or … "executive lawlessness" …In the unequal combat between those who possess power and those on whom such

armed robbers attacked me in my house, I am no longer keen to talk of human rights. Once they are caught they should be shot'. I was stunned. He however, sympathised with my brother's case which he agreed was clearly a civil matter.

[10] The presumption of regularity of official acts under the Evidence Act seems to make the Courts unwilling to make the Electoral Commission live up to its statutory responsibility unlike what its counterparts elsewhere did and strengthened the electoral process. See *Ashby v White* below.

power bears, the Court's primary duty is protection from the abuse of power'.[11]

It is submitted that when the court puts a heavier burden of proof on a party that runs to it for justice, especially in case of election where it is invariably a citizen petitioning against respondents that wield power, they are putting stumbling blocks, inhibitions and handicaps on the way of the petitioner or claimant. That encourages executive lawlessness. In *Ashby v White,* Holt, C.J., whose opinion was upheld by the House of Lords, demonstrated remarkable appreciation of the responsibility of the judiciary to protect civil political rights when he said:

> The right of voting at the election of burgesses is a thing of the highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it. … to allow this action will make public officers to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief; and tends to the prejudice of the people and the peace of nation. … My opinion is founded on the law of England.[12]

The Courts in Nigerian seem to minimise citizens political rights by their interpretation of substantial compliance which has given the electoral Commission escape route from meeting the minimum standards of electoral conduct even after receiving humungous amounts and promising to conduct 'world class free, fair and credible elections'.[13]

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[11] *Federal Civil Service Commission v Laoye* (1989) All NLR 350, 392

[12] (1703) 92 ER 126,

[13] Section 135 Electoral Act, 2022. It is difficult to agree that an election that did not conform to the standards provided by the Act and the Guideline and Regulations of the Commission, and which the Commission virtually swore

3.0. Presumption of Innocence and Proof Beyond Reasonable Doubt

It has often baffled learned and non-learned observers why there should be presumption of innocence and requirement of such stringent standard as 'beyond reasonable doubt' in the trial of a crime. Some may argue that in a world that lies in wickedness, as the Christian doctrine has it, and human beings are inherently prone to evil, there should rather be a presumption of guilt and a lower standard of proof should be required to prove what is already inherent and presumed. This would amount to not realising that the law by which human beings are judged on earth is not given by the dispensation of angels but by human beings with limitations and certain hunches and ideas which may also tend towards evil and that it is made for human beings and interpreted by human beings who are driven by different sorts of idiosyncrasies, and sometimes foibles, not different from those that control other human beings.[14] It also overlooks the depth of wickedness which human beings are capable of in falsely accusing others of crime with the hope of even taking them out of the world.

It is submitted that it is better that there should be presumption of innocence and requirement of proof beyond reasonable doubt than otherwise when any person, irrespective of his antecedent, is formally and directly, not flippantly or indirectly charged (accused) with commission of crime, for the following reasons, among others:

(1) Most crimes comprise of the manifest physical component (the *actus reus*) and the invisible mental aspect (*mens rea*) which would co-exist before a crime can be said to have been committed, if it is

would be the minimum standard, should be held to be conducted in substantial compliance with the Act.

[14] As Benjamin Cardoso (1870-1938) later Associate Justice of the US Supreme Court, wrote in his book, *The Nature of Judicial Process*, (Yale University Press, New Haven Connecticut, 1921), 168, "The great tides and currents which engulf the rest of men do not turn aside in their course, and pass judges by".

not a strict liability crime. Evidence of the standard of proof beyond reasonable doubt is the means by which both the ingredients (components) can be proved to co-exist in or through the accused person (defendant) to hold him culpable for a crime.

(2). The accusation may be wrong and this can be driven by several factors such as malice, suspicion based on wrong assumption or prejudice, intimidation and oppression by the accuser, mob judgment, anxiety or unsettled mind of the accuser and so forth. The objective of the court is the attainment of justice which is only reached through the ascertainment of the truth or falsehood through criminal trial of charge in open court.[15]

(3). Limited capacity of the judge, being human, to know of the true facts but dependence on human narrations of facts which may be driven by some of the factors identified in (2) above.

(4) Condemnation of the innocent is a greater source of pain and devastation for the accuser, the defendant, the judge and the society than the mistaken discharge or acquittal of the guilty. That is why it is often said that it is better to let nine guilty persons go free than to convict one innocent person.

(5) Conviction for crime is a dent on the convict which can affect his generations unborn and it has a weight that can affect subsequent generations. This makes it imperative that the person who sits to judge should be extremely circumspect in believing any accusation and it is better that only a duly constituted Court manned by well-informed professional minds should try them strictly in line with the provisions of the law.[16]

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[15] *Federal Civil Service Commission v Laoye* [1989] All NLR 350, 398, Oputa, JSC.

[16] See Obaseki, JSC in *Garba v University of Maiduguri* [1986] 2 SC 128, 166-167.

(6) Conviction for a crime deprives the person of several things in accordance with the law against which his action or omission is alleged to go or infringe to the detriment of the society. It may deprive him of life, limb, liberty, property or dignity which are things that the law is ordinarily made to protect. Thus conviction and sentence would ordinarily have amounted to a crime against him were he not accused of breaching the law contrary to the interest of the society at large and thus breaking its hedge around him.

It should be appreciated from the outset that this focus of this article is not against the standard of proof of crime in criminal cases where a person is 'charged' with the commission of crime, that is, where the commission of the crime is the issue upon which the case is founded. When a person is facing prosecution, that is he is charged[17] with the commission of a crime which upon conviction renders him liable to sentencing under criminal procedure, it is agreed that proof of such accusation should be beyond reasonable doubt because the aim is to connect him with directly or through proxy breaching the laws made for securing the peace, security and order of the state. The proceeding is to identify and confirm him as an enemy of the State in a sense whether he committed the offence for his own or another person's benefit.

Proof beyond reasonable doubt, as the Supreme Court has held means the prosecution establishing the guilt of an accused with compelling and conclusive evidence.[18] Every ingredient of the offence should be proved by cogent and not just believable but compelling evidence which point inescapably to him and because of which he would be punished under the criminal law of the land. He is the *'our friend, the bad man'* that Oliver Wendell Holmes spoke

[17] Black's Law Dictionary, 9th Edition by Bryan Garner defines 'charge' as 'to accuse of an offence'. It is submitted that is different from stating that crime was committed by identified or unidentified persons in the course of a larger and different transaction such as election.

[18] *Aliyu v The State* [2022] All FWLR (Pt. 1129) 419, 449; *Bakare v State* (1987) 3 SC 1, 32-34.

about[19] and it's the Court, manned by his fellow human, that is given the authority and power to pronounce him so by its interpretation of the law and application of it to the facts presented before him by the evidence of other human beings.

The concern of this article is when crime is alleged but the person, the defendant or respondent is not charged with the commission of the crime even if he may be a beneficiary or even indirect instigator or enabler[20] of its commission because the commission of the crime is not the issue before the court. In an election petition, for instance, the issue is whether the election was validly conducted and the person declared a winner was validly declared.[21] On what basis then, for instance, should there be proof beyond reasonable doubt because a petitioner in an election petition stated that there was violence at polling centres during election or that the election results were mutilated or forged when he did not state that the respondent was the culprit of the violence, mutilation or forgery even, if he was the beneficiary, but produced evidence enough to tilt the balance of probability, the guide to the sanctuary where truth resides.

It is submitted that even if the petitioner implicated the respondent in a crime, the court should only receive such evidence as supporting the fact that he is not duly elected or that the election was not duly conducted if there is no contrary evidence to aid the Court in evaluation.[22] If it is sought to punish him for crime he should be formally arraigned in a criminal trial where proof has to be beyond reasonable doubt. Why should the Court hide on the cloak of beyond reasonable doubt to allow the respondent go scot-free with a

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[19] Holmes, *'The Path of the Law'* in Collected Legal Papers, 173.

[20] When a politician appoints 200,000 Special Adviser on Polling Units n an election in which the Electoral Commission and the Police has their own personal, it may not be a surprise to hear of the SAs being thugs.

[21] Electoral Act 2022, s 134 (1).

[22] *Buhari v INEC* (n3) 558-560.

declaration of success in the pools obtained by non-credible actions including violence?

3.0.1. When Crime is in Issue

It is submitted that crime is in issue only in a criminal trial before a court that has jurisdiction where a defendant is by due process charged with the commission of an offence for which if he is found guilty, he would be liable to sentence under the criminal law code. According to the Evidence Act,

> Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such facts as are hereafter declared to be relevant and of no others:
>
> Provided that –
>
> (a) The Court may exclude evidence of facts which though relevant to the issue, appears to it to be too remote to be material in all the circumstances of the case; and
>
> (b) (Not relevant for purpose of this article).[23]

From this provision it means that evidence should only be given of fact in issue. Where a fact is not in issue such evidence is either relevant and proximate or relevant but remote, irrelevant, or, perhaps, illegal and thus not admissible or otherwise excluded by the law. The Act does not leave us in the dark as to 'fact in issue'. It states that 'fact in issue' includes any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any proceeding necessarily follows'.[24] In a criminal trial the guilt of the defendant is in issue. It is asserted by the prosecutor who has the

[23] Evidence Act 2011 (as amended), s 1.
[24] Ibid, s 258.

burden to proof which never shifts or denied defendant who only has responsibility to introduce evidence which the prosecution evidence must have made redundant or which would exculpate him.

It means that in any proceeding the Court has a responsibility to determine what the facts in issue are. Unfortunately, until the recent insistence on front loading procedure in some jurisdictions, Nigerian Courts seemed to overlook this responsibility. And, in some jurisdictions where efforts are made to identify issues, the Courts have confused identification of issues of fact and law for determination, which should be after receiving evidence, at the conclusion of trial in the address, with identification of issues of fact for trial, which should be at the pre-trial stage.

In a paper this writer was opportune to present at a colloquium on the Rules of the High Court of Rivers State, I had said: 'The fault is not in the rules that lawyers, the courts, litigants or the general public complain about the judicial process. The rules have been available for use as handmaidens or midwives for the delivery of the baby called 'justice' to those who desire it and turned to the 'labour room' – the Court. Where they are properly used the baby is duly delivered and on time, to the joy of all, but where they are not so used there is either miscarriage or still birth of justice sometimes endangering the life of the 'mother'. Where they are abused there is abortion of justice! Lack of use and abuse unfortunately occur too often for comfort. And the tendency is to blame the rules. The problem lies in the ignorance of the rules by the very group who should and are acclaimed to know and use them – the lawyers – in urging for justice to be done to them or their clients. It seems to me that the time has come for us first to ask ourselves how much of the law and its rules we actually know and not just be presumed to know as 'learned' people. …I think we should get to the position where no lawyer who has not gone through the Rules of Court at least once to know the

possible options available to them in conducting a trial should announce appearance and conduct a civil trial.[25]

The Courts should be intentional on differentiating between issues for determination and issues for trial. Confusion in this matter has led to much injustice in civil trials. Where a petitioner in an election petition, for instance, prays that the declaration of a candidate as winner should be nullified because he did not score the majority of lawful votes cast and in his pleading states that there was malpractices bordering on crime in some polling centres or alteration of results by the electoral officers what is the issue for trial and determination in the case? Does he have a duty to prove beyond reasonable doubt that the declared winner or even his privies committed the activities that border on crime or that activities by different persons which are manifest by evidence made his votes not lawful? It is submitted that his responsibility is to prove by evidence that activities by different persons, including the Electoral Commission and its officials, which are manifest by evidence made the respondent's votes unlawful and not to prove beyond reasonable doubt that he directly committed or procured those persons to commit the offence because the commission of the offence is not the issue before the court dealing with election petition. The respondent would then have the responsibility to show by adducing evidence that what the petitioner or his witness alleged did not happen as alleged. It is those sets of evidences (facts) that the court would put in the imaginary scale of *Odofin v Mogaji.*[26] If it is the crime that is in issue the court or tribunal would have no jurisdiction at all to deal with the petition.

It is submitted that it is a disservice to the electoral process which culminates in election petition for a tribunal or court to import

[25] CA.J Chinwo, 'Review of Orders 13-18 of the Draft Rules' presented at *Colloquium on the High Court (Civil Procedure) Rules, 2022 of Rivers State* on October, 23, 2022.

[26] [1978] 1 LRN 212, 213; [1978] NSCC 257; [1978] 4 SC 91.

criminal proceeding into what is clearly a civil proceeding governed by the rules of the court or tribunal and supplemented by the Civil Procedure Rules of the Federal High Court.[27]

If it is agreed that election petition is a civil proceeding then the submission above is clearly supported by the Evidence Act. The Act provides:

> (1) In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.
>
> (2) If the party referred to in subsection (1) of this section adduces evidence which *ought reasonably to satisfy the court that the fact sought to be proved is established*, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so successively, until all the issues in the pleadings have been dealt with.[28]
>
> (3) Where there are conflicting presumptions, the case is the same as if there were conflicting evidence.

Unfortunately, the importation of standard of proof of crimes into civil proceedings to be beyond reasonable doubt when a person is not being charged with crime has resulted in the fundamental error of making the proof of election petitions appear even more onerous than proving crime in criminal proceedings. It has been the source of all sorts of chicanery masquerading as advocatory ingenuity. It has resulted in the perverse understanding of election petition being *sui generis* as a way of obfuscating rather than revealing the truth

[27] Electoral Act 2022, Paragraph 54 First Schedule.
[28] Ibid, s 133. Italics mine for emphasis.

for the interest of the weightier matter of the law – justice. In *Emmanuel v Umana (No. 1)* Kekere-Ekun, JSC (as then was) said:

> It is well settled that an election petition is a proceeding, which is *sui generis*, being of its own kind, possessing an individualist character; which is unique and like only to itself. It is unlike ordinary civil proceedings and governed by its own unique constitutional and statutory provisions.[29]

Election petition being *sui generis* does not elevate it beyond the status of a civil proceedings but rather means that it is 'governed by its own unique constitutional and statutory provisions'. It means that the *sui generis* nature of elections is meant to confer on the courts a more proactive, pro-substantive justice stance that would not add any further burden on the litigants than what is laid by the law makers and contribute to ensuring that justice is served to the litigants (both petitioners and respondents) and the society at large. Why then do the courts ignore constitutional and statutory provisions and follow 'precedents upon precedents'?

It should be understood that it is not only election matters that are claimed to be *sui generis.* Many other proceedings are claimed to be so. In *First Bank Nigeria Plc v Yegwa,*[30] Okoro, JSC in his concurring judgment stated that a 'garnishee proceeding is *sui generis* and completely distinct from the suit that pronounced the debt owing. The judgment debtor is therefore excluded for good cause to prevent unnecessary interventions. What is required of the garnishee therefore is to show cause why the debtor's money in his possession should not be attached in satisfaction of the debt and not

[29] [2016] All FWLR (Pt. 856) 214, 308.See also *Maku v Sule* [2022] 3 NWLR (Pt. 1817) 231, 257; *Buhari v Yusuf* (2003) LPELR 812 (SC); [2003] 14 NWLR (Pt. 841) 445; *Nyesom v Peterside* (2016) LPELR 40036 (SC); [2016] 1 NWLR (Pt. 1492) 71; *Lokpobiri v APC* [2021] 3 NWLR (Pt. 1764) 538, 545-546; *APC v Uduji* [2020] 2 NWLR (Pt. 1709) 541, 572; [2020] All FWLR (Pt. 1065) 1, 27, per Kekere-Ekun, JSC.

[30] [2023] All FWLR (Pt. 1186) 172 at190 E-G.

for him to protect the interest of the debtor by frustrating the judgment creditor from reaping the fruits of his judgment'.[31] It is submitted that what His Lordship said of the banker here applies with equal, if not heavier force to the election umpire, unlike what INEC and its lawyers do in most election petition in Nigeria and the Courts indulge them.

3.0.2. Proper Perspective on *Sui Generis*

It is submitted that the proper perspective on *sui generis* should be as follows:

> It is now settled and well-worn fact that election petition matters are *sui generis* and call for actual and *bona fide* justice where substantial justice overrides technicalities. It is also more acceptable principle of law that reliance on technicalities, which could be due to human error or slip ups, lead to injustice. Justice can only be done if the substance of the matter, rather than the form is attended to in the consideration of these matters. Such trivial and trifling mistakes or errors are likely to be made by counsel and or court registry from time to time as in the instant case. This in my opinion should not deprive a party from having his complaint or matter properly ventilated. And determined on the merits.[32]

Election petition cases are *sui generis* because they involve special considerations of public aspiration and interest, time, expectations from the Court that substantial justice should be the goal of adjudication, skill and expense. Others are that the courts have a

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[31] Every proceeding governed by statute or subsidiary legislation is *sui generis* that statute and a court would be acting *per in curiam* if it ignores the provision of the statute or subsidiary legislation to follow precedents when the court does not make law and cannot ignore a law unless it is invalid.

[32] *Beatrice Itubo v INEC & Ors*, (EPT/RV/GOV/12/2023, judgment delivered on 2/10/2023) 50, Per C. Emifoniye, J., Chairman, Rivers State Governorship Election Tribunal, 2023.

serious responsibility to preserve democracy and thus should reject the *Mike Tyson Technical Knockout Syndrome*. The Courts must be on the side of truth and the protection of the rights of citizens no matter their class and be open to all rather than being secretive in their proceedings.

The Evidence Act provides that the burden of proof shall be discharged on the balance of probabilities in ALL civil proceedings. The Electoral Act has not, in any of its editions in Nigeria,[33] reversed this but the judiciary has, to the consternation of litigants and the entire electorate. As urged below, it is submitted that the Courts in Nigeria should as soon as possible reverse the requirement of proof beyond reasonable doubt when crime is alleged in civil case, particularly election petitions where it is rampant, for the following reasons:

(a) The respondent is not charged with electoral offence but is challenged for his emergence or declaration as the winner of an election, which is a civil proceeding.[34]

(b) The allegation of committing of electoral offence while it may be relevant and admissible fact is not the issue for determination or even trial by the Court. Issues for trial are determined by the claim of the parties. The responsibility of the petitioner should be to prove existence of facts which support his pleading (petition), regard being had to presumptions that may arise in his pleadings, to the extent that would reasonably satisfy the court that the fact sought to be proved is established. Thereafter the burden shifts to the other party against whom judgment would be given if no more evidence were adduced and so successively until all the issues in the pleadings have

[33] To demonstrate that election is a statutory not common law activity, Nigeria has made new Electoral Act for virtually every election season. Thus we had the Transition Decrees of 1978, 1992, 1998 and Electoral Acts of 1982, 2002, 2006, 2010 and 2022.

[34] Constitution of the Federal Republic of Nigeria 1999 [CFRN 1999], s 36 (5); Electoral Act 2022, s 134 (1); *Buhari v INEC* (n3) 518-519.

been dealt with.[35] It is after this process of 'shifting burdens' has been concluded that the trial judge would embark on evaluation following the procedure enunciated by the Supreme Court in *Odofin v Mogaji.*[36] There is no reason for a Court to adopt an admixture of criminal and civil proceeding standards of proof in one proceeding. It is an unacceptable potpourri and it leads to confusion, injustice and, ultimately, much complaining in our streets and cities.

(c) The Electoral Act 2022 has put this beyond opinion and conjecture by creating electoral offences and providing for prosecution of those involved in electoral offences in separate criminal proceedings.[37] This is why a culprit can be convicted for being involved in electoral crime while the beneficiary of his fraud may retain his position if a petitioner against his declaration is not able to prove his petition on the balance of probability required of him.[38]

(d) In criminal proceedings, where proof must be beyond reasonable doubt, it is because 'the commission of a crime by a party to (the) proceeding is directly in issue' not in a civil proceeding when it is tangential or it is alleged to have been committed by a non-party.[39] One is humbling urging that, not only in election petition but in all civil proceedings, where the defendant is not facing criminal charge the standard of proof should only be on the balance of probabilities. Thus if the respondent is not accused of committing the offence directly there should not be requirement of prove beyond reasonable

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[35] Evidence Act 2022, s 133.

[36] (n26).

[37] Electoral Act 2022, Part VII, s 114-125.

[38] In the aftermath of the 2019 General Election a Professor of Soil Science at the University of Calabar, Peter Ogban, who was a returning officer was prosecuted for electoral malpractice of announcing fake election results in two local government areas which benefited a contestant. He was convicted and sentenced to three years in prison. On April 30, 2025 the Court of Appeal upheld his conviction in. https://businessday.com

[39] Electoral Act 2022, s 135.

doubt. If he is accused of then he should be prosecuted for crime.[40] This is further accented by section 135(3) quoted below.

(e) The Evidence Act, 2011 is very clear on this issue as it provides that:

> In election matters, whether the commission of crime is in issue or not, proof shall be on the preponderance of evidence or balance of probabilities.[41]

It means that insisting on prove beyond reasonable doubt is illegal and contrary to the philosophy of judicial engagement in a system of legislative activity. In the same way that a court is not permitted to admit and act on legally inadmissible evidence even if such evidence had been admitted by agreement of the parties or under an order of court in the course of hearing',[42] so, it is submitted, that no court should put on a party a burden of proof that is not put on him by the Evidence Act or any other relevant Act in a matter before it. This, unfortunately, is what the judiciary in Nigeria has been doing against petitioners in election petition. If it could be excused for uncertainty before the 2022 Electoral Act, it is with all trepidation, totally inexcusable if not complicit, to do so after the very clear provisions of the Electoral Act, 2022 and Evidence Act, 2011.

3.0.3. Invitation to Overrule

In *Federal Civil Service Commission v Laoye*,[43] the inimitable Oputa, JSC said:

> This Court does not show any antipathy towards any submission that its previous decision or decisions

[40] In 2005, this writer and Preye Agedah, Esq proposed the establishment of an Electoral Offences Commission to the Senator Brigidi Senate Committee on Electoral Reforms at the Presidential Hotel in Port Harcourt. The proposal was accepted and made part of the recommendations of the Justice Uwais Panel on Electoral Reforms set up President Umaru Yar'Adua in 2007.

[41] Electoral Act 2022, s 135(3).

[42] *Obi v .I.N.E.C.* (No. 1), supra, 155, Tsammani, J.C.A. (as he was then).

[43] (1989) All NLR 350, 391.

> were wrong and should be overruled. In fact the court welcomes any opportunity to review any decisions given *per incuriam*. It is far better to admit an established mistake or correct same rather than persevere in error. Justices of the Supreme Court are human beings capable of erring. It will be short-sighted arrogance not to accept this obvious truth … the Supreme does have the power in appropriate circumstances to overturn its earlier decisions if clearly satisfied that these decisions were wrong. This involves a balancing of the need for certainty in law and need not to persevere in error.

It is submitted that the Supreme Court of Nigeria should, as soon as the opportunity presents itself, be bold and at the same time humble enough to overrule all its decisions that placed on petitioners, claimants and plaintiffs the burden of proving allegations of crime beyond reasonable doubt when the respondent is not charged with the commission of a crime and the commission of a crime by himself (not proxy or supporter) is not *directly in issue* in the proceeding, especially civil proceeding. The present state of the law as interpreted by the Supreme Court has unwittingly provided cover for election riggers in Nigeria who now gleefully taunt those they undo by using their cronies, thugs and fraudulent electoral officials to benefit from malpractices to 'go to court'.

The Evidence Act expects, as it provides, that if the petitioner adduces evidence which *ought reasonably to satisfy the court* that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no evidence were adduced, and so on successfully, until all the issues in the pleadings have been dealt with.[44]

Moreover the Evidence Act has, with the understanding of the harm the judicial stance had done to the evolution of a credible electoral

[44] Evidence Act 2022, s 133 (2).

culture in Nigeria, provided that 'In election matters, whether the commission of crime is in issue or not, proof shall be on the preponderance of evidence or balance of probabilities'.[45] Why then should the courts and lawyers persist in the error of demanding proof beyond reasonable standard when the law maker has provided that it should be on balance of probability?

4.0. Conclusion

In this article one has tried to identify an emerging trend in the attitude of the judiciary in Nigeria, particularly in election matters where the issue occurs more prominently and frequently, whereby the attention is much more on precedent than on the provision of particular statutes governing particular situations. The Courts should always pay particular attention to statutes and appreciate their legislative history, notice the mischief which the lawmakers seek to eradicate and not be anti-legislative development by undue adherence to precedents that were either *per incuriam* or have become no longer good law because of the intervention of new legislation.[46] As the Supreme Court has said 'the well established principle of law is that the safer and more correct course of dealing with a question of construction is to take the words of the document or statute themselves and arrive, if possible, at their meaning without, … reference to cases.[47] This would restore the confidence of the people in the judiciary for it is dangerous when the hope of the people based on a statute is dashed by a few men or women who based their decisions not on genuine interpretation of the statute but on reliance on what had been earlier decided under a different statutory regime. It can be distressing to hear a judge asserting that he would not dare differ from an earlier decision of an appellate court when a statute has addressed an issue expressly and differently. That is the reason why a court has the power and

[45] Evidence Act 2022, s 135(3).
[46] *Mobil v F.B.I.R.* (1977) 53, 75, Bello, J.S.C. (as he was then).
[47] *Adisa v Oyinwola* (2000) FWLR (Pt. 8) 1349, 1391, Iguh, JSC.

responsibility to distinguish.[48] A case has to be relevant on similar legal foundation before it can be binding.[49] The decisions before 2011 Evidence Act on standard of proof of allegation of crime in election petition cases are of different foundation and should no longer stand while on other civil matters the courts should adhere to the statutory provision not earlier precedents.

No court has the power to read into a statute what it does not intend or contain even by the rules of interpretation such as *ejus dem generis* or to ignore what is provided for.[50] It is submitted that that would be in excess of its jurisdiction. The court should not by its interpretation seek to attenuate the provisions of a statute by giving a convenient interpretation to it so as to conform to existing decisions or ensure what it considers as reasonableness. It should not sacrifice straightforward, clear, unadulterated, language of a statute to accommodate convenience thereby doing harm to the intention of the legislature.[51]

The standard of proof in civil cases, including election petitions is on the preponderance of evidence or on the balance of probabilities.[52] The Evidence Act has made it clear that even if there are allegations of crime, it does not change. That in one's humble view settles the question.

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[48] *State v Gbahabo* [2020] All FWLR (Pt. 1037) 373, 390; *Adisa v Oyinwola* (n47) 1395, per Iguh, JSC.

[49] *Oteri Holdings Ltd v Oluwa* [2021] All FWLR (Pt. 1082) 173, 218 C-E.

[50] *Kelvin Peterside v International Merchant Bank* [1993] 2 NWLR 712, 729, N. Tobi, J.C.A. (as he was then); *Shell Pet. Dev. Co (Nig.) Ltd* v F.B.I.R. [1996] 8 NWLR (Pt. 466) 256, 290-291.

[51] *Egbue v Araka* [1996] 2 NWLR (Pt. 433) 688, 710-711.

[52] *Buhari v INEC* (n3) 522.