THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NOs 39 AND 95 OF 2016

ARISING FROM ELECTION PETITION NO 2 OF 2016

1. AMORU PAUL

2. ELECTORAL COMMISSION} ::::::::::::::::::::::::::::::::::::APPELLANTS

VS.

OKELLO-OKELLO JOHN BAPTIST::::::::::::::::::::::::::::RESPONDENT

CORAM: HON. MR. JUSTICE S.B. K KAVUMA, DCJ

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

HON. MR. JUSTICE ALFONSE OWINY DOLLO, JA

JUDGMENT

Introduction

This is a consolidated Election Petition Appeal arising out of the Judgment of Wilson Musalu Musene, J delivered on the 8th day of July, 2016 in which he nullified and set aside the election of the 1st appellant as Member of Parliament for Dokolo North Constituency and ordered that fresh elections for the constituency be held.

The background to the Appeal is that in the general parliamentary elections of 18th February, 2016, the 1st appellant and the respondent were the only candidates who contested for the position of Member of Parliament for Dokolo North constituency and the 1st appellant emerged winner with a margin of 464 votes. He was declared the winner by the Electoral Commission (the 2nd appellant) and later gazetted as MP Dokolo North constituency.

The respondent was not satisfied with the outcome of the election and filed an Election Petition in the High Court at Lira alleging that the electoral process in this constituency was not conducted in compliance with the law regulating elections, and that this affected the result of the election in a substantial manner. He further alleged that the 1st appellant personally or through his agents with his knowledge, consent or approval committed numerous election offences.

In response, the appellants denied the allegations saying the elections were conducted in a peaceful, free and fair manner in accordance with the principle of transparency established by the electoral laws, and that the final results of the election reflected the true will of the majority voters, and, that the 2ndappellant complied with the electoral laws.

Judgment was entered in favor of the respondent. Being dissatisfied, the appellants separately appealed to this court. The 1st appellant filed Election Petition Appeal No 39 of 2016 while the 2nd appellant filed Election Petition Appeal No. 95 of 2016. With consent of the parties, the two Appeals were consolidated since they arose out of the same election, same judgment and the grounds of appeal were similar.

Issues

Upon consolidation the following 8 issues were framed out of the grounds of appeal for determination by court;

1. *Whether the learned trial Judge erred in law and fact when he allowed the amended petition filed without leave of court and out of time and thereby overruled the appellants PO and prayer to strike out the same from the record.*

2. *Whether the learned trial Judge erred in law and in fact when he allowed and relied on affidavits commissioned by a commissioner for oaths without a valid practicing certificate and thereby overruled the appellants PO and prayer to strike out the affidavits and expunge them from the record*

3. *Whether the learned trial Judge erred in law and fact when he held that the exclusion of results from Amonirocho polling station was unlawful and affected the results of the election in a substantial manner.*

4. *Whether the learned trial Judge erred in law and fact when he held that 22 unused ballot papers at Awero Wot polling station were unaccounted for and that 1,070 unused ballot papers at Alenga catholic church polling station were unaccounted for and that failure to account for the unused ballot papers was highly significant and affected the results of the election in a substantial manner.*

5. *Whether the learned trial Judge erred in law and fact when he rejected the results as well as declaration of results forms of 8 polling stations of Abenyo primary school, Tetugu primary school, Awongikobo market, Kiima P.A.G church, Acan Pii primary school, Apor catholic church, Bar opila and Otima PAG which were adduced in evidence by the returning officer Mr Ewalu for the reason that they were not sealed by the commissioner for oaths.*

6. *Whether the learned trial Judge erred in law and fact when upon rejection of results as well as the declaration of results forms from the said 8 polling stations adduced by the returning officer went ahead to rely on DRFs of the 8 polling stations which were not signed by the presiding officer and which were adduced in court by the respondent to hold that the inclusion of results from the said 8 polling stations into the final tally was an illegality which affected the results in a substantial manner.*

7. *Whether the learned trial Judge erred in law and in fact when he held that there was invalidation of 1,617 votes from the entire Dokolo North Constituency and that the invalidation was unlawful and thereafter held that the invalidation affected the election in a substantial manner.*

8. *Whether the learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and thereby reached the wrong conclusion that the appellant in appeal number 39 personally committed the illegal practice of bribery at Apeti Catholic Church.*

Representation

At the hearing of the Appeal, the 1st appellant was represented by learned counsel Mr. Kandeebe Ntambirweki, Mr Oryem Okello, Mr Ben Ekarayi and Mr Egalu Emmanuel, the 2nd appellant by learned counsel Ms Akware Asiro Caroline while Mr Gumtwero Justine represented the respondent.

Submissions

Mr Ekarayi for the appellant proposed to argue issues 1 and 2 jointly. In the course of his submission, he conceded that the trial judge had properly exercised his discretion to grant leave and had validated the amendments he was challenging. He accordingly and rightly in our view, abandoned the two issues.

Mr. Oryem argued issues 3 and 4 separately and 5 to 7 jointly in that order and referred to the Record of Appeal in Election Petition Appeal No 39 of 2016.

On ground 3 of the Appeal, counsel submitted that the trial Judge's finding that the Returning Officer was wrong to exclude the results of Amonirocho Polling Station from the final tally, and as a result the respondent was deprived of 254 votes, was erroneous. That the Declaration of Results Form which was presented by the respondent was never received by the Returning Officer and during the night of the election, the respondent, appellant and the Returning Officer had jointly taken a decision to exclude the results of this polling station because they did not find the Declaration of Results Form in the box. To counsel, mathematically the difference in votes between the 1st appellant and the respondent was 464 in the final tally so the 254 votes

claimed by the respondent which was less could not alter the final result. That even going by the DRF presented by the respondent, he had 254 votes at this polling station while the appellant had 230. The difference of 24 votes in favor of the respondent, would not have affected the result of the election in this constituency in a substantial manner, as it would only reduce the 1st appellant's winning margin to 440 votes.

On this issue learned counsel for the 2nd appellant while associating herself with the submissions of counsel for the 1st appellant submitted that although there was noncompliance with the law at Amonirocho Polling Station, this did not affect the result of the election in a substantial manner as it would not change its outcome. Counsel submitted that the respondent had polled 254 votes while the 1st appellant had polled 230 votes in the same polling station and going by the quantitative test, this would not affect the result in a substantial manner. She relied on the decision in ***Hon. Oboth Marksons Jacob V Dr. Otiam Otaala Emmanuel, Court of Appeal Election Petition Appeal No.38 of 2011*** to support her submission.

On ground 4 of the Appeal, counsel for the appellant submitted that as far as the excess ballot papers were concerned, there was no evidence that they benefited the appellant as the Returning Officer himself stated that this was a miscomputation and that the respondent had failed to adduce any evidence to show that the excess ballot papers benefited the appellant. That the miscomputation in respect of the unused ballot papers did not amount to non-compliance with the law and did not in any way affect the results of the election in a substantial manner.

Counsel submitted on grounds 5, 6 and 7 that the said issues related to 8 polling stations where the DR Forms did not bear the signatures of the presiding officers as required by law and the same should have been rejected by the Returning Officer. Counsel submitted that at the trial, the Returning Officer stated that the DR Forms he relied on were signed by the Presiding Officers and he adduced the certified copies in Court. According to counsel, it was erroneous for the trial Judge to reject the 8 DR Forms adduced by the Returning Officer and attached to his affidavit for not being sealed by the Commissioner for Oaths who commissioned the affidavits as this did not render them invalid. He relied on ***Kakooza John Baptist V Electoral Commission and Anor Election Petition Appeal No.0011of 2007*** to support his submission.

Counsel contended that the trial Judge after expunging the affidavit of the returning officer for the aforementioned reasons went ahead to admit and rely on the DR Forms that were not signed by the Presiding Officer but relied on by the respondent.

Counsel argued in ground 7 that the authority to determine whether a ballot paper is valid or invalid is conferred on the Presiding Officer and it was erroneous for the trial Judge to hold that the invalidation was unlawful without examining each ballot paper to determine whether the rejected ballot papers had been properly marked by the voters in accordance with section 49 of the PEA and that the authorized mark had been properly placed so as to determine the intention of the voter. He relied on ***Hon. Oboth Markson Jacob***

V Otaala Emmanuel, Election Appeal No.38 of 2011 to support his submission.

The trial Judge was faulted in ground 8 for holding that the appellant personally committed illegal practices of bribery at Apeti Catholic Church. Counsel for the appellant submitted that the place where the alleged bribery is said to have taken place called Apeti Catholic Church did not exist and the appellant could not have committed bribery by delivering cement at a non-existent place.

Counsel submitted that Charles Oming, the LC1 Chairman of Apeti Village deponed in his affidavit that there was no one by the name of Otima Joseph the respondents' witness who averred that the appellant on the 14th of February 2016, during Sunday mass personally delivered 15 bags of cement as his donation to the chapel. He further submitted that Obote Charles the deacon of Apeti Church of Uganda deponed that there was no donation of cement to the said church delivered by the appellant. Counsel relied on ***Masiko Winfred Komuhangi V Babihuga J. Winnie Election Petition Appeal No.9 of 2002*** where Court stated that the decision of Court should be based on cogency of evidence adduced by a party who seeks judgment in his or her favor and it must be that kind of evidence that is free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's favor.

Ms. Akware for the 2nd appellant submitted that the election at Dokolo North Constituency was free and fair and in compliance with the electoral laws. She

prayed that the appeal be allowed and the judgment of the lower Court be set aside and costs be awarded to the appellants.

On his part counsel for the respondent argued that there was noncompliance by the Presiding Officer for Amonirocho Polling Station because she failed to make a return to the Returning Officer as required by Section 50(1) and (2) of the PEA. That the agent of the respondent was forced by the appellants to agree to the exclusion of results for this polling station. He referred to ***Joy Kabatsi vs Hanifa Kawoya Election Petition Appeal No.25 of 2007*** to support the proposition that the provisions of the law must be followed. Counsel submitted that the quality of the election was compromised and this had a substantial effect on the result of the election.

Responding to arguments in favor of ground 4 of the appeal, counsel for the respondent submitted that the 1070 ballot papers at Alenga Catholic Church polling station were found missing and were not accounted for and the 2nd appellant did not comply with the rules regarding distribution of electoral materials as provided for under S.27 of the PEA which is intended to ensure transparency in the electoral processes. Counsel argued that the failure to account for the 1070 ballot papers supplied to Alenga Catholic Church Poliing Station and the emergence of the 22 excess ballot papers at Awerowot Polling Station cast a shadow over the transparency of the 2nd appellant in conducting the election for MP Dokolo North Constituency.

Counsel for the respondent supported the trial Judge for rejecting the DR Forms for 8 polling stations which in his opinion were improperly adduced as evidence. He further submitted that rule 8 of the Commissioner for Oaths

Rules makes it a requirement that all annextures to an affidavit must be marked and sealed by the Commissioner for Oaths and failure to do so makes the annexture bad in law. He relied on ***Egypt Air Corporation T/A Egypt Air Uganda V Suffish International Food Processors Ltd & Anor Supreme Court Civil Application No.14 of 2000*** to support his submission.

Regarding the allegations of bribery, counsel submitted that it is trite law that a single act of bribery or illegality will lead to the overturning of an election. To him the 1st appellant did not rebut the allegations of bribery because he and the 2nd appellant having been served with the Amended Petition, abandoned their answer to the Petition that had been filed before the amendment and could not rely on the same evidence that had been abandoned. He adverted that the 1st appellant was wrong to fault the trial judge for holding that the 1st appellant bribed the congregation of Apeti Catholic Church with 15 bags of cement as the appellant did not file any evidence after the amendment indicating that the said church does not exist. The respondent maintained that Apeti Catholic Church exists and he prayed that the findings of the trial Judge be upheld and costs be awarded to the respondent.

In rejoinder, it was the case for the 1st appellant that after an amendment, the respondent is at liberty to respond to that amendment or rely on his original pleadings. He submitted that the original affidavits and those filed after the Amended Petition were still valid and only supplemented each other. Counsel reiterated his earlier prayers that the holding of the trial Judge be set aside, the Appeal succeeds with costs awarded the appellants.

Court's consideration

We have carefully perused the Record of Appeal and the judgment of the lower court. We have also considered the submissions of counsel for all the parties and the authorities that were availed to court for which we are grateful.

It is the duty of this court as the first appellate court to delve at some length into and review the evidence as presented in the trial court, analyze the same, evaluate the evidence and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties. See ***Selle and another V. Associated Motor Boat Company Ltd and another (1968) EA 123***. Under rule 30 of the Rules of this court, the Court has power to reappraise *the evidence and draw inferences of fact; and may in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken.* The Supreme Court in ***Kifamunte Henry v Uganda, SCCA NO. 10 of 1997***, emphasized this position of the law when it held that:

> *"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."*

As earlier pointed out, counsel for the 1st appellant having realized that the trial judge had properly exercised his discretion to grant leave and had validated the amendments he was challenging; he abandoned grounds 1 and 2. We shall therefore proceed to resolve the other grounds of appeal.

The 3rd ground concerned the exclusion of the results of Amonirocho Polling Station as having been done unlawfully which, to counsel, affected the results of the election in a substantial manner.

It is common ground that the results for Amonirocho Polling Station were not tallied in the final result of the elections for the Member of Parliament for Dokolo North Constituency. The reason given by the Returning Officer in paragraphs 4 to 10 of his affidavit is that both the tamper proof envelope supposed to contain the results and comments by the Presiding Officer and the DR Forms were missing. That the respondent had a copy of results from this station but he declined to use them because they lacked legitimacy. The Returning Officer averred that even if he had added the results provided by the respondent where he had allegedly won by 50 votes, it would not overturn the result because the appellant was winning by a margin of 400 votes. That the appellant and the respondent in his presence agreed that the results from this polling station be excluded from the final tally. That the respondent had filed an application for a recount which was dismissed.

Section 50 (1) and (2) of the PEA sets out a detailed procedure of how DR Forms are to be handled after the close of polling. Each presiding officer is to fill several DR Forms of which one copy is attached to the report book, one copy is retained for display at the polling station, one sealed copy enclosed in an envelope sent to Returning Officer, a copy is given to each of the candidates agents and one copy deposited and sealed in the ballot box. The ballot box containing the results is sealed in the presence of the candidates or their agents.

Although no evidence was adduced to show that the required copies of the DR Forms were filled and the ballot box was sealed with the required copy inside, what is certain is that the Returning Officer did not receive the DR Forms for Amonirocho Polling Station. The trial judge faulted the Presiding Officer of the said polling station. It is however not certain where and at what point the results disappeared and who was responsible for the disappearance. The disappearance however, amounted to noncompliance with the law.

Section 53(2) of the PEA allows the Returning Officer to add the number of votes cast even though some of the results have not been received provided the candidates or their agents and a Police Officer not below the rank of Inspector of Police are present.

The main question to answer then is whether the exclusion of the results from Amonirocho Polling Station affected the outcome of the election in Dokolo North Constituency in a substantial manner. In ***Dr. Kizza Besigye Vs Yoweri Kaguta Museveni and the Electoral Commission Supreme Court Presidential Election Petition No.1 of 2006***, the Justices of the Supreme Court concurred with Odoki CJ when he held:

> *"... some none compliance or irregularities of the law or principles may occur during the election, but an election should not be annulled unless they have affected the election in a substantial manner. The doctrine of substantial justice is now part of our constitutional jurisprudence. Article 126(2) (e) of the constitution provides that in adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the ..."*

principle, among others, that substantial justice shall be administered without undue regard to technicalities. Courts are therefore, enjoined to disregard irregularities or errors unless they have caused substantial failure of justice"

According to Muge Nelson who was the coordinator of the respondents campaign team, their agent at Amonolocoo Primary School Polling Station gave him a fully signed DRF for this station showing that the respondent had polled 254 votes and the 1st appellant 230. Ewal Benjamin the Returning Officer for this constituency in his affidavit sworn on the 24/5/2016 averred in paragraph 13 thereof that even if he had added up the 254 votes the respondent would still have not emerged the winner because he would get 15,232 votes after adding the 254 from Amonolocoo and the appellant would have gotten 15,442 without adding those of Amonolocco and would still remain the winner.

While concluding on this issue, the learned trial judge held thus; *"My conclusion therefore is that the exclusion of 254 votes belonging to the Petitioner where the difference was 464 votes affected the results in a substantial manner". (sic)*

There was no evidence to the effect that the disappearance of results was repeated in other polling stations in the constituency. The quality of the election in the constituency was as such not compromised.

With due respect we do not agree with the reasoning of the trial Judge because he failed to take into account the fact that the 1st appellant had obtained 230

votes in this same polling station so the difference was only 16 votes between the two candidates. It is these 16 votes win at Amonolocoo Polling Station which the Respondent was deprived of and not 254. This, in our view, did not affect the results of Dokolo North Constituency in a substantial manner.

We, therefore, find that although the Returning Officer could have used the DR Form presented by the respondent and the failure to include the results of Amonolocoo Polling Station in the final total tally of the results for Dokolo North Constituency was an irregularity; it did not affect the final results in a substantial manner so as to warrant nullification of the election.

Therefore ground 3 of the appeal succeeds.

On ground 4 of the appeal, the learned trial judge is faulted for holding that 22 unused ballot papers at Awerowot Polling Station and 1,070 at Alenga Catholic Church Polling Station were unaccounted for which failure was significant and affected the result of the election in a substantial manner.

Counsel for the 1st appellant submitted that the complaint was that the unused ballot papers did not tally with the number of those issued to the polling station and in the absence of accountability, there was illegality. That when the numbers were reconciled, it was found that the number of unused ballot papers was 795 over and above what had been recorded. Counsel invited court to apply the provisions of **Article 68(4)** of the Constitution and Section 47(5) of the PEA and find that what the law requires at the end of polling is a declaration by the Presiding Officer stating the polling station and the number of votes cast in favor of each candidate. To counsel, the election

in these polling stations was free and fair and all the respondents' agents had signed the DRFs without raising any questions, an indication that they agreed with the results as indicated in those forms. That there was no evidence to show that the 1st appellant benefited from the excess ballot papers at Awero wot Polling Station or the unaccounted for papers at Alenga Catholic Church Polling Station which, according to the returning officer, was due to miscomputation.

Counsel for the 2nd appellant invited court to look at the affidavit of the Returning Officer in resolving the issue of the 1,070 unaccounted for ballot papers at Alenga Catholic Church Polling Station. That the figure arose due to an arithmetical error by the Presiding Officer.

In support of the holding by the learned trial judge, counsel for the respondent submitted that Section 27 of the PEA requires every Returning Officer to furnish each Presiding Officer with a statement showing the number of ballot papers supplied to the polling station but this was not done and the result was that 1,092 ballot papers were unaccounted for and this negatively affected the transparency of the election. This, to counsel, was contrary to the requirement of **Article 61** of the Constitution which obligates the Electoral Commission to conduct elections in a free, fair and transparent manner.

Counsel admitted that although they had not looked at the entire Dokolo North Constituency, what had happened at Alenga Catholic Church Polling Station was an indication which made the respondent believe that there was an underhand method used to inflate the number of ballot papers to benefit

a particular candidate. However he was categorical that they were unable to determine which candidate benefited from the manipulation.

The learned trial judge held that failure to account for the 1,070 ballot papers at Alenga Catholic church polling station was a highly significant number which affected the results of the election in a substantial manner given the winning margin of 464 votes. That for this reason the court could not leave the election of the appellant to stand.

Section 27 of the PEA provides that:

> "Every Returning Officer shall within 48 hours prior to the polling day furnish each Presiding Officer in the district with-
>
> a) a sufficient number of ballot papers to cover the number of voters likely to vote at the polling station for which the presiding officer is responsible
>
> b) a statement showing the number of ballot papers supplied under paragraph (a) with the serial number indicated in the statement; and
>
> c) any other necessary materials for the voters to mark the ballot papers and complete the voting process."

This provision of the law, in our view, is intended to ensure that the election is transparent and the materials are the right quantity to cover all the registered voters and are delivered in time. In his evidence Mr Ewal Benjamin the Returning Officer testified that according to the DRF prepared by the Presiding Officer at Alenga Catholic Church Polling Station 2,400 ballot

papers were issued, the 1st appellant, Amoru Paul, got 192, the respondent Okello John Baptist 289, the number of valid votes cast was 481, those invalid were 54, the ballot papers counted were 535, those spoilt were 00 and the number of those used was 795. He explained at page 186 of the Record that there was an error in recording the issued ballot papers as 2,400 and he attributed it to fatigue and hurry. That this was clearly a miscalculation. He was very certain that this error did not affect the outcome of the election.

To the learned trial judge, the issue was not whether the respondent won at Alenga Catholic Church Polling Station but the process where 1,070 ballot papers were unaccounted for where the margin between the appellant and respondent was only 464 votes. That such a matter would not be taken lightly as a mere miscalculation because it cast a lot of doubt in the Dokolo North Constituency election.

Although the learned trial judge rightly, in our view, attributed the error to officials of the 2nd appellant, he was not certain where the 1,070 plus the 22 for Awero Wot Polling Station went. One would be correct to conclude that none of the two candidates benefited from the said 1,092 ballot papers. What is certain is that the said ballot papers were actually not cast as votes for either candidate. This in our view explains why the candidate's agents signed the DR Forms without visiting any misfeasance on any person.

Faced with a similar situation in ***Ngoma Ngime V Electoral Commission and Hon. Winnie Byanyima Election Petition Appeal No.11 of 2002,*** Justice Byamugisha (as she then was) held that:

"All the declaration of results forms that I have examined contain the essential information that the law requires. The agents of each candidate signed the forms. None of them deponed any affidavit to show that the information contained in those forms is not correct. The appellant made no allegation of multiple voting or ballot stuffing. I cannot infer them merely because there were some alterations in figures concerning males and females that voted and other related matters. I do not think the alterations were deliberately done to falsify the results of the poll. If the agents of the appellant were not satisfied with the results that were declared by the presiding officer at the polling stations mentioned, they would have declined to sign the declaration of results form. They did not. An election is a highly charged exercise. The presiding officers have to count the votes cast and declare the results immediately after the close of the poll. In situations like that, mistakes are bound to occur. The law imposes a duty on electoral officials to strictly account for the results of the poll by recording votes cast for each candidate or question in the case of a referendum. An election cannot be set aside unless it is clear that anomalies being raised undermine the conduct of a free and fair election. It has to be shown that it affected the democratic choice of voters. In the circumstances of this case, the learned trial Judge cannot be faulted for rejecting the appellant's allegations about the anomalies in the accountability of used and unused ballot papers or the number of males and females who voted. The electoral officials strictly in my view accounted for votes cast for each candidate. There was no complaint that this was not strictly done. Therefore it was not necessary for the trial

Judge to examine the ballot boxes when there was no dispute about the accountability of votes cast for each candidate. I have found no merit in the allegations." (sic)

While it is important to know the number of ballot papers delivered to each polling station, in our view this can only be an issue if the excess ballot papers are used for the benefit or detriment of any of the candidates which was not the case in this election. Moreover, ***Article 68 (4) (b)*** of the Constitution and Section 47(5) of the PEA Act No 17 of 2005 limits the concern to the number of votes cast in favor of each candidate.

In our view , it is possible for presiding officers to make errors when filling DRFs as the saying goes, to err is human more so during the tallying of election results which takes place in the middle of the night. No indication was shown that the Presiding Officer could have deliberately altered the figures. The learned trial judge was therefore not justified in imputing dishonesty on the 2nd appellant.

Since none of the parties benefited from the error of entering the 1,070 ballot papers in the DRF for Alenga Catholic Church Polling Station as supplied and in the case of the 22 excess ballot papers for Awero Wot Polling Station, no evidence was adduced that there was ballot stuffing at this polling station. At Page 20 of the Record of Appeal, the DRF for Alenga Catholic Church Polling Station indicates that the 1st appellant got 192 and the respondent 289 votes. The total number of valid votes cast was 481 and 54 votes were rejected for being invalid making the total number of ballot papers counted as 535. The . .

number of the ballot papers issued to the station is shown as 2400 while the total number of unused ballot papers is 795. The total number of females who voted were 287 and males 248 adding up to 535.

Section 53 of the PEA places the responsibility on the Returning Officer to tally the results. In so doing, he has to follow the provisions of ***Article 68(2)*** of the Constitution.

At the back page of the DR Form for Alenga Catholic Church Polling Station, Joan Ogwal and Anna Ojede signed as agents for the 1st appellant while Apor Katherine and Sandra Ausio signed as the respondent's agents. All the agents did not raise any objection or concern about the declared results. This was a clear indication that the issue of excess ballot papers did not cause any problem to the election. The most likely problem which the said excess ballot papers would have caused is ballot stuffing. From the figures above, this did not occur. The explanation given that the recording of 2,400 ballot papers as delivered was an error is plausible.

In the result, we find that there were arithmetical errors in the recording of the number of ballot papers which were delivered to Alenga Catholic Church Polling Station and Awero Wot Polling Station but these errors did not in any way affect the results of the election for Dokolo North Constituency in a substantial manner.

Therefore ground 4 of the Appeal succeeds.

The learned trial Judge is faulted in ground 5 for rejecting the results and declaration of results forms of 8 polling stations of Abenyo primary school,

Tetugu primary school, Awongikobo market, Kiima PAG church, Acan Pii primary school, Apor Catholic Church, Bar opila and Otima PAG church which were adduced in evidence by the Returning Officer Mr Ewalu for the reason that they were not sealed by the Commissioner for Oaths. The respondents' complaint in the lower court was that at the 8 listed polling stations, the results were included in the final tally and yet they had not been signed by the respective Presiding Officers. Some of the copies of the DR Forms attached to the affidavit of the respondent in support of the Amended Petition show that the forms were signed only by agents of both the 1st appellant and the respondent. In his submission counsel for the 1st appellant relied on evidence by the returning officer to say that the copies which the Returning Officer used to tally the results were signed. The signed copies were rejected by the trial judge for the reason that they had not been sealed by the Commissioner of Oaths as annextures.

Counsel for the appellant argued that these were public documents and there was no need to adduce them before presenting them to court for admission under Section 73 of the Evidence Act. He relied on ***Kakooza John Baptist V Electoral Commission & Anor Supreme Court Election Petition Appeal No.11 of 2007*** and ***Egypt Air Corporation Vs Suffish International Food Processors Ltd & Anor Civil Application No.14 of 2000*** to buttress his argument that failure for the Commissioner of Oaths to seal annextures to affidavits does not render them invalid. To counsel, the judge should not have, rejected them. He faulted the judge for rejecting affidavits with unsealed

annextures and admitted those which were not signed and adduced by the respondent hence acting with double standards.

In reply, counsel for the respondent submitted that the rules which apply to affidavit evidence are different from those that apply to oral evidence. He relied on ***Kakooza John Baptist & Anor (Supra)*** to support the proposition that annextures to affidavits ought to be sealed by a Commissioner for Oaths. That this was necessary to avoid smuggling documents into court that did not comply with rule 8 of the Commissioners for Oaths Act. To counsel, admitting the said DRF would have the effect of bringing into the record documents that were not present at the time the results of the 8 polling stations were announced.

Rule 8 of the Commissioners for Oaths Rules provides that all exhibits to affidavits shall be securely sealed to the affidavits under the seal of the Commissioner for Oaths and shall be marked with serial number of identification.

In ***Egypt Air Corporation t/a Egypt Air Uganda Vs Suffish International Food Processors Ltd & Anor, SCC Application No. 14 of 2000*** the Supreme Court, while observing that the sealing and marking of annextures to affidavits is a legal requirement which must be adhered to, went ahead to hold that the omission to comply with the requirements of the Oaths (advocates) Act and its regulations is a technicality curable under ***Article 126(2)(e)*** of the Constitution as failure to do so would not occasion any injustice. The same court in ***Rtd. Col Kiiza Besigye Vs Yoweri kaguta***

Museveni& Electoral Commission Presidential Election Petition No 1 of 2006 Odoki CJ while citing **Article 126 (2) (e)** of the Constitution held:

> *"the doctrine of substantial justice is now part of our constitutional jurisprudence... Courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice"*

The court went further to hold that election petitions are very important and as such, courts should take a liberal view of the affidavits so that a Petition is not defeated on technicalities.

Following the above decisions of the Supreme Court, we find that the failure to mark the annextures to the affidavit of Ewal Benjamin was an irregularity which did not occasion any injustice and the trial Judge should have treated it as a mere technicality and accepted the annextures.

It was further submitted for the respondent that the failure to sign the DR Forms contravened ***Article 68(4)*** of the Constitution and Sections 47(5) and 50 of the PEA No. 17 of 2005; which require that the Presiding Officer and candidates' agents sign the DRFs and then announce the results.

The position of the law is that DR Forms which are not signed cannot be relied on in tallying results see; ***Kakooza John Baptist Vs Electoral Commission Supreme Court Election Petition Appeal No.11 of 2007.*** The Returning Officer, Dokolo District, Ewal Benjamin swore an affidavit in which he averred that the DR Forms for the 8 polling stations were duly signed by the Presiding Officer before the results were declared.

We find fully signed copies of the DR Forms for the 8 polling stations attached to his affidavit sworn on 24th May 2016 and marked "A". The copies were sealed and certified by the Electoral Commission.

In the result, ground 5 of the appeal succeeds.

On ground 6 of the appeal, the learned trial Judge is faulted for relying on DR Forms of the 8 polling stations which were not signed by the presiding officer but adduced as evidence in Court by the respondent and held that the inclusion of the results from the said 8 polling stations into the final tally was an illegality which had affected the results in a substantial manner.

It was the case for the appellant that the trial Judge was wrong to rely on uncertified copies of the DR Forms adduced in evidence by the respondent yet the 2nd appellant had presented to Court certified copies and came to the finding that it was an illegality which affected the results of the election in a substantial manner.

In reply, counsel for the respondent supported the trial Judge's holding. He submitted that during scheduling, both appellants did not object to the unsigned DR Forms that were adduced in evidence and although uncertified public documents cannot be admitted in evidence, a proviso to the law is found in section 65 of the Evidence Act CAP 6 where a party proposing to rely on secondary evidence has given notice to the adverse party in possession to produce the said document. He further submitted that the 2nd appellant was requested for certified copies by a letter dated 12th April 2016 but the same were not provided.

We have studied the Record of Proceedings of the lower Court and found that counsel for the 2nd appellant stated that they were prevented from availing the certified copies of the DR Forms to the respondent in time because there was a queue since so many people in the country needed the certified DR Forms to be relied on in Court. It was therefore a question of time that the certified DR Forms could not be availed to the respondent.

It is trite law that the signing of DR Forms by the Presiding Officer is mandatory and failure to do so invalidates the result.

Section 47(5) of the PEA provides that;

"The presiding officer and the candidate or their agents, if any, shall sign and retain a copy of the declaration stating-

a) the polling station

b) the number of votes cast in favor of each candidate;

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."

Upon perusing the DR Forms of the said 8 polling stations marked annexture "A" and attached to the affidavit of Ewal Benjamin, we find that they were all signed by the Presiding Officers as required under Section 47(5) of the PEA and the same were certified .

Section 47(5) of the PEA was considered in ***Joy Kafura Kabatsi V Hanifa Kawooya Supreme Court Election Appeal No.25 of 2011***where Mulenga JSC concluded that

"I am of the view that signing of the DR forms by the presiding officer is mandatory and failure of a presiding officer to sign a declaration of results form under sub-section (5) of the section 47 does by itself invalidate the results of the polling station. In my view a candidate would then only rely on the results shown on the DR forms."

Further in ***Kakooza John Baptist V Electoral Commission & Anor Supreme Court Election Petition Appeal No.11 of 2007,*** Katureebe, JSC held that

"Clearly, the declaration of result form must be signed, at the very least, by the presiding officer, and their candidates or the agents must retain a copy. A signed declaration of result form becomes the basis for the immediate declaration of the results at that polling station. An unsigned declaration of results form cannot be validly used as a basis for declaring results." We follow and adopt respectively the two decisions.

The trial Judge having disregarded the annextures attached to the affidavit of the Returning Officer dated 24th May 2016 further held that *"Learned counsel for the 1st respondent on page 19 of their submissions stated that even if the results of the 8 polling stations were discounted, that the petitioner could lose 1,418 votes while the 1st respondent could lose 1,308 votes. And that in the end, the 1st respondent could win with a bigger margin of 564. With respect, I totally disagree with the above reasoning because what is at stake is whether there was noncompliance with the law or not. It is a matter of the results of the 8 polling stations when the DR Forms had not been signed by the presiding officer. The Court therefore, finds and holds that the 2nd respondent or their officials acted in contravention of the constitutional provisions and PEA (Section*

47 (5)). That was another flaw in the election process which affected the results in a substantial manner."

With due respect, we find that the trial Judge erred when he relied on the unsigned DR Forms adduced by the respondent even after the 2nd appellant had made an effort to produce the signed and certified DR Forms which he disregarded on the basis that they were not sealed.

Therefore ground 6 of the Appeal succeeds.

Counsel for the appellant faulted that trial Judge in ground 7 for holding that there was invalidation of 1,617 votes from the entire Dokolo North Constituency and further that the invalidation was unlawful as it affected the results of the election in a substantial manner. He submitted that the respondent, all the agents and the supervisors of the respondent were present at the different polling stations and signed the DR Forms to confirm what actually transpired at the different polling stations. Further that the DR Forms give a provision for complaints but the respondent's agents never complained that the invalid votes declared by the returning officer were wrong.

The respondent deponed under paragraph 3(a) of the Amended Petition that while counting votes and results for a number of polling stations in Dokolo North Constituency, the 2nd appellant and its servants, agents or employees did not comply with the law relating to the determination of invalid votes which led to 1617 votes in the entire constituency being declared invalid. The respondent also relied on the evidence of Ewayu Charles, Ochero Okello, Muge Nelson and Patrick Ebyau.

Section 49 of the PEA provides for votes that are to be treated as invalid. The said section states thus;

1) A vote cast is invalid if;

   a) The ballot papers are torn in two or more parts

   b) Where the voting is by placing a mark of choice on the ballot paper:-

      i. The voter marks the ballot paper with a mark other than the authorized mark of choice; or

      ii. Places the authorized mark of choice on the ballot paper in such a way that the choice of the voter cannot be reasonably ascertained.

2) A ballot paper shall not be taken as invalid under this section irrespective of where the authorized mark of choice is placed. So long as the voter's choice can be reasonably ascertained.

3) A vote which is invalid shall not be counted in determining the results of the election.

In resolving this issue, the learned trial Judge held that *"As far as this case is concerned, one can only imagine what such noncompliance caused because a figure of 1617 votes declared as invalid amidst complaints and under unclear circumstances compared to the margin of 464 votes, is almost four times the difference between the declared winner and loser. It casts a lot of doubt in the mind of this Court as to whether the electoral officials in those polling stations*

clearly understood what invalid votes were in the context of s.49(2) of the PEA. The petitioner's case has on this ground among others, passed both quantitative and qualitative test to determine a substantial effect." (sic)

We have examined the affidavits of the respondent's agents namely Ewayu Charles, Ochero Okello, Muge Nelson and Patrick Ebyau and find that the said witnesses alleged that they witnessed a number of ballot papers being unreasonably rejected by the Presiding Officer and their complaints to the Returning Officers and Polling Assistants were never addressed.

We agree with counsel for the 1st appellant's submission that DR Forms have a provision for complaints but none of the respondent's agents complained that the invalid votes declared by the Returning Officer were wrongly declared invalid and that most of them belonged to the respondent. The polling assistants did not also register any complaint with the 2nd appellant. This casts doubt on the genuiness of the complaint made much later.

Section 47(3) of the PEA provides that a candidate may be present in person or through his or her representative or polling agent at each polling station, and at the place where the returning officer tallies the number of votes for each candidate or conducts a recount under Section 54 for the purposes of safeguarding the interests of the candidate with regard to all stages of the counting, tallying or recounting processes.

The evidence on record shows that the respondent had his agents at the different polling stations. The agents did not record any complaint with the 2nd appellant but merely signed DR Forms confirming the results of the

different polling stations. Merely deponing in their affidavits that they made complaints to the Returning Officers and polling assistants which were not addressed without proof of the said complaints is not enough.

Section 48 of the PEA states thus;

> (1) A candidate or a candidate's agent or any voter present may raise any objection during the counting of the votes, and each presiding officer shall-
>
> (a) Keep a record, in the report book, of every objection made by any candidate or a candidate's agent or any voter present, to any ballot paper found in the ballot box; and
>
> (b) Decide every question arising out of the objection.
>
> (2) Every objection recorded under subsection (1) shall be numbered and a corresponding number placed on the back of the ballot paper to which it relates and the ballot paper shall be initialed by the presiding officer and it shall be witnessed by the polling assistants and candidates' agents.
>
> (3) The decision of a presiding officer in respect of an objection raised under subsection (1) is final, subject to reversal only on recount or on a petition questioning the election return.

We have carefully studied the Record of the trial Court and found that there is no documentary evidence indicating that the respondent and his agents raised complaints to the Presiding Officer. Further the DR Forms bear a

provision requiring an agent to sign and where he or she refuses to sign, he must state the reasons for his refusal and where the agent refuses to state the reasons for his refusal to sign then the Presiding Officer must record the facts of the refusal or failure.

The respondent's agents did neither of the above but only signed the DR Forms which was an indication that they were satisfied with the results. It is not enough for one to depone that a number of votes were unreasonably rejected by the Returning Officer or a certain number of votes were rejected as invalid yet they were valid, one has to produce cogent evidence to prove the allegations.

In the result, we do not agree with the trial Judge's holding that there was noncompliance which affected the results of the election in a substantial manner because a figure of 1,617 votes was declared invalid amidst complaints. We are of the considered view that the respondent did not produce sufficient evidence to prove this allegation to the satisfaction of Court.

Therefore ground 7 of the appeal succeeds.

Regarding ground 8 of the Appeal, the learned trial Judge is faulted for holding that the 1st appellant personally committed the illegal practice of bribery at Apeti Catholic Church.

It was the 1st appellant's evidence that Apeti Catholic Church where the alleged bribery is said to have taken place did not exist and the appellant could not have committed it by delivering cement to a non-existent place. He relied on the evidence of Charles Oming, the LC1 Chairman of Apeti Village

who deponed in his affidavit that there is no one by the name of Otima Joseph the respondents' witness who averred that the appellant on the 14th of February 2016, during Sunday mass personally delivered 15 bags of cement as his donation to the chapel and Obote Charles the deacon of Apeti Church of Uganda deponed that there was no donation of cement to the said church delivered by the 1st appellant.

In reply, the respondent submitted that the 1st appellant cannot fault the trial judge for holding that the 1st appellant bribed the congregation of Apeti Catholic Church with 15 bags of cement as the appellant did not file any evidence after being served with the Amended Petition indicating that the said church does not exist. The respondent maintained that Apeti Catholic Church exists.

The 1st appellant in rejoinder submitted that after an amendment, the respondent is at liberty to respond to it or to rely on his original pleadings. He submitted that the original affidavits and those filed after the Amended Petition were still valid and only supplemented each other.

Bribery is defined as an offence committed by one who gives or promises to give or offers money or valuable inducement to a voter, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, or as a reward to the voter for having voted in a particular way or abstained from voting. See ***Black's Law Dictionary 6th Edition.***

Section 68 (1) of the P.E.A provides that:

"a person who either before or during an election with intent either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy two currency points or to imprisonment not exceeding three years or both".

The Supreme Court in ***Col. (Rtd). Dr.Besigye Kizza V. Museveni Yoweri Kaguta & Anor. Election Petition No. 1 of 2001*** outlined the 3 ingredients of the offence of election bribery. There ought to be evidence that; a gift was given to a voter, the gift was given by a candidate or his agent and that it was given with the intention of inducing the person to vote.

Halsbury's Laws of England 4th Edition Volume 15, Paragraph 695 provides as follows:

".... clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive"

In ***Bakaluba Peter Mukasa V Nambooze Betty Bakireke, Supreme Court Election Petition Appeal No.04 of 2009,*** Court held that:

"Court is alive to the fact that bribery is such a grave illegal practice and as such it must be given serious consideration. The standard of proof is required to be slightly higher than that of

the ordinary civil cases. It does not; however call for proving the bribery beyond reasonable doubt as in the case of criminal cases. What is required is proof to the satisfaction of Court."

In determining the issue of bribery, the trial Judge mainly relied on the evidence of Otima Joseph who deponed that he is a member of Apeti Catholic Church in Adok parish and on 14th February 2016, while at Apeti Catholic Church during the Sunday mass, the 1st appellant physically delivered 15 bags of cement as his donation to the chapel. That after handing over the donation, the 1st appellant campaigned in the church and requested the congregation to vote for him on 18th February 2016.

The trial Judge further stated that the 1st respondent did not swear any affidavit in rebuttal to the averments by Otima Joseph. Instead someone called Oming Charles Leonard swore an affidavit giving vague answers that there was no one called Otima Joseph in Aputi "B" Village and that he was not aware of any donation in any form given to the voters or church members.

We have examined Oming Charles Leonard's affidavit which is titled as "Affidavit in rebuttal". He deponed that he is the LC1 of Apeti "B" Village, Apye Parish, Adok Sub County in Dokolo District. That the allegations in the entire affidavit of Otima Joseph are false as there is no person by the name of Otima Joseph in Apeti "B" Village. That the allegations in paragraphs 3, 4 and 5 in Otima's affidavit are false as Paul Amoru did not make any pledge or give any donation to them as alleged. That he is not aware of any donation in any form given to the voters or any church members in his area.

The trial Judge was however not satisfied with the reply of Oming Charles Leonard. In his opinion, Oming Charles Leonard could not challenge the affidavit of Otima Joseph as he did not state in his own affidavit whether he was a member of Aputi Catholic Church and whether he was present at Church during the Sunday mass on 14th February 2016 when the donation in question was being delivered.

In ***Kamba Saleh Moses V Hon. Namuyangu Jennifer Court of Appeal Election Petition Appeal No.0027 of 2011,*** this Court held that:

> ***"in determining election matters involving bribery allegations the law requires caution on the part of Court to subject each allegation of bribery to thorough and high level scrutiny and to be alive to the fact that in an Election Petition, in which the prize is political power, witnesses may easily resort to telling lies in their evidence, in order to secure judicial victory for their preferred candidate."***

Otima Joseph deponed that the said 15 bags of cement were personally donated by the 1st appellant during Sunday mass and handed over the donation to the congregation however his evidence was not corroborated at all. We are of the considered view that since the donation was made during mass, then Otima Joseph's evidence should have been corroborated by other members of the congregation or at least by the church priest.

This Court is alive to the fact that no particular number of witnesses is required to prove any fact (***see section 133 of the Evidence Act).*** However

in the instant case, the trial Judge relied on the evidence of Otima Joseph to find that bribery had been proved against the 1st appellant and for no valid reason down played the evidence of the LC1 chairman Oming Charles which controverted Otima's evidence. Election matters being matters of general importance we find that the trial Judge ought to have looked for independent evidence from an independent witness to corroborate the evidence of Otima Joseph or Oming Charles. We find no such evidence on record.

In ***Wadada Rogers V Sasaga Isaiah Jonny & Electoral Commission, Court of Appeal Election Petition No.31 of 2011,*** this Court held that no number of witnesses is required to prove a fact. In election matters partisan witnesses have a tendency to exaggerate claims about what might have happened during elections. In such situations, it is necessary to look for 'other' evidence from an independent source to confirm the truthfulness or falsity of the allegation.

In the instant case there was no such 'other' evidence from an independent source to corroborate Otima Joseph's evidence. Therefore proof of the allegation of bribery was not established to the standard required in election matters.

Therefore ground 8 of the appeal succeeds.

In the result, the appeal succeeds. We make the following declarations and orders;

1. The decision and orders of the trial Judge are hereby set aside.

2. The 1st appellant is the validly elected Member of Parliament for Dokolo North Constituency, Dokolo district.
3. The respondent shall bear the costs of the Appeal and those at the lower Court

We so order

Dated this 28th day of August 2017

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HON. MR. JUSTICE S.B.K KAVUMA

DEPUTY CHIEF JUSTICE

.....

HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

.....

HON. MR. JUSTICE ALFONSE OWINY DOLLO

JUSTICE OF APPEAL