

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO.55 OF 2016
(Arising from Masaka High Court Election Petition No. 009 of 2016)

NINSIIMA BOAZ KASIRABO **APPELLANT**

THE ELECTORAL COMMISSION **CROSS-APPELLANT**

VERSUS

MPUUGA DAVID **RESPONDENT**

BEFORE: HON. JUSTICE S.B.K KAVUMA, DCJ
HON. JUSTICE ELIZABETH MUSOKE, JA ✓
HON. JUSTICE CHEBORION BARISHAKI, JA

(Appeal from the Judgment and Orders of the High Court of Uganda sitting at Masaka before Hon. Justice Margaret Tibulya dated 29th July, 2016, in Election Petition No.009 of 2016).

JUDGMENT

This is a first Appeal arising from the Judgment and Orders of the High Court at Masaka, where the appellant's election as the Member of Parliament for Kooki County Constituency was nullified, fresh elections ordered and costs were awarded to the petitioner/respondent.

Background to the Appeal:-

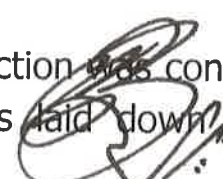
On the 18th February, 2016, the cross-appellant conducted National General Parliamentary Elections where the appellant, the respondent and four other candidates contested for the Directly Elected Member of Parliament seat for Kooki County Constituency, Rakai District. The cross-appellant returned the appellant the winner of the election with 12,672 against the respondent's 11,776 votes, with a margin of 896 votes. The 1st appellant's name was published in the Uganda Gazette of 3rd March, 2016.

Being dissatisfied with the outcome of the election, the respondent petitioned the High Court at Masaka, challenging the results and raising allegations of non-compliance with provisions of the law by the appellant and the cross-appellant. Further, that the non-compliance affected the results of the election in a substantial manner. Specifically, the respondent alleged that:-

1. The cross-appellant allowed stick wielding and gun wielding men to be present at various polling stations to intimidate voters and the respondent's Polling Agents,
2. There was ballot stuffing and multiple voting at various polling stations,
3. The cross-appellant allowed voting to continue beyond 4:00 PM without formal communication for extension of time,
4. The cross-appellant allowed people who did not appear on the Voters Register to vote and did not use the Biometric Data Machines during the voting,
5. The cross-appellant compromised the principle of impartiality and transparency when it failed to restrain the appellant from carrying out illegal activities.
6. Illegalities were committed in connection with the election by the appellant and by other people with his knowledge and consent.

The appellant filed an Answer to the Petition in which he denied the allegations raised by the respondent. He denied any involvement in illegal practices personally or through his authorized agents. Further, that the election was conducted in compliance with the law.

In its reply, the cross-appellant contended that the election was conducted in compliance with the provisions and the principles laid down in the electoral laws of Uganda.



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The following issues were agreed upon for determination by the trial Court:

- 1. Whether there was non-compliance with Electoral Laws for the election of the Member of Parliament for Kooki Constituency.**
- 2. Whether such non-compliance affected the results in a substantial manner.**
- 3. What are the remedies available to the parties.**

The trial Judge passed Judgment in favour of the respondent on the basis that there was non-compliance with the provisions of the law in the conduct of the election. She thereupon nullified the appellant's election and ordered for a fresh election to be conducted in the constituency. The appellant and the cross-appellant were dissatisfied with the decision and appealed to this Court.

The Memorandum of appeal filed by the appellant raised 6 grounds of appeal as follows:-

1. The Learned trial Judge erred in law and fact by relying on and making findings in favour of the petitioner on matters that were not pleaded, and this caused a miscarriage of justice.
2. The Learned trial Judge erred in law and fact when she disregarded evidence of the respondent's witnesses and the written submissions of their lawyers and this occasioned a miscarriage of justice.
3. The Learned trial Judge made an error of judgment by ignoring to subject the evidence on record to exhaustive evaluation and scrutiny, and this occasioned a miscarriage of justice.
4. The Learned trial Judge erred in law and fact when she relied on otherwise inadmissible evidence and this occasioned a miscarriage of justice.
5. The Learned trial Judge erred in law and fact when she relied on matters outside the record of proceedings and this occasioned a miscarriage of justice,

6. The Learned trial Judge erred in law when she found there was non-compliance with the electoral laws, which affected the result of the election in a substantial manner. (sic)

The cross-appellant raised 5 grounds of appeal as follows:-

1. The Learned trial Judge erred in law and fact when she failed to evaluate the evidence on record which occasioned a miscarriage of justice to the cross-appellant.
2. The Learned trial Judge erred in law and fact when she held that there were armed men at the various polling stations in the Constituency who intimidated voters, chased away the respondent's agents, stuffed ballot papers and forced agents to sign DR Forms.
3. The Learned trial Judge erred in law and fact when she found that there was multiple voting, falsification of DR Forms, no verification of voters from Register/BVVK and ballot stuffing at the polling stations in the constituency.
4. The Learned trial Judge erred in law and fact when she found that there was wrong tallying and non-tallying figures of results at the various polling stations in the constituency.
5. The Learned trial Judge erred in law and fact when she found that there was non-compliance with the electoral laws which affected the result of the election in a substantial manner.

At the scheduling conference held at this Court, the following issues were agreed upon for determination:

1. Whether the Learned trial Judge erred in law and fact when she evaluated the evidence on record and came to a conclusion that the appellant was not validly elected Member of Parliament for Kooki County, Rakai District.
2. Whether the Learned trial Judge failed to properly evaluate the evidence on record and came to a wrong conclusion that there was non-compliance with the electoral laws in the conduct of elections for directly elected Member of Parliament for Kooki County, Rakai District

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and that the non-compliance affected the overall result of the election in a substantial manner.

3. Whether the Learned trial Judge relied on matters that were not pleaded and matters that were outside the record of proceedings thereby arriving at an erroneous conclusion.
4. Whether the Learned trial Judge disregarded the evidence of the appellant's witnesses and the appellant's submissions and came to a conclusion that the appellant was not the validly elected Member of Parliament for Kooki County, Rakai District.
5. Whether the Learned trial Judge relied on inadmissible evidence in arriving at the conclusion that the appellant was not the validly elected Member of Parliament for Kooki County, Rakai District.

Representation:-

At the hearing of the Appeal, the appellant was represented by Mr. Frank Kanduho, the cross-appellant was represented by Mr. Kandeebe Ntambirweki while Mr. Katumba represented the respondent.

Appellant's submissions:-

Counsel for the appellant adopted his conferencing notes filed in this Court and made highlights of the same when the appeal came up for hearing. He argued issues 1, 3, 4 and 5 together and concluded with issue 2.

Counsel submitted that the trial Judge erred in finding that all the appellant's witnesses put up plain denials as opposed to the detailed account of events by the respondent's witnesses. It was his contention that if the trial Judge had considered the submissions of counsel for the appellant and subjected the evidence on record to exhaustive scrutiny, she would not have come to the conclusion she arrived at. Counsel made reference to the evidence of Bukenya Mayanja (DW2), and submitted that the trial Judge did not take into consideration his unchallenged alibi that he was sick and stayed at home on polling day. To the contrary, the trial Judge decided to believe the uncorroborated evidence of Tumwine Hamidu

(PW9) who had alleged the presence of DW2 and other unknown army men at 30 polling stations.

In regard to the allegations of multiple voting, counsel submitted that there was no proof that any person, whether a registered voter or not, voted more than once. The trial Judge ought not to have believed the evidence of Nsereko John Fred (PW17) and Mugula Francis (PW13) that armed men ordered the Presiding Officer and Polling Assistants at Nkundi Full Gospel Church polling station to tick all the unused ballots in favour of the appellant. He submitted that the evidence of the said witnesses was not in line with the contents of the tally sheets and the Declaration of Results Forms (DRFs) which indicated that the total number of registered voters at the said polling station was 578, while the total number of voter turn up was 429. Further, that while PW17 stated that one armed man turned up at the polling station, PW13's evidence was that the armed man was in the company of another soldier. Counsel was of the view that the trial Judge ought not to have believed such contradictory evidence.

Counsel further submitted that if the trial Judge had properly evaluated the evidence on record, she would have disbelieved the evidence of Ssenkasi Ibrahim (PW5) and Akankwasa Julius (PW10) that army men at their respective polling stations ordered that no ballot papers should remain unticked. This was considering that contrary to the above evidence, some ballot papers remained unused at several polling stations.

On ballot stuffing, counsel for the appellant made reference to the evidence of Baguma Daniel (DW11), the District Returning Officer, that the results of Kobukurura were cancelled because the total number of votes cast exceeded the total number of registered voters by two votes. However, that there was no evidence of ballot stuffing and the trial Judge was not justified to infer the same from arithmetic computation flaws

Counsel submitted that although Tumwine Hamidu (PW9) made an attempt to purport ballot stuffing, he was materially discredited and the trial court ought not to have relied on his evidence. In that view, counsel submitted

that while PW9 stated in his affidavit that ballot stuffing was done by two army officers for the Presidential Candidates and the District Woman Member of Parliament, during cross examination he testified that ballot papers were ticked and stuffed in all the three ballot boxes.

Counsel made reference to the evidence of Ssenjumba Benon (PW18) that at Kazinga polling station, 25 votes were added to the tallied votes in favour of the appellant. He submitted that the above neither amounted to ballot stuffing or multiple voting. In addition, that the said allegation was an afterthought by the respondent and had initially not been pleaded. Counsel relied on ***Anthony Ngoo & Anor Versus Kitinda Kimaro, Court of Appeal Civil Appeal No.25 of 2012***, and submitted that cases must be decided on the issues on record and pleaded.

It was counsel's further contention that the evidence of Tumwine Hamidu (PW9) that he moved to 30 polling stations with the army men was only theoretical. Counsel submitted that while PW9 testified that his motorcycle was hired at 3:30PM, it was impossible for him to have covered 30 polling stations between 3:30 to 4:00p.m. It was his submission that analysis of PW9's evidence shows that it took him not less than 5 minutes at each polling station. In that regard, that it was impossible for him to have gone to 32 polling stations in two Sub Counties of Kyalulangira and Kiziba within 30 minutes. Further, considering that the alleged illegal practices by the army men were widespread in the whole constituency, it would have been expected that more witnesses ought to have corroborated PW9's evidence.

Counsel further submitted that the trial Judge ought not to have taken into consideration the contradictory evidence of Kaweesi Isaac (PW6), Ssekawunde Ali Kajeerero (PW7), Ssebandeke Swaibu aka Dona (PW8) and Byamukama Kenneth (PW12) in regard to alleged irregularities at Kabashambo and Rwambajjo polling stations. First, that on one hand, PW6 testified that he witnessed the pre-ticking of ballots at Rwambajjo polling station and on the other, he stated that he did not witness the same. Further, that PW6 stated that he witnessed the ballot stuffing with PW8.

However, PW8 did not make mention of PW6 or the people who apparently carried out the ballot stuffing. Further, that the evidence of the two witnesses was different, yet they had apparently witnessed ballot stuffing at the same polling station. Counsel contended that the trial Judge did not take into consideration the evidence of Asiimwe Justus (DW10) the Presiding Officer of Rwambajjo polling Station who disassociated himself from the alleged illegal activities at the polling station yet it was alleged that he had been tortured by the army men.

In regard to Kobukurura polling Station, counsel conceded that the tally of 524 ballot papers as compared to 524 registered voters was an act of non-compliance. However, that it was not logical to argue that the said irregularity affected the results of the election in a substantial manner.

On allegations of falsification of Declaration of Results Forms (DRFs), counsel submitted that this matter was not pleaded in the Petition and was therefore extraneous. In that regard, that the trial Judge considered and believed inadmissible evidence of PW11, PW15, PW17 and PW18 that there was falsification of DRFs. Further, that while the trial Judge made findings on allegations of wrong tallying or non-tallying of figures at some polling stations, the same allegations were not pleaded in the Petition. Therefore, that the trial Judge made findings on extraneous matters which were not the subject of the Petition.

Counsel submitted that the evidence of Natukunda Mackline (PW2) that she did not vote but her name was ticked as having voted at Rwambajjo Polling Station was inadmissible. First, that the petitioner did not personally know about the alleged sickness of PW2 on polling day and only got to know from Ssebandeke Donah (PW8). Further, that contrary to her evidence that she was admitted to Rakai Hospital on the 8th February, 2016, PW2's Medical Report tendered in evidence indicates that she was admitted to Kyotera Medical Centre on 14th February, 2016; the Medical Form is in respect of out-patient services and not labour related complications as alleged by her and from the face of the Form the name of



the patient is not known. Further, that the evidence of PW2 distances her from Rakai Hospital and, therefore, depicts PW8 as a liar.

Counsel further submitted that the trial Judge relied on inadmissible death certificates regarding the alleged death of Hafisa Nalubega, Kato John Wilson, Rushongora Yohana, Tibanyendera and Katembeka Yosamu. He contended that the persons who presented the certificates did not have capacity to present them because they were not relatives of the deceased persons and were not present at the death or burial of the persons mentioned in the certificates. He indicated that neither of the witnesses who presented the death certificates were in a position to confirm the death of the persons they allege had died prior to the election. Further, that the said Death Certificates were issued by the Parish Chief who did not have the mandate of issuing Death Certificates.

Cross-appellant's submissions:

Counsel for the cross-appellant associated himself with the submissions of counsel for the appellant. He submitted that the trial Judge did not properly evaluate the evidence in regard to allegations of ballot stuffing. He relied on *Epetait Francis Versus Dr. Isamat Abraham, Court of Appeal Election Petition Appeal No. 12/2011*, and submitted that evidence of ballot stuffing must be real and there must be proof that more ballots were found in the ballot box than the people who turned up to vote. He stated that in the present case, it was not proved that extra ballots were found in ballot boxes at any polling station.

With regard to Kobukurura polling station, counsel submitted that while results were cancelled because there were two extra votes indicated on the DRF, that was not conclusive evidence that there were illegal votes at the polling station. It was counsel's contention that the above cancellation could be attributed to errors in the calculation of votes while filling the DRF.

With regard to the allegations of the presence of armed men who, allegedly, intimidated voters, chased away the respondent's agents from polling stations, stuffed ballot boxes with ballot papers and forced the respondent's agents to sign DRFs, counsel submitted that the respondent's witnesses did not mention names of people who were ordered to vote more than once. Further, that the respondent's agents who claimed to have been chased from polling stations admitted to having signed DRFs.

Counsel further submitted that in reaching her decision, the trial Judge had not applied either the qualitative or quantitative tests in determining whether the irregularities, if any, affected the results of the election in a substantial manner. Counsel relied on *Kiiza Besigye Versus Yoweri Kaguta Museveni, Supreme Court Presidential Petition No. 1 of 2006*, and submitted that the trial Judge ought to have subjected the irregularities that had been proved to her satisfaction to either the qualitative or the quantitative tests.

Respondent's submissions:

In reply, counsel for the respondent submitted that in arriving at her decision, the trial Judge properly evaluated the evidence and came to the right conclusion that the appellant was not validly elected as Member of Parliament.

He submitted that there was massive intimidation of voters at different polling stations in the constituency. Counsel made reference to the evidence of PW9 that he was hired by 3 people with a gun and a stick, and that they moved to 32 polling stations while intimidating voters. Further, that the above evidence was corroborated by that of Florence Nansamba (PW3) the respondent's agent at Kamate polling Station and Bukonya Wilson (PW15) who was the respondent's agent at Kamate Full Gospel Church. Counsel contended that the discrepancies in time as to when the gun men arrived at the polling stations could be attributed to the fact that the witnesses were not observant in terms of telling what time it was during the polling exercise.

Counsel further submitted that another incidence of intimidation was in regard to Nakintu Sarah (PW4), who was the respondent's Polling Agent at Kibaale S.S polling station. It was her testimony that on the night before the election, she, together with colleagues she was travelling with were arrested by armed men and detained at a Police Station. That on the 18th February, some of the armed men who had arrested them went to her polling station and intimidated voters into voting for NRM candidates. Counsel submitted that Akankwasa Julius (PW10) also testified about intimidation by the same gun wielding men at Dyango Primary School polling station.

On ballot stuffing, counsel submitted that at Nkundi Full Gospel Church, there was unregulated voting without checking in the Voters Register by use of the Biometric Machine. Further that due to the intimidation by army men at the polling station, voters were forced to tick ballot papers in favour of NRM candidates beyond the prescribed time allowed for voting. He submitted that the said ballot papers were then stuffed in ballot boxes. Counsel relied on ***Toolit Simon Akecha Versus Oulanya Jacob L'Okori & anor, Court of Appeal Election Petition Appeal No.19 of 2011***, and submitted that the above was evidence of ballot stuffing during the election.

Counsel further submitted that the trial Judge analyzed the evidence of PW9 and believed his account of events as opposed to the evidence of DW2. Counsel contended that the trial Judge could not have believed the evidence of DW2 who was a partisan witness of the appellant as opposed to PW9 who was an independent witness.

As to whether the non compliance affected the results of the election in a substantial manner, counsel submitted that the trial Judge took into consideration all the acts of intimidation at polling stations and instances of ballot stuffing, and so did not find it necessary to apply either the qualitative or quantitative tests. Counsel was of the view that if either of the two tests was to be applied, the qualitative test would best suit the

circumstances of this case. He invited this Court to re evaluate the evidence and apply the appropriate test to determine if the irregularities in the election affected the result in a substantial manner.

Rejoinder:

In rejoinder, counsel for the appellant submitted that it was not possible that the trial Judge could have rightly weighed the validity of an electoral exercise without applying either the qualitative or the quantitative tests. Counsel was of the view that by the trial Judge neglecting to apply the tests, she caused the parties to suffer injustice.

Counsel further submitted that contrary to counsel for the respondent's submission, PW9 was a partisan witness. In his view, it was questionable why he would choose to report the alleged intimidation and illegal practices to the respondent alone yet there were 5 candidates vying for the same seat and who could have equally been aggrieved with the irregularities.

In his rejoinder, counsel for the cross-appellant submitted that while PW9 alleged that he did not know the other boda boda motorists who had been hired by the army men, he admitted that they had all been hired on the same terms. Counsel contended that if such motorists existed, they ought to have been known to PW9 and would have been hired from the same boda boda stage. In that regard, that the evidence of PW9 was marred with lies and ought not to have been believed by the trial Judge.

Court's decision:

We have perused the record of the lower court and taken into consideration the submissions and authorities relied upon by counsel of all the parties to the Appeal.

This being an Appeal of 1st instance, the duty of this Court is set out under Rule 30 of the Judicature (Court of Appeal Rules) Directions, S1 13-10, as being to reappraise evidence and draw inferences of fact from the evidence adduced at trial. **(See *Banco Espanol Versus Bank of Uganda*;**

Supreme Court Civil Appeal No.8 of 1998). In re-examining and re-evaluating the evidence, we caution ourselves of the fact that in Petitions of this nature, witnesses usually tend to be partisan in giving evidence in support of the candidate of their choice considering that elections are highly politicized contests. ***(See Rt. Col. Dr. Kizza Besigye Versus Yoweri Kaguta Museveni & anor, Supreme Court Presidential Election Petition No.1 of 2001)***.

The burden of proof lies on the petitioner (the respondent herein) to prove the assertions raised in the Petition to the satisfaction of court, and the standard of proof required is proof on a balance of probabilities as stated under section 61 of the Parliamentary Elections Act. ***(See Paul Mwiru Versus Hon. Igeme Nathan Nabeta Samson & 2 Ors, Court of Appeal Election Petition Appeal No. 6 of 2011)***.

Bearing the above principles of law in mind, we now proceed to address the issues raised in the Appeal to determine whether the election in Kooki County Constituency was free and fair and if the findings of the trial Judge should be allowed to stand.

Intimidation of voters by armed men:

One of the complaints raised by the respondent at trial was an allegation as to intimidation of voters by army men at several polling stations, who apparently intimidated voters to vote for the respondent and chased some of the respondent's agents from polling stations.

Section 42(1) of the Parliamentary Elections Act, provides against the presence of persons with any arms at polling stations. It provides as follows:

"A person shall not arm himself during any part of polling day, with any arms or ammunition or approach within one kilometer of a polling station, with arms and ammunition unless called upon to do so by lawful authority or where he or she is ordinarily entitled by virtue of his or her office to carry arms".

The above provision is intended to provide an atmosphere of freedom at or near polling stations during polling and to ensure that voters are not threatened during the polling process. **(See Rt. Col. Dr. Kizza Besigye Versus Yoweri Kaguta Museveni & anor, Supreme Court Presidential Election Petition No. 001 of 2001).**

Further, the Constitution of the Republic of Uganda and the Electoral Commission Act mandate the cross-appellant to ensure that elections are conducted under conditions of freedom and fairness.

The respondent relied on the evidence of several witnesses to prove the presence of gun wielding men at 32 polling stations in the constituency.

Tumwine Hamidu (PW9), a boda boda rider stationed at Kibaale Stage, Rakai District testified that on polling day at about 3:00pm, he was hired by DW2, who was in the company of two men dressed in army Uniform and with firearms and another in civilian clothes with a stick. He stated that he was given instructions, together with two other boda boda riders, to take DW2 and his company to each polling station within Kiziba and Kyalulangira Sub-counties. Whenever they reached a polling station, one of the armed men would engage the Presiding Officer in a conversation, and would thereafter announce to voters that the President had advised that voting would go on till 8:00pm. He testified that at Kabukurura polling station, one of the army men with a gun commanded everyone to sit down while threatening to shoot anyone who moved and that all people sat down in fear. Further, that the army men, together with DW2 ticked ballot papers in favour of NRM candidates, including the appellant. It was his testimony that at Dyago, Kamate, Kabashambo, Rwambajjo, Nkundi Full Gospel Church, Kizinga and Kyalulangira Catholic Church polling stations, the army men instructed voters and officials of the cross-appellant that voting should go on till 8:00pm, their details should not be verified and that voters should only vote for NRM candidates.

Akankwasa Julius (PW10), a voter at Dyango Primary School polling station stated that on polling day, he cast his vote at around 12:00 noon and went back home. At around 4:30p.m., he went back to the polling station to witness vote counting. It was his testimony that before vote counting could begin, armed men arrived at the polling station and told the Presiding Officer to let every person at the polling station vote afresh and only vote for NRM candidates. Further, that the Presiding Officer was under threat and he allowed people to start voting afresh.

The respondent's agents/supervisors at various polling stations alleged the presence of gunmen at their respective polling stations. These were: Nansamba Florence (PW3) Polling Agent at Kamate polling station, Nakintu Sarah (PW4) Polling Agent at Kibaale S.S Polling Station, Ssenkasi Ibrahim (PW5) Polling Agent at Dyango Primary School Polling Station, Kaweesi Isaac (PW6) Polling Agent at Kabashambo Primary School polling station, Ssekawunde Ali Kajeerero (PW7) Polling Agent at Rwambajjo Primary School polling station, Ssebandeke Swaibu aka Dona (PW8) Polling Agent at Rwambajjo Primary School Polling Station, Kawalya Wilson (PW11) Polling Agent at Kabukurura polling station, Byamukama Kenneth (PW12) Parish Supervisor for Rwembajjo Parish, Mugula Francis (PW13) Polling Agent at Nkundi Full Gospel Church Polling Station, Lukwata Gerald (PW14) Polling Agent at Dyango Polling Station, Bukenya Lubuuka Wilson (PW15) Polling Agent at Kamate Full Gospel Church polling station, Abaho Julius (PW16) Polling Supervisor at Rwambajjo and Dyango Parishes in Kyalulangira Sub county, Nsereko John Fred (PW17) Polling Agent at Nkundi Full Gospel Church, Ssenjumba Benon (PW18) Polling Agent at Kizinga Polling Station. Briefly, the above witnesses stated that on polling day, armed men invaded their respective polling stations; they intimidated voters and polling officials; ordered people at the polling stations to vote for NRM candidates including the appellant; and stuffed ballot boxes with ballot papers.

On the other hand, Bukenya Charles (DW2) who was pointed out by PW9 as having been in the company of the armed men denied the allegations. He testified that he knew DW1. However, that he did not see or meet him at any one time on polling day. It was his evidence that on polling day, he restricted all his movements to his home because he was sick. Further, that he did not get in contact with any army men on the said day.

Kasana Paul (DW3) a Presiding Officer at Kamate Full Gospel Church Polling Station, Twikirize Jovinta (DW4) the appellant's Polling Agent at Dyango Primary School polling Station, Ndyabahika Steven (DW5) the Presiding Officer at Kibaale S.S polling station, Kajuna Alex (DW6) the appellant's Polling Agent at Kibaale S.S polling station, Mutatiina Mesach (DW7) the Presiding Officer at Rusana Church of Uganda Polling Station, Rugumayo Jackson aka Kadozi (DW8) the appellant's Polling Agent at Kazinga polling station, Tukwasibwe Ronart (DW9) the Presiding Officer at Kabashambo Primary School, Asimwe Justus (DW10) the Presiding Officer at Rwambajjo Primary School, Baguma Daniel (DW11) the District Returning Officer Rakai District, all denied the presence of un-authorized armed men at polling stations within the constituency and specifically at their respective polling stations.

In analyzing the evidence of the witnesses indicated above, the trial Judge believed the respondent's evidence as opposed to that of the appellant. She made a finding that the appellants' witnesses had put up plain denials as opposed to the detailed accounts of the respondent's witnesses.

While choosing to believe the evidence of PW9 over that of DW2, the trial Judge stated as follows:

"I have considered both the petitioners and the defence evidence and note that Tumwine and Bukenya are known to each other. This removes any possibility of mistaken identity, especially since they interacted during day time. On the face of it, there is no reason for Tumwine making a false allegation against Bukenya. I found Tumwine Hamidu (Pw9) to have been an independent witness, being

that he was not an agent of the petitioner and did not participate in the elections beyond being a voter. He therefore had no reason to bring such an allegation against Dw2 who in fact gave him business by hiring him to transport him and his colleagues as Tumwine testified. He struck me as a witness of truth. I did not believe Bukenya's denial being as it is that Tumwine properly identified him, thereby destroying the alibi he raised.

In addition while the respondent said that DW2 is his supporter, DW2 denies this. This means that either of the two is not being truthful, and there is basis for believing that the liar is DW2. The 1st respondent would have no reason to believe and even testify that he is his supporter unless he said so or acted in a manner that made him believe so. On the other hand DW2 has motive for distancing himself from the respondent at this time since that would make his denial of the events testified to by PW9 credible".

Upon analysis of the evidence of PW9, we are not convinced that he was an independent witness as found by the trial Judge. It is questionable why out of the five candidates who were vying for the directly elected Member of Parliament seat, the Women Member of Parliament seat and the Presidential seat, he chose to report the allegations to only the respondent. It is also surprising that he did not report any of the allegations to Police. In election matters, particular care should be taken in believing the evidence of partisan witnesses since they usually tend to exaggerate circumstances. We are of the view that in such cases, it is only safe to rely on such evidence when there is other independent evidence to corroborate it.

In the instant case, the only independent evidence available was that of PW10, in respect of Dyango Primary School polling station. However, the evidence of the said witness was contradictory. While he stated in his affidavit that he had voted for all NRM candidates under duress by the army men, during cross examination he stated that he only voted for the .



1st respondent under duress. All the other witnesses were the respondent's Polling Agents or supervisors at the various polling stations. There was no other evidence from an independent source to confirm whether the allegations by PW9 and the respondent's Polling Agents were true or not. Considering that the alleged presence of gun men at the polling stations involved threatening voters and polling officers, and forcing them to vote against their will, it is only logical that several of such persons would have been witnesses to corroborate the evidence of PW9, other than the respondent's Polling Agents. It would have been different if any of such persons or the Polling Agents who witnessed the alleged intimidation by the army men would have made a report to Police or other authorities in the area. No such report was mentioned by any of respondent's witnesses.

Further, from the evidence of PW9, he was hired by DW2 together with the gunmen at around 3:00p.m., and they moved to 30 polling stations. We accept the submission of counsel for the appellant that it was not possible that the alleged threatening of voters at 30 polling stations could have been done by the same people in two different sub counties of Kyalulangira and Kiziiba from 3:00 to 4:30 p.m. on the same day.

We find the contradiction as to whether DW2 was the appellant's supporter minor. It could only be DW2 to confirm such a fact and not the appellant. In our opinion, the said contradiction did not taint the credibility of DW2 in any way. He testified that he stayed at home on polling day and his alibi was not destroyed by the respondent's evidence. It was not in contention that he was a former boda boda chairperson of Kibaale Town, Rakai District. It is therefore surprising that it was only PW9 who identified him as being part of the armed men who invaded all polling stations in the Constituency on polling day.

The respondent also alleged that his Polling Agents were chased from polling stations by the armed men. Section 32 of the Parliamentary Elections Act provides that a candidate may be present in person or through his or her representative or Polling Agent at each polling station.

for the purpose of safeguarding his or her interests. The objective of the above provision is to promote transparency in the voting, counting and tallying of results. (***See Rt. Col. Dr. Kizza Besigye Versus Yoweri Kaguta Museveni & anor (Supra)***).

According to the evidence of Kaweesi Isaac (PW6), upon him protesting against ballot stuffing at Rwambajjo Primary School Polling Station, he was first arrested by the armed men, and later ordered to leave the polling station. PW8, also testified that upon him and PW7 protesting against the illegalities at Rwambajjo Primary School, the armed men chased them away from the polling station. The DRF of Rwambajjo Primary School Polling Station indicated the names of PW6 and PW7 as having been the Polling Agents of the respondent at the said Polling Station. However, neither of the two signed the DRF and the reason stated for their refusal/failure to sign was "failure to switch off phones".

PW11 stated that he refused to sign the DRF at Kabukurura Polling Station because of the illegalities committed at the polling station by the armed men. Analysis of the DRF of Kabukurura shows that all candidates' agents did not sign and no reason was given for such failure/refusal to sign.

PW12, who was the respondent's Supervisor for Rwembajjo Parish testified that he was chased away from Kabashambo Polling Station when he tried to object to ballot stuffing. Analysis of the DRF of the polling station relied upon by the respondent shows that no agent signed on behalf of the respondent. However, the DRF relied upon by the appellants and tendered in evidence by Tukwasibwe Ronart (DW9), the Presiding Officer at the station, the respondent's Agent signed the DRF. In analyzing the above DRFs presented by the respondent and the appellant, the learned trial Judge stated as follows:

"I should mention that I generally found it very difficult to believe the respondent's witnesses given that there was evidence of outright dishonesty touching on key aspects of the conduct of this election. One such aspect came out in the evidence of DW9 (Tukwasibwe

Ronart). He was a Presiding officer for Kabashambo Polling Station. To his affidavit he attached a D.R Form (Annexure AB) which bears a signature attributed to an agent for the petitioner. The petitioner's evidence is that his agent did not sign any DR form at the station. He evidenced this by the unsigned DR form- Annexure J to his affidavit". (sic).

The above DRFs had the same information as to the results obtained by each candidate and both of them were signed by the Presiding Officer. The only difference was that one was signed by the respondent's Agent and the other was not signed. With due respect to the findings of the trial Judge, we are of the opinion that the above in itself was not proof of dishonesty in conducting the polls. There was no proof that the signature appearing on the DRF presented by DW9 was forged or that the name of the witness appearing thereon did not belong to the respondent's Agent.

PW14, at Dyango Polling Station, testified that he was chased away by the army men before the vote counting could begin. However, the DRF presented by Twikirize Jovinta (DW4) who was the appellant's Polling Agent at the same Polling Station indicates that two of the respondent's agents signed the form. The respondent did not produce any other DRF to prove otherwise and did not deny the fact that the names appearing thereon did not belong to his agents. Nor was it alleged that their signatures were forged.

Apart from the DRFs of Rwambajjo Primary School Polling Station and Kabukurura Polling Station, all the other DRFs presented in evidence were signed by the candidates' agents. There was no proof that the Agents were forced / coerced to sign the forms. However with regard to Rwambajjo Primary School and Kabukurura Polling Stations, we find that the principle of transparency was compromised.

We find that the allegations as to the presence of armed men at polling stations who intimidated voters and chased the respondent's witnesses from polling stations were not proved to the satisfaction of Court.

Ballot stuffing and multiple voting:

On the allegations of ballot stuffing, counsel for the appellant submitted that there was no proof of ballot stuffing at polling stations. It was his submission that the learned trial Judge inferred ballot stuffing from arithmetic errors yet the same could not be inferred from circumstances considering that it ought to be factual.

It was counsel's further submission that while the learned trial Judge had relied on the evidence of PW4 and PW18 in finding that there was ballot stuffing at Kibaale S.S Polling Station and Kizinga Polling Station, the said witness had not testified about ballot stuffing. Counsel submitted that the evidence of PW18 that an extra 25 votes was added to the appellant's final tally did not amount to ballot stuffing.

Counsel further submitted that the claim by PW18 that the Presiding Officer at Kazinga polling station added 25 votes to the appellant's actual tally was an afterthought, considering that it was never pleaded. He relied on ***Libyan Arab Bank for Foreign Trade and Development Versus Adam Vassiliadis, Court of Appeal Civil Appeal No.09 of 1985***, that a court sits to hear and determine only issues raised by parties in their pleadings. Besides, the fact that the issue was not pleaded, counsel submitted that PW18 conceded to the fact that he signed the DRF for Kazinga Polling Station.

With regard to Dyango Polling Station, counsel submitted that in reaching her decision, the learned trial Judge did not consider the departure of evidence of PW5 from that of PW10 and PW16. Further, that it was questionable why there were 207 ballots that remained unused at the polling station yet PW10 and PW5 alleged that the gunmen ordered that all the remaining ballots be ticked in favour of the respondent.

On the alleged ballot stuffing at Kamate Full Gospel Church Polling Station, counsel for the appellant submitted that the evidence of PW9 in regard to alleged ballot stuffing there was not sufficient and was discredited during cross-examination. Counsel made reference to the evidence of PW9 during

cross examination that he was not sure whether the pre-ticking of ballot papers was in favour of NRM candidates as had been alleged in his affidavit, and that he did not know whether the ballot papers were pre-ticked or not.

Regarding Rwambajjo Polling Station, counsel submitted that while PW6 alleged that he witnessed ballot stuffing with Ssebandeke Swaibu (PW8), Ssekawunde Ali Kajjero (PW7) and a one Kasujja, on the other hand PW8 did not make mention of the said persons including PW6 in his evidence. It was counsel's submission that the evidence of PW6 and PW8 was contradictory and the trial Judge ought not to have believed it. Further, that the respondent had not proved that PW8 was his agent at the same polling station. During Cross examination, the respondent conceded that his Polling Agents at Rwambajjo polling station were PW7 and a one Kaweesi James.

Counsel further submitted that the respondent did not oppose the results he polled at Rwambajjo polling station. His complaint was that there was 100% voter turn up.

Further, that Natukunda Mackline's (PW2) evidence that she did not vote at Rwambajjo polling station yet she was represented as having voted was not pleaded. He submitted that the Medical Form relied upon by PW2 to show that she was admitted in Hospital on polling day could not be relied upon. This was on the basis that the Medical Form did not state the name of the patient; it was for outpatient and not inpatient services; it was not in respect of labour related complications as had been alleged by PW2; the Form was not issued by Rakai Hospital yet PW2 alleged that it is where she had been admitted.

Counsel further submitted that the learned trial Judge erred in relying on the inadmissible evidence of PW8 who tendered in evidence death certificates of persons that were represented to have voted yet they were dead by polling day. Counsel submitted that PW8 did not have the legal capacity to tender in the said death certificates considering that he was not

a relative of the deceased persons and was not present at the time they allegedly died. Further, that the Parish Chief did not have the legal mandate to issue death certificates. In that regard, that the Death Certificates in issue were null and void.

With regard to Kabashambo Polling Station, counsel submitted that perusal of the DRF for the said Polling Station indicated that the respondent's Polling Agent was not PW6 but a one, Semanda Isma. Therefore, that it was questionable why the Polling Agent did not testify about the events at the polling station.

Counsel for the cross-appellant submitted that a case of ballot stuffing must be real and proof of it must be presented before court. He submitted that in order to prove the allegations of ballot stuffing, the respondent had to prove that the votes cast at a given polling station exceeded the total number of people who turned up to vote. He relied on ***Epetait Francis Versus Dr. Isamat Abraham, Court of Appeal Election Petition Appeal No. 12 of 2011*** for that submission.

Counsel contended that in the instant case, it had not been proved that any extra ballots were found in the ballot boxes beyond the number of registered voters. With regard to Kobukururura polling station where the results were cancelled because the DRF indicated two extra votes cast more than the registered voters, counsel submitted that the above was not conclusive evidence of ballot stuffing. He submitted that the above could be attributed to errors in the calculation of votes and filling in of the DRF, not necessarily ballot stuffing. Further, that the results of Kobukururura polling station were cancelled and not included in the final tally. Therefore, they could not have affected the results of the election in a substantial manner.

Counsel concluded that the issue of ballot stuffing was not proved to the required standard.

In reply, counsel for the respondent submitted that at Nkundi Full Gospel Church, there was unregulated voting without checking the voters register by use of the Biometric Machine. Further, that at the same polling station, there was intimidation by armed men who forced voters to tick ballot papers in favour of NRM candidates, and the ballot papers were stuffed in ballot boxes. In counsel's view, the above amounted to ballot stuffing.

Counsel further submitted that the other incidents of ballot stuffing were at Kabukurura Church of Uganda polling station, Dyango polling station, Kamate polling station, Kabashambo polling station, Rwambajjo polling station, Nkundi polling station, Kizinga polling station and Kalulangira polling station.

Counsel further submitted that whether the ballot papers were ticked in favour of the appellant or not, the act of ticking ballots and stuffing them in ballot boxes was illegal and rendered the election unfair.

Court's consideration:

Section 76(f) of the Parliamentary Elections Act creates the offence of Ballot Stuffing. It provides that a person who knowingly and intentionally puts into a ballot box anything other than the ballot paper which he/she is authorized to put in commits an offence. The Court in ***Toolit Simon Akecha Versus Oulanya Jacob L'Okori & anor, Court of Appeal Election Petition Appeal No.19 of 2011***, in defining ballot stuffing, stated as follows:

"Ballot stuffing is not defined under the Parliamentary Elections Act. The parties who appeared before us cited no authority where the words have been judicially considered and I did not come across any.

According to <http://definitions.uselegal.com> ballot stuffing is defined as a type of electoral fraud whereby a person who is permitted only one vote submits multiple ballots. It can also happen when a person

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instead of casting votes in a single booth casts his/her vote in multiple booths. Ballot stuffing can take various forms:

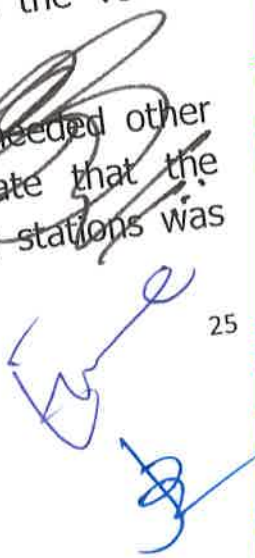
- ❖ a ballot stuffer casts vote on behalf of people who did not show up to the polls.
- ❖ Votes will be cast by those who are long dead or by fictitious characters.

The above definition roughly summarizes what amounts to ballot stuffing. In the absence of decided cases on the subject I shall use the above definition as a guide.

Ballot stuffing is therefore an election malpractice which involves voting more than once at a polling station or moving to various polling stations casting votes either in the names of people who did not exist at all or those who are dead or are absent at the time of voting and yet they are recorded to have voted. Ideally at the end of the polling exercise the number of votes cast ought to be equal to the number of people who physically turned up to vote'.

The major piece of evidence relied upon to prove ballot stuffing by the respondent was that of PW9. It was his testimony that at Kobukururura Polling Station, the army men 'grabbed' ballot books from the Presiding Officer and the Polling Assistants and ticked ballot papers in favour of NRM candidates. Thereafter, they poured the ballot papers in the ballot boxes. Further, that at Dyango Polling Station, Kamate Polling Station, Kabashambo Polling Station, Rwambajjo Polling Station, Nkundi Full Gospel Church, Kizinga Polling Station and Kyalulangira Catholic Church Polling Stations, army men instructed voters and polling officials to vote up to 8:00PM and that their names should not be verified with the voters register.

We reiterate that the evidence of PW9 was partisan and needed other independent evidence to corroborate it. We also reiterate that the respondent's Polling Agents' evidence at the various polling stations was



not sufficient to corroborate PW9's evidence since they were also partisan witnesses.

With regard to Kabukururura polling station, it was undisputed that the results were cancelled because the DRF indicated two extra votes cast more than the registered voters. The appellant's did not give specific explanation as to the difference between the registered voters and the results on the DRF. We accept the trial Judge's findings that the above was proof of ballot stuffing at Kobukururura polling station.

With regard to Rwambajjo Polling Station, in addition to the evidence of PW9 and the respondent's Polling Agents, it was the evidence of the respondent that while it was represented that there was 100% voter turn up on polling day, some voters had not voted. Natukunda Mackline (PW2) testified that she was a registered voter at Rwambajjo polling station. However, that she did not vote because she was admitted at Rakai Hospital where she later gave birth on polling day. However, we accept the submission of counsel for the appellant that the Medical Form relied upon by PW2 to prove that she was admitted at Kyotera was not sufficient in proving that she was actually admitted as alleged. First of all, the Medical Form indicated that it was for outpatient visit record and did not indicate the name of the patient. Secondly, while she indicated in her evidence that she was admitted from 8th February, 2016 and left hospital on 18th February, 2016, the medical record indicates the date of admission as 15th February, 2016, to 18th February, 2016. Further, while she states in her evidence that she was admitted at Rakai Hospital in Rakai, the Medical Form was issued from Rakai Community Based Health Project Kyotera Medical Centre. We, therefore, do not find the evidence of PW2 satisfactory.

We also find that PW8 did not have the legal capacity to tender in the death certificates of persons who had died by polling day yet were represented to have voted at Rwambajjo Polling Station. There was no proof that he was a relative of the deceased persons, nor was he present



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at the time the alleged deceased persons are said to have died. He did not fall within the category of persons who were authorized to register the particulars concerning the death of the alleged deceased persons, in accordance with Section 16 of the Births and Deaths Registration Act. In that regard, we accept the submission of counsel for the appellant that the learned trial Judge erred in relying on the inadmissible evidence of PW8 regarding the death of voters.

We find that there was not sufficient evidence to prove the allegations of ballot stuffing or multiple voting at Rwambajjo Polling station.

There was no proof that any person voted more than once at any of the several polling stations in order to prove the allegations of multiple voting. Apart from PW10, whose evidence we discredited, there is no other voter who was singled out by the respondent as having voted more than once.

With regard to other polling Stations, other than the evidence of PW9 and the respondent's Polling Agents, there was no corroborative evidence to prove the allegations of ballot stuffing and multiple voting. We find that the allegations remained unproved.

Falsification of Declaration of Results Forms:

With regard to the issue of falsification of DRFs, counsel for the appellant submitted that the respondent did not plead this issue. In that regard, that the learned trial Judge erred in making findings on extraneous evidence and issues that were not pleaded.

On falsification of DRFs, the learned trial Judge made reference to the evidence of PW5, PW11, PW18, PW17 and PW15, where the witnesses indicated that they were forced to sign DRFs. She stated as follows:

"The common theme in the above evidence is that the witnesses were forced to sign DR Forms. The defence again raised plain denials, but as I have pointed out, they are not credible, especially since there is at least an instance of obvious falsification of a DR."



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form. There is evidence of a deliberate ploy to clothe the process with credibility. I reject the respondent's evidence and find that there was falsification of Declaration of Results Forms at above named polling stations". (sic).

We have perused the respondent's Petition and the Affidavit in Support of the same on record. We are satisfied that no issues of falsification of DRFs were pleaded by the respondent. Further, while forcing candidates' agents to sign DRFs would amount to an election irregularity, it would not, in itself, be classified as falsification of DRFs. That notwithstanding, we find that the issue of forcing agents to sign DRFs by army men alleged by the respondent was not proved to the satisfaction of Court.

We accept the submissions of counsel for the appellant that the issue of falsification of DRFs was neither pleaded nor proved by the respondent.

The next issue for determination is the effect of non-compliance on the results of the election.

Section 61 of the Parliamentary Elections Act provides for instances where the election of a Member of Parliament may be set aside. Section 61(a) provides for one of such instances as follows:

"non-compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the non-compliance and failure affected the results of the election in a substantial manner."

The term "substantial manner" has received judicial consideration in the Supreme Court in ***Rt. Col. Dr. Kizza Besigye Versus Yoweri Kaguta Museveni & anor, Supreme Court Presidential Election Petition No. 001 of 2001***, and the Court cited with approval ***Mbowe Versus Eliuffo (1967) EA 240***, where it was stated as follows:



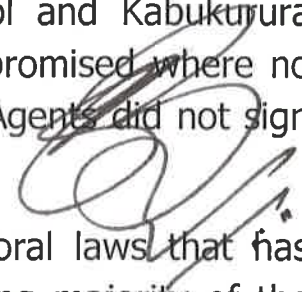
"In my view in the phrase "affected the result" the word "result" means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules"

Therefore, it is not sufficient that there have been irregularities in the election, but it must be proved that the non-compliance/irregularities affected the results of the election in a substantial manner. The principle is that an election should not be set aside basing on trivial errors and informalities. **(See Gunn Versus Sharpe (1974)1 QB 808).**

We have made a finding that the respondent did not prove to the required standard the allegations of the presence of armed men at polling stations who intimidated voters and polling officials at various polling stations. Further, with the exception of Kabukurura Polling Station, the respondent did not prove incidents of ballot stuffing.

It is not in dispute that the results of Kabukurura Polling Station were cancelled and did benefit any candidate. We have also taken into consideration the fact that Rwambajjo Primary School and Kabukurura polling stations the principle of transparency was compromised where no valid reasons were given why the respondent's Polling Agents did not sign DRFs.

However, we find that the non-compliance with electoral laws that has been proved by the appellant did not affect the winning majority of the appellant in any substantial way.



In conclusion, this appeal succeeds. The orders of the trial Court nullifying the election of the appellant as the validly elected Member of Parliament for Kooki County Constituency are set aside.

The respondent shall bear the costs of this Appeal and for the lower Court.

We so order.

Dated at Kampala this 10th day of October 2017



.....
Hon. Justice S.B.K Kavuma,
DEPUTY CHIEF JUSTICE



.....
Hon. Justice Elizabeth Musoke,
JUSTICE OF APPEAL



.....
Hon. Justice Cheborion Barishaki,
JUSTICE OF APPEAL