THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO.84 OF 2016

(ARISING FROM MBARARA HIGH COURT ELECTION PETITION NO.0002 OF 2016)

(An appeal arising from the judgment and orders of the High Court by Hon. Lady Justice Dr. Winifred Nabisinde dated 19th August, 2016)

HON. MUJUNI VICENT KYAMADIDI::::::::::::::::::::::::::::::::APPELLANT

VERSUS

1. **HON. CHARLES NGABIRANO**
2. **THE ELECTORAL COMMISSION::::::::::::::::::::::::::::RESPONDENTS**

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

HON. LADY JUSTICE MUSOKE ELIZABETH, JA

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

JUDGMENT

Introduction

This is an Election Petition Appeal arising out of the Judgment of Dr. Winifred Nabisinde, J delivered on the 19th day of August 2016 in which she dismissed the petitioner's (now appellant) Petition and upheld the election of the 1st respondent as Member of Parliament for Rwampara

Constituency, Mbarara District and made the following orders:-

a. The 1st respondent Ngabirano Charles is confirmed as the directly elected Member of Parliament for Rwampara Constituency.

b. Election Petition Case No. HCT-0002-2016 is hereby dismissed with full costs awarded to the 1st and 2nd respondents. (Sic)

Background

The facts giving rise to this Appeal are that on the 18th day of February 2016, the appellant Hon. Mujuni Vicent Kyamadidi and the 1st respondent Hon. Charles Ngabirano were among the 5 candidates who contested for the parliamentary seat of Rwampara Constituency in Mbarara District.

The 2nd respondent (The Electoral Commission) declared and gazzetted the 1st respondent, Hon Charles Ngabirano, winner of the said election with 25,289 votes as against the Petitioner Hon. Mujuni Vicent Kyamadidi who polled 21,607 votes.

The petitioner was dissatisfied with the above results and filed a Petition contending that the 1st respondent was not validly elected Member of Parliament for Rwampara Constituency; that the petitioner won the election and should be declared as the winner because there was non-compliance with the provisions of the Parliamentary Elections Act, 2005 (as amended) and the said non-compliance affected the results of the election in a substantial manner.

Being dissatisfied with that decision, the appellant appealed to this Court.

Grounds of Appeal

The grounds of Appeal as they appear in the Amended Memorandum of Appeal are as follows;

1. *The learned trial Judge erred when she failed to distinguish between non-compliance and illegal practices/ election offences as well as the principles governing elections as enshrined in electoral laws and when she used them interchangeably in a mixed grill without due regard to the framed issues and the rules governing the different grounds for annulling an election under the Parliamentary Elections Act, thereby failing to adequately and fairly resolve the issues raised in the petition which occasioned a miscarriage of justice.*
2. *The learned trial judge erred when she unjustifiably rejected all the evidence adduced by the petitioner/ appellant and dismissed it as, among other things, mere allegations, obviously fake, fabricated, awful, mere speculation while admitting all the answers of the 1st and 2nd respondent as the gospel truth even where there was no evidence given to support the said answers and as a result, she reached the wrong conclusion that there was no proof of noncompliance or illegal practices/election offences in the conduct of the election*
3. *The learned trial Judge erred when she ignored the evidence on record which included uncontroverted evidence of votes cast in favor of the 1st respondent exceeded the number of registered voters, 14 polling stations where the voter turn up was over 100% of all the registered*

voters and many other polling stations where the voter turn up was over 98% of all the registered voters and basing on her mere conjecture and imagination wrongly held that this was not unique or unheard of and that there was no proof of ballot stuffing and multiple voting during the election.

4. The learned Judge misdirected herself on both the law and evidence on record when she held that the unsigned Declaration of Results Forms (DRFs) used during the election did not constitute non-compliance or affect the results of the election.

5. The learned trial judge erred in law and fact when she dismissed evidence on record of alteration of election results and/ or forgery by polling officials in connivance with and in favor of the 1st respondent.

6. The learned trial Judge ignored the evidence on record where the petitioner and his witnesses reported to police and other lawful authorities the acts of noncompliance, violence, intimidation and illegal practices complained of in the petition and perpetrated against them by election officials of the 2nd respondent and the 1st respondent and his agents and supporters as a result of which she repeatedly came to the wrong conclusion that there were no such reports to police or other authorities in many pages of her judgment.

7. In addition to the aforesaid, the learned trial Judge misdirected herself on the law governing reports to police and other lawful authorities in an election and their relevance when she held that it is the duty of the

complainant/ victim to follow up the investigation of their complaint by the police up to the Courts of law

8. *The learned trial Judge misdirected herself on the legal principles governing noncompliance mixing it with those governing illegal practices as a result of which she came to the wrong holding that it must be proved that the 1st respondent had committed the acts of noncompliance personally or with his knowledge and consent or approval by any other person and that they affected the results of the election in a substantial manner.*

9. *The learned trial Judge misdirected herself on the law governing substantial effect by engaging herself in unsubstantiated and inaccurate mathematical calculations on the basis of which she erroneously held that, even if the 28 contested polling stations were disallowed, the 1st respondent would be the winner whereas not.*

10. *Additionally, the learned trial Judge erred in law and in fact when she failed to consider the sum total of all the acts of noncompliance and illegal practices during the election on the quality of the election process and as a result she came to the wrong holding that the said illegalities did not affect the election results in a substantial manner and that they reflected the will of the people of Rwampara Constituency whereas not.*

11. *The learned trial Judge erred in law and in fact when she dismissed clear and cogent evidence on record corroborated by among*

other things, police, photographic and documentary evidence that the 1st Respondent committed illegal practices personally and by his agents and supporters with his knowledge and consent or approval and with the connivance of the 2nd respondent's election officials during the election.

12. The learned trial Judge erred in law and in fact when she ignored the evidence on record and the legal principles governing the law of agency in elections and wrongly held that the persons cited for illegal practices in the petition were not agents of the 1st respondent.

13. The learned trial judge erred in law and in fact when she upheld the alibi by the 1st respondent as to his whereabouts on the eve of the election (17/10/2016) and as to the whereabouts of the 1st respondent's motor vehicle Registration No. UAW 381H in the election up to polling day on 18/02/2016 and as a result she wrongly exonerated the 1st respondent from having committed the illegal practices/election offences during the election.

14. The learned trial Judge erred when she misconstrued section 24(b) of the Parliamentary Elections Act by holding that for the 1st respondent to be found to have contravened the section, it must be proved that he trained goons in the use of force and her misconstruction of the section led her to arrive at wrong conclusions.

15. The learned trial Judge erred when she applied the wrong standard of proof in different sections of her judgment and when she failed to distinguish between the legal and evidential burden in handling various items of evidence in the petition.

16. *The learned trial Judge erred and is not supported by the record when she held that the learned counsel for the petitioner had withdrawn exhibits from Court whereas not.*

17. *The learned trial Judge erred both in law and in fact when she dismissed the petition without properly evaluating the evidence on record which occasioned a miscarriage of justice*

18. *The learned trial Judge erred when she took into account the written submissions of the 1st respondent which had been filed and served contrary to the orders of Court.*

19. *The learned trial Judge erred when she awarded the respondents full costs of the petition when, in the case of the 1st respondent he did not comply with orders of Court, and there were justifiable grounds for denying them costs.*

20. *The learned trial Judge's judgment is on many pages peppered with biased, dismissive and derogatory expressions against the petitioner generally and learned counsel for the petitioner in particular that were uncalled for in an inquiry of such magnitude and importance, the said comments raise issues of the impartiality and fairness of her ruling and the need to protect litigants as well as learned counsel and accord them the respect they deserve in such matters, even when the learned trial Judge does not agree with them. (Sic)*

Representation

On Appeal, the appellant was represented by Mr. James Byamukama together with Mr. Boniface Ngaruye Ruhindi (counsel for the appellant) while Mr. Kanduho Frank (counsel for 1st respondent) represented the 1st respondent and Mr. Edwin Tabaro (counsel for the 2nd respondent) represented the 2nd respondent. Both the appellant and the 1st respondent were in Court whereas the 2nd respondent was unrepresented.

Counsel on either side relied on their written arguments alongside their oral submissions.

At the hearing of the Appeal, counsel for the respondents raised a preliminary objection that the manner in which the grounds of appeal were raised offended rule 86 of the Rules of this of Court in that they are argumentative, narrative and repetitive.

Court directed counsel to frame an issue out of the preliminary objection raised and argue the same along with the submissions in the main Appeal. The issue which was framed was:-

Whether the grounds of appeal in the amended Memorandum of Appeal conform to rule 86 of the Rules of this Court? (Sic)

Counsel for the appellant informed Court that the 20 grounds of appeal had been condensed into 7 issues. Therefore the issues for determination before this Court, with the agreement of counsel for the parties, were as follows;

1. Whether the grounds of appeal in the amended Memorandum of Appeal conform to rule 86 of the Rules of this Court.
2. Whether the learned trial Judge erred and failed to adequately evaluate the evidence on record thereby coming to the wrong conclusion that there was no proof of non-compliance in the conduct of the election. (Grounds 1, 2, 3, 4, 5, 6, 7, 8, 17 and 20)
3. Whether the learned trial Judge erred and failed to adequately evaluate the evidence on record when she held that the non-compliance did not affect the result of the election in a substantial manner and that the election results reflected the will of the people of Rwampara Constituency. (Grounds 9 and 10)
4. Whether the learned trial Judge erred in law and fact and failed to adequately evaluate the evidence on record when she exonerated the 1st respondent from the commission of any illegal practice/ election offence personally or by his agents with his knowledge and consent or approval. (Grounds 2, 11, 12, 13, 14, 17 and 20)
5. Whether the learned trial Judge erred by mixing the principles/evidence on record concerning non-compliance as a ground for annulling an election with those on illegal practices/election offences coming to the wrong conclusion that there was proof of neither ground and causing a miscarriage of justice. (Grounds 1 and 8)
6. Whether the learned trial Judge erred by failing to distinguish between the legal and evidential burden of proof in the determination of the petition. (Ground 15)

7. Whether the learned trial Judge erred when she held that the learned counsel for the petitioner/appellant withdrew exhibits from Court. (Ground 16)

8. Whether the learned trial Judge's order as to costs was justified and what remedies are available to the parties in the appeal. (Ground 18 and 19)

Duty of this Court

This being a first appeal, we find it necessary to remind ourselves of the requirements of Rule 30 of the Rules of this Court. The said Rule provides:-

30. Power to reappraise evidence and to take additional evidence.

(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—

(a) reappraise the evidence and draw inferences of fact; and

(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.

This duty of the Court to evaluate evidence and draw its own conclusion has been spelt out in a number of decisions; See ***Selle V Associated Motor Boat Co. (1968) EA 123***, and the Supreme Court decision of ***Kifamunte Henry V Uganda SCCA No 10 of 1997*** where it was 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."

We have studied the record of appeal and the judgment of the lower Court. We have also considered the submissions of counsel for the parties and the authorities that were availed to Court for which we are grateful. We shall bear the above principles in mind while resolving the issues in the instant appeal.

Before we delve into the merits of the appeal, the following basic principles generally apply to election appeals to this Court;

i. Standard of proof

The petitioner has a duty to adduce credible and/or cogent evidence to prove the allegations to the stated standard of proof. See: ***Masiko Winifred Komuhangi V Babihuga J. Winnie, Court of Appeal Election Petition Appeal No.9 of 2002*** and ***Paul Mwiru V Hon. Igeme Nathan Nabeta and 2 Others, Court of Appeal Election Appeal No.6 of 2011.***

ii. Burden of proof

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

iii. Substantial manner

The term "substantial manner" has received judicial consideration by the Supreme Court in ***Amama Mbabazi & Another V Musinguzi Garuga***

James, Election Petition Appeal No.12 of 2002 where Odoki CJ stated:

> *".....what is substantial effect? This has not been defined in the statute or judicial decisions but the cases of Hackney & Morgan V Simpson attempted to define what the word substantial meant. I agree with the opinion of Grove J. the effect must be calculated to really influence the result in a significant manner. In order to assess the effect, Court has to evaluate the whole process of election to determine how it affected the results and then assess the degree of the effect. In the process of evaluation, it cannot be said that numbers are not important just as the conditions which produced those numbers. Numbers are useful in making adjustment for irregularities."*

On issue 1 of the Appeal, counsel for the respondent submitted that the grounds in the Memorandum of Appeal do not conform to rule 86 of the Rules of this Court in that they are repetitive, narrative and not concise. Counsel argued that under rule 86 of the rules of this Court, a litigant must only restrict his or her grounds of appeal to the points that have been wrongly decided. He invited Court to look at grounds 1 to 16 of the Memorandum of Appeal as they are narrative, argumentative and a repeated version of ground17.

Counsel further submitted that grounds 5, 6, 9, 10 and 14 are not a criticism of what the trial Judge is alleged to have wrongly decided and that an Election Petition is not determined on discretion. Further that costs are awarded premised on discretion therefore ground 19 did not conform to Rule 86(1) of the rules of this Court. He submitted that the only issue for

determination was ground 17 and prayed that the entire 19 grounds in the Memorandum of Appeal be struck out. He also prayed for costs attendant to the preliminary objection.

In reply, counsel for the appellant submitted that the grounds in the Memorandum of Appeal were not narrative, argumentative or repetitive. He relied on ***John Ken Lukyamuzi V Attorney General Constitutional Petition No.0002 of 2007*** to state that an appeal cannot be struck out on such basis but rather Court has to consider whether the appeal raises merits that require judicial consideration.

Rule 86 of the Rules of this Court provides for the contents of the Memorandum of Appeal thus:-

1) *"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the Court to make.*

2) .....

3) ....."

In ***Sietco V Noble Builders (U) Ltd Civil Appeal No.31 of 1995,*** the Supreme Court stated that a ground of appeal must challenge a holding, a ratio decidendi and must specify points which were wrongly decided. Failure to comply with the rule renders the ground of appeal incompetent and liable to be struck off.

We have noted that the 20 grounds of appeal were condensed to 7 issues which are reproduced above. The appellant's counsel seems to have acknowledged the same in their numerous grounds which were framed hence the reduced number of issues. We therefore find no merit in the points of law raised by the 1st respondent. In the circumstances, we shall proceed to determine the merits of this Appeal based on the issues as framed.

On issues 2 and 4 of the Appeal, counsel for the appellant described the election period as a campaign of terror. He submitted that the 1st respondent, through his agents and supporters, used motor vehicle Reg No.UAW 381H which belonged to the 1st respondent to terrorize voters and supporters of the appellant during the campaign period by beating them up. Counsel further submitted that the individuals who mounted the campaign of terror were not strangers to the 1st respondent but rather his agents whom he knew and whose actions he approved. Counsel further stated that by availing his agents with his motor vehicle, the 1st respondent was guilty of aiding and abetting and therefore equally culpable for the election offences committed by his agents.

Counsel further submitted that the 1st respondent admitted during cross examination that motor vehicle Reg No.UAW 381H belonged to him and it was among the four vehicles that the 1st respondent used during the election campaigns. Counsel stated that the 1st respondent raised an alibi that the said motor vehicle was on 18th February 2016 in the garage undergoing repairs in Kampala and not in Rwampara Constituency.

However, the quotations and invoices for the vehicle repairs that were relied on by the 1st respondent as evidence purportedly written by RW2 Kasim Ssemwogerere was a pack of lies as the said witness was a primary 2 drop out who could neither read nor write and yet the invoice marked as "Annexture Q1" was written in English.

Counsel submitted that the 2nd respondent pleaded ignorance about the campaign of terror, yet the appellant had lodged a complaint with the 2nd respondent which was received by the Assistant District Returning Officer by acknowledging receipt of the same. Indeed, during cross examination, the returning officer, Mr. Kamusiime had admitted to having received the same.

Counsel submitted that on several occasions, the appellant reported to Police but no action was ever taken. He faulted the learned trial Judge for holding that the appellant and his witnesses never reported the illegalities being complained of to the Police.

Regarding ballot stuffing, counsel submitted that the intention of the campaign of terror was to intimidate and harass the agents and supporters of the appellant as a prelude to ballot stuffing and multiple voting in favor of the 1st respondent, in connivance with the 2nd respondent's election officers. He further submitted that at 3 polling stations that is Kabaya COU, Karamurani and Ibumba T/C the votes cast exceeded the number of registered voters. And although the results from the above 3 polling stations were subsequently cancelled, the aforesaid results were proof enough that the 1st respondent was the beneficiary of this massive ballot

stuffing.

Counsel pointed out that at 14 polling stations, the voter turn up was 100% and submitted that ordinarily, it was inconceivable that all the registered voters at the 14 polling stations could turn up to vote. He submitted that the appellant had adduced evidence of dead voters who could not have voted on the polling day but which evidence was ignored by the learned Judge.

Counsel further submitted that with regard to Mwizi Sub County, which had 33 polling stations and out of which 23 registered 100% voter turn up, in some polling stations, votes cast were in excess of the registered voters while in some cases the 1st respondent even scored more votes than the registered voters. Further that the appellant was merely allocated 511 votes in Mwizi Sub County by the presiding officers in corroboration with the 1st respondent's agents at those polling stations.

On his part, counsel for the 1st respondent submitted that the witnesses and the annextures that the appellant relied on to prove the campaign of terror were a hoax. He invited Court to look at page 68 of the Record of Appeal showing a medical form that was supposed to be relied on by the alleged victim PW13. He further submitted that during cross examination the said witness, PW13, denied knowledge of that annexture which was written on 18th March, 2016, one month after the elections. Counsel submitted that the appellant had failed in his evidence to prove which agents of the 1st respondent used violence against him or his agents.

Counsel contended that the evidence of the appellant had indicated that motor vehicle No.UAW 381H belonging to the 1st respondent was at 3 polling stations within the same time carrying people that were meant to terrorize voters. He further submitted that the appellant alleged, under paragraph 38 of his Affidavit in Support of the Petition that one, Ndyareeba Christopher PW19 had told him that the said motor vehicle was at Rwenyanga Primary School polling station yet when the said Ndyareeba Christopher came to Court, he denied any knowledge of the 1st respondent's motor vehicle. In his evidence, he only complained about his pool table that was destroyed by Ahimbisibwe Aloysius. Further, that during cross examination, the appellant had contradicted himself when he stated that he had seen the motor vehicle himself.

Counsel pointed out that while the appellant had contended that there were impersonators at the 14 polling stations who voted for the dead and the sick, he had led no evidence of a single dead voter that was voted for. Counsel further submitted that the appellant's affidavit evidence of the death of certain individuals who were voted for was insufficient as the only way the appellant could have proved the death of these individuals was by the production of death certificates.

On the evidence of PW5, Taremwa Boaz, Counsel contended that it was contradictory whereas under paragraph 4 of his affidavit he averred that he was a polling agent at Kikonkoma Health Centre II polling station, during cross-examination, he stated that he was the appellant's polling agent at Ngoma Health Centre II. Further, that whereas Taremwa Boaz had averred

that at his polling station, the Presiding Officer, one Johnson Kaguhangire, had given one pre-ticked ballot paper to an unnamed person at Ngoma Health Centre II, this evidence was disproved by one, Rwashaija Clesensio, RW4, the Presiding Officer of Ngoma Health Centre II who denied the allegations and attached the Declaration of Results Form signed by him as the Presiding Officer.

Counsel for the 2nd respondent submitted that the allegations made by the appellant that the 2nd respondent failed to control the campaign of terror, intimidation and various illegal practices and offences committed during the campaign period was false. He further submitted that the complaint which the appellant alleges to have lodged with the 2nd respondent which was received by the Assistant District Returning Officer did not bear a "Received" stamp. In any case the complaints raised therein were too general for one to intervene.

Counsel further submitted that there was no electoral law that created 100% voter turn-up as an electoral offence. Where such scenarios occur, the same are strictly subjected to the quantitative test. He relied on ***Rabi Gershom Sizomu Wambedde v Electoral Commission Parliamentary Election Petition No.0006 of 2011***.

In rejoinder, counsel for the appellant sought to distinguish ***Rabi Gershom Sizomu Wambedde (supra)*** relied on by counsel for the 2nd respondent from the present Appeal. In that case Mugamba, J was dealing with only one polling station which scored 99% in the entire constituency, whereas in the present Appeal they were 14 polling stations all scoring 100% voter-

turn up.

Regarding the campaign of terror, counsel submitted that during cross examination, Taremwa Boaz had made it clear that the reference in his affidavit to Kikonkoma Health Centre II polling station as opposed to Ngoma Health Centre II polling station was a typographical error. He had also attached his appointment letter as a polling agent for Ngoma Health Centre II. And further, although Johnson Kaguhangire was not the Presiding Officer at Ngoma polling station as stated in Taremwa Boaz's affidavit, he was one of the Polling Assistants working with the Presiding Officer at the station.

Section 61(1) of the Parliamentary Elections Act (PEA), provides for grounds for setting aside an election. Of specific interest to this appeal is Sub Section (a) which provides that the election of a candidate as a Member of Parliament shall only be set aside if proved to the satisfaction of Court that there was 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 the failure affected the result of the election in a substantial manner.

In ***Mbowe V Eliuffo (1967) EA 240*** cited with approval in ***Rt. Col. Dr. Kizza Besigye V Yoweri Kaguta Museveni & Anor, Supreme Court Presidential Election Petition No.001 of 2001,*** Georges, CJ defined the phrase "*affected the result*" at page 242 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."

Campaign of terror

We have studied the 25 affidavits that form the evidence of the appellant to prove the campaign of terror but of great importance and significance are the affidavits of Nsimire Felix, Tusingyize Onesmus and Tayebwa John.

Nsimire Felix in his affidavit averred that on 20th January 2016 at around 11:30 pm while at home he heard noise coming from the neighborhood and he stepped out of his house to see what was happening. He was then attacked by Karuhanga Aloysious, Bikwatsizehi and Nshemerirwe Pastor who cut him on the head and the rest beat him with sticks and iron bars. And while still bleeding, his neighbor Mr. Mucoori called up Police from Mwizi Police Post and he was taken together with Karuhanga Aloysius to Mbarara Central Police Station where he made a Police statement vide SD 54/21/01/2016. Further that after making the statement he was driven to Mbarara Community Hospital where he spent 2 days. Nsimire Felix attached a medical report marked as annexture "B" and photographs of his injured body.

Having examined the medical report of Nsimire Felix that was relied on by the appellant and marked as Annexture "B", we note that the said medical report is in contradiction with his affidavit evidence. Nsimire Felix in his affidavit averred that he was attacked on 20th January 2016 and taken to Mbarara Community Hospital where he spent two days. However, the medical form on which he was examined indicates that he was a victim of aggravated robbery who was examined on 18th March, 2016 at 2:40 pm, long after the incidence.

Under paragraphs 10, 11 and 12 of Nsimire Felix's affidavit, he averred that immediately after the attack, his neighbor Mr. Mucoori called up Police and he was taken together with Karuhanga Aloysius to Mwizi Police Post where he made a statement and later taken to Mbarara Community hospital where he spent 2 days. Meanwhile, the said Mucoori Abert made no mention of the events of 20th January 2016 in his affidavit. Further, under paragraph 2 of Nsimire Felix's affidavit, he deponed that he is a resident of Marembo II Cell, Rukarabo parish; Mwizi Sub County, Rwampara County. The said Mucoori Abert stated in his affidavit that he is a resident of Nyamabare Cell, Rukarabo parish, Mwizi Sub County, Rwampara constituency and this was proved by his voter location slip marked Annexture "A".

Nsimire Felix did not explain how he came to be a neighbor to Mucoori Abert who is from a different location.

Tayebwa John averred that he was attacked on 19th January 2016 and it is evident from his medical report marked annexture "B" attached to his

affidavit that he was a victim of assault, who was also examined on 18th March 2016 at 3 pm.

We have studied the Record of Appeal and find that each of the 3 witnesses namely Nsimire Felix, Tusigyize Onesmus Isaac and Tayebwa John deponed to having been individually assaulted by the 1st respondent's agents. They provided evidence of a photograph to prove the purported assault which is attached to each of their affidavits. We find that the same photograph showing an assaulted person was used by the three witnesses without clearly indicating whom of the three the picture belonged to.

We agree with the trial Judge's holding that "... *it is noted that where annextures of photographs attached, save for one, it does not take a genius to see that a photograph of the same person presenting similar injuries and wearing exactly the same shirt in the same surroundings is attached.....*" (sic). We therefore find that the photographs that were presented by the said witnesses cannot be attributed to the deponents.

Further the same witnesses save for Tayebwa John presented as evidence medical reports which this Court finds quite unreliable. The medical reports relate to the offence of aggravated robbery which is quite different from the offence of assault upon which part of this Appeal is premised. Additionally, there is no evidence linking the purported aggravated robbery to the 1st respondent.

We have also noted that the witnesses alleged to have been assaulted by the 1st respondent's agents on different days were all examined on 18th.

March 2016 a month after the said election. No explanation was given as to why they had to wait to be examined on the same date. This makes it quite risky for this Court to rely on this evidence.

After critically examining paragraph 6(b) of the Petition in which the appellant alleged that the 1st respondent had contravened Section 24 of the PEA, the affidavit of the petitioner and the evidence of his named witnesses, the trial Judge found that Court had not received any concrete evidence of the 1st respondent recruiting any criminals, suspects, goons or "kiboko squad" to harass the appellant and his supporters or agents.

The trial Judge further noted that "While three of the witnesses Nsimire Felix, Tusingyize Onesmus Isaac and Tayebwa John aver to being assaulted by the alleged goons and were medically examined by their own evidence on PF3 and upon cross examination admitted that they were victims of aggravated robbery. The observation by counsel for the 1st respondent that counsel for the petitioner in regard to paragraph 6(b) of the petition 'merely re-wrote the words of the statute (S.24 PEA) in the petition but unfortunately for him the allegation was fanciful a pleading not backed up by an affidavit of any credible evidential value and that without a doubt the allegation was not proved to show any element of non-compliance with Section 24 of the PEA cannot be more true. I therefore agree with counsel for the 1st respondent and have also arrived at the same finding." (Sic)

We do not find the evidence of Nsimire Felix, Tusingyize Onesmus Isaac and Tayebwa John credible as it is full of contradictions, inconsistencies

and unexplained aspects.

Section 154 of the Evidence Act CAP 6 of the laws of Uganda provides for instances where the credit of a witness may be impeached. Sub Section (c) provides that the credit of a witness may be impeached by the adverse party or with consent of the Court, by the party who calls him or her by proof of former statements inconsistent with any part of his or her evidence which is liable to be contradicted.

We have taken note of the affidavits of Ndyomugyenyi Asaph, Mukyori Abert, Ninyesiga Patrick and Kiiza Vicent and find that while the said witnesses alleged to have been assaulted by the 1st respondent's agents, they did not report the incidents of assault to Police or the concerned authorities. Neither were they medically examined. What was reported were cases of robbery which had nothing to do with this election. What is clear is that there was a futile attempt to make reports as a means of building up evidence for future litigation. This was the case with the letter of complaint to the Electoral Commission dated 5th February 2016, reported in CRB 142/2016, SD Ref 38/18/2/2016. The evidence does not specify by name who the goons were.

We are persuaded by the decision in ***Banatib Issa Taligola V Electoral Commission and Wasugirya Bob Fred Election Appeal No.11 of 2006*** where Yorokamu Bamwine, PJ observed that:-

> *"Court is acutely aware that in election contests of this nature, witnesses, most of them motivated by the desire to secure victory against their opponents, deliberately resort to peddling falsehoods.*

What was a hill is magnified into a mountain."

In the result, the appellant has failed to prove to the satisfaction of Court that the 1st respondent, through his agents committed the assaults as alleged or at all.

Use of the 1st respondent's motor vehicle to terrorize voters

Regarding use of the 1st respondent's motor vehicle, counsel for the appellant submitted that the 1st respondent, through his agents and supporters, used Motor Vehicle Reg. No.UAW 381H, belonging to the 1st respondent to terrorize the appellant's voters and supporters.

On the other hand, counsel for the 1st respondent submitted that the said motor vehicle alleged to have been in Rwampara County Constituency was at all material time in a garage in Kampala undergoing mechanical repairs between 16th February and 20th February. He relied on the affidavit of Kasim Ssemwogerere RW2 who is said to have carried out the repairs.

We have studied the affidavits of the witnesses who alleged to have seen the 1st respondent's motor vehicle in Rwampara County Constituency. The said witnesses included the appellant who deponed that he received a telephone call from Ndyareeba Christopher at around 8am on 18th February 2016 that Motor Vehicle Reg. No.UAW 381H Toyota Land Cruiser pick up had reached Rwenyaga Primary School; Abenawe Ambrose who was a registered voter at Bugarika Primary School deponed that he saw Motor Vehicle Registration No.UAW 381H Toyota Land Cruiser on 18th February 2016 at 9am; Ndyomugyenyi Asaph a registered voter at Kashojwa Cell who averred that he had seen the 1st respondent's Motor

Vehicle Reg. No. UAW 381H Toyota Land Cruiser Pick-up on 18th February at around 12pm; Mupenzi John who was a registered voter at Ihombya Trading Centre Polling Station who deponed that he saw the 1st respondent's Motor Vehicle on 18th February 2016 at around 12pm, Kiiza Vicent a registered voter at Kashabo Primary School Polling Station who deponed that he had seen the 1st respondent's Motor Vehicle Reg. No.UAW 381H Toyota Land Cruiser Pick up on 18th February 2016 at around 11:45am; Mugabi Deus, a registered voter of Rwenyaga Primary School who deponed that he saw the 1st respondent's Motor Vehicle on 18th February 2016 at around 12pm; Sabiiti Fred who was a registered voter at Kenkaranga Primary School Polling Station deponed that he saw the 1st respondent's Motor Vehicle on 18th February 2016 at around 12pm; Kabandize Daniel a registered voter at Mbirizi Market Polling Station deponed that he saw the 1st respondent's Motor Vehicle on 18th February at 12:30pm; Bataringaya Julius a registered voter at Kenkaranga deponed that he saw the 1st respondent's Motor Vehicle on 18th February 2016 between 12pm and 1pm; Mwebembezi Christopher who was a registered voter at Rwenyanga Primary School Polling Station deponed that he saw the 1st respondent's Motor Vehicle on 18th February 2016 but does not state the time when the said Motor Vehicle was seen and Niwagaba Christopher, a registered voter at Kabaya Church of Uganda Polling Station deponed that he saw the 1st respondent's Motor Vehicle Reg. No.UAW 381H on 18th February 2016 at around 10:30am.

We note that the above witnesses were registered voters at different polling stations but claim to have seen the said motor vehicle at the various

polling stations in Rwampara County Constituency on the 18th of February 2016. It is not possible for Ndyomugyenyi Asaph, Mupenzi John, Mugabi Deus and Sabiiti Fred all registered voters at different polling stations to have seen the said Motor Vehicle on 18th February, 2016 at 12pm. We do not find this practicable that one Motor Vehicle can be in different locations at the same time.

While the appellant alleged, under paragraph 38 of his Affidavit in Support of the Petition that he received a telephone call from a one, Ndyareeba Christopher, his agent in Ryamuyonga Parish, that motor vehicle Reg. No.UAW 381H Toyota Land cruiser pick up had reached Rwenyanga Primary School polling station and its occupants had alighted and chased him away, the said Ndyareeba Christopher made no mention of the presence of the said motor vehicle at Rwenyanga Primary School polling station in his affidavit.

Since the 1st respondent had raised an alibi that the said motor vehicle was in a garage in Kampala undergoing repairs, the appellant's evidence had to be corroborated in order to destroy the alibi.

In ***Rtd. Col. Dr. Kizza Besigye V Yoweri Kaguta Museveni & Electoral Commission Presidential Election Petition No.01 of 2006***, Katureebe JSC (as he then was) held that

> *".....when a person denies being in a place, it should require corroboration to pin him down. In absence of such corroboration, I would give such person a benefit of doubt." (Sic)*

We find that the appellant's evidence was never corroborated and in the circumstances we agree with the learned trial Judge's finding that the

petitioner did not adduce sufficient evidence to prove the allegations of intimidation and terror.

Ballot stuffing/ multiple voting

It was the case for the appellant that in some polling stations the number of votes cast exceeded the number of registered voters. Counsel relied on the evidence of Niwagaba Christopher, Tinyefunza Gordon and Saturday Suleiman Kasseka to prove this allegation. The said polling stations included Kabaya COU, Karamurani TV Mast, and Ibumba T/C.

The 1st respondent denied these allegations and submitted that the evidence of Saturday Suleiman Kasseka who claims to have been given a pre-ticked ballot paper by one, Tumuhamye Moses, in favor of the 1st respondent was not corroborated.

According to the result tally sheet, Kabaya COU polling station had 401 registered voters, 401 people voted for the 1st respondent and 7 votes were invalid. Further, at Karamurani TV Mast there were 577 registered voters, and 589 people voted for the 1st respondent and 1 ballot paper was spoilt, while Ibumba Trading Centre polling station had 325 registered voters and 324 people voted for the 1st respondent and 1 vote was invalid.

While the results of the above polling stations were cancelled on grounds that the votes cast exceeded the number of registered voters, we agree with counsel for the appellant's submission that there was multiple voting leading to the cancellation of results in the above polling stations.

We have noted that during cross examination, the Returning Officer, Kamusime Dan Ruhemba testified that there were 127 polling stations in Rwampara and the results of 4 polling stations were rejected by the system

because the number of votes exceeded the number of registered voters. He further testified that once the figures were tampered with, the system automatically rejected the results, though he could not tell who could have tampered with the results.

The learned trial Judge held at page 41 of her judgment that *"I have carefully examined the polling stations in which the total number of votes cast was found to exceed the registered number of voters in that area..... my conclusion is that since the software package/technology adopted by the 2nd respondent was not only unique to Mwizi Sub County or Rwampara Constituency only but was the same technology applied nationwide where such scenarios may have arisen and the effect was to put all candidates on the same level ground regardless of who had scored highest, it is my finding that although not perfect, it was a fair and just method that cannot be concluded to mean ballot stuffing by any particular candidate/s. This allegation therefore fails."*

Ballot stuffing is defined as a type of electoral fraud whereby a person who is permitted only one vote casts more than one. It can also happen when a person, instead of casting his or her vote in a single booth casts in multiple booths. Ballot stuffing can take various forms such as casting votes on behalf of people who did not show up at the polls or for those who are long dead or voting by fictitious characters. (***See Toolit Simon Akecha vs Oulanyah Jacob L'okori & Electoral Commission Court of Appeal Election Petition Appeal No.19/11).***

While the appellant proved ballot stuffing to the required standard, we agree with the learned trial Judge that since the results in the 4 polling

stations were cancelled, it was a fair and just decision as it put all the candidates on the same level ground. It appears to us that all the candidates suffered equally and none was advantaged or disadvantaged over the other.

Regarding the 100% voter turn up at 14 polling stations, counsel for the appellant submitted that it was inconceivable that all the registered voters at the 14 polling stations turned up to vote. He submitted that the appellant had adduced evidence of dead voters who could not have voted on the polling day but this fact was ignored by the learned trial Judge. The appellant relied on his own affidavit, and those of Karugaba John and Tweyongere Silver.

In response, counsel for the 1st respondent submitted that the appellant led no evidence to prove this allegation. He further submitted that the appellant's affidavit evidence of the death of certain individuals who were voted for was insufficient as the only way the appellant could have proved the death of these individuals was by production of death certificates.

It was submitted by counsel for the second respondent that there is no electoral law that makes 100% voter turn up an electoral offence. Where such scenarios occur, the same are strictly subjected to the quantitative test.

On this issue, the learned trial judge held that;-

"While there is likelihood that 100% voter turn up is unlikely, looking at the evidence adduced before me and relied upon, my own conclusions

are that this allegation has not been proved to the standard required by law.....I have also noted that in Election Petitions, while there are polling stations where there were 100% voter turn up and margins of over 90% turn up, I do not find anything unique in that especially in an area where a particular candidate comes from and it is not unheard or illogical for a candidate to concentrate his campaigns in his home area. Further, in the absence of concrete evidence that people who had died were voted for or that others never turned up for voting, much as this would be plausible if proved, the petitioner has a duty to prove that all those people alleged to have died or failed to turn up for voting were indeed registered voters' in the particular mentioned polling stations. Votability of the person/s mentioned must be proved and as for the voting trend, statistics can be impressive but they must be accompanied by evidence to support a stated position."

In the instant case where there was 100% voter turn up at 14 polling stations, no evidence of ballot stuffing or other irregularities was adduced. Therefore we cannot find fault with the results in those polling stations

We therefore find that the appellant has failed to prove this allegation to the satisfaction of Court.

Failure to sign DR Forms

It was counsel for the appellant's submission that at Kashojwa COU, Ihombya, Kyatoko, Rukarabo and Rubagano polling stations the DR Forms were never signed by the appellant's agents due to intimidation and violence. He relied on the evidence of Ndyomugenyi Asaph, Abenawo

Ambrose and Mupenzi John.

Ndyomugenyi Asaph deponed that while he was at the polling station at around 12pm, a motor vehicle Registration No.UAW 381H Toyota Land Cruser Pick Up filled with supporters of the 1st respondent and armed with sticks and stones beat him and chased him away from the polling station.

Abanawe Ambrose, a Polling Agent of Bugarika Primary School Polling Station deponed that when voting started, one of the Polling Assistants whose names he did not know gave out more than ballot paper to a voter and when he complained, the ballot boxes were shifted to another corner. Further that all Polling Agents were called to vote and when he reached the table, he was given a folded ballot paper which had been pre-ticked in favor of the 1st respondent and he refused it. When he inquired why pre-ticked ballot paper in favor of the 1st respondent were being issued, the Presiding Officer directed that he should be arrested and when the supporters of the 1st respondent arrived at the polling station, they beat him up and he fled the scene.

Mupenzi John deponed that he was a Polling Agent at Ihombya Trading Centre Polling Station and on 18th February, 2016 while at the said polling station, Barigye Gervaze, a supporter of the 1st respondent told him that he did not want to see any agent or supporter of the petitioner at the polling station except those of the 1st respondent. Further, a Motor Vehicle Registration No. UAW 381H Toyota Land Cruiser Single Cabin arrived with several supporters of the 1st respondent who beat him and he was forced to flee the Polling Station. Before he was forced to flee, the Polling Officials and agents of the 1st respondent had already started plucking ballot papers

from the ballot books and stuffing them in the ballot box.

In reply, counsel for the 1st respondent submitted that this could not invalidate an election as it was not fatal since the presiding officer had signed. Further that the appellant had to show that failure to sign the DR Forms by his agents was due to acts of the 1st respondent's agents.

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 marked annexture "DRF 84", DRF "83". DRF "73", DRF "90" and DRF "72", we find that the same were not signed by the appellant's agents but they were all signed by the Presiding Officers as required under Section 47(5) of the PEA. There is no cogent explanation given by the appellant for putting the blame for the failure to sign the DR Forms by his agents on the respondents.

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 opined 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."

The above holding by the Supreme Court should, in our view, be read together with the persuasive decision of Kasule, J in ***John Cossy Odomel V Electoral Commission & Louis Opange High Court Election Petition No.6 of 2006*** where he stated:

"Mere failure by an agent to sign a DRF in the absence of a valid reason does not invalidate an otherwise valid result at a polling station." We respectively follow the Supreme Court decision and note with approval that of the High Court.

We, therefore, find that the failure of the appellant's agents to sign the DR Forms cannot invalidate the results of the election. Once the presiding officer signs the Declaration of Results Form, the requirements of the law are fulfilled under Section 47(5) of the PEA.

We find that the evidence of the Ndyomugenyi Asaph, Abenawo Ambrose and Mupenzi John was unreliable as the said witnesses did not prove to the satisfaction of Court that the people who forced them to flee from their respective Polling Stations were actually agents of the 1st respondent.

In the circumstances, we find that the appellant did not prove this allegation to the satisfaction of this Court.

Reports to Police and Electoral Commission

It was the appellant's contention that the appellant lodged a complaint with the 2nd respondent which was signed and received by the Assistant Returning Officer. However, no action was taken.

In reply, counsel for the 2nd respondent submitted that the allegations made by the appellant that the 2nd respondent failed to control the campaign of terror, intimidation and various illegal practices and offences committed during the campaign period were false. Further that the complaint which the appellant alleges to have lodged with the 2nd respondent which was received by the Assistant District Returning Officer does not bear a "Received" stamp and the complaints raised were too general for one to intervene.

It was alleged by the appellant that the 2nd respondent and his agents failed to prevent and deter the 1st respondent and his agents from interfering with the electoral process through the alleged acts of terror that prevented the appellant's agents from voting.

Section 15(1) of the Electoral Commission Act CAP 140 of the laws of Uganda states:

"Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the commission; and where the irregularity is confirmed, the Commission shall take necessary action to correct the irregularity and any effects it may have caused."

We have looked at the complaint to the Assistant Returning Officer marked as Annexture CPT attached to the appellant's Affidavit in Rejoinder and the affidavits of the witnesses that the appellant relied on and find that most of the witnesses did not report the alleged assault to the authorities. Further the witnesses who claimed to have been assaulted and reported to Police annexed medical reports that we found unreliable. The said witnesses were all examined at the same time by the same health worker, on the same date much later than when the said incidents allegedly occurred.

Tusigyize Onesmus Isaac, Tayebwa John, Turyasingura Ronald and Karuhanga Bonaventure all witnesses of the appellant alleged to have been assaulted and reported to police but the said witnesses did not indicate any evidence of police reports nor SD Numbers.

We note that the allegations by the appellant that the 2nd respondent's agents connived with the 1st respondent and his agents and failed to deter and prevent the 1st respondent from interfering with the electoral process are not supported by any credible evidence. They are mere speculations which cannot be relied on.

We note with approval the decision of Ruby Aweri Opio, J (as he then was) in ***Toolit Simon Akecha V Oulanyah Jacob L'okori & Electoral Commission Election Petition No.1 of 2011,*** where the learned Judge stated that:-

> *"Electoral Commission is a Constitutional body vested with powers of holding political elections in this country. It is a very august body. Any allegation which tends to reduce its integrity and confidence of the public must be substantiated. In the instant case the allegations were*

not backed by independent cogent evidence. The question remains nagging. Who connived with which Electoral Commission official? When and at which polling station? Why didn't the petitioner or his agents swear affidavits giving particulars of connivance to make wrong entry into the results? The allegations were made worse by the petitioner failing to cross-examine any of the Respondents' witnesses. The only conclusion I can draw is that those allegations were as a result of the usual anxieties which accompany elections. Elections should be governed by the rule of fair play and should not be a ground for breeding conflicts by way of unfounded allegations."

We have not found any evidence to show that the 2nd respondent indeed connived with the 1st respondent and his agents to interfere with the electoral process. The appellant did not prove to the satisfaction of this Court that there was non-compliance in the conduct of the election.

Bribery at Kitwe

Counsel for the appellant submitted that the 1st respondent gave money to voters to induce them to vote for him or refrain from voting for the appellant. He relied on the evidence of Midius Kamayangi.

Midius Kamayangi deponed that he went to Kitwe primary school polling station and witnessed the 1st respondent and his agents giving out shs 5000/= to each of the voters who were lined up to receive money. Further that the people who were given money included Aisha Gariyo, one Deborah and Bahigaine Pius who was given 3000/= but he rejected it.

The 1st respondent denied this allegation and submitted that he was not anywhere near Kitwe Primary School and further that the appellant led no evidence to show that one, Deborah and Aisha Gariyo whom he alleged to have been bribed by the 1st respondent were actual living persons and registered voters in Rwampara County Constituency. Further, that the affidavits of Midius Kamayangi and Peace Kyarisima who purportedly witnessed the 1st respondent giving out money to the voters at Kitwe Primary School were similar in wording and content thereby casting doubt on the truthfulness of the averments.

Bribery is defined as an offence committed by one who gives or promises to give or offers money or valuable inducement to an elector, 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 which defines and criminalizes bribery provides:

> *"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 3 ingredients of the offence of election bribery and stated that 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 in a particular way.

It is now trite law that in election petitions that the petitioner must adduce cogent evidence to prove their case to the satisfaction of Court. In ***Masiko Winifred Komuhangi v Babihuga J. Winnie Election Petition Appeal No.9 of 2002,*** Mukasa-Kikonyogo DCJ (as she then was), held that the decision of Court should be based on the cogency of evidence adduced by the party who seeks judgment in his or her favor. 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.

We have carefully analyzed the affidavit of Midius Kamyangi relied on by the appellant and we find that apart from Bahigaine Pius who rejected the shs. 3000/= given to him and the two ladies Aisha Gariyo and Deborah to whom it was not shown how much each of them received, the said witness does not mention which other voters were lined up to receive money from the 1st respondent and his agents. The said witness further alleges that Mr. Mwezi called her and informed her that the 1st respondent and his agents were giving money to voters, we find that the said Mr. Mwezi never swore an affidavit and it could not be proved if any of the people who were allegedly bribed existed in Rwampara County Constituency or were

registered voters in that area.

Katureebe, JSC stated in ***Rtd. Col. Dr. Kizza Besigye V Electoral Commission and Yoweri Kaguta Museveni Presidential Petition No.01 of 2006*** *that in cases of bribery, I think it is not enough for a deponent to say* ***"people were being bribed at road junctions."*** *This must be stated with precision as to who gave the money, who received it and the purpose must be to influence their vote. Merely being seen giving money to a person or receiving money from a person cannot per se be evidence of bribery upon which a Court can rely."*

The appellant did not produce any evidence indicating whether the said persons were registered voters. Midius Kamyangi only alleges that the said persons are registered voters of Kitwe Primary School polling station without proving the same.

It is therefore essential in allegations of bribery for the party alleging the same to prove, on a balance of probabilities, that the person or the persons allegedly bribed were registered voters. (***See Paul Mwiru V Hon. Igeme Nathan Nabeta Samson & Others Court of Appeal Election Petition Appeal No.6 of 2011)***

In her judgment, the trial Judge stated:

> *"Since Midius Kamayangi was the only witness relied upon by the petitioner to prove this allegation, and has been found to be very unreliable, this Court believes the evidence of the 1st respondent and his witness and finds that there is no truthfulness of a meeting at*

Kitwe Primary School to bribe voters on 17th February 2016 and that no money was given out by him and his agents to bribe voters. My finding is that this allegation has not been proved on the balance of probabilities." We agree with the trial Judge's holding.

Because a single act of bribery by or with knowledge and consent of the candidate or by his agents however insignificant it may be is sufficient to invalidate an election, the petitioner must prove to the required standard of proof that indeed the respondent or his agents bribed voters. It is not enough for the petitioner to merely state that he saw persons in a line being bribed. The actual act of bribery must be described in sufficient detail for the Court to reach a determination that such bribery took place. Questions such as who gave what, to who, at what time and for what purpose must be answered.

We find the evidence of Midius Kamayangi not credible and we shall disregard it as it lacked the detailed requirements above. Therefore, the appellant failed to prove the allegations of bribery to the satisfaction of Court.

Regarding whether the learned trial Judge erred in law and fact when she exonerated the 1st respondent from the commission of any illegal practice/ election offence personally or by his agents with his knowledge, consent and approval.

It was the appellant's evidence through his affidavit that the 1st respondent, through his agents committed illegal practices / election offences with his knowledge. The said election offences included

intimidation and violence, interfering with electioneering activities of other persons and bribery.

In ***Besigye Kiiza v Museveni Kaguta Presidential Petition No.1 of 2001,*** Mulenga JSC stated:

"An election petition is a highly politicized dispute arising out of a highly politicized contest. In such a dispute details of incidents in question tend to be lost or distorted, as the disputing parties trade accusations; each one exaggerating the others' wrongs while down playing his or her own. This is because most witnesses are the very people who actively participated in the election contest." According to the evidence on record which we have carefully re-evaluated, this is indeed what took place during the election of the Member of Parliament for Rwampara Constituency.

We have already discussed each allegation as presented by the appellant in his submissions and arrived at a finding that the same were not proved by the appellant to the satisfaction of this Court.

Therefore issues 2 and 4 of the Appeal fail.

The learned trial Judge is faulted in issue 3 of the appeal for holding that the non-compliance with electoral laws did not affect the result of the election in a substantial manner and that the election results reflected the will of the people of Rwampara Constituency.

Counsel for the appellant submitted that the winning margin between the appellant and the 1st respondent was 3,682 as per the gazette notice. Further, that when the votes cast in favor of the 1st respondent and the

appellant in the 14 polling stations that registered 100% voter turn up and the votes for Kyenombe polling station that were illegally cancelled are added to the initial votes, the appellant would have emerged the winner with a vote difference of 2652 votes. Further that when the votes cast in favor of both the appellant and the 1st respondent at the 6 polling stations with over 98% are added to the equation, the appellant emerges the winner with a bigger margin of 5,004 votes.

In response, counsel for the 2nd respondent submitted that there is no electoral law which makes 100% voter turn up an electoral offence. He submitted that where such scenarios occur, the same are strictly subjected to the quantitative test in order to ascertain how the cancellation of the results of the impugned polling stations affected the general results. Further that since the winning margin was three thousand six hundred eighty two votes more than the number of those that were cancelled, this did not affect the general results of the election.

It is settled law that the duty lies on the petitioner to prove to the satisfaction of Court that the alleged irregularities and or malpractices or non-compliance with the provisions and principles laid down in the relevant laws were committed and that this affected the result of the election in a substantial manner. See ***Masiko Winifred Komuhangi V Babihuga J. Winnie, Election Petition Appeal No.9 of 2002.***

The test to be applied in determining whether the alleged malpractices or irregularities affected the result of the election in a substantial manner is both quantitative and qualitative. The appellant must prove to the

satisfaction of Court that the alleged irregularities or non-compliance affected the result in a substantial manner.

Odoki CJ went at length to give the legal definition of substantial effect in an election when handling the case of ***Amama Mbabazi & Anor V Musinguzi Garuga James Election Petition Appeal No.12 of 2002,*** where he stated that:

> *"... Substantial effect has not been defined in the statute or judicial decisions but the cases of Hackney & Morgan V Simpson attempted to define what the word substantial meant. I agree with the opinion of Grove J. the effect must be calculated to really influence the result in a significant manner. In order to assess the effect, Court has to evaluate the whole process of election to determine how it affected the results and then assess the degree of the effect. In the process of evaluation, it cannot be said that numbers are not important just as the conditions which produced those numbers. Numbers are useful in making adjustment for irregularities." (Sic)*

According to the official Gazette, the 1st respondent scored 25289 votes, the appellant, Mujuni Vicent Kyamadidi, 21607 votes, Ahimbisibwe Wilberforce Ongom, 514 votes, Bamwine Mercy Mworozi, 385 votes and Mutima Gordon Kappa 39 votes.

We note that the winning margin between the appellant and the 1st respondent was 3682 votes. It was not in contention that the results of 4 polling stations were not considered in the final tally for Rwampara County Constituency.

The learned trial Judge at page 66 of the judgment went on to analyze the effect of the results if the four polling stations were added and found thus:

> *"if one was to add the 4 polling stations in which the automated computer software entered zero for all candidates but in which the results show that the petitioner scored highest i.e 401+589+324+180= 1494 he would score 86783 votes which would push his margin higher still and put the winning percentage at 16,535%. With simple calculation, I find that the 1st respondent would still have emerged the winner." (sic)*

In ***Besigye Kiiza v Museveni Kaguta Presidential Petition No.1 of 2001,*** Mulenga JSC (as he then was) had this to say on the same issue of substantial effect:-

> *"To my understanding therefore, the expression "non-compliance affected the result of the election in a substantial manner" can only mean that the votes a candidate obtained would have been different in a substantial manner, if it were not for the non-compliance substantially.... That means to succeed, the petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced but such reduction however would have to be .... Such that would put the victory in doubt." (Sic)*

We, therefore, find that there was no evidence to the satisfaction of Court that the non-compliance with electoral laws did affect the results in a substantial manner.

Therefore issue 3 of the Appeal fails.

On issue 5 of the Appeal, counsel for the appellant faulted the trial Judge for failing to distinguish between non-compliance from illegal practices/ election offences coming to the conclusion that there was proof of neither ground. He stated that this was reflected in the judgment where the learned trial Judge held:

> *"My conclusion is that the petitioner must prove to the satisfaction of Court that the .....alleged acts of non-compliance were committed by the 1st respondent personally or with his knowledge, consent or approval by any other person and that they affected the results of the election in a substantial manner; and I so hold."*

Section 61 of the PEA provides that the election of a candidate as a Member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the Court-

a) *Noncompliance 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 the failure affected the result in a substantial manner*

b) .....

c) *That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval;*

d) .....

Section 1 of the PEA defines an illegal practice to mean an act declared to be an illegal practice under part X1 of this Act. The illegal practices under part XI of the PEA include bribery, procuring prohibited persons to vote, publication of false statements as to illness, death or withdraw of a candidate.

As already indicated, the appellant's allegations of non-compliance in the conduct of the election as against the 1st respondent included violence and intimidation which he termed as a campaign of terror, ballot stuffing, illegal cancellation of results and unsigned DR Forms all of which the applicant failed to prove to the satisfaction of Court.

Further the illegal offences allegedly committed by the 1st respondent included interfering with electioneering activities of other persons contrary to Section 24 of the PEA; intimidation and violence contrary to Section 80; and bribery contrary to Section 68 of the PEA.

We have not found any failure by the learned trial judge to distinguish between alleged acts of non-compliance and illegal practices that the appellant raised. We therefore cannot fault the judge for the alleged failure to make a distinction.

In the circumstances issue 5 of the appeal fails

On issue 6 of the Appeal, counsel for the appellant submitted that in some instances the learned trial Judge demanded a standard of proof much higher than proof beyond the shadow of a doubt. He submitted that the learned trial Judge demanded the production of death certificates where

the appellant alleged that the dead had been voted for.

Further that it was inconceivable that all the registered voters at the 14 polling stations turned up to vote. To counsel the appellant had adduced evidence of dead voters who could not have voted on the polling day but this fact was ignored by the trial Judge. The appellant relied on his own affidavit, that of Karugaba John and Tweyongere Silver.

Counsel for the 1st respondent submitted that the appellant led no evidence to prove this allegation. He further submitted that the appellant's affidavit evidence of the death of certain individuals who were voted for was insufficient as the only way the appellant could have proved the death of these individuals was by production of death certificates.

Section 101 (1) of the Evidence Act (Cap. 6) states that:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist."

Section 102 of the same Act states that.

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

It is now settled that the burden of proof in election Petitions lies upon the petitioner and he or she is required to discharge that burden on a balance of probabilities to the satisfaction of Court.

Section 61 of the PEA provides that the election of a candidate as a Member of Parliament shall only be set aside on grounds stipulated in the section if those grounds are proved to the satisfaction of Court. (Emphasis ours). Subsection 3 thereof states that; any ground specified in subsection (1) shall be proved on the basis of a balance of probabilities.

In an election Petition, as in a civil case, it is the petitioner who has to convince the Court to take action on the allegations in the Petition. The legal burden remains with the petitioner. The evidential burden initially rests upon the party bearing the legal burden, that is the petitioner, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. (***See Halsbury's Laws of England, 4th Edition, Vol.17, paragraph 15)***

In ***Paul Mwiru V Hon. Igeme Nabeta and others, Court of Appeal Election Petition Appeal No.6 of 2011,*** Court stated:

> *"Section 61(3) of the PEA sets the standard of proof in parliamentary election petitions. The burden of proof lies on the petitioner to prove the allegations in the petition and the standard of proof required is proof on a balance of probabilities. The provision of this subsection was settled by the Supreme Court in the case of Mukasa Harris v Dr Lulume Bayiga (supra) when it upheld the interpretation given to the subsection by this court and the High Court." (Sic)*

Regarding the standard of proof, it was the appellant's contention that in some instances the trial Judge demanded a standard of proof much higher than the required one.

It must be noted that the more serious an allegation or the more serious its consequences if proven, the stronger the evidence has to be before a Court to find the allegation proved on the balance of probabilities. (**See *Home Department V Rehman (2003) 1 AC 153)***

This being a serious allegation, the affidavit evidence that the appellant relied on to prove the dead voters who could not have voted but were voted for was insufficient. He had to offer proof cogent enough to secure judgment in his favor.

We agree with the learned trial judge's finding that:-

> *"in the absence of concrete evidence that people who died were voted for or that others never turned up for voting, much as this would be plausible if proved, the petitioner has a duty to prove that all those people alleged to have died or failed to turn up for voting were indeed registered voters in the particular mentioned polling stations."*

In ***Blyth V Blyth (1966) AC 643,*** Lord Denning observed that *".....no one whether he be a Judge or Juror would infact be 'satisfied' if he was in a state of reasonable doubt....."*

In our view, the learned trial Judge properly applied the required standard and burden in evaluating the evidence before her.

Issue 6 of the Appeal therefore fails.

On issue 7 of the Appeal, counsel for the appellant submitted that the learned trial Judge held that counsel for the petitioner withdrew certain affidavits from Court which included DR Forms for 4 polling stations. Further, that the learned trial Judge imputed an ill motive that counsel for the petitioner's action was intended to conceal falsified documents and this accusation substantiated his claim that the judge was not only unfair but was also not impartial.

The gist of the appellant's complaint as we understand it is that the trial Judge was biased.

The trial Judge held at page 51 of her judgment as follows:-

> *"Court also noted that some annextures bore no serial numbers on them compared to all those acquired from and certified by the 2nd respondent. Bearing the above in mind, it did not surprise Court that counsel for the petitioner shied away from tendering the originals of annexture "H"- Ngoma Health Centre II, "I"- Bushwere Primary School, "J"-Buhungye Primary School and "K" –Kyenobe playground respectively attached to the petitioners affidavit as Exhibits in evidence although at the commencement of the hearing he had availed them to Court for inspection but in the end withdrew them. To me, that and the fact that all the DR Forms duly certified by the Secretary Electoral Commission have similar features proves that contrary to the allegation of the petitioner that results were forged and falsified, it is him and/or his agents who possibly falsified these documents; no wonder he did not find it fit to tender them as exhibits. My finding is*

that this allegation was not substantiated and was therefore not proved by the petitioner, it is also rejected by this Court as untenable."

Bias is a condition of the mind, which sways judgment and renders a Judge unable to exercise his functions impartially in a particular case. ***(See Black's Law Dictionary, 4th Edition)***

The above definition demonstrates that the appellant's assertion was misconceived and we find that there has been no proof of bias as against the trial Judge. The apprehension by the appellant that justice will not be done is a normal apprehension whereby each party who has a matter in Court is apprehensive as to the decision the Court would make.

The principles governing the test to be applied in cases where it is alleged that a Judge has manifested apparent bias were set out in ***Porter V Magill (2002) AC 357***, the House of Lords held as follows;

"The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility..... that the tribunal was biased."

We have analyzed the holding by the trial Judge that counsel for the appellant had issues with. We have also carefully studied the judgment of the trial Court as a whole. We do not find any instances of bias by the trial Judge after applying the test in Porter's case above.

In the result, issue 7 of the appeal fails.

On issue 8 of the Appeal, the appellant prayed that the Appeal be allowed and the election of the 1st respondent as the Member of Parliament for Rwampara County Constituency be set aside and the 1st respondent be ordered to vacate his seat under Section 63(6) (a) (i) of the PEA; Court declares the appellant as the validly elected Member of Parliament for Rwampara County Constituency under section 63(4) (b) and 63(6) (b) of the PEA and issues a certificate of determination to that effect; costs on a certificate of two counsel in both the lower Court and appellate Court; the respondents be denied costs in the lower Court; and such other reliefs as Court may deem fit and appropriate.

Counsel for the respondents prayed that the judgment and orders of the lower Court be upheld and the appellant be ordered to pay costs of the Appeal as well as costs attendant to opposing the Petition in the lower Court.

The learned trial Judge having found that none of the allegations had been proved to the satisfaction of Court by the appellant on the balance of probabilities she confirmed and declared the 1st respondent as the directly elected Member of Parliament for Rwampara County Constituency and dismissed the Petition with full costs to the respondents.

Rule 27 of the Parliamentary Elections (Interim Provisions) Rules SI 141-2 provides:-

> *"All costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the*

Court may determine."

The learned trial Judge, in our view, properly exercised her jurisdiction with regard to the question of costs in this matter. We are, therefore unable to fault her.

In conclusion, the Appeal fails. We make the following declarations and orders;

1. The decision and orders of the learned trial Judge are hereby upheld.
2. The 1st respondent is the validly elected Member of Parliament for Rwampara County Constituency
3. The appellant shall bear the costs of the Appeal and the trial Court

We so order

Dated this ....27th.....day of .....Oct..... 2017

.....

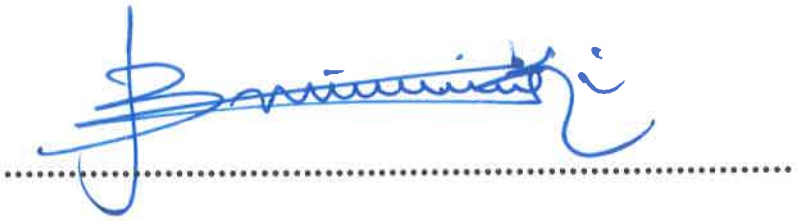
HON. MR. JUSTICE S.B. K KAVUMA

DEPUTY CHIEF JUSTICE (E)

.....

HON. LADY JUSTICE MUSOKE ELIZABETH

JUSTICE OF APPEAL



HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

(1)

EPA No 84/16

Hon. Amuriat Kyamanywa Vicent

vs

Hon. Charles Mbabirano

& Another

(1) Frank Kanduho for the 1st respondent

Ambrose Tebyasa for the 2nd respt.

(2) Appellant is in not but his counsel

Mr. Bonifance Ngaruye & Mr James

Byamukama is absent. (3) Anyin-Clerk.

The matter is for judgment and we ready to proceed

CJ: Judgment delivered in the presence of the above parties

27/10/17