THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

ELECTION PETITION APPEAL NO. 86 OF 2016

(An Appeal from Election Petition No. 005 of 2016 in the High Court at Mbarara, Judgment of Hon. Lady Justice Damalie N. Lwanga dated 26th August, 2016)

Hon. OdoTayebwa ::Appellant

VERSUS

1. Gordon KakuunaArinda
2. The Electoral Commission **:::::::: Respondents**

Coram: Hon.Mr. Justice Remmy K. Kasule, JA
Hon. Mr. Justice Richard Buteera, JA
Hon. Lady Justice Catherine Bamugemereire, JA

JUDGMENT

On 26.08.2016, the High Court sitting at Mbarara, presided over by Hon. Lady Justice Damalie. N. Lwanga, dismissed with costs Election Petition No. 005 of 2016. The petition had been lodged and prosecuted in Court by Hon. Odo Tayebwa, now the appellant, against both respondents to this appeal following the

holding of the Parliamentary Elections on 18.02.2016 for the Bushenyi-Ishaka Municipality Constituency. The appellant, the first respondent and one Nekemia Zelebabel Mbaine were the candidates in this election. The second respondent organized the same pursuant to Article 61 (1) (a) of the Constitution.

At the conclusion of the election, the second respondent declared the first respondent as the one who had the majority votes numbering 6,457 being 40.53 of all votes cast. The appellant got 5,334 votes representing 33.48% of the votes cast, while the third candidate, Nekemiah Zelebabel Mbaine polled 4,142 votes being 26% of the cast votes. Accordingly the second respondent returned, declared and gazetted the first respondent as the validly elected Member of Parliament for the Bushenyi-Ishaka Municipality Constituency.

The appellant was dissatisfied with the results of the above stated elections. He accordingly lodged in Court the Election Petition No. 005 of 2016. He alleged in the petition illegal practices and electoral offences to have happened in the course of the election and the same to have been carried out contrary to specific provisions of the Parliamentary Elections Act. It is this petition that the High Court dismissed with costs thus giving rise to this appeal.

The appeal is based on nine (9) grounds of appeal stated in a Memorandum of Appeal as follows:

1. The learned trial Judge erred in law when she heavily relied on several affidavits sworn in support of the 1st Respondent's answer to dismiss the appellant's petition

when those affidavits contained obvious falsehoods that put the credibility of those witnesses at stake which occasioned a miscarriage of justice.

2. The learned trial Judge erred in law when she held that she would not strike out several affidavits which had been filed in support of the 1st Respondent's answer out of time without leave of Court and which she heavily relied on to dismiss the appellant's petition.
3. The learned trial Judge erred in law when she relied on affidavit evidence filed in support of the 1st Respondent's answer when such affidavit evidence was inadmissible on account of contravening express statutory provisions.
4. The learned trial Judge erred in law when she declined to consider and to rely on several affidavits filed in support of the appellant's case which occasioned a miscarriage of justice.
5. The learned trial Judge erred in law when she held that for the offence of bribery there was need for corroboration of the evidence of a single witness.
6. The learned trial Judge erred in law and in fact when she held that no election offence or illegal practice had been committed by the 1st respondent personally or by his agents with his knowledge, consent or approval.
7. The learned trial Judge erred in law and in fact when she held that the non-compliance with the electoral laws did not affect the results of the election in a substantial manner.

8. The learned trial Judge erred in law and in fact when she dismissed the petition with costs without evaluating the evidence properly which occasioned a miscarriage of justice.
9. The learned trial Judge erred in law when she ordered the appellant to pay costs of the petition to the respondents when there were good reasons for not ordering the appellant to pay all the costs or at all.

The appellant prays this Court to allow the appeal, set aside the Judgment of the High Court, substitute the High Court Order dismissing the appeal with costs with an order allowing the petition with costs, annulling the election of the 1st respondent as the member of parliament for the Bushenyi-Ishaka Municipality Constituency and order a fresh election to be held; and further that both respondents pay the costs of the appeal and those in the Court below.

At the hearing of the appeal learned Counsel Ngaruye Ruhindi Boniface and Collins Nuwagaba appeared for the appellant while Alexander Kibandama and Ronald Tusingwire were for the first respondent and Edwin Tabaro and Justus Karuhanga represented the second respondent.

At the conferencing of the appeal as well as in the conferencing notes of Counsel for the respective parties to the appeal, Counsel appear not to have reached a consensus as to the framing of the issues. We have accordingly, taking into account the pleadings, the Judgment of the Court below, the conferencing notes as well as the submissions of all Counsel framed the issues for resolution on appeal as here below.

1. Whether or not the trial Judge was right in holding that the late filing in Court of the 57 affidavits in support of the answer of the 1st respondent to the petition, 45 of them filed on 16.05.2016 and 12 filed on 17.05.2016, did not lead to injustice and as such they could not be struck out.
2. Whether or not the trial Judge was right to resolve the petition while taking into account 35 affidavits filed in support of the 1st respondent's case to the petition, each of which affidavits contained a falsehood that each deponent of the affidavit had read and understood the contents of the affidavit he/she was responding to and yet the very same deponents stated in each of their same affidavits that each one of them was illiterate and could not read.
3. Whether or not the trial Judge was right not to rely on some other affidavits while determining the petition on the basis that the deponents of those affidavits had not been availed to Court for purpose of being cross-examined on the contents of their affidavits.
4. Whether or not the trial Judge erred when she held that the petitioner had not proved, on a balance of probabilities that the first respondent had personally or by his agent(s) and or with his knowledge, consent or approval committed an election offence or illegal practice.
5. Whether or not the trial Judge properly evaluated the evidence on record as to whether or not there was non-compliance with the electoral laws and whether or not such non-compliance did not affect the results of the election in a substantial manner.

6. Whether or not the trial Judge was right to order the petitioner to pay the costs of the petition to the respondents.

As the first appellate Court, this Court has the duty to re-evaluate the evidence adduced at trial by subjecting it to a fresh and exhaustive re-appraisal, scrutiny, determining whether or not the learned trial Judge came to the correct conclusions and if she did not, then this Court, on a review of all the evidence, is entitled to reach its own conclusions. In carrying out this duty this Court is conscious of the fact that, unlike the trial Judge, we of the appellate Court, did not have the opportunity to observe the demeanour of witnesses at trial where such witnesses were cross examined and re-examined. As such we have to go by the observations of the trial Judge as regards the demeanour of those witnesses who testified at the trial. See: **Rule 29** of the Rules of this Court. See also: **Court of Appeal Election Petition No. 39 of 2011: Achieng Sarah Opendi and Electoral Commission vs OchwoNyakechoKezia**.

At trial the burden of proof lay on the appellant as the petitioner to prove the allegations he alleged in the petition, and to have been able to succeed, the appellant had to prove those allegations, or one of them in case of an illegal practice or an electoral offence, to the satisfaction of the Court on a balance of probabilities, pursuant to **Section 61(3) of the Parliamentary Elections Act [17 of 2005].**

The law is now settled that given the public importance of elections, the degree of proof in election petitions is relatively

higher than in a normal Civil Suit action. The Supreme Court in **Election Appeal No. 18 of 2007: Mukasa Anthony Harris V Dr.Bayiga Michael Philip Lulume** expounded that the term: "proved to the satisfaction of the Court on a balance of probabilities" places upon the petitioner the duty to prove his/her case to the level where the Court is convinced that the occurrence of a fact to have been more probable than not.

This Court shall bear in mind the above legal principles as to the duty of this Court and as to the burden and standard of proof when resolving the issues in this appeal.

The first issue relates to 57 affidavits filed for and in support of the reply to the petition by the first respondent.

The undisputed facts that came out at trial are that the first respondent was served with the Notice of presentation of the Petition on 04.04.2016. He then filed in Court a reply to the petition accompanied by his own affidavit on 14.04.2016. Later on 16.05.2016 he filed in Court 45 other affidavits and on 17.05.2016 he filed another 12 affidavits, thus a total of 57 affidavits.

Appellant's Counsel contends that **Rule 8(1)** of the **Parliamentary Elections Rules, SI (4)-2,** gave the first respondent ten days after being served with the petition on 04.04.2016 within which he had to file his answer to the petition, with all the supporting affidavits. The ten days from 04.04.2016 expired at the close of 14.04.2016. Thus the 57 affidavits filed on 16.05.2016 and 17.05.2016 were filed totally out of time and without any leave of Court. The trial Judge

therefore ought to have struck off those affidavits from the Court record by reason thereof. Once the said affidavits were struck off the record, then there would be no evidence to support the petition as only the affidavit of the petitioner would remain accompanying it. The said affidavit proved to provide no credible evidence as it was full of hearsay. So the petition would also be struck off for lack of evidence. Instead the trial Judge, contrary to the law, had allowed the said affidavits, that had been filed late and without leave of the Court, to remain on Court record and relied upon them to dismiss the appellant's petition at the conclusion of the trial.

Appellant's Counsel prayed this Court to allow this ground of appeal, set aside the Judgment of the trial Court, strike out the 57 affidavits as well as the petition itself since the averments in the petition remained unsupported by any credible affidavit evidence.

Counsel for the first respondent, while admitting that the 57 affidavits were filed in Court on 16 and 17.05.2016, contended that there was no rule of law that stipulated any time as to when the first respondent had to file in Court those affidavits. According to respondent's Counsel, **Rule 15 of the Parliamentary Elections (Interim Provisions) Rules** that provides that all evidence at trial in an election petition, in favour of or against the petition, shall be by way of affidavit read in open Court, allowed affidavit evidence to be filed any time before the hearing of the petition. While **Rule 8(1)** of the same Rules requires an answer to the petition to be filed

accompanied by an affidavit, this did not mean that all affidavits had to be filed in Court at the very same time when the reply to the petition was being filed.

Further, Counsel for the first respondent contended that Counsel for the appellant cannot in any way argue that the appellant is being prejudiced, because on 16.05.2016 before Court, Counsel for the appellant prayed Court to have the scheduling of the hearing of the petition adjourned to 23.05.2016 so as to enable the said Counsel to respond to the affidavits of the first respondent and to finalise all issues and preparations. On 23.05.2016 the same appellant's Counsel confirmed to Court that all affidavits had been read and there was no need to have the same read over in Court.

According to 1st respondent's Counsel, Counsel for the appellant, like all other Counsel representing the parties at trial, consented to having on record all the affidavits that had been filed in Court by the respective parties by the 23.05.2016 when the conferencing was completed and closed in the morning and the cross-examination of witnesses started in the afternoon at 3.10 p.m.

Counsel for the first respondent thus prayed this Court to find that the trial Judge properly allowed these affidavits to be on record and as such the grounds relating to this issue ought to be dismissed.

On his part, second respondent's Counsel adopted the submissions of Counsel for the first respondent on this issue. In addition Counsel submitted that since the **Parliamentary**

Elections (Interim Provisions) Rules were silent as to the period within which the respondents were to file in Court the affidavits in support of their respective cases, then resort should be made to the Civil Procedure Rules by virtue of **Rule 17 of the Parliamentary Elections (Interim Provisions) Rules** which makes the practice and procedure relating to a trial of a Civil Suit in the High Court as set by the Civil Procedure Act and the Rules made thereunder applicable to the trial of an election petition. Accordingly **Order 12** of the **Civil Procedure Rules** as to holding a scheduling conference applied to the trial of this Election Petition. Therefore all parties to the petition and their respective Counsel were bound by the scheduling notes held on 16.05.2016 signed by all Counsel of all parties to the Election Petition and duly endorsed by the High Court Deputy Registrar, Mbarara. By those notes, the 1st respondent's documents annexed to the answer and supporting affidavits were acknowledged as properly filed and taken as forming part of the Court pleadings and it was agreed by all that the respondents are to file all affidavits by close of business on Tuesday 17th May, 2016 and petitioner to file rejoinders, if any, by close of business on Monday, 23rd of May 2016. Therefore Counsel for the appellant was now estopped from asserting that the 57 affidavits in issue were filed out of time. Counsel for 2nd respondent prayed that the grounds relating to this issue be disallowed by Court.

We have carefully considered the submissions of respective Counsel on this issue. We have also analysed the evidence on record and subjected it to fresh scrutiny.

We note in particular the fact that in the scheduling notes executed by all Counsel for all parties to the election petition and filed in the high Court at Mbarara on 16.05.2016 the parties agreed as follows:

"G. Agreed schedule of documents

1. The Respondents to file all affidavits by close of business on Tuesday, 17th May, 2016.
2. The Petitioner to file rejoinders if any by close of business on Monday, 23rd of May, 2016".

By the above agreement Counsel for the appellant agreed with other Counsel on a time frame of filing all affidavits by the respondents to be of 17.05.2016. Accordingly we hold that by his own conduct, the petitioner and his Counsel are estopped form asserting that any affidavit filed for an on behalf of the 1st respondent before the expiry of 17.05.2016 was filed out of time. We so hold so on the basis of **Section 114 of the Evidence Act** which provides that:

"When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing".

The learned trial Judge in resolving this issue did not approach it from the angle of the appellant being estopped from raising it. She instead considered **Rule 8(1)** and **(3) (9)** of the **Parliamentary Elections (Interim Provisions) Rules** and concluded that the administration of justice requires that the substance of the dispute be decided on merit because not all errors and lapses should necessarily debar a litigant from the pursuit of his/her rights. The learned Judge relied on the Supreme Court decision of **Sitenda Sebalu vs Sam K. Njuba, Election Appeal No. 26 of 2007** where the said Court held:

> *"It is no longer enough for Court in determining the validity of an act done in breach of a statutory provision to ask itself whether or not the breached provision is mandatory or directory. The Court must look at the purpose of the legislation and consider whether the breach of the provision should invalidate the impugned act. The purpose is derived from the object of the statute".*

Our appreciation of **Rules 8(1) (3) (a) and 15(1) of the Parliamentary Elections (Interim Provisions) Rules** is that they are intended to ensure a quick trial of an election petition, but also at the same time such a trial must resolve the election dispute on merit with the parties to the dispute exercising to the full their entitlement to a fair trial. Accordingly, in the normal course of things, where the respondent can secure and file the affidavits necessary to support the reply to the petition within the ten days after the service to him/her of the petition set by **Rule 8(1)** then the respondent ought to do so. But where this is not

possible, or where for example the witness is secured after the expiry of the said ten days, then **Rule 15** leaves the door open for such a one to prepare and lodge an affidavit to be read in open Court. It is up to the Court to set the time lines that are to ensure justice to all the parties to the election petition, bearing in mind the overall constitutional goal that, while an election petition should be expeditiously disposed of, **Article 126(2) (e)** of the **Constitution** enjoins Courts of law to administer substantive justice without undue regard to technicalities. See: **Court of Appeal Civil Appeal No. 18 of 2008: Yowasi Kabiguruka vs Samuel Byarufu.**

The learned trial Judge considered the fact that although the 57 affidavits had been filed 22 and 23 days from the last date stipulated by **Rule 8(1)** and no leave had been granted by Court, the appellant, as petitioner, had not shown any prejudice or inconvenience he had suffered as a result of filing the affidavits at that time; and so she declined to strike out the said affidavits.

We agree with the conclusion reached by the learned trial Judge. We only wish to add that, once at the stage of scheduling, time lines were set by agreement of all parties to the petition as to when all affidavits and rejoinders to them were to be filed, then a party to the petition needed no leave of Court to file the same, unless and until the filing was outside the agreed upon time.

For the reasons given above we uphold the decision of the trial Judge for not striking out the 57 affidavits. We find that the trial Judge was right to hold as she did. We find no merit in the

grounds of appeal constituting issue one. The same stand disallowed.

The second issue involves determining whether or not the affidavits of 35 deponents filed in support of the 1st respondent's answer ought to have been rejected by the trial Judge by reason of having been based on a falsehood in each one of them.

The affidavits in question sworn in support of the first respondent's answer were of Rw2 Niwasasira Dan, Rw3 KenzakiMerabu, Rw4 Tumuhairwe Emmanuel, Rw5 Byaruhanga Stephen, Rw6 KabagambeElvanise, Rw7 Karuhanga Wilson Kagumire, Rw9 Kemirembe Lovence, Rw10 Nathenaile Tukamuhebwa, Rw11 Kedress Joy, Rw12 SanyuHairet, Rw13 Mugume Edward, Rw14 Charity Bitwababo, Rw15 Ayebazibwe Alex, Rw16 Muhebwa Boaz, Rw17 Twijukye Innocent, Rw18 Senesio Hangamaisho, Rw19 Topista Kyokunda, Rw21Nuwagaba Innocent, Rw22 Nuwagaba Norbert, Rw24 Rutaro Julius, Rw25 Mutaryebwa Alex, Rw26 Aguma Olismus, Rw27 Nabaasa Elias, Rw28 Turyomuriwe Albert, Rw29 Ahimbisibwe Jenetio Bwengye, Rw30 Mbabazi Scola, Rw31 Butamanya Moris, Rw33 Mugisha Abdu Karim, Rw35 Mutungi Barnard, Rw36 Aloysius Nshemerirwe, Rw38 Tusiime Rosette, Rw39 Tumwine Lauben, Rw40 Kembabazi Peace, Rw42 YasinKyota, and Rw45 Steven Kagaba.

Appellant's Counsel contended that each one of the above witnesses for the first respondent deponed to an affidavit that had a falsehood in it. Each one of those affidavits had been filed in Court.

The falsehood was that each witness stated on oath at the beginning of his/her affidavit that he/she had read the affidavit of a particular witness who had filed an affidavit in Court in support of the appellant's case and that he/she had understood its contents and was deponing to his/her affidavit in response to what he/she had read and understood as contents contained in the affidavit of that particular appellant's witness. Each one of the stated first respondent's witnesses would then proceed to deny and refute on oath the contents of the affidavit of the particular witness of the appellant.

However, at the end of the affidavit of each one of the stated witnesses of the first respondent, the said particular witness stated in the jurat administered to him/her by the commissioner for oaths that he/she, as the deponent of the very same affidavit, being illiterate, had had to have the contents of his/her affidavit being truly, distinctly and audibly read over to him/her and the same explained to him/her as to the nature and contents thereof in the Runyankole/Rukiga language, which he/she appeared to have understood before he/she affixed his/her signature on the said affidavit before the commissioner for oaths.

The falsehood in each one of the affidavits was that since each one of the stated witnesses of the first respondent was illiterate in the english language, then there is no way he/she could have read and understood the contents of the affidavits of the witnesses of the appellant which were in the english language so as to be able to deny and/or to refute the contents of those affidavits. They could only have understood the contents in

those affidavits if those contents had been translated and explained to them from English into the Runyankole/Rukiga or some other language that each one understood well. However none of the 35 witnesses of the first respondent claimed in the body of his/her affidavit that such a translation had been done. Counsel for the appellant thus contended that the said 35 witnesses had committed a grave falsehood in each one of their affidavits. He submitted therefore that the trial Judge ought to have rejected and struck off the Court record each one of those affidavits. The trial Judge had thus grossly erred when she failed to strike off those affidavits, but instead proceeded to sever the falsehood from each one of them, and proceeded to rely on the rest of their contents when arriving at the decision to dismiss the appellant's petition. Counsel prayed that this ground of appeal be allowed by this Court.

Learned Counsel for the first respondent submitted, in opposition to Counsel for the appellant, that all that had happened with regard to the said 35 affidavits was a drafting mistake whereby each deponent was stated to have read the affidavit instead of the said deponent stating that the affidavit had been read and translated to him/her in the language that he/she understood by someone who was conversant in english and the language understood by the deponent witness. Counsel maintained that this mistake did not go to the root and essence of each one of these affidavits.

The mistake in drafting the affidavits was one attributable to the advocates who drafted the affidavits who negligently carried out

their professional work. Counsel contended that such negligence of Counsel ought not to be vested on the first respondent who was the client of the offending advocates.

The witnesses had stated during cross-examination in their evidence given in person before Court that the affidavits they responded to had been translated and explained to them in a language that each one of them understood and as such each one had responded to matters that they clearly understood and appreciated. The trial Judge was thus right to consider their evidence inspite of the drafting error and no miscarriage of justice had been caused to the appellant.

As to the specific affidavit of Nuwagaba Innocent, was a mere oversight in his affidavit on the part of Counsel who drew up that affidavit. The mistake of Counsel should not be blamed upon this witness, who had confirmed to Court during cross-examination that the contents of his affidavit has been translated and explained to him and he had understood the said contents before he signed the affidavit. The trial Judge was accordingly right not to strike out the affidavit of Innocent Nuwagaba.

In resolving this issue, we note that an affidavit is a written statement in the name of a deponent by whom it is voluntarily signed and sworn to or affirmed. It is confined to such statements as the deponent is able of his/her knowledge to prove, but in certain cases, it may contain statements of information and belief with the sources and grounds thereof being disclosed.

Rule 15(1) and **(2)** of the **Parliamentary Elections (Interim Provisions) Rules SI. 141-2** provides that all evidence at the trial in favour of or against a Parliamentary Election Petition shall be by way of affidavit read in open Court. With leave of Court, the deponent to an affidavit before Court may be cross-examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn.

The Supreme Court in **Col. (Rtd) Dr. Kizza Besigye vs Museveni Yoweri Kaguta and Electoral Commission: Election Petition No. 1 of 2001** held that, in proper cases, depending on the circumstances before the Court, the Court has discretion to sever and reject those parts of an affidavit that are defective or superfluous and consider and rely on the proper parts of the same affidavit apart from or in addition to the affidavit of each one of them, some other evidence given on oath through the said cross-examination and re-examination that is availed to Court.

The nature of this evidence given to Court from 30 of the 35 witnesses was to the effect that before each one signed the affidavit, the contents thereof had first been read and interpreted to him/her to each one's understanding in Runyankole/Rukiga language after which such a one signed the affidavit. The lawyers who did this reading and interpretation were Roland Gonzaga Tumwesigye either singly or both in respect of each of these witnesses.

For the other witnesses like Rw3 Kenzaki Merabu she explained that before she signed her affidavit she had had the case of the well/water source explained to her "by a grey haired elderly man"

and then she proceeded to swear as to what she knew about this well/water source. As to Rw26 Aguma Olismus he stated to the trial Court on oath that on 18.02.2016 he was a polling agent of the 1st respondent at Katungu Mothers Union Polling Station and that he never distributed money and he saw no one distributing money at that polling station. He voted at the same polling station. Rw27 Elias Nabaasa, a polling agent for President Museveni at Irembezi primary School also denied on oath before the Court the assertion by Nsasirabo Adrine that on voting day, he had offered her shs. 2,000= to vote for the 1st respondent and that he did not see any one at the polling station giving out money. The environment was good and there was security. Rw29 Ahimbisibwe Jenetio Bwengye also denied on oath that on 16.02.2016 he had mobilised voters to go to St. Kaggwa Primary School to meet the first respondent as well as distributing money to those voters to vote the 1st respondent. Rw35 Mutungi Barnard also stated to Court on oath that the allegations that were put to him were false and that is why he had to sign the affidavit whereby he denied the same. Finally Rw40 Kembabazi Peace, a polling agent of the first respondent at Basajjabalaba Primary School II polling station, stated on oath that on polling day she was at the polling station throughout, except for the ten (10) minutes when she went to vote at a nearby polling station. There were no incidents of violence, no bribing of any one, and no intimidation of any voter at this polling station. The other polling agents never reported anything wrong having happened at their respective polling stations.

The learned trial Judge in refusing to reject the 35 affidavits of the 1st respondent's witnesses that allegedly contained a falsehood in the body of each affidavit, namely that the deponent had read and understood the affidavit he/she was responding to, yet the same affidavit in its jurat at the end stated the deponent to have been illiterate, reasoned as follows in her Judgment:

> *"I agree that the deponents of the affidavits complained of could not have read and understood the affidavits they were responding to as indicated in their affidavits, since they are illiterates. However, it was clear during cross examination of those witnesses that each of them knew and understood the nature and contents of the allegations of the petitioner's witnesses which they were responding to and they gave clear responses to them in Court; therefore the parts of their affidavits which wrongly state that they had read the affidavits did not affect the averments they made".*

We too, in resubmitting the evidence to fresh scrutiny find that, through cross-examination and re-examination, each one of those witnesses adduced to Court evidence on oath that the Court could not disregard. The learned trial Judge, in exercise of her discretion, decided to sever the affidavits by striking off those parts to the effect that the deponents had read and understood the affidavits that they were responding to. The Judge chose to rely on those parts of the affidavit where she was satisfied on the basis of all the evidence before her, including that through cross-examination and re-examination, that these were matters within the knowledge of the deponents. We too, like the full bench of

the Supreme Court did in **Supreme Court Civil Application No. 8/89 Yona Kanyomozi vs Motor Mart (U) Ltd** find it unable to interfere with the discretion exercised by the trial Judge. We accordingly uphold discretion depending on all the evidence that was before her the decision of the learned trial Judge, in exercise of her not to reject the 35 affidavits in their entirety; but rather to sever them and rely on those parts that she found appropriate to rely on together with other evidence.

Specifically with regard to witness Rw21: Nuwagaba Innocent, this witness explained to the trial Court that the contents of the affidavit he signed had first been explained/interpreted to him by lawyer Gonzaga and he signed only after he had understood the same.

To the extent that this witness stated in his evidence that he was illiterate, his affidavit ought to have been made in accordance with the provisions of the Illiterates Protection Act, Cap. 78 and the Oaths Act, Cap. 19. However in **Court of Appeal Election Petition Appeal No. 29 of 201: Muhindo Rehema vs Winfred Kiiza& Another,** this Court held that as long as there are averments before Court showing the contents of the affidavit that the deponent was responding to, then the concern that those contents had not been read or explained to the deponent is alleviated. The Court is thus not justified to reject that affidavit. Only the affidavit of a deponent who does not turn up for cross-examination should be given hardly any consideration. Accordingly, we find no merit in the submission that the learned

trial Judge ought to have rejected the affidavit of Nuwagaba Innocent for lack of a jurat with an interpretation clause.

Counsel for the appellant further contended that the learned trial Judge had erred when she did not take into consideration while resolving the petition the affidavit evidence of three (3) witnesses for the petitioner, now appellant, these witnesses being: Nahabwe Didas, Bandiho Siriri and Natureeba Ben, on the ground that each one of them had not been availed for cross-examination by Counsel for the respondents.

We observe from the trial proceedings that from the very beginning of the trial on 16.05.2016 Counsel for the first respondent informed Court that:

> *"We shall have to cross-examination all the deponents of the petitioner's affidavits"*

This meant that Counsel for the petitioner (appellant) had the duty to avail all such deponents to Court for the purpose of having each one cross-examined by the respondents. In the course of the trial, a number of witnesses were not cross-examined either because they were unavailable or Counsel for the respondent dispensed with the cross-examination. Where this occurred the Court was so informed and the Court record clearly shows this. On 26.05.2016 the proceedings in Court were as follows:

"Kibandama: We intend to cross-examine the witnesses whose evidence relates to the CDS.

Ngaruye: The witness are not in Court to-day. They were present

yesterday but when an application was made to have their evidence expunged, they thought they would not be required to testify. I have consulted my client and we have decided that the witnesses whose evidence relates to the CDS will not be availed for cross-examination. These also include MbaineNekemiaZelbabel who swore an affidavit in rejoinder, in addition to those who had been mentioned by Counsel for the 1st respondent. This is the close of the petitioner's case".

On 27.05.2016 the Curt record is to the effect that:

"Nuwagaba: We closed the petitioner's case; we are ready to cross-examine the witnesses of the 1st respondent, starting with Nuwasasira Dan".

By closing the petitioner's case, Counsel for the Petitioner in effect took the decision not to present any other witnesses of the petitioner for cross-examination or otherwise. He did so without seeking any directions from the Court and also without first finding out from Counsel for the respondents whether or not they were no longer interested in cross-examining those deponents of the affidavits for the petitioner who had not yet been cross-examined. Indeed on 02.06.2016 when Counsel for both respondents clearly reiterated to Court that from the very start of the trial they had indicated that they wished to cross-examine all the witnesses of the petitioner, and they prayed that the affidavits of those deponents filed in support of the petitioner be struck off

by reason of their being not availed for cross-examination. Counsel Nuwagaba for the petitioner, made no attempt at all to pray Court to avail him the opportunity for him to produce those witnesses on that day or on any other day so that they are cross-examined by Counsel for the respondents before Court closed the cases of the respective parties and proceeded to making submissions.

We are unable, given the Court record of the trial proceedings, to accept as correct the submission of the appellant's Counsel that witnesses for the petitioner Nahabwe Didas, Bandiho Siriri and Natureeba Ben Mabaare were available throughout the cross-examination but were never demanded for to be cross-examined by Counsel for the respondents.

It appears to us, from the Court record, that Counsel for the petitioner (now appellant), on his own, stopped availing the petitioner's witnesses for cross-examination by Counsel for the respondents when he closed the petitioner's case. He thus shut out the evidence of the deponents of affidavits who had not yet been cross-examined by Counsel for the respondents. The learned trial Judge was thus right when she held that a deponent who fails to appear for cross-examination when so required is evidence of the weakest kind and Court hardly places any reliance upon the same. We agree that the **High Court** decision of **Paddy Kabagambe& Another vs Bwambale Bihande Yokasi& Another, Fort Portal Election Petition No. 11 of 2006** correctly states the law on this point. Accordingly issue 3 is resolved in the affirmative in that the learned trial judge was

right not to rely on affidavits of those deponents who had not been cross-examined.

The fourth issue is whether or not the trial Judge erred when she held that the first respondent personally or through his agents and with his knowledge and consent or approval had not committed an election offence or illegal practice.

The learned trial Judge addressed herself to the provisions of **Section 61 of the Parliamentary Elections Act. Section 61(1)** lays down that an election of a Member of Parliament may be set aside for noncompliance with the provisions of the Act or the principles in those provisions if the noncompliance affects the election result in a substantial manner or if the candidate commits an illegal practice or electoral offence personally.

The burden of proof is upon the petitioner to prove the allegations alleged in the election petition and the standard of proof according to **Section 61(3)** of the said Act is to prove the allegations alleged in the petition to the satisfaction of the Court on a balance of probabilities, if the petitioner is to succeed on the basis of what is alleged in the petition. The petitioner fails to succeed if, the respondents, on taking on the burden to rebut the assertions of the petitioner, succeed in showing that there was no noncompliance with the law or if there was noncompliance, the result of the election was not substantially affected.

Being of public importance, an election result ought only to be tampered with, unless circumstances so demand, and as such the degree of proving an allegation in an election petition is relatively higher than that required in ordinary civil actions,

though not as high as proof beyond reasonable doubt. See: **Supreme Court Election Petition Appeal No. 18 of 2007: Mukasa Antony Harris vs Dr.Bayiga Michael Lulume.**

In case of an electoral offence or an illegal practice, the learned trial Judge, directed herself to the law that a single illegal practice or electoral offence, once proved as above, is a sufficient ground for setting aside an election.

Every allegation of commission of an electoral offence or an illegal practice, must be subjected by Court to a thorough and high level scrutiny. This is so necessary because in an election petition the prize is political power and as such, witnesses who are invariably partisan, may easily resort to telling lies so as to be able to secure victory for their preferred candidate. The learned trial Judge so directed herself as above and concluded that it was for the petitioner to adduce credible and/or cogent evidence to prove the allegations in the petition to the requisite standard of proof. The learned Judge referred to the decisions of the Court of Appeal **Election Petition Appeal No. 027 of 2011: Kamba Saleh Moses vs Hon. Namuyangu Jennifer and Court of Appeal Election Petition Appeal No. 9 of 2002: Masiko Winfred Komuhangi vs Babihuga** for appropriate guidance. We are satisfied that the learned trial Judge properly and appropriately addressed herself as to the law as pointed out above.

At trial, the petitioner, now appellant, was alleged to have committed a number of electoral offences. The learned trial Judge dealt with the evidence and the law as regards each alleged electoral offence in her Judgment. We too shall deal with

each one of them by subjecting the evidence adduced to fresh scrutiny and then decide whether or not the trial Judge was right in the conclusion she reached or whether we, on our own, are of a different conclusion.

The appellant was alleged to have committed bribery at Irembezi on 16.02.2016.

Pw17 Bamuhairwe Robert claimed that he and Pw27 Nsasirabo Adrine deponed affidavits in support of this allegation. Bamuhairwe Robert saw Hassan Basajjabalaba give to Apollo Asiimwe, NRM, Chairperson of Nyakahita Cell "A" shs. 1,250,000= to distribute to those around so that they vote the 1st respondent on 18.02.2016 at Irembezi Trading Centre. He also saw Tumuhirwe and Nyeihangane Lovina distributing shs. 2,000= to those going to the polling station with a request that they vote the 1st respondent.

Nsasirabo Adrine, a voter at Irembezi Primary School, deponed that on 16.02.2016 at 2.30 p.m. at Irembezi Primary School, one Hassan Basajjabalaaba, invited them to vote for the 1st respondent. He then gave shs. 1,250,000= to Apollo Asiimwe the NRM Chairperson of the Cell to distribute to people there and then. On 18.2.2016 while proceeding to vote an attempt was made to give her shs. 2,000= to vote the 1st respondent, but she refused the money. She saw money being given to those going to vote. Pw18 Barekye Lauben, deponed that on 16.02.2016 at 2.30 p.m. at Irembezi Primary School, Hassan Basajabalaaba gave shs. 750,000= to Byaruhanga Stephene to distribute to all

residents of the area and the same was distributed but the witness did not take part of it.

On 18.02.2016 at 10.00 a.m. when he was at the polling station he saw shs. 3,000= being distributed. He was offered the same but he refused to take it.

The 1st respondent denied having been at the alleged places on the days and time stated by the petitioner's witnesses. Topista Kyokunda (Rw19) denied receipt of any such money being distributed. Byaruhanga Stephen (Rw5) denied receipt of shs. 750,000= from Hassan Basajjabalaba or having offered and/or distributed any money to voters. One Karuhanga Kagumire denied having attended rallies with the 1st respondent on 16.02.2016 in the area.

The trial Judge rejected the affidavit evidence of Bamuhairwe Robert because, though the affidavit shows it was sworn before a commissioner for oaths, the witness insisted under cross-examination that he signed the affidavit before his lawyer, Ngaruye-Ruhindi which could not have been the case as the affidavit does not show this. At any rate, Counsel NgaruyeRuhindi as Counsel for the appellant could not at the same time be Commissioner for Oaths in respect of affidavits of witnesses of his client. We uphold the decision of the trial Judge as being right in this regard.

The Judge found the evidence of Pw27, Nsasirabo Adrine, unreliable as she did not explain how she came to know that the amount of money Basajjabalaba gave to Apollo Asiimwe was shs. 1,250,000= and whether the same was ever distributed. Her

evidence is also at variance with that of Pw18 Barekye Lauben, who claimed that, in the same place and at the same time, he saw the very same Basajjabalaba give to one Byaruhanga Stephen Shs. 750,000= to distribute to the very same people to whom shs. 1,250,000= again from Basajjabalaba was being distributed. Thus Pw18 and Pw27 saw different events involving the same people in the same place and at the same time. This was not possible and so the learned trial Judge was perfectly entitled in the circumstances to regard the said evidence adduced on this aspect as being unreliable. We too agree that bribery at Irembezi on 16.02.2016 and or on 18.02.2016 was not proved.

Bribery at Ambassador Nkuruho's Hotel at Kyeitembe on 15.02.2016.

Bahati Edson (Pw3) and Tumusiime Francis Xavier (Pw3) asserted that they attended this meeting for all NRM flag bearers and at that meeting shs. 2,500,000= was given to Mzee Eldard Bwarare to distribute to those attending with a request to vote for the 1st respondent. Each of the two witnesses received shs. 20,000=. The two witnesses claimed to have been invited to the meeting by one Aloysius Nshemereirwe.

The 1st respondent denied on oath ever attending such a meeting at such a place. He asserted that at that material time he was at Bushenyi Guest House meeting his campaign team and later he went campaigning in the Central Ward. Ambassador Nkuruho, the hotel proprietor denied knowledge of that meeting. He explained that as an ambassador, thus a public servant in

diplomatic service he could not attend such a meeting, let alone distribute money to buy votes for a particular candidate.

We too find it strange and unexplained as to how for a meeting intended to be attended by NRM supporters, Bahati Francis never mentioned in his evidence that Hassan Basajjabalaba, the Chairperson, NRM Bushenyi District, was amongst those who were present and addressed the meeting. Tumusiime, on the other hand asserted that Hassan Basajjabalaba was present and that he addressed the meeting in his capacity as the District NRM Chairperson. This contradiction poses the question as to whether both Bahati Edson and Tumusiime Francis Xavier attended the same meeting in the same place and at the same time. The learned trial Judge on the basis of this contradiction, and others, concluded that the allegation of bribery at Ambassador Nkuruho's Hotel at Kyeitembe on 15.02.2016 had not been proved against the 1st respondent. We have no reason for not agreeing with that conclusion by the learned trial Judge.

Bribery of voters with shs. 1,000,000= at Rwenjeru Central Cell on 16.02.2016.

Witness Pw6 Muramye Yefusa for the Petitioner (now appellant) asserted that on 12.02.2016 at about noon the 1st respondent met one Lauben Mafari at Rwenjeru Central Cell and gave him shs. 250,000=. Later on 16.02.2016 at 3.00 p.m; according to the same witness, the 1st respondent, Hassan Basajjabalaba and other NRM politicians met at Rwenjeru Church of Uganda where they campaigned calling upon those present to vote for the 1st respondent. Hassan Basajjabalaba gave another shs. 1,000,000=

to Lauben Mafari, with a promise to give more were the 1st respondent to win the election. In cross-examination, this witness stated that he received shs. 4,800= of the money given by Hassan Basajjabalaba. Nuwagira Afex, Pw21, also deponed to the same effect, except that for this witness, he asserted that on that date and place at about 3.00 p.m. he saw Hassan Basajjabalaba give shs. 1,250,000= to one Mugume Rwakishaya to distribute to those to vote for the 1st respondent. Of that money, this particular witness received shs. 9,000=.

The 1st respondent denied participating and having been part of the arrangement to pay money to voters so that they vote for him on Election Day.

The learned trial Judge considered in detail the evidence of Pw6 Turamye Yefusa and Pw21 Nuwagira Afex and found very serious contradictions. While Pw6 saw Hassan Basajjabalaba first give shs. 250,000= and then later on he gave shs. 1,000,000=, Pw21 while in the same place and at the same time saw Hassan Basajjabalaba give shs. 1,250,000= at one go and in one lump sum. Further, Pw6 saw Basajjabalaba give the money to one Karuhanga to hand it over to Mafari who then distributed it to those around and Pw6 got shs. 4,800=. However, according to Pw21, he saw Hassan Basajjabalaba give the money to one Mugume Rwakishaya and it was that one, and not Mafari, who distributed the same. Pw21 lined up and was able to get shs. 9,000= from Mugume. The learned trial Judge wondered whether Pw6 and Pw21 witnessed the same event. She found the contradictions unexplainable and she rejected the evidence of

both Pw6 and Pw21 on the principle that serious contradictions which are not explained amount to the evidence not being truthful and lead to rejection of such evidence of the contradictory witnesses: See: **Alred Tajar vs Uganda: EACA Criminal Appeal No. 197 of 1969.** We have on our own subjected the evidence in question to a fresh scrutiny and we too find, in agreement with the trial Judge, that bribery is a serious allegation and as such it must be established by evidence that is cogent, logical and not suspect. The evidence of Pw6 and Pw27 given its contradictory nature, creates grave doubt as to whether or not the events testified to ever happened at all. We uphold the decision of the learned trial Judge.

Bribery with shs. 2,000= at Rwenjeru Polling Station on 18.02.2016.

Muramye Yefusa, Pw6, in an attempt to prove this bribery allegation deponed that one Karuhanga Kagumire gave money to Eri Kamugasha in the denominations of shs. 2,000= to distribute to voters at Rwenjeru Polling Station II. Pw6 did not explain on whose behalf Karuhanga gave the money to Eri Kamugasha, and whether or not he was doing so as an agent of the 1st respondent. The petitioner/appellant bore the burden to bring this out. In his affidavit to Court, Karuhanga did not assert that he was an agent of the 1st respondent. None of the voters alleged to have received the money swore an affidavit to confirm this, let alone to show that whoever gave the money did so as an agent of the 1st respondent. We too also wonder how such an alleged act of giving out money to alleged voters could be carried out in the

open like that and the same is not reported to any lawful authority even by the political opponents of the 1st respondent. The learned trial Judge found the evidence wanting to prove this particular allegation of bribery. We have no reason to differ from her so holding.

Bribery of voters with shs. 1,250,000= at Rwenjeru Trading Centre.

The Petitioner's case was that shs. 1,250,000= was given to be paid to voters of Rwenjeru Trading Centre so that they vote the 1st respondent. The evidence in support of this assertion was by Muramye Yefusa (Pw6) and Nuwagira Afex (Pw21). It was the same evidence that we have already considered in respect of what happened at Irembezi.

The evidence of both these witnesses was considered by the trial Judge and was found to be unreliable both in respect of the bribery allegation at Irembezi and also at Rwenjeru Trading Centre. We have ourselves re-submitted the same evidence to fresh scrutiny. We too find it unexplainable that both Pw6 and Pw21 who asserted to have heard, seen and participated in the same event at the same time and in the same place could be contradictory between themselves, as to the people each one saw Hassan Basajjabalaba give the money to and the different amounts of money that he gave and what actually happened to that money. We too agree with the trial Judge that the evidence of Pw6 and Pw21 did not prove bribery of voters with shs. 1,250,000= at Rwenjeru Trading Centre.

Bribery of voters with shs. 1,250,000= at Bunyarigi Catholic Church.

Byamukama John Bosco, Pw12, deponed an affidavit in support of this allegation that on 15.02.2016 at 4.00 p.m. the 1st respondent gave shs. 1m to one Nuwagaba Norbert to level the playground at the church and that Hassan Basajjabalaba gave shs. 1,250,000= to Senesio Hangamaisho to distribute to voters and urged them to vote the 1st respondent.

Senesio Hangamaisho denied Byamukama's allegations including meeting and receiving money from Hassan Basajjabalaba on that day and at that place; let alone being an agent of the 1st respondent.

We have subjected the evidence of Pw12 and that of SenesioHangamaisho to fresh scrutiny. We wonder how, according to Pw12, money given by Hassan Basajjabalaba could only be distributed to NRM supporters, yet the gathering at the church was not only of NRM supporters and the purpose of giving the money was to influence all, not only NRM voters, to vote for the 1strespondent. It is also un explained how Pw12 came to know that Hassan Basajjabalaba had given shs. 1,250,000= and the 1st respondent shs. 1,000,000= and yet he, Pw12, does not assert that the money was first counted. We also find it strange that such a bribing of voters could go on in a public place of worship and no report of it to the authorities is made at all not even by the political opponents of the 1st respondent. We thus agree with the trial Judge that this evidence did not prove the allegation of bribery to the required standard.

Donation of shs. 1,000,000= by 1st respondent to level the playground at Bunyarigi Catholic Church on 15.02.2016.

The evidence of Pw12 was to the effect that the 1st respondent donated shs. 1,000,000= to level the playground. He gave the money to one Nuwagaba Norbert. Were this version to be true, then there is no way the same 1st respondent who had paid for the levelling of the playground could also have proceed on the very same day within a few hours of effecting payment, to proceed to procure a grader for which he had just paid shs. 1,000,000= to carry out the grading of the playground. Yet this is what Pw7, Mwesigye John, asserts. Both the 1st respondent and his witness Rutare, Rw24, denied the assertions of Pw7 and Pw12. The learned trial Judge carefully considered all this evidence and concluded that there was no merit in the allegation. On our having re-considered all the evidence we too are unable to fault the learned trial Judge for the conclusion she arrived at.

Bribery at Rwatukwire on 16.02.2016 at 6.00 p.m.

The witness to this allegation is Muhairwe Jane, Pw16. Her evidence was that on 16.02.2016 at 6.00 p.m. at Rwatukwire Primary School she saw the 1st respondent give money to the NRM area Chairperson, Aloysius Nshemereirwe, who in turn gave it to Muhebwa Boaz, the LCI Chairperson, who gave shs. 7,000= to each person. The witness did not get any money as she left to attend to her goats. The 1st respondent, Aloysius Nshemereirwe (Rw36) and Boaz Muhebwa (Rw16) all denied participating in the rally and distributing money. The affidavit evidence of Byamugisha Esau in support of this allegation could not be relied

upon by Court as this witness was not availed by the petitioner for cross-examination. Once again we observe that there was no report made by anyone to any authorities about this alleged bribery that is alleged to have been done in broad day light and involving many people of all shades of political opinion. The learned trial Judge subjected to scrutiny the evidence of Pw16 together with the evidence in rebuttal and came to the conclusion that the allegation of bribery against the 1st respondent had not been proved to the required standard. The learned trial Judge had the advantage of observing the demeanour of the witnesses who appeared before her as regards this aspect of the bribery. We have no cause for faulting her in her observance of witnesses and coming to the conclusion that on the evidence that was before her, this particular bribery allegation had not been proved to the requisite standard of proof.

Bribery at Buluma Buramba at the home of the late Enock Bamwanga on 13.02.2016.

Pw28 Byarugaba Godwin and Pw29 Nuwmanya John supported this allegation that on 13.02.2016 at 8.00 p.m. Hassan Basajjabalaba while at the late Enock Bamwanga's home gave sh. 1,500,000= to those around and invited them to vote for the 1st respondent who too was around. However Pw28 and Pw29 contradicted themselves in their evidence. Pw28 stated Hassan Basajjabalaba was with three other people namely the 1st respondent, YasinKyota and Muhammad Lukwago. However to Pw29 Hassan Basajjabalaba was with five people that included his brother Jafari Basajjabalaba and another Silagi Banyanga.

Further, while according to Pw29 Hassan Basajjabalaba gave shs. 1,500,000= to be distributed to the voters there and then, to Pw28 what he saw was a distribution of shs. 500,000= to the voters to vote for the 1st respondent, shs. 500,000= was for transport of those present and shs. 500,000= was to go to the account of Mwezikye Group of the people of the area.

We too, on subjecting the evidence above to fresh scrutiny, agree with the trial Judge that the stated contradictions made the evidence to be unsatisfactory to prove the said bribery allegation.

Bribery by way of donation at Mazinga Ward on 24.01.2016 of shs. 400,000= to repair the source of gravity piped water and protected spring water wells.

In support of this allegation was the evidence of Pw23 Bashaija Herbert, Pw19 Tukundane Rodgers, Pw13 Nayebare Elly and Nahabwe Didas. The assertion was that the 1st respondent had, at a rally at Ahakikooona Trading Centre during the NRM primaries, promised to repair the protected spring water well in the area if he won the primaries. He had repaired the water spring after winning the primaries.

The 1st respondent denied the allegations and denied ever having gone to Mazinga Ward on that day and that he had never repaired the spring water well and had no money for such a project. Kenzaki Merabu, Rw3, Nuwasasira Dan, Tumwine Lauben, Rw39 supported the 1st respondent with their affidavits. Amongst the affidavit deponents were Nahabwe Didas and Mbaine Nekemiah Zelebabel, who unfortunately were not available for cross-examination and so their affidavit evidence

was not acted upon by the learned trial Judge. Barinde Francis, another deponent, deponed to two affidavits, one directly being the opposite of the other. The learned trial Judge thus refused to rely on the evidence of this witness, since the very same witness had switched from one side to the other.

On excluding the affidavit evidence of Barinde Francis as well as that of Nahabwe Didas and Mbaine Nekemiah Zelebabel, all that remains as evidence concerning this bribery allegation was mere hearsay evidence by the petitioner's witnesses that they saw Barinde carrying materials for repair and that the said Barinde told them that the 1st respondent had paid him to do the work. This was not evidence that the Court could base itself upon to hold that the allegation had been proved. We agree with the trial Judge that this allegation was not proved.

Donation of shs. 1,000,000= at Kyandago to the voters of Kashenyi Ward to purchase a cow on 09.02.2016.

Pw2 Muhwezi Alex asserted in his affidavit that on 09.02.2016 the 1st respondent at a party at Moris Butamany'a home as guest of honour, handed to him (Pw2) shs. 1,000,000= to buy a bull and slaughter the same for Kashenyi football teams. Pw2 passed the money to Murangira Joseph who bought the bull which was eaten on 14.02.2016 after a football match and a campaign address by the 1st respondent. Turyasiima Adeo deposed that he participated in the eating of the bull on 14.02.2016 at Kashenyi playground and the 1st respondent was thanked for the same. Voters were urged to vote for him.

The 1st respondent denied offering shs. 1,000,000= to buy a bull, or being around on 09.01.2016, since he was at NRM candidates meeting at State House, Entebbe. Rw32, Ihoora Ignatius in rebuttal deponed that he is the one who was guest of honour at the event on 09.02.2016 and he handed over a goat for roasting. The 1st respondent was away and he never donated shs. 1,000,000= to purchase a bull. The trial Judge considered the evidence that was adduced for the petitioner and for the 1st respondent. She disregarded as of little value the evidence of Owakubariho Hilton in support of the allegation and that of Nyehangane Elias Mparana in disputing the allegation as both these witnesses had not been available for cross-examination. Further the learned trial Judge found the evidence of Butamanya Moris too contradictory to be worthy of any reliance.

We have ourselves submitted the evidence that was adduced to fresh scrutiny. We note that in paragraph 6(m) of the petition the date pleaded is 9th January, 2016 as the one the 1st respondent, being, a candidate, is asserted to have donated shs. 1,000,000= to the voters of Kashenyi Ward for the purpose of purchasing a cow to slaughter for the voters of Kashenyi Ward. This however was contradicted by the petitioner's witness Muhwezi Alex, Pw2, who stated that the party took place on 09.02.2016. The 1st respondent and his witnesses were entitled to respond and to prepare their case according to what had been pleaded in the petition. While we find that the learned trial Judge was not justified to refer to the affidavit evidence of Owakubariho Hilton while justifying the contradictory evidence as to when the donation was alleged to have been made, since the Judge had

already discarded that affidavit for the non-availability of the deponent for cross-examination, we hold that the contradiction in the date pleaded in the petition i.e. 09.01.2016 and the date stated by Pw2 Muhwezi Alex i.e. 09.02.2016 justified the conclusion that the 1st respondent had no proper material before him as to how to respond to this allegation and that the Court cannot also tell when the alleged donation was made. The petitioner thus failed to prove that the 1st respondent donated shs. 1,000,000= to buy a bull for the football teams of Kashenyi. We uphold, though for a different reason, the decision of the learned trial Judge on this allegation.

Bribery by the 1st respondent to Nkwasibwe Ezra with shs. 200,000= at Bushenyi Guest House on 14.02.2016.

The evidence in support of this allegation was by Pw9 Nkwasibwe Ezra whom the trial Judge found that he had never appeared before a commissioner for oaths while deponing to his affidavit and that this was contrary to the Oaths Act. We have already dealt with the evidence of this witness and upheld the decision of the trial Judge. With the collapse of the evidence of this witness, the alleged bribery allegation also collapsed. We uphold the trial Judge that this allegation was not proved.

Bribery at Yafeesi Bagarukaine's home of Ntaaza I Cell, Kashenyi Ward on 14.02.2016 of shs. 500,000= and a donation of shs. 200,000= by Basajjabala and shs. 100,000= by the 1st respondent.

We uphold the decision of the trial Judge that this bribery allegation depended on the evidence of Pw9 Nkwasibwe Ezra and

that the allegation collapsed with the collapse of the evidence of that witness.

Bribery of shs. 750,000= at St. Kaggwa Primary School on 16.02.2016.

Bandiho Siriri and Mubangizi Alex, Pw20, asserted that on 16.02.2016 at St. Kaggwa Primary School at a rally, Hassan Basajjabalaba handed shs. 750,000= to the 1st respondent to distribute to those around so that they vote the 1st respondent. BandihoSiriri never appeared for cross-examination and so his affidavit evidence cannot be relied upon as proof of this allegation.

As to Mubangizi Alex, Pw20, he gave no explanation whether the alleged amount was distributed and whether those who received the money were voters. He left the scene as soon as Hassan Basajjabalaba handed over the money to the 1st respondent. The 1st respondent denied any knowledge of this allegation.

We have re-considered this evidence and we too agree with the trial Judge that this allegation was not proved against the 1st respondent.

Bribery with shs. 750,000= on 15.02.2016 at Rweibare Cell which Hassan Basajjabalaba gave to Mwijukye Innocent to distribute.

Mugisha Silvano, Pw11, in support of this allegation deponed that on 15.02.2016 at the home of Scola Mbabazi, the 1st respondent, in the company of Hassan Basajjabalaba, Richard Byaruhanga and Aloysius Nshemereirwe, came and found about

100 people. Basajjabalaba handed shs. 750,000 to Mwijukye Innocent who on instruction of the 1st respondent distributed the money to the gathering each one receiving shs. 4,000=.

The learned trial Judge observed, and we agree with her, that on this very day and time according to Bahati Edson, Pw3, the 1st respondent was stated to have been at Nkuruho's hotel with NRM flag bearers. Again, according to Pw12 Byamukama John Bosco, on this very and time, the 1st respondent and Hassan Basajjabalaba were stated to have been at Bunyarigi Catholic Church. This is physically impossible and renders the petitioner's case against the 1st respondent very suspect.

At any rate Mbabazi Scola, Rw30, denied ever having had a rally of a 100 people or at all at her home. Rw24 Rutaro Julius, Aloysius Nshmereirwe and Twijukye Innocent all denied the meeting and distribution of money at Mbabazi Scola's home. We uphold the decision of the trial Judge that there was no merit in this allegation.

Our subjecting to fresh scrutiny all the evidence that was adduced has made us appreciate, like the trial Judge also did, that there was never any pleading in the petition as to the alleged bribery at Basajjabalaba Primary School, though the same was testified to by Natureba Ben Mabale and was rebutted by Halimah Rw53.

There was also some evidence adduced alleging a bribery of sh. 1,250,000= having been carried out at Ahakitooke.

To the extent that these allegations were not pleaded in the petition, then no evidence ought to have been adduced about them.

Further, the fact that a witness involved in one of these allegations, Natureba Ben Mabale, was never available for cross-examination, renders the evidence of this witness to be of least value. We thus agree with the decision of the trial Judge when she held these allegations as not at all proved.

Attack of petitioner's character and minimizing the stature and candidature of the petitioner.

The petitioner, Pw22 Kansiime Darius, Pw24 Musa Kasujja and Pws25 Mbera Richard, alleged that on 17.02.2016 the 1st respondent and /or his agent used his motor-vehicle UAM 930V to distribute posters with a portrait photograph of the petitioner with words in Runyankole "Reeba Enjoka Omumatsinde, Endyadyaya FDC, Traitor", loosely translated in English to mean:

"See a snake in the ploughed garden, a traitor to FDC".

The photographs were distributed in Ahakitookye and elsewhere in the Constituency.

The 1st respondent denied this allegation and explained that his said vehicle had been grounded at Bushenyi Police Station on 17.02.2016 having been damaged in some incident of violence. RW49 D/IP Nkabyesiza Agapito confirmed the vehicle having been at Bushenyi Police Station on 17.02.2016 up to 6.00 p.m. when it was released. The trial Judge on receiving all the evidence held that the vehicle had been at Bushenyi Police

Station at the material time and also that there was no evidence that the 1st respondent or his agents had made the posters. Further, the trial Judge held that petitioner having admitted to Court under cross-examination that the picture on the posters was his, the same having been published by the Daily Monitor of 21st May 2015 where the petitioner wore a hat with a portrait photograph of President Museveni with words "M7 NRM 2016" inscribed on it, thus giving an impression that he supported NRM party for 2016, then there was a burden upon the petitioner to convince Court how false or reckless the words in the poster were with regard to his candidature. It was not for the Court to make conclusions on its own without evidence from the petitioner. The petitioner now appellant, had failed to discharge this burden and the allegation thus not proved.

We too have reviewed the evidence and analysed the law and we find that the Supreme Court in **Election Petition No. 1 of 2001: Col. Rtd Dr. Besigye Kizza vs Museveni Yoweri Kaguta**: held (Mulenga, JSC):

> ***"..... the burden to prove that the statement was false, was imposed by statute, namely by the provision of S.65 of the Act. To prove that an illegal practice as defined in that provision was committed, the petitioner had the onus to prove that the statement published by the first respondent was false, and he had to prove it so as to leave the Court certain that it was false. Even if the first respondent offered no evidence at all, the burden would not be any less. Whilst the illegal***

practice is similar to defamation in nature, it differs in the way it has to be proved. This may well appear harsh, as in the saying 'adding insult to injury', but the illegal practice being quasi criminal, leads me to the conclusion that the onus of proof would shift only if a prima facie case has been made out. To my mind, evidence advanced by the petitioner did not make out a prima facie case, sufficient to shift the burden of proof. I was therefore, unable to find that the petitioner had proved to the required standard that the statement was false".

We accordingly agree with the trial Judge that the petitioner in order to succeed, ought to have explained how false or reckless the words in the portrait photograph were in the peculiar circumstances of this case. The petitioner failed to do so and so the allegation remained unproved against the 1st respondent.

The learned trial Judge has been faulted by the appellant's Counsel for asserting that the evidence of a single witness in a bribery requires corroboration. It is the appellant's contention that this is not the position of the law. We reiterate that the correct position of the law on corroboration in election matters is what this Court of Appeal stated in **Election Petition Appeal No. 24 of 2011: Aligawesa Philip vs Byandala Abraham James & Another**.

We stated:

"We are firmly of the view that in Election Petitions, evidence does not invariably require corroboration. However the

evidence adduced must be strong enough to prove the alleged facts. It must be of such a standard as to satisfy the Court on balance of probabilities. In this particular case the Court was not satisfied with the evidence of the appellant's witnesses. Court looked for some independent evidence, but there was none. We do not agree with the submission of respondent's Counsel that Courts are at liberty to require that any evidence be corroborated. We also do not agree that, the Judgement of His Lordship Katureee, JSC, in Presidential Election Petition No. 1 of 2006(SC) was to that effect. The law provides instances where a particular type of evidence has to be corroborated and instances of evidence where corroboration is not necessary".

On our subjecting to fresh scrutiny the evidence of the single witnesses that the learned trial Judge dealt with while dealing with the bribery allegations, we find that the Judge found the evidence of these single witnesses to be insufficient on its own. The Judge thus looked for other independent credible evidence, if any, to support the bribery allegation and she failed to find any. She thus concluded that the particular bribery allegations purportedly supported by the wanting evidence of single witnesses had not been proved to her satisfaction at the requisite balance of probabilities. We see nothing wrong in the approach adopted by the learned trial Judge. We thus find no merit in the criticism of the trial Judge by Counsel for the appellant in this regard.

It has also been our impression, on a review of all the evidence relating to the bribery allegations, that we are surprised that inspite of the fact that the alleged bribery allegations were stated to have been made in open day light, by more or less the same people in public places and before voters of all political inclinations in the Constituency, that in all of them, there was not a single report made to the police, local authorities and/or to any official of the Electoral Commission in charge of conducting the elections.

Such absence of any such report raises the doubt as to the overall truth of such bribery allegations.

Issue 3: *Whether there was noncompliance with the electoral laws, and if so whether such noncompliance affected the results of the election in a substantial manner?*

The petitioner alleged in the petition and adduced evidence to the effect that he had received reports of illegalities and noncompliance with the principles of the electoral laws. The first and second respondents denied this and the second respondents averred that the elections were conducted in accordance with the electoral laws and that mechanisms were employed so that the electoral process was smooth, transparent, free and fair and the result was an expression of the will of the people of this Parliamentary Constituency as evidence by the fact that the petitioner or his agents never lodged any complaints to the 2nd respondent in the course of the election.

The trial Judge received and resolved upon the evidence of particular instances of alleged violation of the electoral laws. These were:

Intimidation and violence at Ishaka Taxi Park Polling Station on 18.02.2016 with machetes and fire arms.

The evidence adduced before Court was that on polling day of 18.02.2016 one D/C Okodu Anthony arrested one Lukwago Muhammed for threatening violence with a panga at Ishaka Town and he had been taken to Bushenyi Police station and a file CRB 240/2016 had been opened up. Pw15 Paul Tusubira, then Counsel for the appellant at the time of the election, had followed up the case with Bushenyi Police Station and had found that by 07.03.2016 the said Muhammed Lukwago had been released on police bond but the panga had been retained as an exhibit by the police.

The 1st respondent denied intimidating any voters at Ishaka Tax Park polling station or that Muhammed Lukwago was his agent and did what he did with his knowledge and consent.

The trial Judge considered all the evidence on this matter and concluded that the allegation that Muhammed Lukwago had carried out an act of violence at Ishaka Taxi Park Polling Station had been proved to her satisfaction. However the trial Judge found that no evidence had been adduced that this incident of violence had in any way affected the result of the election.

Neither the petitioner Pw15, nor the arresting police officer D/Sgt Ngaiga David, Rw23, gave any evidence as to how the incident had happened. The Petitioner, Pw15, was merely told of it.

D/Sgt Ngaiga only testified as to the nature of the complaint on the police file. There was no evidence as to how the panga was used to cause violence. No one alleged having been threatened and/or having been prevented from voting. The trial Judge concluded, and we agree with her on our having reviewed the evidence, that this incident did not in any way affect the result of the election.

The other incident of noncompliance with the electoral laws was the alleged incident of intimidation and violence at Basajjabalaba Poling Station on 18.02.2016. This incident depended on the sole affidavit evidence of one Natureba Ben Mabale. This witness was not available for cross-examination and as such Court could not act on the affidavit evidence over which he had not been cross-examined. Thus this allegation was not proved and we agree with the trial Judge for so holding.

An attempt was made by the petitioner to adduce evidence of violence and intimidation having taken place at Buramba Primary School Polling Station. The trial Judge rejected this evidence since the petitioner had not pleaded this allegation in the petition and as such the respondents were being taken unaware of the same. This offended the principle of a fair trial. We uphold the trial Judge's decision. The petitioner was duty bound to adduce evidence in respect of only those allegations pleaded in the petition, that is those of which the respondents had been given prior notice and knowledge as constituting the petitioner's case.

In finality we too agree with the trial Judge that the petitioner did not prove that there were any malpractices that had substantially affected the outcome of the election and as such issue 3 is so resolved.

Issue 4: What are the available remedies?

It has been submitted for the appellant, that even if the appeal is disallowed, the respondents ought not to be awarded costs because the 1st respondent had filed late 57 of the affidavits in support of his case; while the 2nd respondent had allowed violence and intimidation to go on in the course of the election.

Section 27 of the Civil Procedure Act provides that costs of an action shall follow the event unless Court, for good cause, orders otherwise. For the reasons we have already given we have held in effect that no affidavits were filed out of time. As such we do not agree with the submission of Counsel for the appellant that the 1st respondent be deprived of costs by reason of his having filed late the affidavits in support of his case.

As to the issue of intimidation and violence, we have agreed with the trial Judge that the petitioner failed to prove the alleged incidents of intimidation and violence to the satisfaction of the trial Judge at the requisite standard of proof. It is thus not correct, as the appellant's Counsel submits, that the second respondent ought to be deprived of costs by reason of the fact that the 2nd respondent allowed this intimidation and violence to go on during the course of the election. Were this the case, then the appellant and his agents/representatives ought to have made reports of such incident's to the 2nd respondent. There were no

such reports made. We accordingly find no proper reason for denying costs to the respondents.

In conclusion this appeal stands dismissed. The Judgment of the High Court is hereby upheld. The appellant is to pay the costs of the 1st and 2nd respondents of this appeal and those in the Court below.

We so order.

Dated at Kampala this 17th day of NOV. of **2017**.

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RemmyKasule

Justice of Appeal

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Richard Buteera

Justice of Appeal

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Catherine Bamugemereire

Justice of Appeal