ANIN YEBOAH, J.S.C

The petitioners herein by an amended petition dated the 8/02/2013 claimed the following declaratory reliefs:

i. A declaration that John Dramani Mahama, the 2nd Respondent herein was not validly elected president of the Republic of Ghana.

ii. That Nana Addo Dankwa Akufo-Addo, the 1st Petitioner herein was validly elected President of the Republic of Ghana.

iii. Consequential orders as to this court may seem meet.

The facts of this matter appear not to be in any serious controversy as the events culminating to this petition were not disputed by the parties herein.

THE FACTS:

Ghana went to polls to elect a president on the 7th and 8th December 2012. The presidential election was constested by eight candidates. The first petitioner herein Nana Addo Dankwa Akufo-Addo was the candidate for the New Patriotic Party whereas the first respondent His Excellency John Dramani Mahama was the candidate for the National Democratic Congress. The second respondent herein who under Article 45 of the Constitution is the sole constitutional body charged to conduct elections declared the first

respondent herein as winner of the presidential election. The first respondent obtained 5,571,761 votes representing 50.7% of the valid votes cast thereby satisfying the constitutional requirement under Article 63(3) of the Constitution. The first petitioner obtained 5,248,898 votes representing 47.74% of the valid votes cast. The contestants obtained votes as follows:

(1) John Dramani Mahama	--5,574,761	50.70%
(2) Dr.Henry Herbert Lartey	--88,223	0.35%
(3) Nana Addo Dankwa Akufo-Addo	--5,248,898	47.74%
(4) Dr Papa Kwesi Nduom	--64,362	0.59%
(5) Akwai Addai Odike	--8,877	0.08%
(6) Hassan Ayariga	--24,617	0.22%
(7) Dr.Michael Abu Sakara Forster	--20,323	0.18%
(8) Jacob Osei Yeboah	--15,201	0.14%
	10,995,262	**100%**

Pursuant to the declaration of the results by the second respondent that the first respondent had obtained 50.7% of the valid votes cast, the petitioners invoked our jurisdiction under Article 64(1) of the Constitution by this petition challenging the validity of the election of the first respondent on several grounds captured in the petition. Some of the

grounds were, over-voting, lack of signatures on the declaration forms by the presiding officers, lack of biometric verification of voters, and duplicate serial numbers, unknown polling stations and duplicate polling station code.

The respondents resisted the allegations of electoral improprieties catalogued by the petitioners by stoutly denying all the allegations of improprieties leveled against the second respondent. Reading the answer of the second respondent to the petition, it became clear that the second respondent never admitted any of the irregularities or electoral improprieties leveled against it and maintained throughout that the election was conducted fairly and devoid of any such lapses as contended by the petitioners. The answers of the other respondents were supportive of the line of defence of the second respondents.

It must be pointed out for a fuller record in such a monumental case that this petition was initially against the first two respondents. The third respondent, however, successfully applied for and obtained an order for joinder making them the third respondent to this petition. Pursuant to the order for joinder, the third respondent proceeded to lodge its answer to the petition.

Several interlocutory applications were made to us in course of the proceedings (apart from the other for joinder) in the form

of further and better particulars, interrogatories, production and inspection of documents etc. These interlocutory applications in my view narrowed the scope of the trial.

At the applications for directions stage, the parties raised several issues for the court to determine. However, this court mindful of the pleadings and the nature of the reliefs sought `imposed' only two issues on the parties for determination of this petition. These issues were couched as follows:

i. Whether or not there were violations, omissions, malpractices and irregularities in the conduct of the presidential elections held on 7th and 8th of December 2012; and

ii. Whether or not such violations, omissions, malpractices and irregularities, if any, affected the outcome of the said election.

At the application for directions stage, parties were directed to file affidavits and annexed any relevant evidence they intended to rely on during the trial within a specified time frame. It was also ordered that irrespective of the fact that the court had ordered filing of affidavits, parties were at liberty to give evidence through their representatives. All the parties gave evidence through their representatives and several exhibits were tendered through them.

BURDEN OF PROOF:

Under the Evidence Act, NRCD 323 of 1975 a party who bears the onus of proof has, an obligation to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.

According to Thayer in Preliminary Treatise on Evidence at The Common Law page 355, the nature of the burden is as follows:

> **"The peculiar duty of him who has the risk of any given proposition on which parties are at issue - who will lose the case if he does not make this proposition out, when all has been said and done".**

It has been urged on this court that the evidential burden has not been discharged by the petitioners. Writing on this topic, Professor Rupert Cross in his invaluable book: Cross and Tapper on Evidence, 12th Edition states at page 122 as follows:

> **"An evidential burden is not a burden of proof. It determines whether an issue should be left to the trier of fact, while the persuasive burden determines how the issue should be decided".**

In this petition, however, the burden of proof is squarely on the petitioners. In an election in which results were officially published, the results must be deemed as correct and any person challenging same ought to prove that it wasn't so. Another point worthy of mentioning is that, the second respondent, which is the only statutory body constitutionally charged to conduct such elections in its official capacity must be presumed to have regularly performed its official functions as it

did in this case. This common law position is statutorily supported by section 37(1) of the Evidence Act, NRCD 323 of 1975. The presumption of regularity therefore holds in favour of the second respondent.

Another common law principle to guide jurists in ascertaining which party bears the burden of proof is this: which of the parties will lose if no evidence is called. From the nature of the reliefs sought and the pleadings in this case the petitioners will lose if no evidence is called. Under section 17(1) of the Evidence Act NRCD 323 of *1975,* the petitioners obviously bear the burden of producing evidence to establish that the election was fraught with the irregularities they complained of. Applying basic common law principles and the Evidence Act, it appears that the burden of proof is squarely on the petitioners. This was indeed acknowledged by the petitioners in their written address submitted to the court at the close of the case.

STANDARD OF PROOF:

The petition is simply a civil case by which petitioners are seeking to challenge the validity of the presidential elections. From the pleadings and the evidence, no allegations of fraud or criminality were ever introduced by the petitioners. The standard of proof of allegations in civil cases is proof by preponderance of probabilities. It is only when crime is pleaded or raised in the evidence that the allegation sought to be proved must be proved beyond reasonable doubt. See **ARYEH & AKAKPO v AYAA IDDRISU (2010) SCGLR 891** and **FENUKU** v **JOHN TEYE (2001-2002) SCGLR 985.** The fact that this petition is brought under Article 64 of the 1992 Constitution does not make any difference in the applicability of the standard of proof. The allegations in the petition that were denied by the respondents in their

answers to the petition ought to be proved as required in every case. The fact that the petition is a constitutional matter is also entirely irrelevant. The standard of proof in all civil cases is the usual standard of proof by preponderance of probabilities and no more.

From the various written submissions on record, none of the parties has raised any question or issue as to any higher standard of proof required to be applied in a purely civil litigation of this nature.

THE EVIDENCE

The second petitioner's evidence followed the order for filing of further and better particulars of the petition. In lengthy evidence covering several days in the witness-box, the second petitioner was subjected to rigorous and far-ranging cross-examination by all the counsel for the respondents. His evidence, however, touched on virtually all the irregularities or violations leveled against the second respondent. It must be pointed out at this stage of this delivery that from the pleadings no allegations of electoral improprieties or irregularities were made against the first and third respondents herein. It does appear that the presence of the first respondent is simply based on the fact that he was the sole beneficiary of the allegations of electoral irregularities and improprieties leveled against the second respondent.

The petitioners, pursuant to an order of this court filed several Statements of Poll for the Office of President of Ghana which shall be referred to in this delivery as Pink Sheets for the polling stations which results appeared to be in controversy. In course of the evidence of the second petitioner it became clear that the number of pink sheets filed was in doubt. It is part of the official records of this petition that learned counsel for the first respondent wrote to the Registrar to demand extra pink sheets which he claimed had not been served on him. Learned counsel for the third respondent made similar complaints of not having been served with the exact number of the pink sheets allegedly filed by the petitioners in support of their case. This controversy also affected the second petitioner. In his evidence, the second petitioner said on oath that by his affidavit they were to lead evidence to cover 11,842 polling stations, but ended up with 11,221 polling stations. This did not end there as according to him 83 polling stations were later deleted to reduce the number of polling stations to 1 1,138. The second petitioner, however, ended up saying that the petitioners were relying on 11,842 pink sheets. This was in his evidence under cross-examination on 9/05/2013.

As the confusion raged on about the figures, this court made an order for the appointment of official referee to count the total number of pink sheets filed by the petitioners. The referee, KPMG came out with the figure of 8,675 as the total number of polling stations that were uniquely identified in course of the counting of the pink sheets. Upon filing its report to the court, the official referee gave evidence through its representative. It turned out during cross-examination of the official referee's representative, one Nii Amanor Doodo that the total number of 13,926 were exhibits that they counted and out of that 1,545 were not

eligible so that reduced the number to 12,381.Out of this number the exhibit numbers appearing once came up to *9,504* and the polling station codes also appearing once came up to 5,470.

I must confess that I was very uncomfortable with the way and manner this highest court of the land was left unassisted by the second respondent in whose custody the original pink sheets are kept. It appeared from the reports of the official referee that as many as 1,545 of the pink sheets supplied by the petitioners as filed exhibits were not legible. In a serious matter in which the mandate of the entire voters of this country is being questioned through a judicial process one expected the second respondent as the sole body responsible for the conducting of elections to have exhibited utmost degree of candour to assist the court in arriving at the truth. Surprisingly, the second respondent opted for filing no pink sheets leaving this court unassisted and thereby placing reliance only on the pink sheets supplied to the agents of the petitioners at the various polling stations in issue. Why the second respondent elected to deny a court of law in search of the truth in a monumental case of this nature is beyond my comprehension. I think this must be deprecated in view of its constitutional autonomy granted to it to perform such vital functions under the constitution for the advancement of our democratic governance. The second respondent strongly resisted an Application to produce Documents for inspection filed by the petitioners The Results Collation Form which are in the exclusive custody of the second respondents were never exhibited, indeed not a single constituency collation form was before the court This court was thus left to consider only the pink sheets supplied by the petitioners which were copies of the original.

Section 163(1) of the Evidence Act NRCD 323 offers some assistance in relying on the pink sheets which were supplied to the petitioners by the second respondent's agents at the various polling stations affected by the petitioner. The section states as follows;

> **"An "original" of a writing is the writing itself or any copy intended to have the same effect by the person or persons executing or is issuing it"**

This definition of " original" above , takes care of section 165 of the Act which states as follows:

> **"165. Except as otherwise provided by this decree or any other enactment, no evidence other than an original writing is admissible to prove the content of writing"**

From the evidence led there was no quarrel with the exhibits in the form of pink sheets provided by the petitioners as regards their admissibility. To go further, section 166 of the same Act provides as follows:

> **"166 A duplicate of a writing is admissible to the same extent as an original of that, unless**
>
> **A genuine question is raised as to the authenticity of the original or the duplicate; or**
>
> **In the circumstances it would be unfair to admit the duplicate in lieu of the original"**

I have said earlier that the respondents, especially the second respondent who gave only copies of the pink sheets of the various polling stations did not doubt the authenticity of the any of the pink

sheets. As it was given only in the normal official business of the second respondent, a strong presumption is raised as to its authenticity under section 37(l) of the Evidence Act.

I have taken time to discuss the admissibility of the pink sheets under the laws as it stands now for the simple reason that the pink sheets appear to be the only evidence which emanated from the various polling stations which are in controversy before this court. As pointed out earlier, none of the three respondents ever, even faintly, doubted the authenticity of any of the pink sheets. On record copies of same had been served on parties pursuant to the applications for directions before the second petitioner gave evidence on oath. In the absence of any allegations challenging any of the pink sheets I find as a fact that they clearly represented the official records of whatever took place at the various polling stations throughout the country with particular reference to the areas in controversy. The presumption of its regularity and authenticity are clear. Throughout the proceedings the court, the parties and the official referee appointed by the court relied on the various pink sheets as representing the official records of the polling stations. It may be argued for judicial purpose that the pink sheets only raise a rebuttable presumption in favour of those who tendered them, that is, the petitioners. Assuming that it was so no evidence, contrary to and inconsistent with what appeared on the pink sheets was led to rebut any presumption of regularity and authenticity. In any case, on the authorities of **YORKWA** v **DUAH (1992-93) GBR 278 CA** and **FOSUA** & **ADU POKU** v **ADU POKU MENSAH (2009) SCGLR 1,** the court have established the principle of law to the effect that `wherever there was in existence a written document and oral evidence over a transaction, the time-honored principle is that the court was to lean favourably towards

the documentary evidence, especially if it was authentic and the oral evidence conflicting'.

In my respectful opinion, save the pink sheet that fell into the category of over-voting, no attempt was made by second and indeed, other respondents for that matter, to rebut the presumption raised in favour of the petitioners. The details of their evidence would be addressed later in this delivery.

In the petition, the further and better particulars supplied by the

petitioners and the evidence catalogued the alleged irregularities,

malpractices and violations into six categories. It would, in my opinion for the sake of clarity be appropriate to refer to them in detail:

a. Widespread instances of over-voting

b. Widespread instances of voting without prior biometric verification

c. Widespread instances of absence of the signatures of

presiding offices or their assistance on the Declaration forms known as the 'Pink Sheets'.

d. Duplicate serial numbers

e. Unknown polling stations

f. Duplicate polling station codes

OVER - VOTING:

A look at all the statutes governing elections in this country including even the Constitution is bereft of the definition of over-voting. The Peoples Representative Law PNDCL 284 of 1992, Cl 75 and any other statutes, touching on elections have not defined over-voting. In course of his evidence, the second petitioner who gave evidence for and on behalf of the other petitioners stated that over-voting may occur when the total number of votes cast exceeded the number of ballots issued to voters. Another instance of over-voting is when the total number of votes cast in the polling station exceeded the number of registered voters at that particular polling station. The representative of the first and third respondent, Mr. Johnson Asiedu Nketiah disagreed with the second petitioner on the definition. He was of the view that over-voting would occur only when the total number of votes cast exceeds the registered voters for the polling station in controversy. This definition of over-voting by Mr. Johnson Asiedu Nketiah was supported in its entirety by the second respondent who gave evidence as the Electoral Commissioner himself when he said that a classical definition of over-voting is when the total number of votes cast exceed the total number of registered voters. This so-called classical definition prompted my brother Baffoe-Bonnie JSC to question him whether this definition holds as there would never be hundred percent turnout in any

elections. The second respondent's representative, that is, Dr. Afari-Gyan insisted on this definition. However, when he was subjected to rigorous and far-ranging cross-examination he admitted that certain pink sheets qualified to be declared as over-voting notwithstanding that the total number of votes did not exceed the registered voters in some polling stations.

It must also be pointed out that in course of his evidence the second petitioners admitted that some of the pink sheets which he initially considered as over-voting were not indeed so. Under cross-examination the second petitioner had to admit out of candour that some were arithmetical errors which did arise out of the filing of the figures on the affected `pink sheets'.

The lack of any statutory definition presents an invidious situation for the court to decide the fate of several polling stations which the petitioners have presented to us to annul the votes on the simple but cogent grounds that the results had been compromised and that there was clear want of transparency at the affected polling stations. Under this category of over-voting the representatives of the first and third respondent was of the view that in course of the voting a 'foreign material' may be found in the ballot box to lead to over-voting. I must confess that I found it *very* difficult to agree with him how a so-called transparent electoral process could be so. In any case he was not re-examined on what a `foreign

material' meant and I can safely presume that a `foreign material' may be some material that is foreign to the ballot paper in the ballot box or something different from the ballot papers in the ballot box.

In my opinion, over-voting may occur when the total number of ballot papers issued to voters at a particular polling station is exceeded by the total number of ballot papers in the ballot box. Secondly, it may occur when the total number of ballot papers in the ballot box exceeds the number of registered voters on the polling station register. To define overvoting by limiting it to the second part of the definition would not hold in that it is a fact of history that it is always impossible to get a hundred percent, turnout at any public elections. For the purpose of this delivery I shall limit myself to the first definition of over voting.

The latter one put forward by the second respondent which was supported in its entirety by the representatives of the first and third respondents would not be helpful.

Assuming without admitting that there is merit for considering the other definition put forward by the respondents, it cannot be pointed out that both definitions in principle are against the idea of allowing one person to have more than one vote. This in my view would run counter to the preamble of the constitution which talks of "The principle of universal adult suffrage" which guarantees to the citizen qualified to vote only once in every election. I am of the opinion that in the exercise of the right to vote if it turns out that an individual has voted more than once as

required under the constitution in an election, the whole electoral system is compromised by the abuse of that right. In the local case of **TEHN ADDY V ELECTORAL COMMISSION & OR [1996-97] SCGLR 589** Acquah JSC [as he then was] made the following observation in his opinion at page 594 when he pointed out the onerous duty imposed on the second respondents as follows:

> **"Article 45 entrusts the initiation, conduct and the whole electoral process on the Electoral Commission and article 46 guarantees the independence of the commission in the performance of its task. A heavy responsibility is therefore entrusted to the Electoral Commission under article 45 of the constitution in ensuring the exercise of this constitutional right to vote"**

Under regulation 24(1) of Public Elections Regulations 2012 C.l 75, no voter should cast more than one vote. It states as follows;

24(1) A voter should not cast more than one vote when a poll is taken It is therefore unconstitutional and contrary to regulations 24(1) of Cl 75 for one person to be allowed to cast more than one vote. It must be pointed out for further clarity that the Public Elections Regulations 2012, Cl 75 was enacted pursuant to powers conferred on the second respondent under article 51 of the constitution which provides as follows: **51."The Electoral Commission shall by constitutional instrument make regulations for the effective performance of its functions under this constitution or any other law and in particular for**

registration of voters , the conduct of public elections and referenda including provision for voting by proxy"

Apart from the principle of Universal Adult Suffrage boldly stated in the preamble to the constitution, Cl 75 which regulates elections also grants "statutory injunction" against the abuse of electoral process when one voter cast more than one vote as required by law. As the second respondent failed to prevent the abuse of electoral process it stands to reason that its own regulations governing the elections was clearly breached when it recorded several instances of over-voting as

presented by the petitioners It is a clear case of illegality proved to my satisfaction on the evidence presented to this court in the nature of documentary evidence, that is, the pink sheets. Donaldson J [as he then was] in **BELIVIOR FINANCE CO LTD** v **HAROLD G. COLE** & **CO [1969] 2 ALL ER 904** said at page 908 as follows:

> **"Illegality, once brought to the attention of the court, overrides all questions of pleadings including any admissions made therein"**

It should also be noted that all elections here and elsewhere, especially in constitutional democracies are regulated by statutes. It is within the limits of the statutes that elections elsewhere and in this country are conducted. In the very recent case of **REPUBLIC V HIGH COURT (FAST TRACK DIVISION) ACCRA; EX-PARTE NATIONAL LOTTERY AUTHORITY (GHANA LOTTO OPERATORS ASSOCIATION & OTHERS INTERESTED PARTIES)** [2009] SCGLR 390 at 397 the worthy president of this court ATUGUBA JSC said:

"It is communis opinio among lawyers that the courts are servants of the legislature. Consequently any act of a court that is contrary to a statute such as Act 722 s 58(1)-(3) is unless expressly or impliedly provided a nullity"

The question is if a court of law does not give effect to the law who will?

In the above-cited case, Date Bah JSC, one of the most illustrious and lucid exponents of our contemporary judiciary said at page 402 as follows;

"No judge has authority to grant immunity to a party from consequences of breaching an Act of parliament . But this was the effect of the order granted by learned judge. The judicial oath enjoins judges to uphold the law, rather than condoning breaches of Acts of parliament by their orders. The end of the judicial oath set out in the second schedule of the 1992 constitution is a follows: `I will at all times uphold preserve protect and defend the constitution and laws of the Republic of Ghana: ... is entirely inconsistent with any judicial order that permits the infringement of an Act of Parliament"

In my respectful opinion any attempt to endorse a clear illegality in the nature of over-voting which is contrary to and inconsistent with our constitution and the constitutional instrument made thereunder would itself be unconstitutional in the sense that it would defeat the principle of Universal Adult Suffrage stated in our constitution.

I am of the opinion that no matter the number of votes involved that may constitute over-voting; it is a clear illegality and should not be endorsed by a court of law, more so by the highest court of the land. I will therefore proceed to annul all votes which were proved by the petitioners to be so. The figures and the polling stations would be addressed later in this delivery.

NO SIGNATURE OF PRESIDING OFFICER

It is part of the case for the petitioners that some of the polling stations' statement of poll and Declaration of Results for the office of the President form known in these proceedings as the Pink Sheets were not signed by the presiding officers of the polling stations affected . It should be clear beyond question that on this allegation of fact the parties did not join issue The only disagreement on this issue was the legal effect of the lack of signature of the presiding officers at the polling stations involved. It has been argued vigorously in the closing address of the petitioners that it amounted to a serious irregularity as it was a clear breach of a constitutional provision. This provision is Article 49(l) (2) and (3) of the constitution which states as follows:

49(l) At any public election or referendum, voting shall be by secret ballot.

(2) Immediately after the close of the poll, the presiding officer shall, in the presence of each of the candidates or their representatives and their polling agents as are present proceed to count at that polling station, the ballot papers of that station and record the votes cast in favour of each candidate in question.

(3)The presiding officer, the candidate or their representatives and, in the case of a referendum, the parties contesting or their agent and the polling agents if any, shall then sign a declaration stating

(a)The polling station; and

(b)The number of votes cast in favour of each candidate in question; and the presiding officer shall, there and then, announce the results of the voting at that polling station before communicating them to the returning officer.

It has been argued and indeed maintained throughout these proceedings that the signature of the presiding officer at the polling stations appear to be mandatory and failure on the part of the presiding officer to sign the pink sheets is tantamount to electoral irregularity in the form of constitutional violation.

The respondents stoutly denied the effect of no signature by the presiding officer. In his evidence on 27th May 2013, this was what the representative of the first and third respondents said in his evidence-in-chief:

Q. You are also aware that reference has been made to pink sheets on which there is no signature of the presiding officer at the polling station?

A. Yes my Lord I am aware of that allegation.

Q. What is your response to that?

A. My Lord it is true that we are all trained by the 2nd Respondent that at the close of poll after sorting and tallying votes to the candidates you have all the party agents including the presiding officers who must sign then there is a declaration then after the declaration each party agent is given a copy of the pink sheet and the presiding officer has a duty of conveying the results of the polling stations to the collation centre. So my Lord I am aware that there is requirement that the presiding officer must sign.

Learned counsel for the petitioners subjected his evidence to crossexamination on this part of the evidence-in-chief.

He said under cross examination as follows:

Q. Are you aware that there are several instances where the presiding officer did not sign the pink sheets?

A. Yes I have seen some instances where the presiding officer did not sign.

Q. And your agents brought you several pinks sheets where the presiding officer had not signed?

A. Yes I have seen some of them

Q These are your well trained agents?

A. Yes

Q. And they did not see that the presiding officer failed to sign was a malpractice?

A. My Lord the agents are not to direct the presiding officer about how they do their work. It is the presiding officer who invites the agents to come and testify. So anytime the agents disagree with the way and manner the work has been done, they cannot, compel the presiding officer to do it, but they will raise an objection if they think that would affect the outcome of the results. But in this case, the signature or lack of it of a presiding officer does not affect the results; it cannot add votes to any of the contestants.

The representative of the second and third respondents in further answers

to the questions put to him under cross examination said:

> **"So it can only be a matter of omission because I cannot see anybody who will finish his work, invite others to come and attest to his work and then proceed to declare results, proceed to transmit the declared results to the collation centre. And I am sure if the presiding officers had time to revise their analyses they would have detected this and correct it".**

This was part of his answers under cross-examinations on the same 27/05/2013.

On the part of the second respondent who conducted the elections in controversy, the lack of signature of presiding officers on the various polling stations amounted to a mere irregularity if I understood him. For

a more detailed evaluation of the relevant evidence on this issue I refer to the evidence of Dr. Afari Gyan under cross-examination by counsel for petitioners.

Q. One of the reasons you gave for the non signature of the presiding officer is that the presiding officer could be influenced not to sign?

A. My Lord I have not given any reasons for the presiding officers not signing.

Q. You did not say that the presiding officer could be influenced, you never said that?

A. What I said was that we should be worrying because if we are not, the presiding officer could be induced not to sign simply because he wants to achieve a desired result.

Q. So rather you said that they could be induced not to sign for a desired result. First of all what will that desired result be?

A. My lords I would not know.

Q. And who could induce the presiding officer?

A. Anybody who is an interested party.

Q. Could the presiding officer also be induced to enter wrong figures? **A. I** guess anybody could be induced to do anything.

In an answer to a question by learned counsel for the third respondent the witness said that:

> **"Our conclusion, as a commission, is that the very fact of the presiding officer not signing will not injure any particular candidate and therefore we accept the validity. You see, I don't**

know what you lawyers mean by malpractice. In election language that will not be a malpractice unless you can show that the reason why the presiding officer did not sign was because he wanted to favour or to injure somebody. In other words, it is a simple irregularity".

Q. In fact Dr. Afari Gyan , you would agree that if presiding officers had the ability by not signing to make the votes of people not count that will actually be a danger to the rights of people who have queued to vote, would you not?

A. My lords, I would agree because somebody could be prevailed upon not to sign.

I think all the respondents against whom this allegation of no signature of the presiding officer has been made agree that it was a mere irregularity. It is to me the duty of the court to form an opinion what would be the legal effect of lack of signature of the presiding officer .l have already quoted above the constitutional provisions under Article 49 clauses 1,2 and 3.

In interpreting a provision of a statute and constitutions for that matter, at times it would assist the court for guidance if reference is made to the law as it then stood before the coming into effect of the provisions under consideration.

Perhaps it may be very useful for a moment to embark on a journey into constitutional history of this country in the search for clues to know how a constitution of this country should

have this provisions entrenched in under Article 290(1) (e) to render it not vulnerable to easy amendment by Parliament. It is clear from a close reading of the 1960 Republican constitution that no such provision existed.

In both the *1969* and 1979 constitutions, this country never had any similar provisions whereby the presiding officer of a polling station was given constitutional duties of this nature in such a serious matter which determines the fate of public elections and referenda. A search into the proceedings of minutes of the Consultative Assembly dated the 17th of March 1992 would yield some clues. The contributions from J.C Amonoo-Monney and Mr Muhammed Mumuni on this issue appears to be very instructive and invaluable.

The requirement of the presiding officers signature on polling stations declaration forms or Pink Sheets emerged as a constitutional requirement for the first time in our post-republican constitution of 1992. As a country with a desire to entrench democracy based on universal adult suffrage and transparency and accountability the framers of the 1992 constitution had cause to debate and insert this very important provisions in the constitution. Care must be taken to avoid any attempt to multiply words through linguistic manipulations to deny it effect as a constitutional provision, entrenched for a purpose.

It has been vigorously argued and urged on us by citation of leading cases like **TEHN ADDY** V **ELECTORAL COMMISSION ; CENTRE FOR HUMAN RIGHTS AND CIVIL LIBERTIES (CHURCIL) V ATTORNEY-GENERAL AND ELECTORAL COMMISSION** [consolidated] [2010] SCGLR 575 that any rejection of the votes cast

by voters in the exercise of their constitutional rights as enshrined in the constitution on the grounds that the presiding officer at any polling station did not sign will be contrary to the constitutional rights of the individual to cast a valid vote. Both cases appear to support the argument that nothing should be done to deny any qualified Ghanaian his constitutionally guaranteed rights to vote at public elections. I must place it on record that I was a member of the panel which delivered the judgment in the **AHUMAH-OCANSEY** case 'supra' on the interpretation of Article 42 of the constitution.

I said as follows at page 676:

> **"However, Article 42 which is under interpretation is a constitutional provision and, indeed an entrenched one which stands on its own. Under Article 42 of the constitution, it is a constitutional right which the framers of our constitution have entrenched in the constitution to be enjoyed as a basic tenet to democratic governance in electing our leaders. No wonder the preamble of our constitution talks of the principle of universal Adult suffrage"**

I came to the conclusion in the above case in support of the opinions of my worthy colleagues including the Chief Justice to make it abundantly clear that prisoners ought to vote in public elections and should be registered to exercise that fundamental constitutional right. Reference were indeed made to the **TEHN ADDY'S** case by members on the panel to support the constitutional right vested in the Ghanaian who is qualified to vote to be registered to vote.

In this case, it is not the case that those electorates who would be affected by any ruling adverse to their rights to vote were denied their rights to vote. They voted in the normal course of the elections on the days the elections were held. The only point raised against their votes is that the presiding officers who were enjoined by the constitution to sign the Pink Sheets did not sign them. The right to vote in my respectful opinion is not just limited to voting but to have the vote counted. In the case of **UNITED STATES** V **CLASSIC** 313 US 299 it was said that:

> **"the right to participate in the choice of representative for congress includes the right to cast a ballot and to have it counted at the general election whether for the successful candidate or not".**

I recognise, like it was done in the **TEHN ADDY'S** case, the individual's constitutional right to vote and to have the vote counted as a constitutional right. My only problem is that the requirement of the signature of the electoral officer which is also a constitutional requirement is seriously in issue.

On this, the case of **MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING Co** V **BURGLESON,** 255 US 407 comes to mind. In that case the court was of the opinion that constitutional rights should not be fritted away by arguments so technical and unsubstantial.

Before I proceed to form an opinion on this vital issue of constitutional importance affecting the rights of the voters whose votes were cast in the normal course of the elections, I think it would not be out of place for

me to examine in detail the role of the presiding officer whose lack of signature on such a vital electoral document has sparked controversy. Apart from Article 49 of the Constitution which deals with the role of presiding officer in an election, nowhere in the constitution is presiding officer mentioned. However, Article 51 of the constitution mandates the second respondent to make regulations for elections and referenda. It is a fact of electoral history that several of such regulations were made by the second respondents prior into the coming into force of the current one which is: Public Election Regulations, 2012 (CI 75). Regulation 17 spells out the functions of the Presiding officers and polling assistants.

The nature of this case is such that I have to quote ad longum the official duties of the presiding officer under regulation 17(1) of C.I 75: 17
(1) The commission shall appoint

(a) a presiding officer to preside at each polling station; and

(b) a number of polling assistance that the commission may consider necessary to assist the presiding officer in carrying out duties.

(2)The duties of the presiding officer include

(a) setting up the polling station ;

(b) taking proper custody of ballot boxes, ballot papers, biometric verification equipment and other materials required and used for the poll;

(c) filling the relevant forms relating to the conduct of the poll;

(d) supervising the work of the polling assistants;

(e) attending to proxy voters;

(g) maintaining under order at the polling station;

(h) undertaking thorough counting of the votes;

(i) announcing the results of the election at the polling station; and

(j) conveying ballot boxes and other election materials to the returning officer after the polls.

From the functions imposed by the instrument on the presiding officer, it stands out clearly that virtually all the administration and even including security matters for the smooth running of the polls are vested in the presiding officer. The constitutional duties imposed on the presiding officer apart from signing a declaration stating the polling station and the number of votes cast in favour of each candidate also includes announcing the results .It stands to reason that he is deemed as the representative of the Electoral Commissioner at the polling stations. In my respectful opinion the signatures of the polling agents and the representatives of the political parties at the polling station may be dispensed with as from the available Pink sheets most of the political parties never presented their representatives or polling agents at many polling stations.

From the evidence on record apparent on the pink sheets many political parties did not send agents or representatives to many of the polling stations. None of the parties herein is making a

case out of that, in that, the interpretation one can put on Article 49(3) is that political parties are not bound under the constitution to send agents to the polling stations. Their absence at any polling station and for that matter not signing any pink sheets as representatives or agents of the political parties would not amount to any irregularities or malpractice in the electoral process. A close reading of regulation 19 Of C.1 75 that is The Public Elections Regulations 2012, in my view shows the limited vote the polling agents play at the polling stations. The polling agent does not have any major role to play in course of the elections. It is clear under regulation 44 of C.l 7 that the non-attendance of the polling agent shall not invalidate the act or a thing done The role of the polling agent is to detect impersonation and multiple voting and certifying that the poll was conducted in accordance with the laws and regulations governing elections.

The constitutional duties imposed on presiding officers at polling stations as regards the result of elections are repeated in C.l 75 under regulation 36.The presiding officer is enjoined to sign the declaration stating the name of the polling station, the number of votes cast in favour of each candidate, and the total number of rejected ballots, before proceeding to announce the results to the public. The signature of the presiding officer is mandatory in the constitution and the regulations made thereunder which is under consideration.

Some statutory provisions may express the performance of an act in several forms. It may be permissive or mandatory. The courts in Ghana have shown remarkable consistency in this regard. As far back as1972 in the case of **REPUBLIC** V **DISTRICT MAGISTRATE ACCRA; EX PARTE ADIO** [1972] 2 GLR 125 CA, the Court of Appeal was of the view that as the town clerk who was mandatorily required by paragraph 19 of Act 54, sched.Vll to affix a notice before a premises could be sold to recover rates owed or intention to occupy that premises, had not done so the sale was quashed on the grounds that a mandatory statutory condition was not performed.

In all statutes, the courts apply mandatory provisions as expected and failure of non-compliance are not waived in some circumstances The current constitution has been interpreted in line with the time-honoured principle that mandatory provisions must be respected. In **A-G** V **FAROE ATLANTIC COMPANY LTD** [2003-05] GLR 580, Date-Bah JSC said at page 601 as follows:

> **"The plain meaning of clause 5 of article 181 of the constitution 1992 would appear to be that where the government of Ghana enters into " an international business or economic transaction " it must comply with requirements, mutatis mutandis, imposed by article 181 of the constitution. Those requirements clearly include the laying of relevant agreement before parliament in terms of clause (1) of Article 181 of the constitution, 1992. And under clause (2) of article 181 of the constitution 1992, the agreement is not to come into operation unless it is approved by a resolution of parliament"**

Article 181 clause 2 is a as follows:

(2) An agreement entered into under clause (1) of this article **shall** be laid before parliament and shall not come into operation unless it is approved by a resolution of parliament.

Effect of this mandatory provision has always being recognized in recent cases of **MARTIN ALAMISI AMIDU** V **A-G &ORS** (unreported) suit No. J 1 /15/2012, a recent decision of this court is also in point.

In the **FAROE ATLANTIC** case, Akuffo JSC said at page 613:

> **"Had the court of Appeal considered article 181(5) of the constitution, 1992 critically, it might have realized that, taking into account its language the overall effect is that, as with loans, international business or economic transactions to which the government is a party also require parliamentary authorization shall be required for certain transactions, then any transactions to which the provisions are applicable that is concluded without the authorization of parliament cannot take effect".**

I have quoted at length the dicta of this court's esteemed jurists to demonstrate the effect of mandatory provisions in statutes and the constitution for that matter. The current Interpretation Act which is in operation provides further support.

Section 42 of Interpretation Act, Act 792 of 2009 is as follows:

"42. In an enactment the expression "may" shall be construed as permissive and the empowering and the expression "shall" as imperative and mandatory".

The question that I respectfully ask is simply this:

If in an ordinary statute **shall** should be construed as imperative and mandatory, what interpretation should we place on the same word shall if it appears in our constitution and calls for construction?

I am of the firm view that the framers of the constitution inserted the word shall there for a purpose and should be construed as imposing a mandatory duty on the presiding officers to perform their statutory duty which appears clearly as a condition for the declaration of the results at the polling stations. When there is clear breach of mandatory provisions of a constitution it must be so declared and no effect is given to the act performed in breach of the provisions in issue.

As the constitution is the supreme law, equitable defences of estoppels, etc would obviously be inapplicable See **TUFFOUR** V **A-G [1980] GLR** 637.The forceful argument that the agents of the various parties including that of the petitioners signed in my respectful opinion would not matter. Learned counsel for the first respondent has urged on this court that as the presiding officer counted the votes and the results properly tallied, entered onto the declaration form and declared by the presiding officer the court must adopt a purposive approach to the interpretation of Article 49(3) and should not invalidate the results for lack of signature by the presiding officers. It was also urged on us that the polling station agents did not protest in any prescribed manner as required by electoral

laws and further, it would accord with preserving the votes of the Ghanaian voters if the court should resolve this issue in favour of the respondents under Article 42 of the constitution on which the two landmark cases of **TEHN ADDY** and **AHUMAH-OCANSEY** supra, were decided by this very court.

I have considered the issues raised by counsel for the first respondent on this issue of lack of signature of the presiding officer. It appears the submissions of other counsel for the other respondents support his views which he has seriously pressed on this court.

My personal view is that Article 42 which gives every qualified citizen of Ghana the right to vote in public elections cannot be read in isolation in this case. Every right conferred on the citizenry is regulated by the constitution. A citizen of Ghana who is eighteen years and above and of sound mind cannot go to a polling station and cast a vote without going through the procedure of registration laid down by law. Even the voting at the polling station which ultimately ends up with sorting out ballot papers for valid and invalid votes, announcement of results after the necessary entries on the pink sheets are all statutorily regulated.

In my opinion, the article under consideration, that is, Article 49(3) is very clear and unambiguous it is trite law that when the provision of a statutes and constitution for that matter is clear and unambiguous it is not the duty of a court of law under the guise of interpretation to scan the provision to interpret the clear and unambiguous provisions. This has been the position of the law since the oft-quoted case of **AWOONOR-WILLIAMS** v **GBEDEMAH** **[1970] CC 18** was decided.

If the fundamental law of the land which is the constitution has entrenched Article 49(3) to make it a constitution precedent for the validity of the election results, I am of the view that effect must be given to it notwithstanding the fact that Article 42 preserves the right to vote.

My position on this issue may be seen by some jurist as not preserving the

right conferred by Article 42 but a judge's duty is to uphold the

constitution which is the supreme law of the land. I always remind myself

that some citizens who queued to vote may have their votes annulled

under the circumstances by applying Article 49(3). But as it has been said

in several cases that provision of the constitution must be upheld in all

times. In the case of **HOME BUILDING & LOAN ASSOCIATION** V **BLAISDELL**

290 US 398 at 483, Justice Sutterland had this to say:

> **"I quite agree with the opinion of the court that whether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it is likely to work well or work ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot be invoked to accomplish its destruction. If the provisions of the constitution be not upheld when, they pinch as well as when**

they comfort then must as well be abandoned" [emphasis mine]

My constitutional duties would be fulfilled as a judge if I enforce the constitution. Our judicial oath taken on our appointment as judges enjoins us to at all times uphold the constitution which is the supreme law as clearly stated in the second schedule to the 1992 constitution .

If Article 49(3) would work injustice against the citizenry who registered, queued and voted, it is regrettable that I cannot in upholding the very constitution engage in any manipulation of language and deny its effect when it has been thrown to us for the first time ever in the history of this court . I will uphold the constitution and proceed to give effect to it by annulling the votes cast which were not, on the face of the pink sheets, signed by the presiding officer to reflect what actually took place at the various polling stations involved .

The arguments that the agents signed and the result publicly declared by the presiding officers would not hold as in my opinion there is a clear breach of a vital constitutional provision which is a condition precedent to the declaration of the results involved in the affected polling stations.

VOTING WITHOUT BIOMETRIC VERIFICATION DEVICES

This is yet another ground on which the petitioners are seeking to annul votes cast. The petitioners in their pleadings and the further and better particulars supplied made available several Pink Sheets which they claim support their allegation that some votes did not go through biometric verification process.

It is their contention that under regulation C.I 75 of 2012 a voter must go through biometric verification to make his votes valid. The said regulation states as follows:

30(1) A presiding officer may, before delivering a ballot paper to a person who is to vote at the election, require the person to produce

(a) A voter identification card or

(b) Any other evidence determined by the commission

In order to establish by fingerprint or facial recognition that the person is the registered voter whose name and voter identification number and particulars appear in the register.

The voter shall go through a biometric verification process.

It is a fact of history in our electoral process that this is the first time in Ghana that biometric verification process was introduced in public elections. A short trip into history since 1992 in my respectful view will suffice. In 1992 a ballot box was not transparent for any voter to see what was in it. Voters cast their votes without any voter identification card provided the voter did register at a particular polling station, he or she could vote. Voters' identification and transparent ballot boxes were later introduced but voters' identification cards were initially limited to few areas in Ghana. Another development which emerged was the introduction of voters' identification card for all registered voters in Ghana. Perhaps the last one is the introduction of biometric verification machine process, which was hitherto unknown in our electoral process. Its introduction, as said above is supported by C.I 75 of 2012.

In my respectful view the issue of voting without biometric verification could be resolved by determining whether indeed some voters were not biometrically verified and secondly, whether or not lack of the biometric verification should lead to the annulment of votes cast. The petitioners contend that some voters did not undergo any verification as required under the regulation as it then stood. The respondent deny vehemently this allegation of lack of biometric verification. Like any other denials in civil litigation it calls for proof by preponderance of probabilities. On this issue, it is clear that the petitioners bear the burden of proof to satisfy this court that indeed some voters were not biometrically verified as pleaded in their pleading based on which further and better particulars of the allegations were filed later.

The respondents, to be precise, the second respondent said the challenges which emerged from the use of the biometric verification machines were later successfully overcame and nobody voted without biometric verification and therefore there was no breach of the regulations.

The pink sheets in evidence to prove this issue of no biometric verification necessitates a closer evaluation of the rival testimonies.The evidence of the second petitioners is to the effect that the entries made by the presiding officer is column C3 of the pink sheets which is obviously the ballot accounting column provided a basis to support their allegation. The petitioners are of the view that column provided a basis to support their allegation. The petitioners are

of the views that column C3 represents the same details on the voter identification cards captured by the second respondent and duly issued to those who were biometrically registered. That column was intended to, as it were, capture the number of those who voted at the elections with the aid only of their voters identification cards and did not obviously go through prior fingerprint verification as required by C.I 75. In the opinion of the petitioners any entry of figures made by the presiding officer in that column represents the number of voters who did not undergo biometric verification before voting. In his evidence on this issue the second petitioners again relied exclusively on the pink sheets to make his case. No wonder in several answers to questions he said:

"You and I were not there"

In his answers to questions under cross-examination from counsel for the first respondent these are some of the answers:

Q In all instances that you alleged people voted without biometric verification you are not suggesting for a moment that somebody voted whose name was not in the voters register. Are you?

A We are suggesting that the face of the pink sheets indicates a number of people who voted without biometric verification.

Q. This is a direct question, you cannot evade it and I am asking you a direct question. Are you alleging that anybody voted who was not qualified to vote?

A. I wasn't at the polling station so I can only go by what is on the face of the pink sheet.

These answers to probing question from the first respondent's counsel shows how the petitioner was relying, as it were, exclusively on the materials on entries on the pink sheets.

In his evidence, the first respondent's representative, Dr. Kwadwo Afari Gyan said by way of denial that the entries on the pink sheets in respect of C3 were evidence of voting without biometric verification . He further insisted that those entries were clerical errors and that column C3 was not required to be filed at all by the polling station presiding officers. He continued in is evidence that column was placed there to cater for those voters who had been registered by the electoral commission during the biometric registration exercise before the voting but whose biometric data had got missing as a result of some difficulties that the electoral commission had encountered. He went further to say that as he wanted to give everybody the opportunity to vote he devised this facility to allow those persons to vote without going through the biometric verification and that would involve the filling in form 1 C before one could vote. According to the witness this proposal was rejected outright by political parties; and he instructed that Form 1 C should not be sent to the polling stations and that the C3 column was not supposed to be filled by the Presiding Officers. Dr. Afari Gyan said in details as follows;

"C3 was put there in an attempt to take care of those people who through no fault of theirs would have valid voter ID cards in their possession but whose names will not appear on the register and therefore could not vote. But let me add that when we discussed this with the political parties , some of them vehemently said no, that we will not allow any person to be verified other than by the use of verification machine. I am just explaining why the C3 came there. The parties said no and we could understand that argument that this facility is not given to one person, it is being given to every presiding officer, so you are given this facility to 26,002 and it is possible to abuse it. So we do not want it and we agreed that facility would not be used". Unfortunately, the forms had already been printed, and these forms are offshore items, so we could not take off C3. And what we said, and we have already said this in our earlier communication was that we will tell all the presiding officers to leave that space blank because they have already been printed and there was no way that we could take it off. And that explains the origin of C3 on the Pink Sheets .It was a serious problem".

I have gone very far to quote the crucial evidence of the second respondent on this matter of no biometric verification. In his view C3 was not to be filled but they were filled by some presiding officers. The case of the petitioners on this matter, as pointed out earlier in this delivery, is only limited to the entries on the face of the pink sheets and no more. The second respondent on this issue tendered Exhibit EC 2 on 24th April

2013. Exhibit EC 2 is: A guide to Election officials' E lection 2012 Presidential and parliamentary Elections.

This book or manual as one may call it, was prepared by the second respondent to guide the public on voting procedure On the face of the pink sheets or the statement of poll for the office of President of Ghana the C column of which C3 should be filled or not to be filled is designated as the Ballot Accounting (To be filled in at END of the poll before counting commences).If indeed this was what was officially used to train the presiding officers it does not contain C3 but on the right hand side of it a provision is made for C3 to be filled . On the left hand side column it commences from C 1, C2, C3, C4, C5 and C6.

At C6 it is stated thus:

What is the total of Cl, C2, plus C3, plus C4? (This number should equal A.1 above) Why the deletion of C3 appeared on the left hand side and was stated on the right hand side is incomprehensible to me. Whether it was as a result of bad printing was not explained. When it was printed and how the training was done as regards this problem is still shrouded in doubt.

My problem is that these pink sheets cumulatively form mass documentary evidence amassed by the petitioners. They were filled and given to the agents of the parties after the close of polls. The only contribution from the agents in generating pink

sheets at a polling station is that they sign the form if they are present. If they also want to protest formally, this they could do, and no more. The pink sheet to me is under the exclusive control of the presiding officer from the time polls start till after he has signed them and issued them out. This is a statutory document required by law and even under the constitution to be signed by the presiding officer. It stands to reason that if entries are made thereon, prima facie, the entries are deemed as the official recordings of whatever took place at the polling station and no more. I do not think that any of the parties to this petition will dispute the fact that the recordings on the face of the pink sheets are deemed to reflect what the presiding officer in his official capacity recorded at the polling station for the declaration of the results. This is a documentary evidence of a transaction very serious and vital in every respect. To me it raises a strong presumption of regularity and satisfies, in my view the best evidence under the circumstances provided the evidence is admissible.

I do not find any objection to the admissibility of the pink sheets. **In J.SABA**

& **Co LTD V WILLIAM [1969] CC 52 CA** it was held as follows:

"MAJOLGBE V LARBI has been considered by this court in its judgment in the recent case of the Republic v Asafu-Adiaye No 2 [1968] CC 106 CA in which it was held that the dictum quoted above is no authority for the proposition that a judicial tribunal

cannot decide an issue on the evidence of one witness or on the oath of one person against that of another"...

When the statement therefore refers to an averment capable of proof in some positive way, e.g. by producinq document it can only mean such an averment as by its very nature requires to be proved by than a mere assertion on oath. What evidence is required to prove an averment can only depend on the nature of the averment"

The evidence by the presentation of the pink sheets by the petitioners in my opinion raises prima facie evidence of what officially took place at the various polling stations. In my opinion the petitioners have discharged the burden of proof as none of the pink sheets supplied in respect of lack of biometric verification attracted any objection on admissibility. The respondents who on the pleadings and the evidence doubted what is officially recorded on the pink sheets must satisfy this court that the recordings are incorrect or suffer from any defects known to admissibility of evidence. As regards the second respondents whose agents, that is the presiding officers, prepared, signed and issued the pink sheets to the petitioners agents at the various polling stations they are estopped from denying their authenticity. Under section 26 of the Evidence Act, NRCD323 of 1975 the law is clearly stated as follows

"26" Except as otherwise provided by law including a rule of

equity, where a party has, by his own statement, act or omission,

intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon that belief,

the truth of that thing shall be conclusively presumed against that party or his successors in interest".

From the evidence of the second respondent's representative he relied on all those pink sheets to declare the results and he cannot just deny its contents. He is bound by the entries on the face of the pink sheets. I find his explanation as most unsatisfactory in that he could not indeed tell the court when and by which means it was officially made known to the presiding officers not to fill C3.If he was in serious doubt , a court of law must not leave this vital evidence led in rebuttal to guess or conjecture. I am aware of the submissions from counsel for the first and third respondents that this evidence on the C3 was left unchallenged by counsel for petitioners.

I accept the proposition of law that when evidence led against a party is left unchallenged under cross-examination the court is bound to accept that evidence, see **AYIWAH** V **BADU [1963] 1 GLR 86, NARTEY** V **VRA [1989-90] 2 GLR 368** and **TAKORADI FLOUR MILLS** V **SAMI FARI [2005-06] SCGLR 882,** but it was clear that Dr.Afari Gyan who gave evidence on this issue was just conjecturing and it would be a sad day for me to believe such evidence, more so when throughout his evidence under-examination be demonstrated want of credibility. I find that the respondents, especially the second respondent who led evidence to rebut a documentary evidence prepared by his duly authorized agents failed to lead credible evidence to rebut the presumption of regularity of officials acting in their statutory capacity and performing their constitutional duty. The evidence on the face of the pink sheets that there were no biometric verification has not been rebutted by the second respondent as required by law in civil cases .I find as a fact

that the petitioners have proved that the entries show conclusively that those voters were not verified biometrically .On this I cannot rest without citing the case of **HAWKINS V POWELLS TILLERY STEAM COAL Co LTD [1911] 1 KB *988,996*** where **Buckley LJ** said:

> **"When it is said that a person who comes to court for relief must**
>
> **prove his case, it is never meant that he must prove it with absolute**
>
> **certainty. No fact can be proved in this world with absolute**
>
> **certainty. All that can be done is to adduce such evidence as that**
>
> **the mind of the tribunal is satisfied that the fact is so. This may be**
>
> **done either by direct evidence or by inferences from facts. But the matter must not be left to rest in surmise, conjecture or guess".**

In my opinion the various affidavit filed against this issue of lack of biometric verification do not in the least rebut the documentary evidence duly prepared by the second respondent's agents, signed by them and duly used for the declaration of the results which is in controversy. I feel that this is not the type of evidence needed to rebut the presumption of regularity raised in favour of the pink sheets covering lack of biometric verification.

Having found that the clear regulation has been flouted by the second respondent, I will uphold the claim of the petitioners on this category and proceed to annul votes cast without the biometric verification as required by law.

UNKNOWN POLLING STATIONS, DUPLICATE POLLING STATION CODES, AND DUPLICATE SERIAL NUMBERS

These categories in my view could be dealt with together. I had a draft copy of the opinion of my esteemed brother Dotse JSC on these remaining categories. I took time to have detailed discussion with him on his draft. It appeared that my learned brother had put a lot of industry in preparing his opinion on these categories of electoral irregularities or malpractices. I find his reasons very convincing in law based on the evidence adduced before us by the parties. I am in support of the reasons canvassed by him for the dismissal of these categories and I cannot multiply words to justify my agreement with him. I therefore, like my brother proceed to dismiss these categories as not proved by the standard expected of a suitor.

CONCLUSION

Before I rest my opinion on this petition, I must comment on the point raised by learned counsel for the first respondent who argued that the petitioners did not exhaust the remedies available by petitioning the second respondent herein. I have considered the evidence on record and it appears that the petitioners presented a petition to the second respondent to postpone the declaration of the results. This, the second respondent declined. He said it was unmeritorious and according to Dr.

Afari Gyan, the evidence supplied to him later by the petitioners' party was woefully insufficient to justify the postponement of the declaration of the result. I have taken time to refer to this point raised in his closing address as I think he was the only counsel who raised this point and therefore calls for attention on the part of this court which owes counsel a duty to comment on it.

I deferred the computation of the voters whose votes were to be annulled under the three categories fully discussed by me earlier on in this judgment. It has become very difficult in the computation of the figures as pointed out earlier in that there were changes in the figures on several occasions and the KPMG report as the report of the only official referee was not conclusively helpful. It must be pointed out that when parties filed their respective addresses the petitioners compiled a data and had it served on counsel for the respondents. These data contained the list of Pink Sheets used in this petition and those deleted. It is on record that these data were served on the respondents for their study before the court invited oral submissions from counsel. It turned out that no question was raised against the data submitted by the petitioners. It probably may not be an accurate representation of the exact figures from the pink sheets filed in this petition. However, I have noticed that all the pink sheets captured in the date were in the KPMG report which was accepted by the court as the official record of pink sheets to be considered by this court which had also taken care of pink sheets not legible as well as others that suffer from other deformities.

On the several pink sheets that fell within the category of No Signature, the invalid votes which were declared as annulled by me would be 659,814 out of which the first petitioners' annulled votes would come to

170,940 whereas that of the first respondent would come to 382,088. It does appear that his would reduce the first petitioner's valid votes to 5,077,958 whereas that of the first respondent's would come up to 5,192,673. It must be pointed out that other contestants obtained insignificant numbers.

However, neither the first petitioner nor the first respondent would obtain fifty per cent plus as required under the constitution as the first petitioner's percentage votes would be 48.68% whereas that of the first respondent would be 49.78% of the total valid votes cast.

As regards over-voting the first petitioner's votes after annulment of the invalid votes would be 5,040,176 forming a 48.88% of valid votes whereas that of the first respondent would be 5,112,667 making a percentage of 49.59% of the valid votes cast.

On no biometric verification, the invalid votes to be annulled against that of the first petitioner would be 221,678 leaving his valid votes to 5,027,220 and making a percentage of the total valid votes cast stand at 49.14% in percentage terms, whereas the first respondent's total annulled votes would come up to 526,416 leaving him with 5,048,345 and a percentage of 49.35% of valid votes cast.

THE ISSUES: I do not think that from the evidence of the petitioners, both documentary and oral, any one would doubt that the petitioners failed to prove multiple irregularities, malpractices and statutory violations against the second defendant. I am of the firm conviction that issue (1) was proved to my satisfaction by the available evidence on record and I accordingly proceed to resolve same in favour of the petitioners.

On Issue (2), I find from the evidence that given the number of votes affected by the violations, omissions and malpractices and the irregularities appear to be such that they impacted adversely on the results, I would also resolve issue (2) in favour of the petitioners.

I would have readily proceeded to grant the reliefs sought in its entirety but the ONLY problem is that from the available evidence, the widespread violations, omissions and malpractices appeared to be of such proportions that it would not be proper for me to declare the first petitioner as winner of the elections in controversy in terms of the reliefs sought. I find the malpractices, omissions and violations enormous which rock the very foundation of free and fair elections as enshrined in our constitution which was itself breached through over-voting, lack of presiding officer's signature and lack of biometric verification which takes its validity from Article 5l of the very constitution.

I would therefore grant the relief (i) in view of the evidence led and decline to grant relief (ii). I, however, as consequential order, order the second respondent to organize an election to elect a president as I cannot rely on an election which was seriously fraught with all the malpractices, irregularities and statutory violations proved in this petition to declare the first petitioner as having been duly elected.

Before I rest my delivery, I would want to point out that so much reliance was placed on the Canadian case of **OPTIZ** V **BORYS WRZESNEWSKYS [2012] SCC 55.** It must be pointed out that this Canadian case which was cited by all must be read within its own context for its persuasive value. It was decided on the legislation as it

then stood, that is, Canada Elections Act, S.C 2000, C9, SS. 524 (1) (b), 531(2) involving an electoral petition in which a candidate in federal election was defeated by margin of twenty-six votes alleging irregularities.

No matter the persuasive effect of this decision which was split, care must be taken not to allow foreign decisions to persuade us when our own legislations or constitution are placed before us for interpretation. In the case of **SAM NO.2** V A-G **[2000] SCGLR 305,** Her Ladyship Justice BanfordAddo JSC cautioned us in the following words at page 315:

> **"In interpreting our constitution, it is important that the constitution should be interpreted in the light of its own wording and not by reference to their constitution in other jurisdictions, for example, that of the United States. Our constitution is peculiar to us and we must therefore interpret it in accordance with its clear words as well as its spirit.**
>
> **Therefore cognizance must be taken only of the expressed provisions in our constitution and in accordance with the clear intentions of the drafters of the constitution. No reliance should be placed on the requirements of the constitutions in other jurisdictions, whose constitutions are structured to suit their individual needs"**

With this admonition at the back of my mind, I am done.

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT