ANSAH,J.S.C

INTRODUCTION/BACKGROUND

The facts surrounding this suit have been fully played out in near epic dimensions before the public.

However, there is no way this suit can be seen as a likeness of the numerous cases on various aspects of our 1992 Constitution. Indeed, I venture to say it cannot be compared to any of the cases touching on various aspects of all our previous Constitutions.

By virtue of its peculiar nature and potential effects, many commentators have rightly described this suit as one posing a test of the structural maturity of our democratic ethos, causing all eyes worldwide to focus, even if only briefly, on our polity to see if and how we can surmount this unique challenge.

Without doubt, the resolution of this case portends much for the future path of our democratic development.

On 7th December, 2012, Ghana underwent its sixth general elections under the 1992 Constitution. On account of factors which led in part to the present suit, the elections for the first time in the post-1992 Constitution era spilled over into the next day, that is, 8th December, 2013. Whiles the parliamentary results from the elections were largely unchallenged, the results of the presidential elections have come up for judicial scrutiny through this action.

On 9th December, 2012, the Electoral Commissioner, the constitutionally designated returning officer in presidential elections, announced the results of the Presidential elections as follows:

a.	John Dramani Mahama	5, 574, 761	50.70%
b.	Dr. Henry Herbert Lartey	38, 223	0.35%
c.	Nana Addo Dankwa Akufo-Addo	5, 248, 898	47.74%
d.	Dr. Papa Kwesi Nduom	64, 362	0.59%
e.	Akwasi Addai Odike	8, 877	0.08%
f.	Hassan Ayariga	24, 617	0.22%
g.	Dr. Michael Abu Sakara Forster	20, 323	0.18%
h.	Jacob Osei Yeboah	15, 201	0.14%

Based on these results, the 2nd respondent declared John Dramani Mahama, the 1st Respondent in this case, as the winner of the Presidential elections. Subsequently, on 7th January, 2013, the Chief Justice of the Republic of Ghana swore the 1st Respondent to assume office as the President of the Republic of Ghana.

THE PETITIONERS' ACTION

The petitioners seek in this action to set aside the election and swearing in as president of the 1st Respondent.

The 1st and 2nd petitioners had contested the 2012 general elections on the ticket of the New Patriotic Party (hereinafter referred to as the NPP) as that party's presidential and vice presidential candidates. The third respondent is the chairman of the NPP.

By their petition, the petitioners themselves proceeded against the first and second respondent. The first respondent is the current President of the Republic of Ghana, whereas the second respondent is the body set up under Chapter Seven (7) of the Constitution to inter alia, conduct and supervise all public elections and referenda. The National Democratic Congress (hereinafter referred to as the NDC) was joined as the third respondent herein after a successful application to this Court.

The petitioners seek a one hundred and eighty degree twirl from the events of 9th December, 2012 and 7th January, 2013. In their own words, they seek from this Court:

"(1) A declaration that John Dramani Mahama, the 1st respondent herein, was not validly elected president of the Republic of Ghana;

(2) A declaration that Nana Addo Dankwa Akufo-Addo , the 1st petitioner herein, rather was validly elected President of the Republic of Ghana;

(3) Consequential orders as to this Court may seem meet."

The grounds for these reliefs were inextricably linked to various alleged deviations from the prescribed procedures for the conduct of presidential elections which said deviations, according to the petitioners, incurably vitiated the election and swearing in of the 1st respondent as president of Ghana.

The petitioners stated the said Grounds in their second amended petition in these terms:

> "Ground 1: There were diverse and flagrant violations of the statutory provisions and regulations governing the conduct of the December 2012 Presidential elections which substantially and materially affected the result of the elections as declared by the 2nd Respondent on 9th December, 2012.
>
> Ground 2: That the election in **11,916** polling stations was also vitiated by gross and widespread irregularities and/or malpractices which fundamentally impugned the validity of the results in those polling stations as declared by 2nd Respondent."

I consider it essential to set out the petitioners' particulars of this Ground 2 as these indeed embody several of the irregularities relied on by the petitioners in their challenge of the 2012 presidential election results. The petitioners couched the said particulars thus:

> "(a) That the results as declared and recorded by the 2nd Respondent contained widespread instances of over-voting in flagrant breach of the fundamental constitutional principle of universal adult suffrage, to wit, one man one vote.
>
> (b) That there were widespread instances where there were the same serial numbers on pink sheets with different poll results, when the proper and due procedure established by 2nd Respondents required that each polling station have a unique number in order to secure the integrity of the polls and will of the lawfully registered voters.

(c) That, while the total number of registered voters as published by the 2nd Respondent and provided to all political parties or candidates for the Presidential and Parliamentary elections was **fourteen million thirty-one thousand, [six hundred] and eighty (14,031,680)**, when 2nd Respondent announced the result of the presidential election on 9th December 2012, the total number of registered voters that 2nd Respondent announced mysteriously metamorphosed to a new and inexplicable figure of **fourteen million, one hundred and fifty eight thousand, eight hundred and ninety (14,158,890)**. This, thereby wrongfully and unlawfully increased the total number of registered voters by the substantial number of **one hundred and twenty-seven thousand, two hundred and ten votes (127,210)**.

(d) That there were widespread instances of voting without prior biometric verification.

(e) That there were widespread instances of absence of the signatures of presiding officers or their assistants on the Declaration Forms known as 'pink sheet'; and

(f) That there were widespread instances where the words and figures of votes cast in the elections and as recorded on the "pink sheets" did not match".

The petitioners added a Ground 2 (a) as follows: "That there were **28 locations** where elections took place which were not part of the **twenty-six thousand and two (26,002)** polling stations created by the 2nd Respondent for purposes of the December 2012 elections." (emphasis in the original)

Ground 3 of the petition was: "That the statutory violations and irregularities and/or malpractices described under Grounds 1, 2 and 2a herein, which are apparent on face of the Declaration forms ('pink sheets'), had the direct effect of introducing into the aggregate of valid votes recorded in the polling stations across the country, a whopping figure **four million six hundred and seventy thousand five hundred and four (4,670,504)** unlawful and irregular votes which vitiated the validity of the votes cast and had a material and substantial effect on the outcome of the election…." (emphases in the original).

Thus stated, the Grounds of the petition show that it was centrally based on alleged irregularities, namely, duplicate pink sheets, over voting, voting without biometric verification, pink sheets lacking signatures by presiding officers or their assistants and that voting took place at unknown polling stations, that was outside the 26002 created by the Electoral Commissioner.

The petitioners initially included in their case allegations that votes had been unlawfully varied such that votes for the first respondent were increased whereas those for the first petitioner were decreased. The petitioners' also claimed initially that the STL Company acted in cohort with the first respondent to increase his votes, and to reduce those for the first petitioner. Both claims were subsequently withdrawn by the petitioners on grounds of lacking adequate evidence. In the result, I shall consider them no further in evaluating the case of the petitioners.

THE RESPONDENTS' CASE

The respondents denied all the petitioners' averments.

The respondents did not deny the fact that serial numbers had been repeated on some pink sheets. However, they vehemently disagreed with the petitioners on the effect of the various repetitions. This was based on a supposed crucial difference between pink sheets and polling station codes and numbers – the latter are security features whereas pink sheets are not generated by the 2nd respondent but by printers and thereafter randomly assigned to polling stations. In the result, according to the respondents, the lack of distinctive serial numbers on pink sheets did not occasion any irregularity in the presidential elections.

The petitioners' claim of over voting was also denied by the respondents. The respondents stated that no evidence was shown, proving any incident of multiple voting at any polling station and that no one had voted when he was not entitled to vote. Indeed, the petitioners themselves, under cross-examination, recanted parts of this claim here by removing certain polling stations from the list of polling stations where they alleged over voting occurred. Further, the petitioners' polling station agents were not only present at the polling stations but had participated in counting and declaring the votes there and signed the declaration of results, all without raising any protests of over voting.

As regards the claim of some persons voting without prior biometric verification, the respondents contended that some faulty equipment which prevented biometric verification were repaired and this allowed biometric verifications of all persons before voting. Further, the second respondent claimed that some presiding officers erroneously made entries in column 'C3' on pink sheets contrary to instructions on completing the pink sheets.

Concerning the claim of the lack of presiding officers' signatures on pink sheets, the respondents' case was that given that the Constitution did not specify the result of that failure, it was unconstitutional to rely on this ground to invalidate votes on those pink sheets. In any case, this lapse could be remedied through compelling the concerned presiding officers by way of an order of mandamus to undertake their official duties. For the third respondent,

it was argued that qualified voters having stood in queues to cast their votes, quashing their votes solely on grounds of this lapse by election officials, which lapse the voters had no control over, entailed imposing a retroactive penalty on the voters in breach of the constitutional prohibition. That was also for no wrong done by the innocent voters; in fact it would amount to visiting the punishment of presiding officers on the voters.

Finally, the respondents also denied the petitioners' claim of unknown polling stations. Here, they rightly pointed to the petitioners' changing reckoning of the number of these unknown polling stations, beginning with a number of 28, changed to 26 and eventually given as 22. Although the petitioners claimed these polling stations were unknown, they dispatched polling agents there to witness voting there on the strength of appointment letters signed by no person other than the first petitioner himself.

ISSUES FOR DETERMINATION BY THE COURT

The Court ordered the parties to agree on the issues for trial. However, the parties were unable to agree on the issues following which issues were settled by the Court for the resolution of the petition thus:

"1. Whether or not there are statutory violations in the nature of omissions, irregularities and malpractices in the conduct of the Presidential Elections held on the 7th and 8th December 2012.

2. Whether or not the said statutory violations, if any, affected the results of the elections. "

Upon distilling the case of the petitioners and that of the respondents in answer, the issues I shall seek to address in resolving the above issues and ultimately evaluate the reliefs sought by the petitioners are as follows:

a. Whether the petitioners have proved the claim that voting occurred at unknown polling stations;
b. Whether the petitioners established the allegation of unsigned pinked sheets by presiding officers or their assistants;

c. Whether the petitioners established the allegation of duplicate serial numbers and polling station codes;
d. Whether the petitioners proved the claim of over-voting;
e. Whether the petitioners proved the allegation of voting without the required biometric verification;

BURDEN OF PROOF AND APPLICABLE STANDARDS

These are governed by statute and are provided in the Evidence Act, 1975, (NRCD323).

From the Evidence Act (supra), the burden of proof comprises the burden of persuasion and the burden of producing evidence.

Section 10 of the Act defines the burden of persuasion thus:

"10. Burden of persuasion defined

(1) For the purposes of this decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.
(2) The burden of persuasion may require a party
(a) to raise a reasonable doubt concerning the existence or non-existence of a fact, or
(b) to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt."

In civil cases such as the instant petition, the burden of producing evidence is covered by Section 11 (1) and (4) of the Act which state that:

"11. Burden of producing evidence defined

(1) For the purpose of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

(4) In other circumstances, the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind

could conclude that the existence of a fact was more probable than its non-existence."

The standard of proof to be satisfied by a party is by a "preponderance of probabilities" save where a contrary requirement is created by law. This is by virtue of Section 12 (1) of the Act which is in these terms:

"12. Proof by a preponderance of the probabilities

(1) Except, as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities".

This standard is defined under Section 12 (2) thus:

"(2) Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence."

On whom does the burden of persuasion rest?

This is based on Section 14 of the Act which provides that:

"14. ALLOCATION OF BURDEN OF PERSUASION

Except as provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defense that party is asserting."

The allocation of the burden of producing evidence on the other hand is governed by Section 17 which is in these terms:

"17. ALLOCATION OF BURDEN OF PRODUCING EVIDENCE

Except as otherwise provided by law,

(a) the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof;

(b) the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact."

THE PRESUMPTION OF PERFORMANCE OF OFFICIAL DUTY

Rebuttable presumptions are described under Section 20 of the Evidence Act (supra) as:

20. Effect of rebuttable presumption

A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact."

It results from certain facts and operates to establish a prima facie case. Unlike conclusive presumptions, it may be rebutted by the introduction of contrary evidence.

To start with, the law is settled that official duty is presumed to have been regularly performed; see section 37 (1) of the Act.

It reads:

"37. Official duty regularly performed

(1) *It is presumed that an official duty has been regularly performed.*

As stated already, a rebuttable presumption means evidence can be led to show that what is purported to obtain is not really so. In other words a party can lead evidence to show that some official duties were not regularly performed. In that situation the onus of proof lies on the person seeking to rely on the rebuttable presumption, such as the petitioners in this case, to prove the contrary assertion as a fact. I shall presently revisit this issue.

The second respondent submitted in its address to this Court that:

"The Representation of the People Law, PNDC 284, as amended by the Representation of the People (Amendment Law), 1992, to apply to any public elections in its Section 20 (2) (b) provides as follows:

'Where at the hearing of an election petition the High Court finds that there has been failure to comply with a provision of this Act or of the Regulations, and the High Court further finds:

(i) *That the election was conducted in accordance with this Act and Regulations, and*

(ii) *That the failure did not affect the results of the election,*

the election of the successful candidate shall not, because of the failure be void and the successful candidate shall not be subject to an incapacity under this Act or the Regulations."

In the view of the second respondent, the effect of this provision is that "it requires that it is not enough to allege and indicate a failure, but that it must also be demonstrated that the failure affected the results of the election."

I have no doubt about the truthfulness of this submission as that was the very issue we set down for determination by this court in these proceedings. However, it was obvious the law quoted applied to Parliamentary elections, but not to presidential elections. It may apply to all public elections which comprise both types of elections.

It is needless to repeat that this is an election petition which was a civil suit and therefore partook of all the incidents known to it; flowing from these provisions (quoted supra) and backed by the well known principles governing civil procedure and practice in civil trials like the present case before this court, the burden of proof is on the petitioner to prove the facts alleged against the respondents. This is because the law is well settled that:

"the burden of proof in election petition lies on the petitioner; and a petitioner who sought to annul an election bears the legal burden of proof throughout the proceedings. In other words, he who asserts is required to prove such facts by adducing credible evidence in support and if he fails to do so his case must fail"; on these general principles of burden of proof, see **Yorkwa v Duah [1992-93] GBR 280, CA; Buhari v INEC (2008)12 SC 1; Ackah v Pergah Transport Ltd. [2010] SCGLR 728; GIHOC Refrigeration v Jean Hanna Assi [2005-2006] SCGLR 198; Dr. Kwame Appiah Poku & ors v Kojo Nsafuah Poku ors. [2001-2002] SCGLR 162**;

In **Takoradi Flour Mills v Samir Faris [2005-2006] 882**, I said concerning these provisions at page 896 of the report that: "A great deal of the submissions made on behalf of the second defendant in support of the grounds of appeal

centered on the burden of proof, or the *onus probandi,* by which it is the duty of the party who asserts the affirmative to prove the point in issue. This was expressed in classical terms '*ei incumbit probatio qui dicit , non qui negat'*. As it was the plaintiff who made a claim and asserted the positive, he had to adduce evidence sufficient to establish a prima facie case a required by section 14 of the Evidence Decree, 1975, because in law a fact is essential to a claim, the party who asserts the claim has the burden to persuade the court of the existence of that fact. The standard of proof is by a preponderance of the probabilities: see section 12 (1) of the Decree. Section 17(1) states that the burden of producing any particular fact is on the party against whom a finding on that issue would be required in the absence of further proof."

The standard of proof in especially election petitions, a species of a civil case, is on the balance of probabilities or preponderance of probabilities.

I return to the issue on the presumption of regularity of the performance of official acts and state that in election matters there is a presumption that the results declared by the Electoral Commission, are correct until the contrary is proved. This is on account of Section 37 (1) of the Evidence Act, 1975 (NRCD323) which provides that:

"It is presumed that official duty has been regularly performed."

This is rendered with some classical flourishes or latinism as *'Omnia praesumuntur rite et solemnite esse acta'* – all things are presumed to be done in proper and regular form; the principle applies to the performance of public functions, no less presidential elections like where the Electoral Commission created by the Constitution and vested with the power to conduct all public elections and referenda in Ghana. They are public functions when it declares results of such elections such declarations are presumed to be correct. Our law goes on to stipulate that such presumptions are rebuttable. Therefore anyone who asserts the results so declared are incorrect or are invalid, bears the onus of proving that assertion. He places himself under section 20 of the Evidence Act (supra).

The inference is that the petitioners were required by law to allege sufficient facts to support their claims; secondly, when that is done, the court will have to consider how it was satisfied that the petitioners adduced sufficient

evidence to support the facts. This is because they would have succeeded in discharging the evidentiary burden on them.

If the petitioners are able to establish the facts they rely on to ask for their reliefs, the onus will then shift to the respondents to demonstrate the non-existence of that fact. This was because the court bases its decision on all the evidence before it; the petitioner and the respondent alike have a burden to discharge so as to be entitled to a claim or a defence put up.

The respondents submitted the petitioners failed to discharge the evidentiary burden that lay on them, for they pleaded they had filed about 11,916 pink sheets in support of their case, yet in their oral evidence in court, they kept reducing the figure till they ended up saying they produced 11, 138, a far less figure at that. Even there they said they were no longer relying on 704 pink sheets. The respondents submitted on account of this, the petitioners failed to discharge the onus of proof or the evidentiary burden on them and so should lose the action.

I am not in the least impressed by that submission. A party may plead a higher figure for a claim but may reduce it or even further reduce it in the course of proceedings; it will be unreasonable to say because of these reductions in initial figures he should lose the entire action. Rather I incline to the view that the party will be judged on the quality of evidence he produced on the figures he finally quoted. I also believe in matters of this nature it is not the number of pink sheets that will tilt the scales one way or the other, but rather the weight to give to each. What benefit will one derive if one should produce tons of pink sheets but found to be of little weight when put in the imaginary pair of judicial scales? The number of pink sheets produced, just like witnesses called at a trial, will be weighed but not counted. If a party put up a case and supported it with a certain number, but no longer relied on them or only on some part, or a lesser part, that per se, did not or should not spell the doom of the entire case. A trial court would be within its rights to consider its judgment on the residue.

In their affidavit filed, the petitioners complained of breach of Regulation 30 (1) and (2) of C.I. 75, in respect of which they provided particulars pursuant to

orders of further particulars and following memorandum of issues and mode of trial as follows:

"52. That there were 379 polling stations where exclusive instances of voting without prior biometric verification occurred and can be found on pink sheets. The combined effect of this infraction vitiated 134,289 votes. Attached herewith and marked Exhibits MB-L-1 to MB-L-378 are photocopies of pink sheets of the polling stations where there these infractions occurred."

The duty of the court was to determine how the evidence supported the facts alleged. The court will subject the evidence before it to a microscopic analysis to determine its probative value. Before then, I must observe that the petitioners no longer relied on some of the allegations they made such as:

i) that votes for the first respondent from some polling stations were illegally padded in his favor, whilst some for the first petitioner were reduced all geared towards securing a favorable verdict for the first respondent;
ii) allegations of fraud and conspiracy leveled against the first respondent and others were abandoned for lack of sufficient evidence in support thereof;
iii) allegations of clandestine activities by the STL Company to receive, doctor and manipulate results before transmitting them to the second respondent to declare results were also abandoned for the same reason above;
iv) some allegations of over-voting at some polling stations were abandoned for lack of sufficient evidence in support;
v) no evidence was led on ballot-stuffing by anybody during the voting;
vi) there was no allegation made that somebody who wanted to vote was prevented from doing so, or that
vii) that a voter whose name was not on the register nevertheless attempted to vote.

I note that the respondents denied each and every averment of the petitioners in the petition. This imposed on the petitioners the duty of proving every single

allegation they made in order to obtain a favorable finding thereof by this Court.

I will next proceed to discuss seriatim the various categories of irregularities raised by petitioners in this case.

CATEGORIES OF IRREGULARITIES

A. UNKNOWN POLLING STATIONS

The petitioners' claim here concerns the 22 so-called unknown polling stations. This was a reduction of the petitioners' initial allegation of 28 unknown polling stations.

The 2nd respondent showed that the flag bearer of the political party to which the petitioners belong, who is also the 1st petitioner herein, himself signed letters appointing polling agents to these same polling stations. It is difficult to fathom how in light of this the petitioners could maintain a claim that these polling stations were unknown.

I find the petitioners' case in this respect not satisfactory. There was evidence that following the aforesaid appointment letters, the petitioners sent their agents to the polling stations, voting took place there, the votes were counted and results declared, and finally the agents signed the result forms. In the face of these overwhelming evidence, no one will doubt that the allegation of voting taking place at stations outside the 26,002 polling stations created by the second respondent was ill founded and remained unproven at the end of the trial.

For these reasons, I also like my respected brethren, dismiss that part of the petitioners' claim against the 2012 presidential elections founded on that ground.

B. PINK SHEETS NOT SIGNED BY PRESIDING OFFICERS OR THEIR ASSISTANTS

The petitioners alleged there were widespread instances of polling stations where there were no signatures by the presiding officers or their assistants on the pink sheets in clear violations of Article 49(3) of the Constitution and Regulation 36(2) of CI 75. These are contained in Paragraphs 33, 47 and 58 of the affidavit by Dr. Bawumia. He deposed that (quoted in extenso below):

"33. That I am advised and verily believe same to be true that by virtue of Article 49 of the Constitution, especially clause (3) thereof, and also Regulation 36 (2) of C.I.75, the Presiding Officer has a mandatory constitutional and statutory duty to sign the declaratory form at the polling station before he can lawfully declare the results at the polls at that polling station."

47. That there were 66 polling stations where instances of constitutional and statutory violations malpractices and irregularities in the nature of (I) over voting, (ii) voting without biometric verification; (iii) the same serial numbers on pink sheets with different results and (iv) the absence of signatures of the presiding officers or their assistants on pink sheets occurred and can be found on the pink sheet , the combined effect of these infractions completely vitiated the 32,469 votes cast in these polling stations. Attached hereto and marked as Exhibits MB-F, ,B-F-1 TO MB-F-65 are photocopies of the pink sheets of the polling stations where these infractions occurred.

58. That there were 310 polling stations here exclusive instances of constitutional and violations in the nature of absence of signatures of polling presiding officers and their assistants on the pink sheets occurred and can be found on the pink sheets. The combined effect of these infractions vitiated 112,754 votes. Attached herewith and marked as Exhibit MB-S to MBS-1 to MB-S-309 are photocopies of pink sheets of the polling sheets where the infractions occurred.

The constitutional provision relied on in connection herewith is Article 49, which provided that:

> *"(1) 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 the candidates or their representatives and their polling agents as are present, proceed to count, at that polling station, the ballot papers at*

that polling station, the ballot papers of that polling station and record the votes cast in favor of each candidate or question.

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

(a) the polling station, and

(b) the number of votes cast in favor of each candidate or 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."*

Another relevant statutory provision is Regulation 36 (2) of the Public Elections Regulations 2012, C.I. 15 which read:

"(2) The Presiding officer, the candidates, or their representatives and the counting agents *shall* then sign a declaration stating

a. the name of the polling station;
b. The total number of persons entitled to vote at that polling station;
c. The number of votes cast in favor of each candidate; and …"

The words of Article 49 (3) and Regulation 36 (2) of C.I.75 are the same. In fact the constitutional provision was lifted word for word in C.I.75. They are *in pari materia* one with the other.

I would say of these provisions that they are some of the safeguards of the right to vote; the signature by the persons named in the statutes authenticates the document and its contents and by the rules of interpretation are to be read as enforcing each other.

It may be recalled that the Director of Finance and Administration of the Electoral Commission, Mr. Amadu Sulley, swore an affidavit to challenge the claim by the petitioners that some pink sheets were not signed. The second respondent commission in these proceedings said 1,009 pink sheets were signed by the Presiding officers at the polling station or at the instance of the

Returning officer at the collation center; but 905 pink sheets were found to have been left unsigned. Dr. Kwadwo Afari Gyan said in his evidence in chief that it is only the presiding officers and the candidates' agents who can sign the pink sheets lawfully. The petitioners submitted there were more than 905 unsigned pink sheets. Dr. Afari Gyan conceded these facts, and that they were more than that. In fact in his address, counsel for the petitioners said he was relying on 1638 unsigned pink sheets, involving '65,9814' votes.

It is not difficult to interpret the meaning of these provisions. They mean that the persons named therein, namely the presiding officer, the candidates or their representatives and the counting agents, shall sign the declaration form stating the particularized items. There was no mention made of 'polling assistants' in the two provisions let alone requiring them to sign the declaration form. If therefore they did not sign the forms they committed no irregularity; none could therefore use that failure to found or support a case of irregularity or violation of any law. But the presiding officer was not relieved from the duty to sign the declaration forms; it was a mandatory duty cast on them by the constitutional and statutory provisions governing elections in the country; the legitimate inference is that failure by the presiding officer to sign the declaration form is an irregularity which cannot be excused or waived on the grounds that the pressure of time, prevailing atmospheric condition, etc, etc, did not simply allow or permit them to sign the forms and thereby comply with the constitutional duty.

The duty cast on the presiding officers to sign the declaration was couched in mandatory terms and deserves obedience and not meant to be disobeyed. An election much more so, Presidential Elections, are serious matters governed by well laid rules to preserve sanctity and integrity of the elections, especially where a specific duty is imposed on election officials. A breach of any of those duties meant the integrity of the election was compromised and ultimately affected the exercise of the right to vote as well as jeopardizing the sovereign will of the people.

Because of this, I am unable to accept the alibi put up by the respondents, like pressure of work, nature of carbon paper making the signatures look faint through over use, and pressing the pen too often, too hard.

In paragraph 47 of the affidavit, the petitioners deposed that:

"47. There were 66 polling stations where violations of constitutional and statutory violations, malpractices and irregularities in the nature of (i) over voting,(ii) voting without biometric verification, (iii) same serial numbers on pink sheets with different results and(iv) absence of signatures of the presiding officers and their assistants occurred and can be found on the same pink sheets. The combined effect of these infractions completely vitiated 32,469 votes cast in these polling stations. Attached herewith and marked as Exhibit MB-F, MB-F-1 to MB-F-65 are photocopies ….."

Paragraph 58 of the affidavit of Dr. Bawumia read:

"58 That there were 310 polling stations where exclusive instances of Constitutional and statutory violations in the nature of: absence of signatures of the presiding officers or their assistants on pink sheets. The combined effect of these infractions vitiated 112,754 votes. Attached herewith and marked as Exhibits MB-S to MB-S-1 to MB-S 309 are photocopies of pink sheets of the polling stations where these infractions occurred."

These paragraphs of the affidavit spoke of the same thing, namely the absence of signatures of the presiding officers on the face of the pink sheets; paragraph 58 went on to show where these infractions occurred and also to provide the exhibits affected pink sheet by pink sheet as well as the number of votes vitiated thereby.

Article 49 (3) of the Constitution read:

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

(a) The polling station, and
(b) The number of votes cast in favor of each candidate or 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,"

The Regulation referred to also read:

"36 (2) The presiding officer, the candidates, or their representatives and the counting agent shall then sign a declaration stating

(a) The name of the polling station;
(b) The total number of persons entitled to vote at that polling station;
(c) The number of votes cast in favor of each candidate; and
(d) The total number of rejected ballots."

I shall return to this ground again in this delivery for the issues involved are of prime importance in conducting elections in the country. For the meantime it is sufficient to say that the real meaning of the combined effect of these constitutional and statutory legal provisions, is that they cast a mandatory duty on the presiding officer, the candidates or their representatives are to sign the declaration form before the presiding officer announces the results at the polling station. Signing a document like a declaration means the person wrote it or part of it, that he agrees with what it says, or that it is genuine; see the Oxford Advanced Learner's Dictionary, p 1366. The authors of the pink sheets, the framers of the constitution and the legislature really meant to do a serious business when they made the law and couched it in these mandatory terms. By the use of the word 'shall', the legislature intended that the duty to do the act specified and cast on the presiding officer must be honored in obedience than the letter.

I am fortified in this view because of the interpretation given of the word in our Interpretation Act, 2009, (Act 792) which provided that:

"27 'Shall' and 'may

In an enactment made after the passing of this Act, 'shall', shall be construed as imperative and 'may' as permissive and empowering."

'Shall' connotes an obligation, or mandatory duty conveying a command bereft of a discretion: see Blacks Law Dictionary (supra) at page 1407.

The unreported judgments of this court in Suit No. J1/23/2013, Martin Amidu v Attorney General & 2 ors 2013 unrep. dated 21st June 2013, SC; (commonly called the Isofoton case.); Writ No. Writ No. J1/15/2013 Martin Amidu v Attorney-General, Waterville and Woyome (the Woyome case), S.C. unrep. 14TH June 2013, SC; Attorney-General v Faroe Atlantic Co. Ltd. [2005-2006]

SCGLR 271 support the proposition that where an enactment uses the word 'shall', it means mandatory or imperative.

In consideration of this well known interpretation, when the petitioners alleged these violations of the constitution and enactments and went on to provide evidence in support by way of the Exhibit MB-S series, the onus shifted by law on to the respondents to lead evidence in rebuttal or to admit the allegations.

The second respondent deposed to an affidavit in response to this allegation that when it received the allegation of no signature by the presiding officer or his assistant on the pink sheet it proceeded to examine them (pink sheets) and found that out of the 2009 pink sheets alleged by the petitioners that were not signed, 1099 were in fact signed by the Presiding Officer at the polling station, or at the instance of the Returning Officer at the Collation Center, 905 were unsigned representing 3.5% of the total number of pink sheets nationwide.

When Dr. Kwadwo Afari Gyan, the Chairman of the Electoral Commission, who gave evidence for and on behalf the Commission second respondent, was cross examined on his evidence he said there were instances where some pink sheets in addition to the 905 admitted not to have been signed, there more unsigned pink sheet, but which were signed at the collation center at the instance of the Returning officer. Mr. Johnson Asiedu Nketia made a similar admission that presiding officers did not sign the pink sheets as was required of them by the law.

If it was accepted that the law cast a mandatory duty on the presiding officer to sign the pink sheet, then he could not neglect to perform that act; excuses like the officer had a lot of work to do that day, and signing the pink sheet was only one of them, the prevailing weather, the crowd at the polling station shouting 'tsoo boi' (see the evidence of Asiedu Nketia), could not be good enough reasons to relive him from discharging his legal duty. Considering the importance the nation attaches to the exercise of conducting a national election, sustaining the integrity of the election should be zealously guarded; this could best be done by the presiding officer in charge of affairs at the polling station appending his signature to the declaration to testify that the events on the face of the pink sheet took place there.

In Presidential elections, a polling station is but a microcosm of the country at large where the whole country is a one constituency. A presiding officer at a polling station in a constituency is like a returning officer for the whole country in Presidential elections where there is only one constituency. If the presiding officer at a polling station shall fail to sign a declaration form at the end of a poll what shall it mean? Can the Returning officer in a Presidential election refuse to sign the declaration form and announce the results of the election and still hope it will still be accepted as valid? If the answer is in the negative, then it is to the same effect where a presiding officer fails to sign the declaration of results portion of a pink sheet at a polling station and so do I hold.

I hold in my concluding comments on this ground, that the failure to sign the pink sheet was a monumental irregularity unmitigated by any circumstances. I am further fortified in this view by the observation that in establishing the duty for presiding officers to sign pink sheets before proceeding to declare the results of the polls at the polling station, Article 49 (3) of the Constitution does not merely constitute a mandatory constitutional duty on presiding officers to do so prior to announcing the election results, but it is also one of the entrenched provisions of the Constitution. In the face of the full force of this entrenched constitutional requirement, I am unable to make any exception to save the pink sheets impugned by the omission of the presiding officers on the basis of the explanations offered by the respondents. I am emboldened to come to this conclusion following upon the holding that:"the Ghana Supreme Court has recognized the concept of the spirit of the constitution as a tool of constitutional interpretation……to ensure that Ghana succeeds in her fourth attempt at democratic and constitutional system of government, both the government and the people should observe not only the written provision of the constitution but it's spirit as well." See The Law of Interpretation in Ghana, Exposition and Critique by S.Y.Bimpong-Buta Chapter 10 p373.

All things considered, I am of the candid opinion that the failure by the presiding officer to sign the pink sheet before announcing the results constituted an omission to perform and a breach of his constitutional duty. It vitiated the votes cast at the polling station, a more monstrous irregularity no one can imagine.

I may remark that it was as unpardonable as it was inexcusable that presiding officers should fail to sign declaration portion of pink sheets they worked with on the polling day from the beginning to the end of polls on the election day.

Based on the foregoing discussion under this head of irregularities, I find that all votes cast and declared during the 2012 presidential elections which involved pink sheets not signed by presiding officers or their assistants are to be nullified and I so declare.

C. DUPLICATE SERIAL NUMBERS AND POLLING STATION CODES

The petitioners deposed in their grounds for the petition that:

"40. There were widespread instances where different results were strangely recorded on the pink sheets in respect of polling stations bearing the same polling station codes, when by the second respondents established practice each polling station was assigned a unique code in order to avoid confusing one polling station with another which could not be explained by a reference to special voting."

In their affidavit in affidavit filed pursuant to the court directions and memorandum of issues and mode of trial dated 2nd April 2013, the second petitioner deposed in paragraph that:

"40. That exclusive … polling station codes were found in 37 polling stations in 34 of these stations, representing 91% of this irregularity together with i) over voting, ii)voting without biometric verification and iii) same serial number of different pink sheets with different … Only in 3 polling stations did the irregularity occur without other violations, irregularities or malpractices."

It was further deposed on the grounds of the petition that:

"59 That there were polling stations where exclusive instances of irregularities and malpractices of polling stations with some polling station codes and different results occurred and can be found …

The respondents agreed that what differentiates one polling station from the other is the polling station code. Dr. Afari-Gyang said at page 12 of the record of proceedings of 31 May 2013, that:

"the code is unique; first in the sense that no two polling stations ever have the same code number or code. It is also unique in the sense that the code is consciously crafted to contain information that directs you the location of the polling station. And the system is alpha-numeric, that is to say, it combines the letters of the alphabets and numbers, and the system is a letter followed by 6 digits and it may end or may not end with another letter."

a.) The petitioners also complained of the use of serial numbers for different polling stations with different results. They stated this irregularity affected …polling stations and … votes. I have considered the defence to this allegation that there is no constitutional or any other statutory backing for the serial numbers, which were not generated by the EC for any purpose except that they were created by the printers and randomly assigned to the constituencies and onward to the polling stations. In the absence of any such constitutional and statutory foundations, their use as alleged by the petitioners did not amount to any breaches such as will attract the draconian effect of being used to annul votes affected thereby.

In the result I hold they could not be used to annul the votes in the polling stations specified. I rather dismiss the claim based on that ground, just as my brethren have done.

D. OVER VOTING AT POLLING STATIONS

In paragraph 44 of the affidavit filed by the petitioners (infra), they alleged over voting took place in over 320 polling stations. I must observe that the electoral laws of the land, the Constitution itself or any other enactment, did not define the term. The petitioners pleaded over voting as an irregularity in the conduct of the elections and said it tainted the results and invited the court to so find and annul the votes thereby affected. Over voting was pleaded as either standing alone or being exclusive of any other irregularity, or violation etc, etc (see paragraph 44 of the affidavit by Dr Bawumia) where he deposed that:

'44. That there were 320 polling stations where exclusive instances of the constitutional and statutory violations of over voting occurred and can be found on the same pink sheets. These completely vitiated all the 130,136 votes

cast in those polling stations. Attached herewith and marked as Exhibit MB-C, MBC 1 to MB-C-319, are photocopies of the pink sheets of the polling stations where these infractions occurred."

It was the petitioners speaking through the second petitioner their spokesman, who gave evidence on their behalf and said in his evidence that*:*

"First, over voting would arise if the total votes in the ballot box as recorded on the face of the pink sheet exceeds the voters register at the polling station as recorded on the face of the pink sheet. Secondly, over voting would arise if the total votes in the ballot box as recorded on the face of the pink sheet exceed the total ballots issued to voters as recorded in Section C1 and C2 including proxy voters. So the total votes in the ballot box, if they exceed the number of voters you have given ballots to, to vote, then there is over voting." (See a copy of a pink sheet quoted below for ease of reference.)

Giving evidence on behalf of the first and third defendants, Mr. Johnson Asiedu Nketia, General Secretary of the National Democratic Congress, said*:*

"We have come to know over voting to mean an occurrence where the number of votes found in the ballot box exceed the number of people who are entitled to vote at that polling station."

Continuing his evidence under cross-examination the following took place:

"Q. In your evidence you gave a definition of over-voting which excludes a situation where if there are 100 ballots issued and it turns out that there are 110 ballots in the ballot box, you exclude that as over-voting. Am I right?

Ans. Yes you are right.

Q In such a situation what will you term it?

Ans. When such a situation arises, my lord it is an indication that some 'unidentified material' is in the box and there is a procedure of locating that 'unidentified material' during sorting and it is removed and the other valid votes are counted."

The Chairman of the Electoral Commission, Dr Kwadwo Afari Gyan also said concerning over voting that:

"I think I am not too clear in my own mind what the connotation of over voting is so at this time I think it is subject to further clarification. Oh yes my lords the 'classical' definition of over votes is where the ballot cast exceeded the number of persons eligible to vote at the polling station or if you like, the number of persons on the polling station's register, that is the classical definition of over voting. Two new definitions have been introduced there is nothing wrong with that but I have problems with this new definition proposed and the problem is that they limit themselves visibly to what is on the face of the pink sheet as I understand the definition."

A careful reading of the evidence by Mr. Asiedu Nketia and Dr. Afari Gyan revealed a marked difference between their definitions and that provided by Dr. Bawumiah. It was that unlike theirs, the petitioners talked about the number of ballots *'issued to voters'.* Another real difference inherent in the definition by Dr Bawumia which did not seem to find favor with Dr Afari Gyan was that it limited itself to what was 'on the face of the pink sheet'. That compelled me to take a close look at the face of the pink sheet, which is otherwise called by its full name and title of what has been called a 'pink sheet' in these proceedings, a word which has gained a wide usage or currency and enriched our vocabulary, is "Electoral Commission of Ghana. Statement of Poll and Declaration of results for the office of President."(see the heading of a typical pink sheet, quoted in full infra.) A study of an anatomy of the face of a pink sheet shows it contains a great lot of information including the following (I am not ashamed to be pedantic enough to provide a panoramic view of a pink sheet hereunder, if to do so will provide relevant information so as to drive home the opinion I am about to make of the definition of over voting, or some of the grounds of the petition).

"A. Ballot information on (to be filled in at start of poll).

1 What is the number of Ballots issued to this polling station? A1 [ ]

2 What is the range of serial numbers of the ballot papers issued to the polling station? A2 [[

B. Information at the Register and other lists at the polling station? B1 [ ]

1 What is the number of voters on the polling station register? B2 [ ] 2 What is the number of voters on the proxy voters list? B3 [ ]

3 What is the TOTAL voters eligible to vote at this polling station? (B1 plus B2) B3 [ ].

C. Ballot Accounting (to be filled in at end of poll before counting commences).

1 What is the number of ballots issued to voters on the polling station register? C1 [ ]

2 What is the number of ballots issued to voters on the Proxy Voters list? C2 [ ]

3 What is the number of ballots issued to voters verified by the use of Form 1C but not by the use of BVD? C3 [ ]

4 What is the TOTAL number of SPOILT ballots? C4 [ ]

5 What is the Total number of UNUSED Ballots? C5. [ ]

6 What is the TOTAL number of C1, plusC2, plus C3, plus C4, plus C5 (This number should be equal to A1 above) C6 [ ].

D is on Rejected ballots report to be filled in at the end of poll after counting is complete***."***

The point I am striving to make is that the pink sheet is a very vital document to consider when determining several issues in this matter like the issue as to whether or not there was over voting at a polling station; it contains a summary of information on what exactly took place during the voting and the number of ballots issued for the day, what use they were put to and the results of voting at the end of the poll. Apart from the pink sheets there is no other comprehensive record of how the polls were conducted at the polling stations and the counting of the ballots. These vital pieces of information are found on the face of the pink sheet. The pink sheet contains information on the number of people registered to vote at the particular polling station; the respondents did not show by any evidence how a register shows more information on ballots, let alone the events at a particular polling station.

It is for all these reasons that I prefer the definition of 'over voting', as given by Dr. Bawumia to what the respondents gave. Undoubtedly, I accept that in the web of electoral laws, over voting is where the number of ballots in the ballot box *after* a poll exceed the number of ballots issued *before* a poll. These are discernible from the face of the pink sheet, an electoral document which I agree with Dr. Bawumia, is the primary document for the 2012 Presidential elections. Of course, other documents like the register for a polling station, collation forms, etc, etc may come in handy.

The register may contain names of people registered to vote at the polling station, but on the election date for one reason or the other, not all of them may turn out to vote. It is not always that all may do as empirical studies show that a 100% voter turnout is a rare occurrence in our municipality nowadays. This is a fact of which judicial notice can be taken.

On the other hand a criterion like 'ballots issued', is a certainty for the ballots will be issued to voters present – a sure ascertainable number. It was for these reasons that I prefer the definition by Dr. Bawumia to any other put before me in these proceedings.

Dr Afari Gyan did not supply the source of his so called 'classical definition', of over voting and his self confessed confusion and lack of clarity in mind made it extremely impossible to accept his definition. Indeed, I reject it just as I do of the definition by Mr. Johnson Asiedu Nketia. Both definitions were short, simple but very wrong. There was nothing classical about it. Both should have referred to *the ballots issued before the voting began,* if they desired to make their definitions credible.

When I considered the definition of over voting by the respondents I found that they were mere distinctions without any difference, for both ended up referring to the register something Dr Bawumia did earlier in his definition; I still wonder why the respondents did not readily agree with him but tried to create the impression they were bringing something new to assist the court determine whether there was any over voting or not in the elections. They failed abysmally and left Dr. Bawumia's definition intact.

Almost everything about voting is premised on the right to vote, and it is gratifying to note that the petitioners referred to article 42 of the constitution

and Regulation 24 (1) of CI 75 as the constitutional and statutory violations which had a close link with over voting. I respectfully quote them *in extenso* hereunder for their full import and effect:

"42. The Right to Vote".

Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda."

Regulation 24 (1) is as follows:

"The poll

Number of votes and place of voting

24 (1) A voter shall not cast more than one vote when a poll is taken."

The two enactments are to be read together because, the right to vote is the pivot around which political rights revolve; it is the heart beat and crescendo of democracy. The real meaning of these legal provisions above is that where a citizen decides to go to the poll to exercise his/her undoubted right to vote, he casts his vote only but once. Anything more than that is unlawful and if found out attracts the penalty of having that extra vote declared null and void. Before proceeding further, I must state that the right to vote under our constitution, is governed by qualifications, some of which are that the person must be:

i) a Ghanaian citizen;
ii) of eighteen(18) years of age or above;
(iii) of sound mind; and
(iv). be or is entitled to be registered as a voter

Thus in the Ghanaian law, the right to vote is not automatic. It is hemmed in by qualifications as to citizenship, age, soundness of mind and the fact of registration.

The pith of the ground of 'over voting' is the right to vote set out above. If Article 42 (supra) created the right, Regulation 24 (1) (supra) showed how to

exercise it; the Preamble to the Constitution laid the roots and foundation as it pointed to the principles of 'Universal Adult Suffrage' and 'The Rule of Law'.

There is no paucity of case law on the topic and the local cases of Tehn-Addy v Electoral Commission [1996-97] SCGLR 589, and Ahuma-Ocansey v Electoral Commission and others; Centre for Human Rights & Civil Liberties (CHURCIL) [2010] SCGLR 575, expatiated on the principles which cumulatively said that where the right to vote has been conferred on the citizen of Ghana by the 1992 Constitution, whatever is provided for by law to enjoy the right, should aim at complementing to the full, promote, enforce, facilitate and encourage that right to vote. Anything done by any person or authority to fetter that right is inconsistent with the constitution will attract the sanction of being declared unconstitutional, null and void, to the extent of the inconsistency; see Article 2 (1) of the constitution. In election matters, it is to be annulled.

I like to clinch the deal by taking a leaf from the ruling by the US Supreme Court, in the recent case of George Bush v Al Gore 531 US 98,where it was ,held at page 148 that:

"The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by a later arbitrary and desperate treatment, value one persons vote over that of another."

This case underscores the principle that one person's vote is not more important than that of another and therefore a person cannot be made to win elections where the results are flawed by over voting, the implication being that a citizen's vote has been preferred or upgraded over the vote of another.

The right to vote, I must remark, did not come as a matter of course or given on a silver platter. It came as a result from the struggles, sweat, blood and toil of others till we in Ghana became the benefactors thereof. A reading of the Tehn-Addy (supra), Ahumah-Ocansey (supra) and Apaloo v Electoral Commission [2001-2002] SCGLR 1 cases, to name only these few ones, throw much light on the point I am seeking to make.

The legal provisions quoted above provided the basis for the allegation of constitutional and statutory breaches or violations spoken of by the petitioners. The true import of these statutes is that where they confer powers on any person, it must be exercised in terms of the enabling statute: see Apaloo v Electoral Commission [2001-2002] SCGLR 1 at 14, and more recently, Nii Tetteh Opremreh v Electoral Commission [2011] SCGLR1159. The upshot of this is that where there is proof of over voting at any polling station, it will attract the full effect of declaring the results of that polling station null and void in which case the results will be annulled. Therefore over voting cannot be trifled with in any election much less a Presidential election and so if the petitioners were to make out a case of over voting they are required by law to furnish this court with all the pink sheets in the MB-C series and to also demonstrate that on the face of the pink sheets there was a real case of over voting.

If I may respectfully revisit the issue of proof in law, I may remark that the law was settled that where a party makes an averment which was capable of proof the positive way, but the averment was denied by his adversary, he succeeds in his proving his case by producing the proof in court by evidence; in this case by producing the evidence in the pink sheets in court. A bare allegation bereft by any probative evidence does not and cannot amount to proof of that allegation: See Samuel Okudzeto Ablakwa & other v The Attorney General and another ….; Dogo Dagarti v The State [1964] GLR 653, and the oft -cited case of Majolagbe v Larbi [1959 GLR] 199.

As said already, the petitioners mentioned that the exhibits supporting the allegations of over voting was in 320 polling stations exhibited by the MB-C-1 to MB-C-319 series. However, in his evidence the witness said that some of them had been deleted and were no longer relied upon. In other words, they were no longer part of the case supporting the allegation of over-voting.

they made up a total of 83), 57 in the over voting category, 1 each in the over voting and no signature of presiding officer category, over voting, voting without biometric verification and no signature of presiding officer category]. The names of the Region, constituency, polling station, code, serial number

and exhibit number as well as the category were given. The evidence which the petitioners put before the court must carry a great deal of weight; their probative value must be borne by the contents discernible on the face of the pink sheet, bearing in mind that 'you and I were not at the polling station', to borrow the words of Dr. Bawumia. Evidence on the deleted pink sheets in the over-voting and the various categories was given in Exhibit C, C1-C11; C3. Exhibit C4 was showed the polling stations deleted from the over voting category.

In the result, all pink sheets deleted from the exhibits relied on as proving over voting will not be considered in so far as that irregularity is concerned. I must state that notwithstanding this, all other exhibits that were not deleted are relied upon and will be considered, just as those that were admitted no longer supported allegations of over-voting.

I also find it from the evidence under cross-examination by the second petitioner given on 24th April 2013 that the petitioners admitted that on the face of the pink sheets, (eight of them), some polling stations were found to have been wrongly described as over voting in the Exhibit MB-C category.

When the petitioners conducted a quality control exercise over the exhibits, they ended up no longer relying on 704 pink sheets.

In addition to this, when the evidence of the respondent was studied carefully, it tended to show that under cross-examination, that

(i) Dr. Bawumia admitted some pink sheets did not support a case of over voting at some polling stations;

(ii) others were simply cases of arithmetical errors. In my assessment of the defence by the respondents, I am able to conclude that there was no evidence that any voter voted more than once at any polling station; in fact that was not the case by the petitioners;

(iii) no person voted who was not entitled to vote; that was also not part of the case by the petitioners;

(iv) agents who were deployed to the polling stations signed the declaration of results forms after the votes had been counted in full public view after the voting, but,

(v) none of them ever lodged a complaint against the declaration of results;

(vi) Notwithstanding these admissions, the petitioners succeeded in proving on the preponderance of probabilities that there was over-voting in some polling station results and I so find as a fact. That would also support a finding that the irregularity affected the results of the polling station. The evidence would tend to show that the number of polling stations mentioned in paragraph 44 of the affidavit as being 320 for the over voting category, was reduced by 57.

(vii) The petitioners removed some polling stations as result of what they termed a quality control and removed 83 of them from the over voting category; they were listed in evidence in exhibit C, C1 and C2. The total number of votes affected in the exercise was 33, 972.

(viii) The petitioners relied on 1722 polling stations as presented in Table 10 of Volume 2B; the number of votes affected was 745,569.

CREDIBILITY OF SECOND PETITIONER AS A WITNESS

Counsel for the third respondent cast a serious aspersion on the credibility of the second petitioner, on the grounds that his own evidence was that he was not at the polling station when the irregularities took place and for that reason could not be a witness to the events he testified about in court. Well could that be true but, as stated Dr. Bawumia left no doubt that he was not at any polling station to observe proceedings and the evidence he gave did not stem from personal observation, ocular or any such other personal perception. That being so, the respondents submitted he could not be a witness properly so called. The reason was that he was a witness who satisfied the requirement in section 60 of our Evidence Act, 1975, that:

"60. (1) A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that the witness has personal knowledge of the matter.

(2) Evidence to prove personal knowledge may, but need not consist of the testimony of witness himself.

(3). A witness may testify to a matter without proof of personal knowledge if an objection is not raised by a party."

Thus, under the law of evidence, a witness may testify if he had a personal knowledge of what he is testifying about. Aside of that a person who does not have any personal knowledge of what he testified about because he was not at the scene or shown that he has some extra-sensory power of perception, may still be a witness if his adversary did not raise any objection to his giving evidence on the matter.

Section 6 of the Evidence Act (supra) was that:

"6 (1) In every action, and at every stage thereof, any objection to the admissibility of evidence by a party affected thereby shall be made at the time the evidence is offered.

(2) Every objection to the admissibility of evidence shall be recorded and ruled upon by the court as a matter of course. "

Despite the confession by Dr. Bawumia summed up pithily in his refrain 'you and I were not there' he could still testify about the matters he testified about because no objection was raised by the respondents. That he was truthful in saying so was not far to rationalize, for how, he bereft as he was of any power of omnipresence, or ubiquity, could be at the over 26,000 polling stations *parri passu*, or at all, could be doubted. He could only rely on what was on 'the face of the pink sheet' and still qualify as a witness, especially when counsel did not raise any objection against his giving evidence when he did so, the court will be perfectly entitled to use the evidence led.

I will base my findings on the admissibility of Dr. Bawumia's oral evidence on the pink sheets on another separate point. Even though a witness may not testify in respect of a matter outside his personal knowledge, this bar does not apply to official or public records.

On this, Section 126 of the Evidence Act, 1975 (NRCD 323) provides that:

126 OFFICIAL RECORDS

(1) Evidence of a hearsay statement contained in writing made as a record of an act, event or condition is not made inadmissible by section 117 if

(a) the writing was made by and within the scope of duty of a public officer;

(b) the writing was made at or near the time the act or event occurred or the condition existed; and

(c) the sources of information and method and time of preparation indicate that the statement contained in the writing is reasonably trustworthy.

In application of this exception to the admissibility of hearsay evidence, the evidence concerning the pink sheets are admissible since they are duplicates of the original pink sheets, which are the official primary records of the election. The pink sheets being duplicates, they are as good as the originals, unless their authenticity is successfully challenged.

There being no such challenge, the fact that Dr. Bawumia was not present at any of the polling stations from whose results were captured on the pink sheets, does not detract from the admissibility of his testimony in respect of the pink sheets. To put it bluntly, as I saw and heard Dr. Bawumia as he gave his evidence on oath in the witness box my impression about him was that he was a witness of truth. He frankly admitted salient facts and answered questions put to him freely and unhesitatingly.

I like to consider another point raised by the respondents which I think bordered on the credibility of Dr. Bawumia. The first was that he said polling agents were mere observers at the polling stations. I think he underestimated the role of polling agents at elections; they were more than that. Polling agents are appointed and assigned specific functions to perform at elections under C.I.75. They act under an oath and when they breach their oaths or perform their duties willfully, they suffer penalties for that; (see Regulation 19 of the Public Elections Regulations, 2012, C.I.75).

Secondly, the respondents submitted nobody complained at the polling stations that infractions took place there during the voting and the polling agents signed the pink sheets to demonstrate their approval at events at the polling stations. Studying the evidence closely, it was clear nobody complained against anything at the polling stations, but I do not infer from that that the petitioners had no basis to complain. As Dr Bawumia said the polling agents

only signed to acknowledge what took place there but not as to its legality or that everything was done regularly.

Where it is shown that relevant legislation and regulations governing elections were breached in the course of voting, the fact that polling agents did or did not complain against the events or signed pink sheets would not invalidate that which was invalid, or regularize that which was irregular. The result would be that the evidence on record will be evaluated for its probative value to be assessed.

It was said in the KPMG report that paragraph 44 of the affidavit of the second petitioner alleged 320 pink sheets were filed but 318 Exhibits were counted in the Exhibit MB-C- series: see Appendix A.1: Report Summary of Pink Sheet Count: see Page 5 of the KPMG Report. Appendix A.2.1 contained the details of data captured for the MB-C Series of exhibits in the paragraph stated. The summary stated clearly there was a difference of two pink sheets in support of the allegation of over-voting.

The respondents did not impugn that these were documents in support of allegations of over voting. In the law of evidence, documentary evidence prevails over oral evidence: **Fosua & Adu-Poku v Adu-Poku Mensah [2009] SCGLR 310**. The reason is not far to see. Documentary evidence if not challenged, is often the best proof of matters in controversy. In fact it should prevail over oral evidence.

I have read the evidence of the second respondent several times over and on some occasions, he impressed me as telling the truth; one was when he readily conceded that working with a large number of personnel who were trained over a very short period of time, blunders were bound to occur; blunders did in fact occur which he explained was more of arithmetical errors than deliberate or out of mischief. But it was on the basis of these errors that he declared the results. These errors he also labeled 'excess votes'. So 'arithmetical errors', 'trans-positional errors', 'excess votes' and the result is over-voting. Mr Asiedu Nketia even spoke of 'unidentified materials in the box' whatever he meant by that. My observation is that in these proceedings no party had an exclusive monopoly over 'arithmetical challenges' or any other such challenges.

There was credible evidence that where there was proof that there was over voting, the Electoral Commission annulled the votes at the particular polling station. This step by the commission was justified because they apparently were violations of statutory provisions quoted above in this opinion. That much was also admitted by the second respondent; he only sought to mitigate the effect of these errors when he made a half hearted effort by saying that he was not made aware of those cancellations and if he had been he would have checked the records further before cancelling the results. The fact that they had been cancelled for over voting was not doubted; by that the second respondent set an example he ought to follow wherever there was an over-voting.

I am of the view that our electoral laws will be given a lot of impetus and strength and respect if they are given teeth to bite and all breaches are given uniform treatment; what is good for the goose is equally good for the gander. Reduced to simple practical terms polling stations where over voting took place the results were cancelled, and there was no reason why the same thing ought not to be done to where the same thong took place.

My overall assessment of the evidence on the ground of over-voting is that the petitioners proved their case on the preponderance of evidence and that looking at the weight of the votes affected by that irregularity, it affected the outcome of the results so much that I have no option other than annulling those votes and I do so annul them.

E. VOTING WITHOUT PRIOR BIOMETRIC VERIFICATION

The petitioners pleaded in their paragraph 29 of the affidavit by Dr Bawumia that:

"29. That equally, prior to the December 2012 elections, and after the enactment of C.I. 75, Regulation 30 (2) which provides 'The voter that shall go through a biometric verification process.' Before being allowed to vote, the second respondent issued the following directive 'NVNV' . This again is to protect the integrity of the voting register, and the entire elections. The

Chairman of the Electoral Commission stated it and four polling stations had their votes annulled for 'No verification no vote' at the Nalerigu-Gambaga constituency, Kutre (No 1) polling station, Code Number G 124201."

The second respondent submitted that the petitioners did not produce a single piece of evidence of anyone voting without being biometrically verified. Thus the issue arose as to whether or not anybody voted without a prior biometric verification and the burden of proof of this fact was cast on the petitioners.

Voting after a biometric verification was governed by Regulation 30 of the Public Elections Regulations, 2012, C.I, 75. It is not a long provision and I would like to quote the whole of it here. It was that:

"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 Constitution

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.

(2) The voter *shall* go through a biometric verification process."

Everything Biometric, registration and verification, burst on to the Ghanaian electoral landscape only just recently. It followed a thorough debate by political parties as a result of lots of agitation and clamor for reforms in the system so as to generate public confidence and integrity in the electoral system by checking impersonation, multiple voting and provide a quicker method of registering voters, amongst others. On the voting day, after a voter had gone through the essentials in Reg. 30 (1), then he was required to go through a biometric verification exercise.

I am persuaded that regulation 30 (2) of C.I.75 was a mandatory provision in our enactment regulating the conduct of elections in the country. Regulation 30 (2) (supra), stated that biometric verification is a process to verify the identification of a voter which may involve fingerprint or facial recognition that

the particular voter standing or appearing before the presiding officer, is the person whose name and voter identification number and particulars appear in the register. Biometric verification is only by the use of an electronic device called the biometric verification device (bvd) or equipment, interpreted in C.I. 75 as:

47. (1) "biometric verification equipment" means a device provided at a polling station by the Commission for the purpose of establishing by finger print the identity of the voter."

It was gratifying to learn that exceptions were made to the application of the mantra for it was readily recognized that there was an inherent limitation to the use for either through an act of God or natural causes over which no one had any control or any other cause like human activity, many a people may either have no fingers at all, like lepers and amputees, accident victims, called 'those with permanent trauma'; some may have finger prints which could not be captured by the biometric verification device like those whose fingers prints have been worn out with age or repeated human activities like the use of that part of their members. The law made room for these people so they did not lose the franchise for any reason whatsoever.

The Electoral commission crafted a special dispensation for them and they were identified by their face only and labeled 'FO'. The letters 'FO' were inscribed against their names in the register, but even such persons had to undergo a form of biometric information. 'FOs' had to swipe the barcode on their voter's identity card through the biometric verification device. Successful verification thereafter occurred where the photograph of the 'FO' popped up. When this happened then to all intents and purposes such a person was deemed biometrically verified so there would be no need to proceed further to ask that voter to still put a finger on the device. He would proceed to vote by casting his ballot for his/her preferred candidate.

All witnesses before this court testified on this and sang the same song in court to underscore the veracity in it. Dr Bawumia said there were about 700 of such people in the country, Dr. Kwadwo Afari Gyang said that figure was an understatement for they were more than that.

The second respondent referred to the Public Elections (Registration of Voters) Regulation, 2012, C.I. 12, and submitted that sub-regulation 12 stated that

"A registration assistant shall capture the biometric data made up of the ten finger prints and the photograph of the head, showing the face and two ears without any obstruction of the applicant"

Also, sub-regulation (9) stated that

"the Commission shall make alternative arrangements in relation to biometric data for a person who has no fingers."

Regulation 31 explained that

"bio-data refers biographic and biometric information of a person required for the purpose of establishing that person's identity."

The second respondent submitted that in view of these provisions biometric verification could not be limited to only finger prints.

I am unable to agree with that submission. A reading of regulation 30 of C.I. 75 shows that the voter shall mandatorily go through a biometric verification process by a biometric verification equipment for the purpose of establishing the identity of the voter by finger print. In order to ensure that those who through no fault of theirs have no fingers at all, or have fingers but whose finger prints could not be taken for one reason or the other, special provisions/arrangements were made for them. Those voters are labeled 'FOs' and are excused from undergoing biometric verification by the equipment.

I note there was a difference between 'identifying' and 'verifying' a voter. I agree biometric verification is a process under our electoral laws. It begins with the process in regulation 30(1) and continues at regulation 30(2). The two provisions mention identification and verification of voters and truly they are to be read as forming one scheme even though it is a process involving several steps, voters are verified with biometric verification devises which establishes the identity of the voter by his her fingerprints.

Apart from them I do not know of any other exception recognized by statute or regulation. It would therefore be wrong for anybody advocating that there could be voting without verification biometrically, where even the machine

failed to function. Evidence put before this court had it that when political parties suggested this could be done the suggestions were rejected. Other persons including chiefs who made similar suggestions were equally rebuffed. My heart missed a beat when Dr Afari Gyan said if a chief popular in the area appeared at a polling station to vote, he could be excused from undergoing biometric verification. He did not provide data of those who benefitted from that dispensation and it could safely concluded that it did not happen, for it was wrong, dangerous to accept and follow.

I am satisfied from the KPMG Report that in Appendix A.2.9, Details of data capture for MB-L Series of Exhibits, 382 pink sheets were counted.

I conclude on the issue of voting without biometric dispensation that where power is conferred, it ought to be exercised in terms of the enabling statute. Anything done outside the power stands the risk of being affixed with the ultra vires stamp and declared null and void: see Apaloo v E.C. [2001-2002] SCGLR 1, at 14; Nii Tetteh Opremreh v E.C. [2001-2002] SCGLR 1159;

The petitioners were obliged to give evidence to prove their allegation that people voted without going through biometric verification. Dr. Bawumia stated the evidence is on the face of the pink sheet, tendered in evidence, marked and stamped with the commissioner of oaths stamp. They were tendered in evidence and accepted without any objection. They were photocopies of the originals, which were in the custody of the second respondents.

It may be asked, how does the biometric verification device (bvd) infringe on the right to vote? The onus is on those alleging the infringement to establish it. There is a presumption of regularity of legislation until it is proved otherwise. Article 63 (2) of the constitution emphasizes that presidential elections shall be based on universal adult suffrage; the biometric verification device ensures that voting is done by universal adult suffrage. Therefore it promotes the enforcement of the principle of universal adult suffrage.

Whether or not anybody voted without biometric verification is an issue of fact.

The petitioner sought to prove their case by relying on the contents of the pink sheets tendered in evidence. He pointed to column C3 of the pink sheet and

the entry made as to the number of voters who voted without being verified by Form 1C, or the biometric verification device (bvd) machine. On the other hand the respondents did not tender any pink sheet to counter the case for the petitioners. They gave evidence through Dr. Afari Gyan who said when it was suggested voters could be allowed to use the card in Form C1 to vote for it was generated from data collected by the EC but was lost through no fault by the voters but rather by the EC. This was because the EC. did not want any voter to lose his/her franchise, or, her right to vote. However political parties strenuously opposed the idea till the EC agreed to stick to the idea of voting only by the biometric verification process. He then said he told the presiding officers not to fill the column 3C on the forms.When Dr. Afari Gyan was asked how he gave that instruction to the presiding officers not to fill column C3, he could not tell positively. In my assessment of his creditworthiness on this wise, I found him wanting. I gave him zero marks. The conclusion I came to was that no such instructions were given to the presiding officers and they filled the pink sheets as truthfully as they could. I therefore found no reason to disbelieve the evidence of Dr. Bawumia. I accept and find that some voters voted without undergoing the biometric verification. Again, I think they should have to challenge the veracity of the genuineness of what the petitioners tendered in evidence. If it is considered that the second respondent had custody of all the pink sheets and only gave photocopies to the parties according to Regulation 36 (3) of C.I. 75, then the petitioners' pink sheets tendered in evidence remained the only evidence before the court, and their authenticity could not be impugned by the respondents. The pink sheets in evidence provided the best evidence of what transpired at the polling station in the absence of better evidence must be accorded the best regard. Their contents are conclusive of the facts in issue, and no oral evidence is admissible to add to, subtract from or vary them.

Arguing in support of this legal point, the appellants relied on Section 25 (1) of the Evidence Act which provided that:

"Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are presumed to be true as between the parties to the document, or their successors in interest."

This means that after filing the numbers of pink sheets and given oral evidence in support, the onus shifted to the respondents to lead evidence to challenge it or to leave doubts on the existence of those facts.

I believe that the petitioners have the duty to prove the irregularity alleged, and also that they affected so many polling stations. In their effort to discharge this burden they gave evidence relying on the face of the pink sheet. In column 'c' figures were to be filled as to the number of voters who voted without being verified biometrically. The evidence supplied was that where figures were not written but were only left blank, that was an attempt to cover over voting, or any other irregularity. A blank space therefore was construed to mean zero. In Table 10 B of Volume 2B, Page 360 it was stated that 223 polling stations were affected, and it covered the various categories. The total number of votes affected was 93, 273. Forty three (43) of these polling stations were in the over voting category alone. I must be quick to state that I do not think the construction by the petitioners that a blank means zero can be correct, for I did not see any real justification for that; I simply reject that interpretation by the petitioners.

In evaluating the evidence by the petitioners, I note that when the petitioners were ordered by the court to provide further and better particulars on the allegation of voting without biometric verification, they stated the irregularity took place at 2,279 polling stations. However, by the close of trial and addresses stage, they deleted 148 of them from the list relied on 2,131 polling stations. I have said these reductions in figures did not prove fatal to the petitioners' case and will be considered by the court.

In the result, I declare that all votes cast at the 2012 presidential elections which were affected by this irregularity of voting without prior biometric verification are nullified.

ANNULLING ELECTION RESULTS BASED ON IRREGULARITIES

I now consider some of the principles upon which a court considers whether or not to annul an election results have been discussed in several cases and a few will be considered.

In Re Election of First President – Appiah v The Attorney General, 1970, reported at pp 1423-1436, A Sourcebook of Constitutional Law of Ghana, Bannerman Acting.C.J said, citing **Medhurst v Lough Casquet [1901] 17 LTR 210**, where ,Kennedy J said (at p 230) that:

"An election ought not to be held void by reason of transgression of the law committed without any corrupt motive by the returning officer or his subordinate in the conduct of the election where the court is satisfied that the election was, notwithstanding those transgressions, the election, an election really and in substance conducted under the existing election law, and that the result of the election, that is the success of the one candidate over the other was, or could not have been affected by those transgressions. If on the other hand the transgressions of law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it was open to reasonable doubt whether these transgressions may not have affected the result and it [was] uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which [was] generally been recognized and acted upon by the tribunals which have dealt with election matters." And again the judgment in the case of Woodward v Sarsons 1875 32 L.T(NS) 867 at pp. 870-871; L.R. 10 C.P. 733: "…we are of opinion that the true statement is, that an election is to be declared void by the common law applicable to Parliamentary elections, if it was so conducted that the Tribunals, which is asked to avoid it, is satisfied, as a matter of fact either that there was no real election at all, or that the election was not really conducted under the subsisting election laws … but if the Tribunals should only be satisfied that certain of such mishap had occurred, but should not be satisfied either that a majority had been, or that there had been reason to believe that a majority might have been prevented from electing the candidate they preferred, then we think that the existence of that mishap would not entitle the Tribunal to declare the election void by the common law of Parliament'. We do not think that it can be said or even suggested that in the election under review the candidate returned had really been elected by the majority of electors and are

satisfied that that the election was really and in substance conducted in accordance with the existing election law."

Woodward v Sarsons, L.R. ; was also reported in L.R.10 C.P. 733, and cited in Morgan and others v Simpson and another [1875] 3 WLR 517; [1975].

Another case cited to us by all the parties herein was the Canadian case of **Ted Opitz (Appellant) v Borys Wrzesnewskyj 2012 SCC 55**. The Supreme Court of Canada held in an election petition that:

"The practical realities of election administration are such that imperfections in the conduct of elections are inevitable. As recognized in Camsell v Rabesca, [1987] N.W.T.R. 186 (S.C.), it is clear that 'in every election a fortiori, those in urban ridings, with large numbers of polls irregularities will virtually always occur in one form or another' (p.198). A federal election is only possible with the work of tens of thousands of Canadians who are hired across the country for a period of a few days or, in many cases a single 14-hour day. These workers perform many detailed tasks under difficult conditions. They are required to apply multiple rules in a setting that is unfamiliar. Because elections are not everyday occurrences, it is difficult to see how workers could get practical, on-the-job experience.'"

The **Opitz case (supra)**, went on to say that:

"Lower courts have taken two approaches to determine whether votes should be invalidated on accounts of irregularities. Under the strict procedural approach, a vote is invalid if an official fail to follow any one of the procedures aimed at establishing entitlement. Under the substantive approach, an election official's failure to follow a procedural safeguard is not determinative. Only votes cast by persons not entitled to vote are invalid. The substantive approach should be adopted, as it effectuates the underlying Charter rights to vote, not merely the procedures used to facilitate that right. The substantive approach has two steps under s.524(1)(b). First, an applicant must demonstrate that there was a breach of a statutory provision designed to establish the elector's entitlement to vote. Second the applicant must demonstrate that someone not entitled to vote, voted. He may do so using

circumstantial evidence. The second step establishes that the 'irregularity affected the result' of the election. Under this approach an applicant who has led evidence from which an irregularity could be found will have met his prima facie evidentiary burden. At that point the respondent can point to evidence from which it can be inferred that no irregularity occurred or that despite the irregularity, the voter was in fact entitled to vote and prevent those not entitled to vote from voting. After-the-fact evidence of entitlement is admissible. If the two steps are established, a vote is invalid. Finally, although a more realistic test may be developed in the future,.. "the magic number test" is used for the purpose of the application. It provides that an election should be annulled if the number of invalid votes is equal to or greater than the successful candidate's plurarity."

In **Morgan & others v Simpson & others [1974] 3 WLR 517; [1975] Q.B. 151**, the English Court of Appeal had occasion to consider the conditions where electoral results could be nullified on grounds of violations of statutory electoral rules. The facts were that at an election, the number of votes in the ballot box were 23,691, 44 of which had been rejected because the polling officials at 18 polling stations had inadvertently omitted to stamp them with the official stamps. After some recounts the candidate declared winner had a majority of 11. If the rejected votes had been counted, he would have had a majority of 7 votes. The candidate and four others petitioned for a declaration against the successful candidate and the returning officer that the election was invalid for the reason that the issue of unstamped papers was an act or omission in breach of the official's duty and that as it had affected the result the court ought under section 37 (1) of the Peoples Representation Act 1949, to make the declaration. The court dismissed the petition holding that as the election was conducted substantially in accordance with the law as to elections, the fact that a small number of errors had affected the result was not a sufficient reason for declaring it invalid.

On appeal, the Court of Appeal reversed the earlier decision and ruled that the election was to be declared invalid even though it had been held substantially in accordance with the law governing elections. In so ruling, the Court of Appeal recognized two circumstances in which election results could be

nullified. In his judgment, Lord Denning M.R. said collating all the relevant cases together, he could make the propositions that:

"1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated irrespective of whether the result was affected or not…(that is for example, where two out of 19 polling stations were closed all day).

2 If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided it was not affected by the results.

But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the results – then the result is vitiated."

I approve of the material holding in the case above and apply them to the facts of this case.

It is clear from this decision that a petitioner is not entitled to an order quashing election results merely upon establishing some form of non-compliance with the rules governing the poll; the non-compliance must further either be of a substantial proportion or the non-compliance must produce a different outcome in the election, namely, result in some person emerging victor who would but for the non-compliance not secure such victory.

In the Nigerian case of **General Muhammadu Buhari v. Independent National Electoral Commission &4 Ors. (2008) 12 S.C. (Pt. I) 1** that country's Supreme Court recognized that a claimant is entitled to relief not merely on the basis of proven non-compliance but where it is shown that substantial non-compliance with electoral regulations has resulted in a variation of the allocation of votes between the contenders. Tobi, JSC expressed himself in that case thus at page 75 of the report:

"It is manifest that an election by virtue of [the applicable statute] shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the [applicable statute]. It must be shown clearly by evidence that the non-compliance has affected the result of the election. Election and its victory is like soccer and goals scored. The Petitioner

must not only show substantial non-compliance but also the figures, i.e. votes that the compliance attracted or omitted."

I note that unlike **Morgan and ors v. Simpson and Others (supra),** both **Buhari v. INEC (supra)** and **Re Election of First President: Appiah v. Attorney-General (supra)** establish a higher standard by their requirement that a petitioner must establish *both* substantial non-compliance with electoral regulations and impact of the non-compliance on the election results. **Morgan and ors v. Simpson and Others (supra)** allows a petitioner to succeed upon establishing any one of the requirements.

I hold that the distinction between these two standards is not necessary for the resolution of this case, and I shall express no preference for either standard at this time. This is because, in the cases of the irregularities established by the petitioners, they are entitled to judgment even when the higher standard in **Buhari v. INEC (supra)** is applied.

Firstly, it is clear that the irregularities associated with the 2012 presidential elections were substantial. Substantial is not used here as a term of art and it can be understood in its natural sense as meaning either materially or essentially.

Secondly, it is equally clear that the non-compliance in this case affected the results of the 2012 presidential election. Once account is taken of the irregularities (which is shown in the next discussion on the numerical effect of the irregularities), the first respondent no longer has the required fifty percent plus one of the valid votes cast which produces the remarkable effect that he was not entitled to be declared president-elect of the Republic of Ghana. Put differently, the irregularities produced the significant consequence that the first petitioner was deemed to have lost any chance of continuing the race for the presidency of Ghana, whereas a proper reckoning of the election outcome, that is, minus the nullified votes, would have shown that he was entitled to a final shot at that high office through a run-off poll.

IMPACT OF NULLIFIED VOTES ON THE 2012 PRESIDENTIAL ELECTION RESULTS

I now proceed to assess the impact of annulment of votes due to the various categories of irregularities established by the petitioners as follows:

a. <u>Voting without prior biometric verification</u>

His Excellency Mr. John Mahama obtained 560,399 votes which were actually invalid under this category. When these are subtracted from total votes declared in his favour by the E.C., namely, 5,574,761 he is left with 5,014,362 representing 49.25 of the total valid votes.

Nana Akufo-Addo had 5,48,898 votes declared in his favour of which 234,970 fall in this category of irregularities. The difference of these two is 5,013,928 and this represents 49.25 of valid votes cast.

b. <u>Pink sheets not signed by presiding officers or their assistants</u>

Here, Mr. John Mahama had 382,088 invalid votes which when subtracted from the total number of 5,574,761 votes declared in his favour leaves him with 5,192,673 valid votes. This remainder accounts for 49.78% of the valid votes cast.

Out of the 5,248,898 votes declared in his favour, Nana Akufo-Addo had 170,940 votes affected by this category. This leaves him with 5,077,958 representing 48.68 of the valid votes cast.

c. <u>Over voting</u>

For His Excellency Mr. John Mahama, he had 5,574,761 declared in his favor by the E.C., in the over voting category, he benefitted by 504,014 votes. When these are annulled, he had 5,070,747 valid votes in his favor. That would leave him with 49.47%.

Nana Akufo-Addo had 5,248,898 votes declared in his favor by the E.C., out of which he benefitted 226,198 in the over voting category, which as they are being annulled left a total of 5,027,700 valid votes in his favor. Expressed in percentages, that would be 49.00% of the valid votes cast at the elections.

The foregoing evaluation of the impact of the nullified votes shows that they resulted in neither the first petitioner nor the first respondent obtaining the critical fifty percent plus one valid vote threshold.

As neither the first petitioner nor the first respondent had the required number of votes by the constitution to be declared the President of the Republic of Ghana,

I make the following conclusions and directions:

1. That the relief that an declaration be made that Mr. John Dramani Mahama was not validly elected the President of Ghana, is hereby granted;
2. That a declaration be made that Nana Akufo-Addo be declared the candidate who was validly elected the President of Ghana, is also refused.
3. The consequential order I make is that the E.C. conducts a re-run of the Presidential elections for the two leading candidates, Mr. John Dramani Mahama and Nana Akufo-Addo, in all the polling stations affected and indicated in the petition and its supporting documents, forthwith.

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT