

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

5

ELECTION PETITION APPEAL NO.59 OF 2016

(Arising from the Judgment and Orders of Hon. Margret C. Oguli Oumo, J
in Election Petition No.16 of 2016 dated 28th July 2016 at Mbale)

10

CORAM: HON. MR. JUSTICE ALFONSE OWINY DOLLO, DCJ
HON. MR. JUSTICE S.B.K. KAVUMA, JA
HON. MR. JUSTICE RICHARD BUTEERA, JA ✓

15

1. ACHIENG SARAH OPENDI
2. ELECTORAL COMMISSION.....APPELLANT

V E R S U S

20

AYO JACINTA.....RESPONDENT

25

JUDGMENT OF THE COURT:

Brief facts:

30 The 1st appellant and the respondent together with four others were candidates for elections for Woman Member of Parliament for Tororo District held on the 18th day February 2016. The 1st appellant won the election. She was declared and gazetted as such by the 2nd appellant having polled 62,215 votes. The respondent was the first runner-up with 59,806 votes.

35 The respondent challenged the election of the 1st appellant on grounds, *inter-alia* that the elections were marred with irregularities and illegalities, non-compliance with the electoral laws and did not meet the test of free and fair elections. It was also alleged that the 1st appellant committed acts of bribery personally and by her



agents with her knowledge and consent or approval before and during the election.

5 It was the respondent's case that the failure to comply with the Electoral Laws and the Constitution affected the results in a substantial manner.

10 In answer to the Petition, the 1st and the 2nd appellants denied the respondent's allegations and contended that the election in issue was conducted in compliance with the Constitution and the prevailing electoral laws and the few omissions and or errors complained about did not affect the results in a substantial manner.

At the conclusion of the trial, the learned trial Judge nullified the election of the 1st appellant and ordered for fresh elections under different officials. The Judge ordered the 1st and 2nd appellants to meet costs of the Petition.

15

Dissatisfied with that decision, the two appellants appealed to this Court. They filled 2 separate Election Appeals. Election Appeal No.59 of 2016 and Election Appeal No.61 of 2016. The two Appeals were consolidated with the consent of the parties at the hearing and were heard together since they arose from the same Elections.

20

Representation

At the hearing learned counsel, Mr. Arinaitwe Rajab and Mr. Mujurizi Jamiru appeared for the 1st appellant. The second appellant was represented by learned counsel, Mr. Joseph Kyazze and Mr. Nasser Sserunjojji. Learned counsel Mr. Oscar Kihika and Mr. Bazira Anthony represented the respondent. The 1st appellant and the respondent were in court at the hearing.

Counsel for the parties agreed on the following 7 issues arising from the consolidated Appeals for their submissions. :

5
1. Whether the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record and came to a wrong conclusion that the Election Results from Osukuru Sub-county arrived late at the Tororo District Tally Centre which amounted to non-compliance with the PEA and thus rendered the results illegitimate.

10

2. Whether the learned trial Judge erred in law and fact when she held that the District Returning Officer for the 2nd appellant did not rely on the Original Declaration of Results which amounted to non-compliance with the PEA thus rendering the results illegitimate.

15

3. Whether the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record thus arriving at wrong conclusions that the respondent was denied votes in some polling stations and the 1st appellant awarded votes.

20

4. Whether the learned trial Judge erred in law and fact when she held that there were major alterations and omissions of the petitioner's election results by the 2nd respondent hence coming to a wrong conclusion.

25

5. Whether the learned trial Judge erred in law and fact when she held that there was non-compliance with the PEA which substantially affected the result of the election qualitatively.

6. Whether the learned trial Judge erred in law and fact when she nullified and set aside the election of the 1st appellant and further ordered the appellants to pay costs.

5 7. What remedies are available to the parties?

Submissions of counsel for the appellants

Issue No1.

10 Counsel submitted that the key issue for courts' determination was whether the results for Osukuru Sub-County arrived at midnight or before midnight of 18th February 2016 as contended by the appellants or 24 hours later as contended by the respondent who was the petitioner in the lower court.

15 According to counsel, the allegation that the results arrived late was ably rebutted with affidavit evidence that was on court record but was not considered by the learned trial Judge.

Counsel pointed out the following pieces of evidence that was on the lower courts
20 record for this Court's consideration in the resolution of the appeal on the issue.

(1) There was the affidavit evidence of the 1st and the 2nd respondents affidavits in reply that the Ballot Boxes for Osukuru Sub-county arrived at the District Tally Centre before midnight on 18th February 2016.

25 (2) The 1st respondent's Affidavit in Reply to the Petition when she denied knowing Ojulo Richard and she swore that she did not appoint Ebbu Vincent as her agent. The 1st respondent also swore that she was never

assigned any votes that belonged to the petitioner to any other person and no such complaint was raised by her during or before the tallying.

5 (3) The evidence by the Returning Officer which was to the effect that the Ballot Box for Osukuru Sub County arrived at the Tally Centre before midnight.

(4) The Returning Officer's evidence in cross examination where he reconfirmed when the DR Forms were delivered at the Tally Centre.

10

(5) The Returning Officer's explanation that the Presidential, Directly Elected Members of Parliament and the Woman Members of Parliament Ballot Boxes are delivered together to the Tally Centre and not separately and that was what happened in respect of the Ballot Boxes for Osukuru Sub-county.

15

(6) The petitioner, Ayo Jacinta, in cross examination stated that she never saw Ebbu Vincent and Ojulo Richard take away Ballot Boxes which is a contradiction with the Petition itself.

20

(7) The petitioner concedes in her evidence that 59,806 votes were the results in the Gazette for Tororo and that included results for Osukuru Sub-county.

25

(8) None of the respondent's Agents contested the results in the entire Osukuru Sub-County as contained in the DR Form for the Sub-county as differing from what was declared at each of the polling stations.

30

(9) The learned trial Judge was influenced by the finding she made that the District Returning Officer did not have original DR Forms at the time of the Declaration of results when in fact there was evidence that at the time of declaration of results there were original DR Forms.

(10) There were two sets of Declaration of Results Forms certified by the Electoral/Commission both availed by the Petitioner, one attached to the affidavit of Dr. Tanga Odoi and another attached to the affidavit of Alu Yosiya. There was no indication that the results contained in any one of the two sets was different from what the respondent's agents had at any of the polling stations in which case there was no evidence of variation of the results which results should therefore be admitted as a true reflection of the election results.

10

(11) There was no evidence of tampering with the results of Osukuru Sub-County and there was no contestation as to what each candidate polled at the respective polling stations. The evidence was clearly to the effect that voting took place and the will of the people was clearly expressed.

15

(12) The trial Judge had concluded that the 2nd appellant had failed to tender in court a Records Book to confirm when the DR Forms were actually delivered when it was the petitioner who had the burden of proof of the allegation she had made of late delivery of the Ballot Boxes to the satisfaction of Court.

20

Issue No.2.

Counsel submitted that the learned trial Judge erred when she ruled that the Returning Officer did not rely on the original DR Forms for the results of the whole Osukuru Sub-county while tallying the results of the Tororo Woman Member of Parliament for Tororo District.

25

Counsel contended that the Returning Officer used the original DR Forms and there was evidence of the Returning Officer and the other evidence to that effect

on the court record but the trial Judge did not consider that evidence in her judgment.

5 Counsel contended further that the results for Osukuru Sub-county arrived at the Tallying Centre before the winner was announced. There was evidence that the results declared by the Returning Officer were not at variance with the results reflected in the DR Forms the 1st respondent obtained from her Polling Agents and the certified copies attached to Dr. Tanga Odoi affidavit availed by the Electoral Commission and what was included in the Tally Sheet.

10 Counsel submitted that there was no evidence that the DR Forms were tampered with. There was evidence that the Returning Officer used the original DR Forms which were delivered in the Ballot Box and after declaring the results he transmitted them to the Electoral Commission.

15 **Issue No.3 and No.4**

Counsel submitted that there were arithmetical errors in the DR Forms which were not deliberate as claimed by the petitioner/respondent and that did not benefit the 1st appellant as the votes cancelled were never added to hers.

20 Counsel argued that the alterations were due to minor errors on the DR Forms which were corrected.

25 Counsel contended that when DR Forms are not signed by a Presiding Officer but they are signed by the candidate's agents and the results are not contested, the results for such stations should be accepted and included in the final tally.

Similarly, when DR Forms are signed by the Presiding Officer but are not signed by the agents of a candidate and they are not contested, such results should also be included in the tally.

5 Counsel submitted that in such situations where the DR Forms were not signed by either the Presiding Officer or the candidate's agents but were not contested the trial Judge selectively gave such votes to the respondent but denied them to the appellant.

10 According to counsel, the trial Judge had erroneously removed 1,443 votes in favour of the 1st appellant in areas where there were unsigned DR Forms but retained all the votes for the respondent where the Presiding Officers had not signed and thus came to the wrong conclusion that the respondent would have won the election.

15

Issue No.5.

Counsel for the appellant submitted that the respondent had alleged various illegal practices and offences including practices of bribery of voters, chasing away of agents of candidates from polling stations, from the Tally Centre, late delivery of
20 DR Forms, alterations of DR Forms, and others which allegedly affected the results in a substantial manner.

According to counsel, the respondent had the duty to prove the alleged acts of noncompliance and she had not discharged that burden of proof. She also had the
25 duty to prove that the noncompliance, if any, had affected the results in a substantial manner.

Counsel contended that the irregularities complained of were not substantial enough to overturn the outcome of the election.

Issue No.6.

Counsel submitted that the learned trial Judge did not properly evaluate the evidence on record and because of that she made erroneous findings leading to wrong conclusions.

5

Counsel contended that the trial Judge had nullified the election of the 1st appellant as the Woman Member of Parliament because of the erroneous findings and called upon this Court to properly evaluate the evidence and set aside the nullification of the 1st appellant's election and also set aside the order for the 1st appellant to pay costs.

10

Issue No.7.

Counsel submitted that this Court has the Jurisdiction, power and discretion and should allow the Appeal and set aside the Judgment and Orders of the High Court and award costs for the Petition and the Appeal to the appellants.

15

Submissions of counsel for the respondent.

Issue No.1.

Counsel submitted that S.51(2) of the Parliamentary Elections Act (PEA) obliges each Presiding Officer to immediately deliver to the Returning Officer duly filled and signed DR Forms, the sealed Ballot Boxes and the Report Book filled and signed by the Presiding Officer and the Polling Assistants.

20

S.52 of the P.E.A. provides for the Returning Officer to be responsible for the safe keeping of all election materials used in the District in connection with elections.

25

Counsel contended that the Returning Officer for Tororo District contravened the provisions of Section 51(2) and 52 of the P.E.A. in that he failed to control and protect the voting materials for Osukuru Sub-county.

5 According to counsel, the voting and the counting of votes in the Sub-county were completed by 6.30 pm on 18/02/2017 on average. The elections materials were then transported from various polling stations to Osukuru Sub-county Headquarters which was the collection Centre for the Sub-county and this was concluded by 9.30 pm of the same day.

10

The election material were then transported in an Ipsum vehicle from Osukuru Sub-county Headquarters at 9.30 pm on 18/02/2017 but did not reach the Tororo District Tally Centre which is only 1½ kilometers away until 2.30 pm of 19/02/2017 when the materials were dumped at the entrance of the District Tally

15 Centre.

Counsel submitted that the chain of movement of the election materials from Osukuru Sub-county was broken and because of that, the results could not be trusted and relied upon.

20

The trial Judge was therefore right, according to counsel, when she held that the results for Osukuru Sub-county were unreliable and the 2nd respondent had failed in their duty to safeguard the election materials and the results.

25 **Issue No.2.**

Counsel submitted that the Returning Officer for Tororo did not use the original DR Forms for results from the whole of Osukuru Sub-county while tallying the results of the election of the Woman Member of Parliament for Tororo District. According to counsel, the envelopes containing the DR Forms from Osukuru

Sub-county were taken away by a Police Officer from outside the District Tally Centre where the Ballot Box for Osukuru was dumped. The tallying process of the results from Osukuru Sub-county was highly suspected and cannot be relied upon as being a true reflection of the voters will.

5

Issues No. 3 and 4.

The two issues were argued together by counsel for the respondent.

10 Counsel submitted that contrary to provisions of Section 78(a) of the PEA the Returning Officer of the 2nd appellant in connivance with the 1st appellant and her agents willfully omitted to include in the final tally 1,705 votes that had been garnered by the respondent.

15 Counsel submitted further that the alterations and omissions were not few or minor. They were gross errors and could not be ignored by Court as they substantially affected the results resulting into a total of 1,705 votes which were omitted for the respondent and if these had been included, the respondent would have won.

20 Counsel detailed the DR Forms for Rochwa Kwapa Primary School, Mission of Hope, Ramogi, Gwest Wing, Sironko, Magole Society Headquarters and Ticaf Primary School Polling Stations as the stations where the results were altered to the prejudice of the respondent.

25 Counsel contended that the 2nd appellant failed to provide a total of 68 DR Forms that were not signed by the Presiding Officers to the respondent when he asked for all the DR Forms.

Issue No.5.

Counsel submitted that the learned trial Judge had ably evaluated the evidence on record and came to the proper decision that there was noncompliance with provisions of the PEA which was committed by the 2nd appellant and that the
5 noncompliance had a substantial effect on the election results.

According to counsel, when all the errors are corrected, the respondent would have been given 61, 276 votes and would have won the election by 504 votes.

10 **Issue No.6 and 7.**

Counsel contended that there was evidence that the respondent and not the 1st appellant won the election for Woman Member of Parliament for Tororo District and this Court should therefore uphold the findings of the lower court and both appellants should pay costs of the Suit and the Appeal.

15

The decision of Court

We are duty bound, as a first appellate court, to re-evaluate the evidence adduced at the trial and make our own inferences on all the issues of fact and law. See:
Rule 30(1) of the Rules of this Court, Fr. Narcensio Begumisa and Others
20 **versus Eric Tibebaga (Supreme Court Civil Appeal No.17 of 2000).**

We shall proceed to do so.

Issue No.1.

25 This is on whether the results for Osukuru Sub-county arrived at the Tally Centre around midnight of 18th February 2016 as contended by the appellants or at 2.30p.m on 19th February 2016 as contended by the respondent who was the petitioner.

The Returning Officer testified that the election materials arrived at midnight on 18/02/2017. He further testified that all the election materials for Presidential elections, Directly elected Members of Parliament and District Woman MP were collected together and were all at the Tally Centre before midnight on 18th February 2016.

The petitioner produced affidavit evidence that the election materials from Osukuru Sub-county were collected on the night of 18th February 2016 but it was not clear where the materials were before they were dumped at the Tally Centre at 2.30 p.m. on 19th February, 2016 although the Tally Centre is only 1½ kilometers away from the Osukuru Sub-county Headquarters. The petitioner alleged that from the Tally Centre the materials were taken to the Police Station.

The petitioner had the duty to prove to Court what she alleged and to prove her case to court's satisfaction.

This Court had the occasion to state the legal burden and standard of proof for the petitioner in **Election Petition Appeal No.30.2011 Mugema Peter versus Mudiobole Abedi Peter** when it held:-

“Burden and standard of proof.

The burden of proof lies on the petitioner to prove the assertions in the election petition and the standard of proof required is proof on a balance of probabilities according to Section 61(1) and (3) of the Parliamentary Elections Act. See: also *Supreme Court of Uganda Election Petition Appeal No.18 of 2007. Mukasa Anthony Harris vs. Bayiga Micheal Philip Lulume.*

Though the standard of proof is set by the statute to be on a balance of probabilities, because of the public importance of an election petition, the facts in the petition must be proved to the satisfaction of the court. A petitioner has a duty to adduce credible and/or cogent evidence to prove the allegations to the stated standard of proof: *See: Court of Appeal Election Petition Appeal; No.9 of 2002: Masiko Winifred Komuhangi vs. Babihuga J. Winnie.*"

It was the petitioners' duty to prove that the election materials were dumped outside the Tally Centre and were later taken to Police. The respondent (Petitioner) alleged that the Returning Officer was not in control and did not protect the voting materials as required of him by Section 52 of the PEA.

Counsel for the appellants submitted that the trial Judge did not consider the evidence available on record when she concluded that the election materials arrived at 2.30 pm on 19/02/2017 and not before midnight on 18/02/2017.

We shall now review and analyse the evidence on this afresh ourselves.

The Returning Officer testified in his affidavit that the ballot boxes for Osukuru Sub-county arrived at the Tally Centre before midnight on 18th February 2016 and not on 19th February 2016 at 2.30 p.m. He went further and clarified in re-examination as follows:- **"yes, I have been asked how the DR Forms are taken. Presidential, directly elected M.Ps and Women MPs come at the same time to the Tally Centre."**

The witness explained that all the ballot boxes for the Presidential, Directly elected Members of Parliament and District Woman Member of Parliament

elections were transported together and arrived at the tally Centre at the same time.

5 According to this witness, all the results were at the Tally Centre by midnight on 18th February 2016 and then transmission of results of the Presidential results was done first. The results declaration of the MP for the Municipality followed. Declarations for the results for the directly elected constituency MPs was done thereafter. The declaration of the constituency results for the Woman MP for the whole District was handled last and this was on 20th February 2016 at 5.000am.

10 The Returning Officer's evidence on the timing for the transmission and the declaration of the different results was not challenged. There is no such challenge anywhere on the lower court record. If the ballot boxes for Presidential, Directly Elected MPs and Woman MPs are transported together, and this is what happened
15 for Osukuru sub-county as with other polling stations, then what is alleged to have happened to the polling boxes of the District Woman MP would have happened to the other boxes as well. The trial Court did not consider this point which we find critical.

20 The available evidence on Court record was to the effect that it was after all the ballot boxes had arrived at the Tally Centre that the transmission and declaration of results started.

If indeed the ballot boxes for the Woman MP had been dumped outside the Tally
25 Centre and they had been taken to Police, the petitioner, whose duty it is to prove his allegations, would have demanded for Police to produce the alleged ballot boxes in court which was never done. It was alleged Engorit Victor, was arrested for tampering with election materials for Tororo Woman MP but the Police Officer who arrested him, Vincent Alex, swore an affidavit and explained that he

arrested him on suspicion of having stolen DR Forms for Directly elected Members' of Parliament for Tororo South Constituency. His arrest was not connected with materials for Woman Member of Parliament for Tororo as claimed by the petitioner. The whereabouts of the ballot boxes allegedly dumped
5 at the Tally Centre and taken to Police remained a mystery at the time of trial. There is no further evidence at all about the alleged elections materials that were taken to Police. The petitioner did not adduce evidence for proof of the fact that the materials were taken to the Police Station. The petitioner thereby failed to prove what she alleged. The evidence of the Returning Officer that the Osukuru
10 Sub-County election results were declared with other constituency results was not controverted by any evidence of the petitioner.

This gives credence to the appellants contention that the story of dumping the ballot box outside the Tally Centre was a fabrication.

15

We find that the petitioner failed to prove what she alleged.

We find that the ballot boxes for the Woman MP arrived at the Tally Centre together with the other ballot boxes for the Presidential and the Directly elected
20 MPs before midnight on 18th February 2016 and not at 2.30pm on 19th February 2016.

We therefore resolve issue No.1 in the affirmative.

25 **Issue No.2.**

Whether the learned trial Judge erred in law and fact when she held that the District Returning Officer for the 2nd appellant did not rely on the original
declaration of results which amounted to non-compliance with the PEA thus rendering the results illegitimate.

The Returning Officer gave evidence as per the affidavit he swore on 27th May 2017 and he stated in paragraph 4(d) that he used the original declaration forms to declare results of Osukuru Sub-county.

5 Counsel submitted that this evidence was corroborated by the evidence of Tanga Odoi who testified for the respondent.

10 Tanga Odoi gave evidence that he requested for certified copies of DR Forms from the Electoral Commission and they were availed to him. He also testified that the Tally Sheet was also availed to him by the Returning Officer of Tororo.

15 Counsel submitted further that the certified copies given to Tanga Odoi by EC were obtained from the original ones that the EC received from by the Returning Officer. According to counsel, this was corroboration of the evidence of the Returning Officer that he transmitted the originals of the DR Forms to the EC in compliance with his statutory duty. There was no reason for him not to have used the DR Forms that he had in his possession and he forwarded to the EC.

20 We agree with counsel for the appellant that there was no basis it was erroneous for the learned trial Judge to conclude that the District Returning Officer did not rely on original DR Forms when there was no evidence on record upon which the trial Judge relied to conclude as she did.

25 We therefore find in the affirmative on this issue.

Issue No.3 and 4.

Whether the learned trial judge erred in law and fact when she failed to properly evaluate the evidence on record thus arriving at wrong conclusions that the respondent was denied votes and the first appellant was awarded
5 **votes.**

Whether the learned trial Judge erred in law and fact when she held that there were major alterations and omissions of the respondent's election results by the second appellant; hence coming to a wrong conclusion.

10

Counsel for both appellants and the respondent filed written submissions and handled the two issues together both in their said submissions and at the oral hearing. We shall accordingly handle the two issues together.

15 The appellant/respondents' case is that contrary to Section 78 of the PEA, 2005 (as amended), the Returning Officer of the 2 appellant, in connivance with the 1st appellant and her agents willfully omitted to include in the final tally 1,705, votes that had been garnered by the respondent. The petitioner/respondent produced
20 DR Forms and the Tally Sheet whose results were altered while the Returning Officer was tallying the results. That the 1st appellant was awarded 1,443 votes which should not have been included on account of the fact that the respective DR Forms from where she was awarded such votes were not signed by the Presiding Officers as required by law.

25 The appellant on the other hand contended that the arithmetical errors in the DR Forms were not deliberate and they did not benefit the 1st appellant as the votes therein were never added to hers. That the alterations were due to some minor errors on the DR Forms which were corrected on the same DR Forms. Moreover



the petitioner did not complain about the polling stations where results were crossed to give her more votes.

5 On the issue of the unsigned DR Forms, the appellants contended that failure of the Presiding Officers to sign the DR Forms *per se* does not affect the quality of the elections since the agents of the respondent confirming the entries therein without complaint.

10 This Court had occasion to consider a situation similar to that in the instant Appeal in Court of Appeal, **Election Petition Appeal No.14 and 16 of 2011 Mbaghadi Fredrick Nkayi and Another versus Dr. Nabwiso Frank Wilberforce** and it held:-

15 “Under the circumstances of this petition, I hold the view that the role of the court is not confined to balancing of the rights and merits of the opposing parties. Rather the question is, was a valid election held having regard to the rights of Kagoma voters? I have looked at the whole of the evidence – I have scrutinized the DR Forms in question as indicted above. I find that on the whole the results as borne out by
20 documents are the same with no evidence of complaints whatsoever having been raised at the time of counting of the votes. The process was generally fault-free as pointed out by Mr. Kiryowa. The agents signed most forms without any complaints. They are the candidates’ representatives. Thereafter the presiding officers signed some, though
25 not all, at the same polling stations. This was the sealing of the process.

I consider the situation would have been different if there were no other copies to compare with. See: *John Baptist Kakooza v The Electoral Commission* (supra).

In determining whether an election was so conducted as to be substantially in accordance with the electoral laws and whether the omission to sign some of the DR Forms by the presiding officers affected the results – these are the questions for the court to decide basing on the evidence as a whole – *Baxter v Baxter (1950) All E R 458; Komuhangi v Banihuga T. Winne – Election Petition Appeal No.9/2002.*

I thus do consider that under the circumstances of this case failure by the presiding officer to sign some of the DR Forms cannot be used as a sword, where the agents signed most of them, to stop the mandate of the votes of Kagoma County in electing a candidate of their own choice. See: *Anifa Kawoya Bangirana and Anor. (Supra)*. It would otherwise be tantamount to disenfranchise the unsuspecting Kagoma voters.

The purpose of section 12 of the Electoral Commission Act and article 68(4) of the Constitution is not to disenfranchise but to safeguard the votes against fraudulent manipulation.

Substantial justice warrants this court to admit the results on the DR Forms omitted to be signed by the presiding officers but which results are the same as on all forms in possession of the respondent and the 2nd appellant, which would restore the appellant's majority votes. The learned judge erred in law to disregard them.”

This same Court held as follows in Election Petition Appeal No.3 and 4 of 2007 *Anifa Kawooya and Electoral Commission versus Joy Kabatsi:*

5 “In the instant case, it is not clear how many of the 177 declaration of
result forms were not signed. In that way it is not possible to determine
the extent of the non-compliance. Even if more than half of that
number had not been signed, they would rightly have affected the
result of the election in a substantial manner. The reason is that failure
to sign the declaration of result forms *per se* does not affect the quality
of the elections. Declaration of result forms are filled or completed
after the poll is closed and the votes are counted in a polling station. If
there are failures in the correct filling or signing of the declaration of
10 result forms in many polling stations that could be a ground to justify
recount. They do not affect the result of the election because such a
failure does not invalidate the votes otherwise properly cast.”

15 The authorities above make it clear that it’s a requirement of the law for DR
Forms to be signed by the Presiding Officers and the candidates agents. Where
that has not been complied with, however, there may be situations that in
exceptional circumstances of the case, the omission alone may not lead to
nullifications of elections if the voters will can still be ascertained.

20 In the instant case, Tanga Odio had requested for certified copies of the results
from the EC. The copies of the results were availed. The results that were given
to Tanga Odoi by the EC and those declared by the Returning Officer were not
found to be different.

25 The respondent conceded that the gazatted results for the Constituency included
results from Osukuru Sub-county. The respondent had agents all over the
Constituency including Osukuru Sub-county. None of the respondent’s agents in
the entire Osukuru Sub-county contested the results as contained in the DR Forms
for that Sub-county for being different from what was pronounced at each of the

polling stations. If we apply the principles laid down in **Mbaghadi Fredrick and Another versus Dr. Nabwiso** (supra) and **Anifa Kawooya and Another versus Joy Kabatsi** (supra) to the facts of this case, the DR Forms that were not signed by the Presiding Officers but were signed by the candidate's agents and were not
5 contested by any of the candidates or candidates agents should not have been invalidated. They should have been considered for tallying. They did not have to be excluded from the tallying of results as the trial Judge held. Their exclusion was therefore in error.

10 We therefore resolve this issue in the affirmative.

Issue No.5.

**Whether the learned trial Judge erred in law and fact when she held that there was non-compliance with the PEA which substantially affected the
15 result of the election qualitatively.**

The petitioner/respondent raised various allegations of illegal practices and offences as set out in paragraphs Nos.5 and 6 of the Petition.

20 The alleged illegal practices and offences included *inter alia* bribery, chasing away of agent's from polling stations and the Tally Centre, late delivery of DR Forms, alteration of results on the DR Forms, among others which led to non-compliance of the electoral laws and thus affected the elections in a substantial manner.

25 The allegations were denied by the appellant who also submitted that the alleged illegal practices and offences were not proved by the petitioner and they did not and could not have affected the elections in a substantial manner.

The learned trial Judge considered the allegations and resolved them in her Judgment.

5 The trial Judge justifiably dismissed the allegation of chasing away the petitioner/respondents agents from the polling station, as she found that the respondent had not adduced evidence to prove the fact to the satisfaction of Court. The trial Judge also dismissed the allegation of chasing away the petitioner's agents from the Tally Centre because **“at the time of tallying the petitioner was present as required by the law in Section 53(1) of the Parliamentary Elections Act. It was irrelevant that her agents were not present.”**

10

The trial Judge considered the issue of the late arrival and delivery of Osukuru Sub-county results to the Tally Centre.

15 The trial Judge made a finding that there was a delay of 24 hours in the delivery of the Results Forms from the polling centre to the Tally Centre when the law requires that they should be delivered immediately. According to the trial Judge such late arrival raises a lot of questions when the language of the Statute says that the declaration of Results Forms should be transmitted immediately without

20 delay to the Tally Centre.

After making this finding the trial Judge did not go ahead to establish from the evidence whether or not this had a substantial effect on the elections within the meaning of **Section 61(1)(a) of the PEA.**

25

This Court had occasion to state the duty of Court to assess the effect of non-compliance in **Election Petition No.29 of 2011 Mulindo Rehema versus Winifred Kiiza and the Electoral Commission** when it held:-

“It is well settled that non-compliance with electoral law *per se*, however, is not enough to overturn an election. Rather the non-compliance must be so significant as to substantially affect the results of the election – Section 61(1) PEA.2005. While the learned Judge considered the effect of each category of non-compliance individually, with respect she should have assessed the effect of non-compliance as against the entire process of the election as was stated by Odoki, Chief Justice:

‘In order to assess the effect, the court has to evaluate the whole process of the election.’

Besigye vs. Museveni (supra). In that case the Justices of the Supreme Court used both the qualitative and quantitative approaches. The quantitative approach takes a numerical approach to determining whether the non-compliance significantly affected the results. In this case, at least 13,426 votes (over 7%) have been rendered doubtful where the margin of victory was only 1,484 votes (less than 1%). Under the quantitative test, therefore the non-compliance appears to affect the results substantially.”

We have already found above that the petitioner did not prove the alleged delay in the delivery of the election materials. The delay that was not proved, could not be held to have had a substantial effect on the results of the election.

The respondent alleged that the Returning Officer in connivance with the 1st respondent and her agents willfully omitted to include in the final tally 1,705 vote that had been garnered by the petitioner. This is an offence under Section 78(a) of the PEA. The Returning Officer in cross-examination conceded that there were minor alterations of results effected by his staff but there was no evidence of any deliberate wrong returns that were made by the Returning Officer or his staff.

The appellants contend that these were arithmetical errors in the addition of results at the Polling Stations which never benefitted the 1st appellant.

This Court had occasion to consider the issue of errors such as those that occurred here in **Election Petition Appeal No.39/2011 Achieng Sarah Opendi and Another versus Ochwo Nyakecho Kezia** and held:

“Where a total of 15 polling stations had not been included in the final tally, and 2 polling stations cancelled and the petitioner (respondent in the appeal) had been given less votes in the Tally Sheet yet she had scored more in DR Forms in some areas. At the p.13 of the judgment, Court of Appeal held:

‘An election is not to be upset for informality or for a triviality. The objection must be something substantial, something calculated to affect the result of the election....

The court further held that the court should look at the substance of the case to see whether the informality or errors are of such a nature as to be fairly calculated in a rational mind to produce a substantial effect upon the election.’

The principle is that elections should not be lightly set aside simply because there had been informalities and errors.”

In the instance case, there were only 5 DR Forms that were not signed by the Presiding Officers out of more than 411 Polling Stations in Tororo District. Even for these stations where the Presiding Officers did not sign, the respondent’s agents and those of other candidates signed without complaining about the authenticity of the results and no body swore an affidavit denying the results.

The results of the polling stations where the Presiding Officers did not sign but candidates and agents signed can be ascertained and are authentic since the agents of the various agents including those of the respondent signed.

5 The errors that were conceded by the Returning Officer were three categories.

(1) There were 3 polling stations where zero votes were recorded. They were Rochwa Polling Station, Mission Hope Polling Station and Ramogi Primary Station. The error affected all candidates, so it was not deliberate. The DR Forms were available and the error could be corrected and clearly the results for these stations could be ascertained and the inadvertent error corrected with the result that the respondent would have 1,025 votes and the 1st appellant 379 votes.

10 (2) There was an error at Magola Society Headquarters Polling Station. The respondent claimed to have got 405 instead of 45 votes recorded for her. The DR Forms are available and were signed by the respondent's agents without complaint. None of the agents swore an affidavit denying their signatures or disputing the 45 votes rejected. We find the votes for the respondent to have been 45 rather than 405 as she alleged.

20

(3) Alleged inclusion of 1,443 votes in favour of the petitioner.

The respondents case was that the votes ought to have been omitted on account that the DR Forms were not signed by Presiding Officers.

25 On the authority of **Mbaghad Fredrick Nkayi and Another versus Dr. Frank Nabwioso EPA No.14/16/201**, failure by a Presiding Officer to sign some DR Forms cannot be used as a sword where the agents signed to stop the mandate of voters. In this case, the voters had signed with complaint. The voters' will in this case can be ascertained.

On a re-evaluation of the evidence as a whole, we accept with counsel for the appellant's assertion that on re-computation of the results, as per the Table below the results are:-

5

FINAL ANALYSIS AND COMPUTATION

NO. OF VOTES	AYO JACINTA	ACHIENG SARAH OPENDI
GAZETTE	59,806	62,215
ZERO ENTRY	+1,025	+379
WRONG ENTRY	+320	-365
FINAL TALLY	61,151	62,229

With the re-computation above the respondent would still lose by over 1,078 votes.

10

The errors were minor and the trial Judge erred therefore, in holding that there was proof by the respondent of non-compliance that affected the results in a substantial manner.

15 Issue No.5 is therefore resolved in the affirmative.

Issue No.6

20 Whether the learned trial Judge erred in law and fact when she nullified and set aside the election of the 1st appellant and further ordered the appellants to pay costs.

We have re-evaluated the evidence in respect of each of the issues and found in the affirmative for all of them.



We find, therefore, that the nullification of the election of the 1st appellant was erroneous.

Remedies: Issue No.7.

5 Having found as above we set aside the nullification of the 1st appellant's election. The judgment and orders of the High Court are set aside.

In the result, this Appeal is found to have merits; and so, it succeeds. We accordingly make the following orders:-

10 (1) The 1st appellant is hereby declared the duly elected Woman Member of Parliament for Tororo District.

(2) It is trite that costs follow the event. We therefore award costs both in this and the lower Courts to the appellants.

15

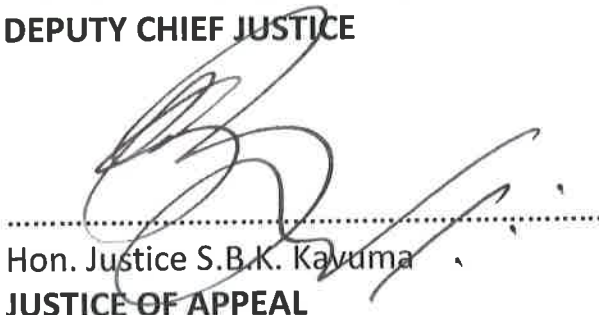
Dated at Kampala.....14th.....this day of.....DEC.....2017.

20



Hon. Justice Alfonse Owiny Dollo
DEPUTY CHIEF JUSTICE

25



Hon. Justice S.B.K. Kayunga
JUSTICE OF APPEAL

30



Hon. Justice Richard Buteera
JUSTICE OF APPEAL

-1-
EPA No. 59/16

ALTER & SARAH OPENAI & EE
D

AFO (AEN) TA

Amin - e t clerk

Blaze Babunura &

Signature Payas for the

appellant is present.

The respondents lawyers are absent and

is from ^{Everlyne} ^{submitting for} ^{EC} the report

CI: Judgment delivered in open court. ~~Signature~~ (1/1/17)