

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO.74 OF 2016

NTENDE ROBERT:.....APPELLANT

VERSUS

10 **ISABIRYE IDDI:.....RESPONDENT**

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

HON. MR. JUSTICE BARISHAKI CHEBORION, JA ✓

HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA

JUDGMENT

15 **Introduction**

This is an Election Petition Appeal arising out of the Judgment of Margaret Mutonyi, J delivered on the 18th day of July 2016 in which she nullified the election of the 2nd respondent (now appellant) as the Member of Parliament for Bunya South Constituency, Mayuge District and directed that a bye-
20 election be conducted in the constituency.

Background

The facts giving rise to the Appeal are that on the 18th of February, 2016, the appellant, Ntende Robert, the respondent Isabirye Iddi, Kyeyago Jowali Kaggwa and Owaro Geoffrey contested for the parliamentary seat of Bunya

5 South Constituency, Mayuge district.

The Electoral Commission declared and gazetted the appellant, Ntende Robert, winner of the said election with 18,789. On the other hand the respondent, Isabirye Iddi, obtained 18,366 votes.

Being dissatisfied with the above results, the respondent filed a Petition
10 contending that the election was conducted in contravention of the provisions of the Parliamentary Elections Act, 2005 (PEA) and that the said noncompliance affected the result of the same in a substantial manner. He was successful in the High Court where the election was nullified.

Being dissatisfied with the decision of the High Court, the appellant
15 appealed to this Court.

Grounds of Appeal

The Memorandum of Appeal raises the following 3 grounds of appeal namely:

1. The Learned trial Judge erred in law and in fact by failing to properly
20 evaluate evidence and relying on conjectures, speculations and weak evidence to find that the appellant bribed voters with an ambulance.
2. The Learned trial Judge erred in law and in fact when she lowered the standard of proof required in an election petition there by occasioning a miscarriage of justice.
- 25 3. That the Learned trial Judge erred in law and in fact when she held that the appellant committed an electoral offence basing on

5 uncorroborated evidence of partisan witnesses. (sic)

The respondent was also partially dissatisfied with the decision of the trial Judge and filed a Cross Appeal. During scheduling, the grounds of the Appeal and Cross Appeal were constituted into the following issues for Court's determination;

- 10 1. Whether the learned trial Judge erred in law when she rejected and struck off some of the respondent's affidavits and audio CD
2. Whether the learned trial Judge properly evaluated the evidence on the allegations of bribery in reaching her decision
3. Whether the learned trial Judge lowered the standard of proof
15 required in an Electoral petition
4. Whether the learned trial Judge erred when she declined to grant costs to the petitioner/respondent
5. What remedies are available to the parties (Sic)

Representation

20 At the hearing of this Appeal, the appellant was represented by Mr. Asuman Nyonyintono, Mr. Waiswa Ramathadan, Ms. Namata Harriet and Mr. Mujuzi Najib, counsel for the appellant while the respondent was represented by Mr. Galisonga Julius, counsel for the respondent.

25

5 **Submissions**

Issue 2

This issue relates to bribery of voters. Counsel for the appellant argued that the respondent, under paragraph 8(c) of the Petition accused the appellant of having committed bribery by buying gifts for voters which
10 included an ambulance the registration number of which is UAA 957Y. That this was done during the campaign period and in his Affidavit in Support of the Petition, the respondent had stated in paragraph 13 thereof that he was informed that the appellant committed bribery by buying gifts for voters, such as the ambulance.

15 It was the appellant's submission that the claim that the appellant bought an ambulance was not substantiated in evidence given that the respondent neither produced the sale agreement nor the logbook to prove that the ambulance was bought by the appellant as alleged. He further stated that the respondent should have ascertained the owner of the said vehicle as it
20 was not enough to merely allege that the appellant donated an ambulance with evidence of a photograph. He relied on ***Hellen Adoa V Alice Alaso, Court of Appeal Election Petition Appeal No.57 & 54 of 2016*** to support his submission.

It was further argued that the evidence adduced by the available witnesses
25 did not prove that they were the actual recipients or users of the ambulance. He criticized the trial Judge for holding that it was not necessary for a person who received a bribe to be a registered voter. He



5 relied on ***Kikulukunyu Faisal V Muwanga Kivumbi Mohammed, Court of Appeal Election Petition Appeal No.44 of 2011, Lanyero Sarah Ochieng & Electoral Commission V Lanyero Molly Court of Appeal Election Petition Appeal No.32 of 2011 and Kabuusu Moses Wagaba V Lwanga Timothy Mutekanga & Electoral Commission Election***
10 ***Petition Appeal No.53 of 2011*** in support of his contention.

The appellant criticized the trial judge for holding that the ambulance was donated to the constituency and that as such the witnesses did not have to use it before they could qualify to testify about it. Counsel submitted that the holding of the trial Judge offended the electoral law. It was further
15 submitted that the witnesses produced by the respondent gave evidence not on their own account but on the account of the electorate who were not in Court. To the appellant, this was not only speculative but also hearsay.

Counsel argued that the respondent did not produce any evidence to prove that the appellant inscribed the purported words on the ambulance and
20 the witness, Mpango Rashid, who introduced the photograph with the words testified that he was not present at the time the words were being written on the ambulance yet he maintained that the said words were inscribed on the ambulance by the appellant.

Counsel particularly raised issue with the photograph of the purported
25 ambulance which was tendered in as evidence by a one, Mpango Rashid. He submitted that the said photograph was neither dated nor did it state the place where it was taken. He further submitted that during cross

5 examination the said Mpango acknowledged not to have taken the photograph but rather he testified that the same was given to him by a one Serunjogi who was never brought to Court as a witness.

Counsel for the appellant further submitted that the three witnesses namely Mr. Basalirwa Yolamu, Mr. Kiirya Bruhan and Mr. Mpango Rashid
10 who had testified that they received the ambulance were not proved to be registered voters and the voters' register was not adduced in evidence. It was his submission that the Supreme Court decision in **Bakaluba Peter Mukasa V Namboze Betty Bakireke, Election Appeal No.4 of 2009**, did not take away the burden on the petitioner to prove that a registered voter
15 received a bribe. He added that the offence of bribery had not been proved to the required standard.

The appellant's counsel argued that election matters being of great importance to the nation, the Voters' Register was very necessary. He further argued that the submission of counsel for the respondent that
20 Section 66(2) (b) of the Registration of Persons Act, 2015 is proof enough that a person in possession of a National Identity Card is a voter for identification purposes was misleading given that not all persons with National Identity Cards are eligible to vote.

In reply, counsel for the respondent submitted that the three witnesses
25 who testified about the existence of the ambulance did not only rely on the photograph but also attended a rally where the appellant brought the ambulance. According to counsel the witnesses testified on facts that they



5 perceived with their own eyes. He further submitted that the photograph which the said witnesses testified about was a production of what these witnesses had perceived.

Counsel for the respondent submitted that Section 66 of the Registration of Persons Act, 2015 provides for the mandatory use of national identification
10 cards and the Electoral Commission complied with the law when it used National Identity Cards to identify voters instead of using voters' cards. He further submitted that the import of the above is that one no longer has to produce a voter's register to prove that he is a registered voter. He relied on
15 ***Amama Mbabazi V Yoweri Kaguta Museveni and anor, Presidential Election Petition No.1 of 2016*** to support his submission.

In arguing the Cross Appeal, counsel for the cross appellant submitted that all the witnesses who testified in respect of the illegal act of bribery were registered voters who attached their National Identity Cards to their affidavits. He submitted that under Section 66 of the Registration of
20 Persons Act, the use of National Identity Cards for identification is mandatory. He relied on ***Amama Mbabazi V Yoweri Kaguta Museveni (supra)***.

Counsel submitted that Kawunda Jessica, Mulani Byanguwa and Mubiise David, all residents of Namavundu, deponed that the appellant promised to
25 send a person to repair a borehole and the persons who repaired the borehole confirmed that they were sent by the appellant. He further submitted that the statements of the appellant at the "Frontline" Radio talk

5 show corroborated the evidence of the above witnesses. Counsel argued that the appellant repaired the said boreholes to induce voters to vote for him.

Counsel further contended that had the learned trial Judge properly evaluated the evidence, she would have found that even without naming
10 the person who repaired the borehole, it was evident that the appellant had fulfilled his promise which he made to the people of Namavundu. Counsel added that the appellant donated a solar panel to an Organization called "Tufidi" and stated that the trial Judge disregarded the evidence of Kairu Ibra when she held that the donation of solar panels, salt and soap were
15 illegal acts but had not been specifically pleaded.

Regarding the donation of an ambulance, the cross appellant argued that the submission by counsel for the appellant that the respondent should have provided evidence of a sale agreement, logbook of the ambulance and authenticity of the photograph of the ambulance are farfetched. He
20 submitted that the donation of the ambulance was to induce all the voters in Bunya South constituency.

In reply to issue 2 of the Cross Appeal, counsel for the appellant submitted that the evidence of Kawunda Jessica, Mulani Byanguwa and Mubiise David was unreliable since the said witnesses were not proved to be
25 registered voters. Secondly, they all stated that someone claiming to be an agent of the appellant told them that he had been sent by the appellant to repair boreholes. He noted also that the said witnesses did not establish

5 who the agents were and whether or not their actions were sanctioned, ordered or approved by the appellant.

Regarding bribery by gifting of a solar panel to members of "Tufidi" organization, counsel for the appellant submitted that the witnesses whose evidence was relied on did not mention when these acts of bribery took
10 place and that the allegation was not pleaded in the Petition and the supporting affidavit.

Issue 3

This issue relates to the standard of proof. Counsel for the appellant faulted the trial Judge for lowering the standard of proof. He submitted
15 that the standard of proof is on a balance of probabilities however, where a party alleges bribery, then the standard of proof is slightly above a balance of probabilities although not beyond reasonable doubt and the said balance of probabilities should be to the satisfaction of court. Counsel criticized the trial Judge for holding that a bribe need not be given to an individual
20 registered voter. He relied on ***Kamba Saleh V Namuyangu Jeniffer, Election Petition Appeal No.27 of 2011*** to support his submission.

Counsel argued that the trial Judge was wrong when she disregarded the evidence of the purchase agreement or the logbook of the ambulance as vital in establishing its existence. He submitted that the trial Judge should
25 have obtained the required evidence before holding as she did. He added that a one Frank who was referred to by Mr. Basalirwa Yolamu was, in the opinion of Court, an agent of the appellant in charge of the ambulance but

5 that the said Frank did not give evidence and Conqueror's College was never proved to belong to the appellant.

It was the argument of counsel for the appellant that the respondent neither reported the offence of bribery to the Police nor to the Electoral Commission until when he lost the election. He said the allegation was
10 made in search of grounds to challenge the outcome of the election.

Counsel for the cross appellant submitted that the burden of proof rests on the petitioner who must prove the allegations in a Petition to the satisfaction of court on a balance of probabilities. He submitted that the appellant put up a mere denial regarding all the allegations of bribery
15 which were levied against him which included repairing of boreholes, donation of an ambulance, and donation of a solar panel among others.

In reply, counsel for the appellant submitted that the law requires that Court must be satisfied before it makes a finding that an electoral offence was committed.

20 **Issue 1**

The trial Judge was faulted for rejecting some of the respondent's affidavits and audio CD. It was the case for the appellant that the three witnesses who swore affidavits to support the claim that the appellant had committed the electoral offence of bribery were not trustworthy.

25 It was submitted also that one of the witnesses, Mr. Basalirwa Yolamu, testified that he was a supporter of the respondent before the appellant donated the ambulance. He testified against the appellant saying the



5 appellant had committed an electoral offence of bribery. The same witness
stated that he had never used the ambulance and he did not know
anybody who had used it. Counsel submitted that the evidence of all the 3
witnesses was never corroborated and the failure to subject this kind of
evidence to the test of corroboration by some other independent evidence
10 was an error in both law and fact.

Counsel submitted that the respondent's witnesses were partisan and their
evidence should have been corroborated and that in the absence of
corroboration court should not have relied on the same. He faulted the trial
Judge for finding the witnesses produced by the respondent to be truthful
15 and not partisan.

On his part, counsel for the cross appellant faulted the trial Judge for
striking off the affidavits of Gulere Wambi Cornelius and Anyole Innocent
filed on the 4th May 2016 and 16th May 2016 respectively. The affidavits
were tendering transcriptions and translations of an audio recording of the
20 "Frontline" Radio talk show conducted on 87.7 BABA FM, a local radio
station in Jinja on 14th February 2016.

Counsel contended that the trial Judge, having read through the affidavits
on record, she asked to have the audio CD from which the transcriptions
and translations emanated. He submitted that these were affidavits of
25 Gulere Wambi Cornelius and Anyole. He further submitted that the trial
Judge expunged the said affidavits on account that they were filed a month
after the Petition had been filed which was held to amount to inordinate
delay yet, according to counsel, there is no time frame set by law in which



5 evidence should be filed.

Counsel argued that the trial Judge misconstrued Section 88 of the Civil Procedure Act and that this led her to reject the audio recording because it was in Lusoga. Counsel further argued that the said Section is no bar to admission of evidence which is not in English but that the section only
10 requires that evidence tendered in Court which is not in English should be recorded in English for court record and this is done by court interpreters. He relied on ***Dr. Wenceslaus Rama Makuza V Madina Nakamyia and others, High Court Miscellaneous Application no.140 of 2013*** to support his submission.

15 In response, counsel for the appellant submitted that the evidence of the audio CD which the cross-appellant filed and served, offended Section 88 of the Civil Procedure Act as the said CD was not in the English which is the official language of court. He further submitted that filing a response to the respondent's evidence would require the appellant to hire the services
20 of an expert to interpret the evidence in the audio CD. He relied on ***Assumpta Sebunya V Kyomukama James, High Court Miscellaneous Cause No.55 of 2012*** in support of his submission.

Counsel submitted that the trial Judge having expunged the affidavits of Gulere Wambi Cornelius and Anyole Innocent, the appellant could not
25 respond to the said affidavits since the same did not exist at the time of trial and the same evidence was not subjected to cross examination to ascertain its veracity. He further submitted that the introduction of new evidence by the cross appellant in form of an audio CD which was rejected



5 at the trial would cause an injustice to the appellant as there would be no chance of testing the credibility and veracity of the witnesses or the evidence itself through cross examination.

In rejoinder, the cross appellant submitted that the answer to the Petition was filed on 28th April 2016 while the expunged affidavits were filed on 3rd 10 May 2016 and as such it was not necessary to seek leave of court in order to file these affidavits because the cross appellant was still within time.

Issue 4

Counsel for the cross appellant/respondent faulted the trial Judge for declining to grant the respondent costs. He submitted that section 27 of 15 the Civil Procedure Act governs the award of costs and that a successful party can only be denied costs for good cause.

He further submitted that in election matters, it is not a requirement at all that a candidate reports to Police an illegal act for purposes of filing a Petition and the learned trial Judge did not show how the failure to report 20 the illegal acts to Police affected the trial. Counsel prayed that the appeal be dismissed with costs to the cross appellant.

In reply to issue 4 of the Cross Appeal, counsel for the appellant submitted that the cross appellant failed to prove all the allegations in the Petition to the satisfaction of court and therefore the trial Judge correctly held like she 25 did. Counsel reiterated his earlier prayers that the Appeal be allowed, that the Cross Appeal be dismissed and that costs of this Appeal and in the lower court be awarded to the appellant.

5 **Court's resolution**

We have carefully considered the submissions of the respective counsel on both the Appeal and the Cross Appeal. We have also studied the Court Record and analyzed the authorities cited to us. Before delving into the merits of the appeal and cross appeal, we are mindful of the duty of this
10 Court.

This being a first appeal, this Court is required to re-evaluate the evidence and materials before the trial Court and come up with its own conclusion as enunciated in Rule 30(1) of the Court of Appeal Rules.

In a first Appeal such as this one, the court is enjoined to revisit the
15 evidence as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusion but always aware that the trial court had the advantage of hearing the parties fully on the facts and giving allowance for that. **See *Selle and another V Associated Motor Boat Company Ltd and Others, (1968) EA 123.*** See also Supreme Court
20 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.

25 We note that there is an overlap in the grounds in the appeal and cross appeal which resulted in the framing of the 5 issues. We shall resolve the issues in the order they were argued by counsel starting with issue 2 which



5 relates to bribery of voters. We shall then deal with issue 3 concerning standard of proof, issue 1 on evidence, issue 4 on costs and finally issue 5 on remedies available to the parties.

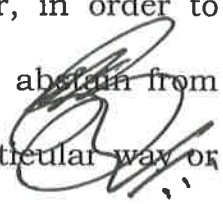
Issue No.2

Whether the learned trial Judge properly evaluated the evidence on
10 **allegations of bribery in reaching her decision.**

Regarding issue 2, the learned trial Judge is faulted for failing to evaluate evidence on allegations of bribery before reaching her decision. It was the appellant's contention that the respondent under paragraph 8(c) of the Petition accused the appellant of having committed bribery by buying
15 voters gifts to wit, an ambulance bearing registration number UAA 957Y during the campaign period.

On the other hand, counsel for the respondent submitted that the trial Judge found all the respondent's witnesses credible and thus came to a finding that the appellant bribed the voters with an ambulance. In order to
20 prove this allegation, the respondent relied on the evidence of Basalirwa Yoram, Mpango Rashid and Kiirya Bruhan.

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
25 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.**



5 **Section 68 (1) of the PEA** provides that a person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or 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
10 liable on conviction to a fine not exceeding seventy two currency points or imprisonment not exceeding three years or both.

It is now trite law in electoral Petitions that the petitioner must adduce cogent evidence to prove their case on a balance of probabilities to the satisfaction of Court. **In Masiko Winifred Komuhangi v Babihuga J. Winnie, Election Petition Appeal No.9 of 2002**, Justice Mukasa-Kikonyogo DCJ, 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 and truthful so as to convince a reasonable tribunal to give judgment in a
15 party's favor.
20

In deciding whether there was voter bribery through donation of an ambulance by the appellant, the trial Judge relied mainly on the evidence of the respondent, Basalirwa Yoram, Mpango Rashid and Kiirya Bruhan. In her view, the respondent had the light burden of proving on the balance of
25 probabilities that the appellant introduced motor vehicle registration No. UAA 957Y as the ambulance donated to serve the people of Bunya South Constituency, that it was donated to the people of Bunya South



5 Constituency during the campaign period and that the intention was to induce the voters to vote for him.

The appellant denied the above allegation in paragraph 16 of his Affidavit in Support of the Answer to the Petition stating that he did not own motor vehicle registered number UAA 957Y and that he had never donated the
10 said vehicle to any voter during campaigns. It was contended that the assertion that voters were given the said motor vehicle was false.

We note that in Petitions of this nature, witnesses tend to be partisan while giving evidence in support of a candidate of their choice. We thus have to take more caution while evaluating it. In **Rtd. Col. Dr. Kizza Besigye V**
15 **Yoweri Kaguta Museveni & Anor, Supreme Court Presidential Election No.1 of 2001**, Mulenga JSC (as he then was) stated that:

*“An election petition is 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
20 witnesses are the very people who actively participated in the election.”*

In the same case, the Supreme Court outlined the 3 ingredients of the offence of election bribery which ought to be proved. These were that a gift
25 was given to a voter, the gift was given by a candidate or his agent and that



5 it was given with the intention of inducing the person to vote for a particular candidate.

As to whether the ambulance was given by the appellant, it was the case for the appellant that the only physical evidence of existence of the ambulance was the photograph "H2" adduced by a one Mpango Rashid but the authenticity of which was not ascertained. He submitted that the said photograph was neither dated nor did it show the purported number plate. In view of this, he submitted that it was not possible to determine with certainty whether the photograph was of the impugned ambulance or not. It could therefore not be relied on as proof of the existence or the ownership of the ambulance.

This Court had occasion to pronounce itself on what is expected of photographic evidence in ***Lanyero Sarah Ocheng & Electoral Commission V Lanyero Molly, Court of Appeal Election Petition Appeal No.32 of 2011*** when it held that the photographs that were adduced to show that the respondent bribed women in Lamwo were never authenticated. Whereas they showed people receiving gifts and adorning T-shirts with the 1st appellant's picture, it was not proved for sure that the T-shirts were adorned with her knowledge and approval and that the photographs were taken at the time and place of the alleged bribe giving or even that it was the 1st appellant or his agents who gave these gifts, with the intention of influencing any voters. Of critical importance is the need to prove that the people bribed were actually registered voters. In this case,



5 there was no evidence to show that the women who allegedly received salt and bitenge were registered voters being bribed to influence their pattern of voting.

The scenario relating to the alleged bribery of women in **Lanyero Sarah Ocheng (supra)** and the attempt to prove the same by use of a photograph
10 are similar to this case. We are persuaded by the finding of Court in that case and as a result we find that the learned trial Judge erred when she relied on a photograph of the purported ambulance without establishing its authenticity.

We note that the trial Judge found that an ambulance was donated to the
15 constituency and that the witnesses did not have to use it before they could qualify to testify about it as long as they witnessed it being donated to the electorate in the constituency. The Judge further found that the ambulance was donated by the 2nd respondent as indicated by the words that were inscribed on it. It was held that the court would be raising the
20 standard of proof beyond reasonable doubt if it insisted on the registration book for the vehicle. The inscribed words, it concluded, connected the ambulance to the 2nd respondent.

We have perused the Record of Appeal and found no evidence from any
witness showing that they voted for the appellant after reading the words
25 that were inscribed on the ambulance.

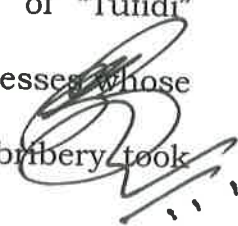


5 We are, therefore, of the considered view that the trial Judge's findings regarding the donation of the ambulance were as a result of conjecture and speculation.

Regarding the allegations of bribery through repair of boreholes and the donation of a solar panel by the appellant, the cross appellant/respondent
10 relied on the evidence of Kawunda Jessica, Mulani Byanguwa and Mubiise David, all residents of Namavundu, who deponed that the appellant promised to send a person to repair a borehole and that the persons who repaired the borehole confirmed they had been sent by the appellant. It was further submitted that this evidence was corroborated by the
15 statements of the appellant at "Frontline" Radio talk show. Counsel added that the appellant donated a solar panel to an Organization called "Tufidi".

In reply, the appellant's counsel submitted that the evidence of Kawunda Jessica, Mulani Byanguwa and Mubiise David was unreliable as the said witnesses were not proved to be registered voters and they all stated that
20 someone claiming to be an agent of the appellant told them that he had been sent by the appellant to repair boreholes. Counsel added that the said witnesses did not establish who the alleged agents were and whether or not their actions were sanctioned, ordered or approved by the appellant.

As for bribery by provision of a solar panel to members of "Tufidi"
25 organization, counsel for the appellant submitted that the witnesses whose evidence was relied on did not mention when these acts of bribery took place.



5 On the submission by the appellant's counsel that Kawunda Jessica,
Mulani Byanguwa and Mubiise David's evidence ought not to be relied
upon because they were not proved to be registered voters, one need not be
a registered voter in order for one to give evidence in an election Petition. It
is only when testifying to prove that the witness received a bribe that it is
10 necessary to show that he/she is a registered voter.

We have carefully studied the affidavits of the witnesses who deponed that
the appellant, while holding a rally on 9th February 2016 at Namavundu
village, promised to repair boreholes and that the same were repaired on
12th February 2012. We find that the said witnesses made no mention of
15 any agent of the appellant that repaired boreholes. Mulani Byanguwa and
Kibamba Piiso merely allege that on the 12th February 2016, the
appellant's agents who included a one Peter, an engineer, arrived and
started repairing the boreholes. That said, the said Peter did not adduce
any evidence nor was it proved that he had repaired the boreholes as an
20 agent or on the orders of the appellant.

An agent is a person who in most cases is authorized by another to act for
that other, one who undertakes to transact some business or manage some
affair for another by the authority or on account of the other. (***See Hellen
Adoa & Anor V Alice Alaso, Court of Appeal Election Petition Appeal
25 No.57 and 54 of 2016***).

We agree with the trial Judge's holding that failure to name agents of the
2nd respondent who were alleged to have repaired the boreholes made it
impossible for the 2nd respondent to prepare any affidavit in rebuttal. It is



5 trite law that no reasonable tribunal can hold the principal vicariously liable for the conduct or actions of an undisclosed agent.

The cross appellant failed to prove which agents of the appellant repaired the boreholes in Namavundu Village. He failed also to prove to the satisfaction of court that the appellant bribed the voters by repairing
10 boreholes. We note also that the said witnesses were not proved to be registered voters. Merely attaching copies of the National Identity Cards to prove that they were registered voters without extracting or annexing the relevant page of the Voters' Register was not sufficient.

Regarding the donation of solar panels, the cross appellant relied on the
15 evidence of Kairu Ibra and Zinsanze Elidadi, both members of the "Tufidi" organization where the appellant is alleged to have donated a solar panel. He submitted that the above witnesses attached photocopies of their National Identity Cards to prove that they were registered voters.

It was the appellant's evidence that Zinsanze Elidadi and Kairu Ibrah did
20 not mention when these acts of bribery took place and this was never pleaded by the cross appellant in his Petition or Affidavit in Support.

The trial Judge held that if it were true that there was a donation of solar panels to Tufidi Association, soap and salt to voters during campaigns then this amounted to an illegal practice of bribery which once proved to the
25 satisfaction of Court would result into setting aside an election. The illegal practice and offence must however be specifically pleaded in the petition and affidavit in support for the Court to be able to investigate it.



5 In **Interfreight Forwarders (U) Ltd V East African Development Bank, Civil Appeal No.33 of 1992**, Oder JSC stated that;

10 *“The system of pleading is necessary in litigation. It operates to define and deliver clarity and precision of the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them. It thus serves the double purpose of informing each party what is the case of the opposite party which will govern the interlocutory proceeding before the trial and when the Court will have to determine at the trial. See Bullen & Leake and Jacobs*
15 *Precedents of Pleadings, 12th Edition page 3. Thus, issues are framed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and bound to prove the case as alleged by him and as covered in the issues framed. He will*
20 *not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings.”*

In **Julius Rwabinumi V Hope Bahimbisomwe, Supreme Court Civil Appeal No.10 of 2009** cited with approval in **MS Fang Min V Belex Tours and Travels Limited, Supreme Court Civil Appeal No 06 of 2013** consolidated with **Crane Bank Limited V Belex Tours and Travel Limited Supreme Court Civil Appeal No. 01 of 2014**, Katureebe JSC, as

5 he then was, observed that:

10 *"I only wish to add by way of emphasis that the Court of Appeal should have restricted its decision to matters that were pleaded by the parties in their respective petitions. The parties sought intervention of the Court in respect of specific properties where there was alleged contribution by either party. They did not ask Court to pronounce itself on all their properties generally. This Court has had occasion to pronounce itself that a Court should not base its decision on unpleaded matter."*

15 In the case of **Attorney General V Paul Ssemwogerere & Zachary Olum, Constitutional Appeal No.3 of 2004 (SC)**, Mulenga JSC stated as follows;

20 *"It is a cardinal principle in our jurisdiction process that in adjudicating a suit, the trial Court must base its decision and orders on pleadings and the issues contested before it. Founding a Court decision or relief on unpleaded matter or issue not properly placed before it for determination is an error of law."*

The learned Justice concluded;

25 *"Likewise on appeal, matters that were not raised and decided on in the trial Court cannot be brought up as fresh matters. The Court would be wrong to base its decision on such matters that were not raised as issues and determined by the trial Court."*



5 We have carefully studied the Petition and the accompanying affidavit and find that the cross appellant did not plead the allegation of bribery by donation of solar panels. As such, alleging the same in his submissions would amount to a departure from his pleadings.

It was however argued by the cross appellant that it is trite law that once
10 an illegality is brought to the attention of Court, then it overrides all questions of pleadings. He relied on ***UBC V Sinba (K) Ltd and others, Civil Application No.12 of 2014.***

Kairu Ibrah deponed that on the 16th day of 2016 at around 2pm, the appellant visited their Organization "Tufidi" in Bwondha where he was
15 personally present with other members like Godfrey Kala and Isabirye Deo. He stated that the appellant donated a solar panel. Further, Zinsanze Elidadi deponed that he is a member of "Tufidi" Organization where the appellant donated a solar panel and members of the "Tufidi" Organization went on jubilating and walking in Bwondha town with the solar panel that
20 had been donated to them by the appellant.

Counsel for the cross appellant submitted that the said witnesses were registered voters and they attached photocopies of their National Identity Cards to that effect.

We reiterate our position that merely attaching a National Identity Card is
25 not enough for one to prove that one is a registered voter.

Issue 1 of the appeal succeeds.



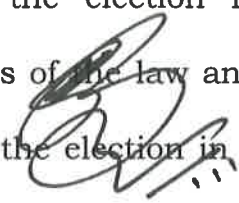
5 **Issue 3**

Whether the learned trial Judge lowered the standard of proof required in an Electoral Petition.

It was submitted for the appellant that the standard of proof in election Petitions is on a balance of probabilities but that where a party alleges
10 bribery, the standard is slightly above the balance of probabilities although not beyond reasonable doubt which should be to the satisfaction of Court.

It is trite law 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. The burden of proof in a suit or
15 proceedings lies on that person who would fail if no evidence at all were given on either side.

In Parliamentary Election Petitions, 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. Section 61(1) and (3)
20 of the Parliamentary Elections Act provides that an election shall be set aside if it is proved to the satisfaction of Court that there was noncompliance with the provisions of the Act relating to elections and if the court is satisfied that there was failure to conduct the election in accordance with the principles laid down in the provisions of the law and
25 that the noncompliance and failure affected the result of the election in a substantial manner.



5 The Supreme Court in **Col. (RTD) Dr. Kizza Besigye V Yoweri Kaguta Museveni, Presidential Petition No.1 of 2001** ably dealt with the phrase “**proved to the satisfaction of Court**”. Mulenga JSC (as he then was) stated that:

10 *“I do share the view that the expression “proved to the satisfaction of Court” connotes absence of reasonable doubt.....The amount of proof that produces the Court’s satisfaction must be that which leaves the Court without reasonable doubt.”*

Lord Denning in **Blyth V Blyth (1966) AC 643** observed the import and meaning of the word “satisfied” when he stated that;

15 *“The Courts must not strengthen it, nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When parliament has ordained that a Court must be satisfied only parliament can prescribe a lesser requirement. No one whether he be a judge or juror would in fact be “satisfied” if he was in a state of*
20 *reasonable doubt....”*

Counsel for the appellant pointed out the following instances where he thought the learned trial Judge lowered the standard of proof;

- a. When the learned trial Judge held that a bribe need not be given to an individual registered voter.
- 25 b. When learned trial Judge disregarded need of the purchase agreement or the logbook of the vehicle as vital in establishing its existence when she held that the electorate, the majority of whom are



5 peasants, could not think of the registration card of the vehicle.

c. Following upon the description by Mr. Basalirwa Yolamu, in cross examination of one Frank as the director of Conqueror's College the trial Court formed the opinion that Frank was an agent of the appellant who was proved to be in charge of the ambulance. This led the trial Judge to hold that it was not necessary to produce the person who was in charge of the ambulance as the petitioner's witness. Similarly the fact that the 2nd respondent did not find it prudent to call the director of Conqueror's College in rebuttal had shifted the burden of proof from the respondent (the petitioner) to the appellant.

Counsel faulted the trial Judge for holding that a bribe need not be given to an individual registered voter.

In reply it was the argument of counsel for the respondent that Section 66 of the Registration of Persons Act, 2015 provides for the mandatory use of national identification cards and the import of that Section is that one no longer has to produce a voter's card or register to prove that one is a registered voter.

Section 1 of the PEA defines a registered voter as a person whose name is entered on the voters' register.

25 The same section defines a voters' register to mean the National Voter's Register compiled under Section 18 of the Electoral Commission Act.



5 **Section 18 of the Electoral Commission Act CAP 140** provides that:-

(1) **The commission shall compile, maintain and update, on a continuing basis, a national voter's register, in this Act referred to as the voters' register, which shall include the names of all persons entitled to vote in any national or local government election.**

10

(2) **The commission shall maintain as part of the voters' register a voters roll for each constituency under this Act.**

(3) **The Commission shall maintain as part of the voters' roll for each constituency a voter's roll for each polling station within the constituency as prescribed by law.**

15

While dealing with this issue, the trial Judge held that donation of an ambulance targets all voters in a constituency and the argument that the witnesses were not voters because the voter's register was not tendered in court identifying them as voters was not tenable. She held that it could only be tenable where bribery is aimed at an individual voter or an individual witness who testifies to an allegation in his or her capacity as a voter.

20

With due respect to the trial Judge, we do not agree. This Court in **Kabuusu Moses Wagaba V Lwanga Timothy and The Electoral Commission, Court of Appeal Election Petition Appeal No.53 of 2011,** held that section 68(2) of the PEA makes it an offence for a person to receive a bribe and where the evidence is of an accomplice then some

25



5 independent corroborative evidence is required. It added that in cases of
bribery during elections, it must be shown that the person bribed was a
registered voter. It is not enough to swear an affidavit that one is a
registered voter and even quote the voter's card. It is necessary to produce
10 a copy of the voters' register showing the name of the bribed person with or
without his or her photograph.

In the instant Appeal, counsel for the respondent submitted that all the
witnesses in respect of the illegal act of bribery deponed that they were
registered voters and they attached their National Identity Cards to their
affidavits. He further submitted that under Section 66 of the Registration of
15 Persons Act, 2015, this was sufficient proof that the deponents of the said
affidavits were registered voters.

Section 66 (2) (b) of the Registration of Persons Act, 2015 provides
that;

20 **“(2) For avoidance of doubt, a ministry, department or agency of
government or any other institution providing the following
services shall require a person to produce a national identification
number or national identification card or alien’s identification
number or alien’s identification card-**

- a)
- 25 **b) identification of voters.”**



The Record of Appeal shows that the respondent did not make any effort to
adduce the voter's register. The witnesses who alleged that the appellant



5 had donated an ambulance to the people of Bunya South Constituency merely attached their National Identity Cards to prove that they were registered voters. The said witnesses included Basalirwa Yoram, Kiirya Bruhan and Mpangu Rashid.

This Court has in a recent decision of *Hon. Otada Sam Amooti Owor V*
10 *Tabani Idi Amin & The Electoral Commission, Court of Appeal Election Petition Appeal No.93 of 2016* held that:

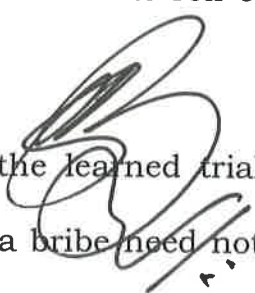
15 “By virtue of the provisions of Section 1 of the PEA, conclusive proof of a registered voter is by evidence of a person’s name appearing in the National Voter’s Register and not possession of a National Identity Card. Section 66 of the Registration of Persons Act 2015 provides for mandatory use of National Identification Cards for purposes of identification of voters among others. Our understanding of this legal provision is that for national elections, the National Identity Card is used to cross
20 check and confirm particulars in the Voters’ Register before a voter can be allowed to vote. The National Identification Card did not replace or do away with the Voters’ Register which is a special document prepared by the Electoral Commission. Section 66 of the Registration of Persons Act 2015 did not
25 amend Section 18(1) of the Electoral Commissions Act Cap.140 which requires the Commission to compile, maintain and update, on a continuing basis, the National Voters Register which includes the names of all persons entitled to vote in any

5 **national or local government election. The importance of the Voters' Register prepared by the Electoral Commission cannot be underscored because Article 61 of the Constitution enjoins the Electoral Commission to compile, maintain, revise and update the Voters Register.**” Emphasis ours

10 With due respect, we do not agree with the trial Judge’s holding that
donation of an ambulance targets all voters in a constituency. For the
donation to influence the voters, it must target the voters who should be
aware of it and actually accept it. We are also not persuaded by the trial
Judge’s holding that it can only be tenable where bribery is aimed at an
15 individual voter and or an individual witness who testifies to an allegation
in his or her capacity as a voter.

We are persuaded by the reasoning of the Justices of Appeal in ***Hon. Otada Sam Amooti Owor V Tabani Idi Amin and The Electoral Commission (supra)***, and find here that the witnesses and the
20 beneficiaries who were alleged to have seen the ambulance that was
donated by the appellant to the voters of Bunya South Constituency were
not proved to be registered voters. Merely attaching a copy of the National
Identity Card to prove that one is a registered voter without extracting or
annexing the relevant page on which the deponent appears on the roll of
25 voters was not enough.

We accept counsel for the appellant’s submission that the learned trial
Judge lowered the standard of proof when she held that a bribe need not
be given to an individual registered voter.



5 Counsel for the appellant further submitted that the trial Judge disregarded the need to produce the purchase agreement or the log book of the vehicle so as to establish its existence when she held that the electorate, the majority of whom are peasants could not think of the registration card of the vehicles.

10 From the Record of Proceedings the only evidence which the respondent adduced to prove the existence of the ambulance was a photograph adduced by Mpango Rashid. The said witness deponed that he was present at around 4pm when the appellant, accompanied by some of his agents like one, Sserunjogi got out of the ambulance. He attached a photograph of the
15 said ambulance. However the said photograph does not show the said Sserunjongi getting out of the ambulance. Further the photograph is neither dated nor does it display the registration number of the said vehicle.

We do not find it prudent on the part of the trial Judge to rely on the
20 photograph to prove the existence of the said ambulance. The respondent had a duty to adduce cogent evidence to prove that the appellant indeed donated an ambulance registration number UAA 957Y to the electorate of Bunya South Constituency in order for Court to be satisfied.

The trial Judge further held that the ambulance was donated by the 2nd
25 respondent because of the words inscribed on it. Court would be raising the standard of proof to beyond reasonable doubt if it insisted on the registration book for the vehicle. The inscribed words connected it to the 2nd respondent.



5 From the Record of Appeal, it is evident that during cross examination, Mpango Rashid testified that he had no knowledge of the person in whose name the ambulance was registered. He further testified that the photograph of the said ambulance was given to him by one Sserunjogi, a supporter of the appellant.

10 Notably the said Sserunjogi was never summoned as a witness to corroborate the evidence of Mpango Rashid.

We further find that no cogent evidence was adduced to establish a nexus between the appellant and the ambulance.

In Masiko Winifred Komuhangi v Babihuga J. Winnie, Election
15 ***Petition Appeal No.9 of 2002***, Justice Mukasa-Kikonyogo DCJ, 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 and truthful so as to convince a reasonable tribunal to give judgment in a party's favor. This has not been
20 the case in respect of the allegation that the appellant bribed voters with an ambulance.

Respectfully we find that the learned trial Judge erred when she disregarded the need to have the purchase agreement or logbook of the vehicle in evidence so as to prove the existence and ownership of the
25 ambulance.

There was no cogent evidence to prove that Frank, said to be the director of Conquerors College and reputed to have been in charge of the ambulance



5 was an agent of the appellant.

We therefore find that the learned trial Judge did not apply the required standard of proof in evaluating evidence on the allegation of bribery.

Issues 3 of the Appeal succeeds.

Issue 1

10 **Whether the learned trial Judge erred in law when she rejected and struck off some of the respondent's affidavits and audio CD**

On issue 1, the learned trial Judge is faulted for holding that the appellant committed an electoral offence basing on uncorroborated evidence of partisan witnesses and further for rejecting and striking off some of the
15 respondent's affidavits and audio CD.

It was the case for the appellant that the trial Judge failed to subject the evidence of the three witnesses of the respondent namely Basalirwa Yolamu, Kiirya Bruhan and Mpango Rashid to the test of corroboration by some other independent evidence.

20 While analyzing the evidence of the three witnesses, the learned trial Judge held that the witnesses in the instant case were ordinary residents of the respective areas as indicated by their National Identity Cards and it was not necessary for court to look for some other independent evidence to corroborate their evidence on allegations of bribery by the appellant.



5 In **Lanyero Sarah Ochieng V The Electoral Commission and Lanyero Molly (supra)** the Court of Appeal, while dealing with a similar matter relating to alleged bribery in an election held that proof of the allegations of bribery could not be established to the standard required in election matters basing on just the uncorroborated evidence of a partisan witness.
10 We hold the same view.

Counsel for the cross appellant faulted the trial Judge for striking off the affidavits of Gulere Wambi Cornelius and Anyole Innocent. He submitted that these affidavits were purposed to tender transcriptions and translations of an audio recording of "Frontline" Radio talk show conducted
15 over 87.7 BABA FM, a local radio station in Jinja on 14th February 2016.

He further submitted that the trial Judge expunged the said affidavits on account that they were filed a month after the Petition had been filed and that this amounted to inordinate delay. Counsel argued that there is no time frame set by law in which evidence should be filed. He relied on **Dr.**
20 **Wenceslaus Rame Makuza V Madina Nakamya & others**
Miscellaneous Application No.140 of 2013.

In reply, counsel for the appellant submitted that on 4th May 2016, the cross appellant filed further affidavits without leave of court after pleadings had been closed and the said affidavits were rightly expunged from the
25 Court Record. He added that on 16th May 2016, court granted the cross appellant leave to file and serve an affidavit which would introduce the audio CD but that the evidence which the cross appellant filed and served

5 offended section 88 of the Civil Procedure Act as the said CD was not in English, the official language of Court.

At page 183 of the record of appeal, the trial judge noted that the affidavit introducing the translation was expunged from the record because the contents of the CD were not in English, the language intelligible to Court as
10 indicated by S.88 of the Civil Procedure Act.

Section 88 of the Civil Procedure Act CAP 71 states thus;

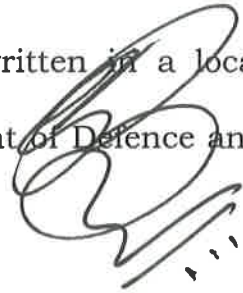
(1) The language of all Courts shall be English.

(2) Evidence in all Courts shall be recorded in English.

(3) Written applications to the Courts shall be in English.

15 In **Godfrey Katunda V Betty Atuhairwe Bwesharirwe, Mbarara High Court Miscellaneous Application No.185 of 2004**, P.K Mugamba, J (as he then was) while noting that the annexures were part of the affidavit of the applicant which was pivotal to the Application had them expunged because they were annexed to an affidavit that had been translated into
20 English language. We are persuaded by this authority.

Counsel for the cross appellant relied on **Dr. Wenceslaus Rama Makuza V Madina Nakamya & others, Miscellaneous Application No.140 of 2013**, where Murangira, J held that attaching a document written in a local language cannot make the respondents' Written Statement of Defence and
25 counterclaim illegal.



5 In our view this authority is distinguishable from the instant case in the sense that what was in issue was an annexure to the Written Statement of Defence while in the instant case what is in issue is an annexure to an affidavit which is evidence in itself.

Section 88 of the CPA is couched in mandatory terms and failure to
10 comply with it, renders the document unusable. We therefore find the argument by counsel for the cross appellant/respondent that Section 88 is no bar for admission of evidence which is not in English language untenable. If that were to be the case, then there would be no need of translators in Courts of law.

15 We, therefore, cannot fault the trial Judge for expunging the affidavit that was to introduce an untranslated audio CD as this offended Section 88 of the CPA.

Regarding the affidavits filed on 3rd May 2016 without leave of Court, in her ruling at page 122 of the Record of Appeal, the trial Judge held that the
20 affidavits filed on 3rd May 2016 should be expunged because they were filed more than a month later and after the respondents had filed their response making it prejudicial to the respondent. She found a 30 days delay unreasonable and inordinate given the need for the expeditious trial of Election Petitions and the nature of the evidence that had to be responded
25 to.

Parties to Election Petitions should strictly follow the timelines set out by the rules in an Election Petition. **(See *Mayende Stephen Dede V Ocheng*)**



5 **Peter, Court of Appeal Election Application NO.05 of 2011)**

We are of the considered view that the affidavits of Gulere Wambi Cornelius and Ayole Innocent filed on 4th May 2016 were inadmissible in evidence because they were filed without leave of court. Court directed parties to file their pleadings on clear dates. The cross appellant/ respondent filed and
10 served the appellant with the Petition, in turn the appellant filed his Answer to the Petition and Affidavit in Support and served the respondent. Evidently he did not raise any new issues that required a rejoinder. Surprisingly after pleadings had been closed, the cross appellant filed further affidavits without leave of Court.

15 We, therefore, are in agreement with the trial Judge that the affidavits filed more than a month after pleadings had been closed, without leave of Court, would prejudice the appellant.

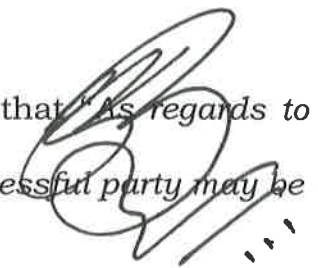

Therefore issue 3 of the Appeal succeeds and issue 1 of the Cross Appeal fails.

20 **Issue 4**

Whether the learned trial Judge erred when she declined to grant costs to the petitioner.

Counsel for the cross appellant faults the trial Judge for declining to grant him costs of the Petition.

25 In handling the issue of costs, the trial Judge stated that *"As regards to costs, they follow the event unless for good cause, a successful party may be*

5 denied. In the instant case the petitioner had all the time to report the proved
illegal practice even before elections. He decided to wait until after he had
lost the election. The 1st respondent is also mandated under S.12 (1) (j) of the
Electoral Commission Act to ensure compliance by all candidates with the
provisions of the Electoral laws. It seems to play a passive role as political
10 thuggery in terms of bribery and donations thrive threatening true
democracy, but in the absence of any report about the donation, Court
cannot condemn it to costs. It would be different if the petitioner reported to it
and it ignored. Most of our politicians seem not to comprehend the simple
electoral laws that govern politics. Consequently each party is directed to
15 meet its own costs as they prepare to go back to the field to play clean and
pure politics.”

Section 27 of the Civil Procedure Act provides that subject to such
conditions and limitations as may be prescribed and the provision of any
law for the time being in force, costs and incidences to the suit shall be in
20 the discretion of Court.

A successful litigant can only be denied costs for good cause, such as when
the successful party’s conduct prior to or during the course of the suit has
led to litigation but for his/her conduct might have been avoided. **(See SDV
Transami (U) Ltd V Nsibambi Enterprises (2008) ULR 497 CA).**

25 In the instant case, the cross appellant/respondent petitioned the High
Court to have the election of the appellant annulled on grounds that the
appellant had committed various electoral offences with intent to influence
the voters of Bunya South Constituency. The same was annulled by the



5 trial Judge who declined to grant costs on grounds that the cross
appellant had all the time to report the proved illegal practices prior to the
elections but the same was not done.

We are unable to fault the trial Judge for exercising her discretion the way
she did on the issue of costs.

10 Therefore issue 4 of the cross appeal fails.

In conclusion, the Appeal succeeds and the cross appeal fails. We make the
following declarations and orders:

1. The decision and orders of the trial Judge are hereby set aside.
2. The appellant is the validly elected Member of Parliament for Bunya
15 South Constituency, Mayuge district.
3. The respondent shall bear the costs of this Appeal and in the Court
below

We so order

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Dated this 15th day of Nov. 2017

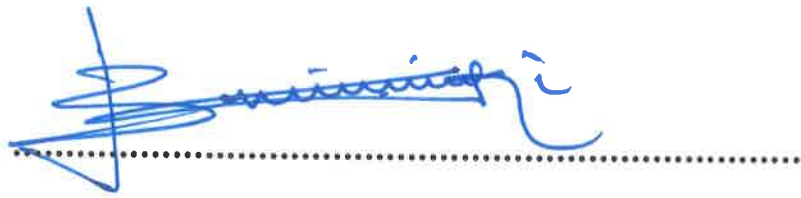
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.....
HON. MR. JUSTICE S.B. K KAVUMA

DEPUTY CHIEF JUSTICE (E)



5



HON. MR. JUSTICE BARISHAKI CHEBORION

JUSTICE OF APPEAL

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HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA

JUSTICE OF APPEAL

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