THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL No. 083 OF 2016

1. HON. OCEN PETER

2. ELECTORAL COMMISSION :: APPELLANTS

VERSUS

HON. EBIL FRED :: RESPONDENT

(An appeal arising from the Judgment and decree of the High Court of Uganda at Lira presided over by Hon. Mr. Justice Wilson Musalu Musene in Election Petition No. 001 of 2016)

CORAM: HON. MR. JUSTICE ALFONSE OWINY DOLLO, DCJ

HON. LADY. JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

JUDGMENT OF THE COURT

Introduction:-

This is an Election Petition Appeal against the Judgment and orders of the High Court at Lira, delivered by Musalu-Musene, J on the 12th day of August, 2016 in Election Petition No. 001 of 2016.

Background:-

On 18th February, 2016, Parliamentary Elections were held throughout the country. The first appellant, ***Hon Ocen Peter***, the respondent, ***Hon Ebil Fred,*** Alula David, and Okori Anthony Brazil were duly nominated and gazetted as candidates by the second appellant, ***the Electoral Commission*** for the parliamentary seat of Kole South Constituency, Kole District. At the end of the polling exercise the first appellant got 15,784 votes; Alula David

garnered 12,714 votes; the respondent got 5,867 votes; while Okori Anthony Brazil got 503 votes.

Consequently, the second appellant declared the 1st appellant as the winner and duly elected Member of Parliament for Kole South Constituency, Kole District. His name was gazetted in the Uganda gazette accordingly.

The respondent being dissatisfied with that declaration filed Election Petition No. 001 of 2016 before the High Court of Uganda at Lira under Sections 4, 60, 61 and 80 of the Parliamentary Elections Act (PEA) (Act 17/05). The main thrust of the petitioner's (now respondent's) case was that the 1st respondent (now 1st appellant) had committed several electoral offences of uttering false and disparaging statements as well as threatening to use violence. In the alternative but without prejudice to the foregoing, the respondent alleged that the 1st appellant committed electoral offences of:-

i. ***Uttering false and disparaging statements of the petitioner, to wit that the petitioner is "Akwar Anam" and greets people with sticks for fear that they would bewitch him and because he thinks the voters are dirty.***

ii. ***The 1st respondent uttered false and disparaging statements of the petitioner when he embarked on a certain campaign by regularly referring to the petitioner during campaigns as "Akwar Anam" in words of paragraph 5(b) of the petitioner meaning that the petitioner was a grandson of Bantu beyond Lake Kyoga and thus not pure Langi who voters should shun.***

iii. ***Using or threatening to use violence contrary to Section 80 of the Parliamentary Elections Act.***

iv. ***The 1st respondent used a government motor vehicle Reg. No. LG001-058 which had officially been given to him as LC5 Chairperson.***

He sought the following orders of redress in the petition:-

a) ***A declaration that the 1st respondent by himself and through his campaign agents with his knowledge, consent and approval did commit electoral offences highlighted in the petition.***
b) ***An order that the 1st respondent's election was thereby null and void or voidable.***
c) ***An order to cancel and/or annul the 1st respondent's election.***
d) ***An order that the election of the 1st respondent be set aside and a new election be held.***
e) ***Finding the 1st respondent guilty of committing electoral offences and ordering that criminal proceedings be commenced against the 1st respondent in that respect as a deterrence of violence in our elections.***
f) ***Costs of the petition.***
g) ***Any further and better reliefs that the court may deem fit and just to grant.***

The 1st respondent (now 1st appellant) filed an Answer to the Petition in which he denied the allegations leveled against him. In particular he averred that throughout his campaigns, he was never violent, and neither he nor his agents committed any electoral offences at all. He further averred that he never uttered any reckless, false and disparaging statements against the petitioner as alleged. He prayed for the dismissal of the petition with costs.

The 2nd respondent (now 2nd appellant) in its Answer contended that the electoral process of Kole South Constituency was conducted fairly and legally in accordance with the principles of transparency, as well as free and fair elections laid down in the electoral laws of Uganda, and that the results in the Constituency reflected the true will of the majority voters.

In the alternative and without prejudice, the 2nd respondent contended that if there were any irregularities or non-compliance with electoral laws, such non-compliance did not affect the results in a substantial manner. The 2nd respondent also prayed for the dismissal of the Petition with costs.

The following were the issues framed for the lower court's determination:-

1. ***Whether the 1st respondent personally or through his agents with his knowledge, consent and approval did commit electoral offences during campaigns and/or elections.***
2. ***Whether the 2nd respondent has any liability in this case.***
3. ***Whether the Petition is competent.***
4. ***What remedies are available to the parties.***

The petition was heard and allowed by Musalu Musene, J with costs to the petitioner. The learned trial Judge further ordered the 2nd respondent to conduct fresh elections for Kole South Constituency hence this appeal.

The grounds of appeal as they appear in the 1st appellant's Memorandum of Appeal are as follows:-

a) ***That the Learned trial Judge erred in law and fact in upholding the validity of the affidavits of Ojok Tom, Ocuri Denis, Rose Alapi, Otuko Bonny, Otila Jimmy and Mushabe Alex Korocho.***
b) ***That the Learned trial Judge erred in law and in fact in finding and holding that the Appellant personally and/ or through his agents with his knowledge, consent or approval committed electoral offences during campaigns and elections.***
c) ***That the Learned trial Judge erred in law and in fact in annulling the election of Kole South Constitution Member of Parliament and ordering a fresh election when there was a run up candidate to the Appellant whose election was not challenged.***
d) ***That the Learned trial Judge erred in law and in fact in when he failed to properly evaluate the evidence and apply the law thereby***

coming to the wrong conclusion resulting in the annulment of the election of the Appellant.

e) That the Learned trial Judge erred in law and in fact when he treated the submissions of the Appellant as submissions in reply to the respondent's submissions when, at the time they were filed, the respondent had failed and/or refused and/or neglected to file his submissions to which the Appellant would reply and they were never served on the Appellant.

f) That the Learned trial Judge erred in law and in fact in relying on the submission of the respondent which the Appellant had had an opportunity to challenge in reply as they were filed out of the time prescribed by the court and after the Appellant had filed his submissions.

g) That the Learned trial Judge erred in law and in fact when he shifted the burden of proof of the respondent's case to the appellant.

h) That the Learned trial Judge erred in law and in fact when he failed to find that the Petition was incompetent.

i) That the Learned trial Judge erred in law and in fact in proposing that all affidavit evidence regardless of its evidential value should be challenged or contradicted by an affidavit in reply or rejoinder.

j) That the Learned trial Judge erred in law and in fact in failing to appreciate the importance of the relationship of principal and agent in electoral offences.

k) That the Learned trial Judge erred in law in making a finding on the offence of use of a Government motor vehicle which was not pleaded and on which the trial did not proceed on that basis.**(sic)**

The 2nd appellant did not file a Memorandum of Appeal in this court and relied upon the Memorandum of Appeal filed by the 1st appellant.

At the conferencing of this matter, Counsel for the appellants with leave of court abandoned ground (a), and condensed the rest of the grounds into four issues for court's determination namely:-

1. ***Whether learned trial Judge in annulling the election of the appellant erred in law and in fact by failing to properly evaluate the evidence and apply the law. (grounds (b), (d), (e) and (f), (g), (i) and (j) reformulated)***
2. ***Whether the learned trial judge erred in law and in fact when he annulled the election of the Member of Parliament for Kole South Constituency and ordered a fresh election when there was a run up candidate to the appellant whose election was not challenged. (ground c)***
3. ***Whether the offence of use of a government motor vehicle was neither pleaded nor the basis of the trial, and so, the learned trial Judge's finding on the offence was, therefore, an error. (ground k)***
4. ***Whether the learned trial Judge erred in law and in fact when he failed to find that the petition was incompetent. (ground h)***

At the hearing of this appeal, Counsel Nesta Byamugisha together with Counsel Abwang Atim Aaron appeared for the appellants, while the respondent was represented by Learned Counsel Kamba Hassan.

Counsel for the 1st appellant and Counsel for the respondent with leave of court relied on their conferencing notes which they highlighted in court. They also filed written submissions as directed by the Court. They are all to be found on the Record of Appeal.

Counsel for the 2nd appellant associated himself with the submissions of Counsel for the 1st appellant, since all the grounds and/or issues related directly to the first appellant.

Counsel for the appellants reformulated the appellant's grounds into four issues as laid out herein above and Counsel for the respondent without faulting the appellants for the reformulated grounds argued all grounds as set out in the Memorandum of Appeal.

Counsel for the appellants argued ground (h) alone, ground (g) alone, grounds (a) & (i) together, ground (c) separately, grounds (e) & (f) together, grounds (b) & (d) together, ground (j) separately, and ground (k) separately.

We shall resolve the issues and handle the grounds of appeal as set out in the Memorandum of Appeal.

The Submissions:

Issue 1: Whether learned trial Judge in annulling the election of the appellant erred in law and in fact by failing to properly evaluate the evidence and apply the law. (Grounds (b), (d), (e) and (f), (g), (i) and (j) reformulated)

On ground b, Counsel for the appellants submitted that the learned trial Judge erred in law and in fact in finding and holding that the appellant personally and/ or through his agents with his knowledge, consent or approval committed electoral offences during campaigns and elections.

Regarding the stated election offence of sectarianism, Counsel submitted that the learned trial Judge found that there was a verbal sectarian campaign committed by the 1st appellant which was as detrimental as the use of a symbol or color with tribal or any sectarian connotations. Counsel referred Court to **Section 23 (1) (a)** of the PEA which prohibits the use of a symbol or colour which has a tribal, religious affiliation or any other sectarian connotation as a basis for one's candidature for election or in support of one's campaign and submitted that the phrase ***'... or any other sectarian connotation'*** related to a symbol or colour which had a tribal or religious affiliation and that verbal words which did not relate to such symbol or colour could not be subject of sectarian campaign in terms of the

ejusdem generis rule of interpretation. (**See Halsbury's Laws of England Vol. II page 430 para 693** and **Magnhild (Owners) vs. Mcintyre Bros & Company [1920] 3 KB 321).**

Counsel further referred Court to the definition of *sectarian/ism* in **Black's Law Dictionary (8th Ed) page 1382** and concluded that the mere calling of names *'akwar anam'* as alleged by the respondent in the petition was, therefore, not covered by Section 23 of the PEA, but rather would be relevant **under Section 24(a) of the PEA** which was not pleaded. Further still, that the mention of sectarian campaign under paragraph 5(b) of the petition was merely as evidence of false/disparaging statements of *'akwar anam'*.

In reply, counsel for the respondent submitted that under paragraph 5(a) of the petition, the first appellant uttered false and disparaging statements which were set out in para 5(a)(i) to (iii). Further that, the appellant embarked on a sectarian campaign by regularly referring to the petitioner as *"akwar anam"* during the campaigns meaning *'grandson of Bantu beyond Lake Kyoga and that Langi voters should shun him'.*

Counsel referred court to **Black's Law Dictionary (6th Edn) page 1353** which defines *Sectarian* to mean denominational; devoted to, peculiar to, pertaining to or promotive of the interest of a sect or sects, and submitted that counsel for the appellants' contention that the offence of sectarianism under Section 23 of the PEA related only to religious beliefs, according to Black's Law Dictionary was amiss. He contended that the wording ***'...or any other sectarian connotation'*** was disjunctive of use of symbol or color

which has any religious affiliation, and section 23 (1) of the PEA must be read together with section 24 (a) of the same Act.

Counsel further submitted that the authority of **Magnhild (Owners) versus Mcintyre Bros & Company [1920] 3 KB 321** relied upon by the appellant dealt with 'Shipping Charter Party hire' and was inapplicable to the facts of this case, and referred court to **Becke vs. Smith (1836) 2 M & W 191 at 195** which was cited with approval in **Cross on Statutory Interpretation (Butterworths, 1976) at page 15,** to state that in construction of a statute, the ordinary meaning of words used ought to be adhered to unless there is variance with the intention of the legislature or any manifest absurdity, repugnance or inconvenience but no further.

It was contended that neither the 1st appellant nor his campaign manager **Aloi James, in their affidavits neither** generally nor specifically denied that the 1st appellant had uttered the words *'akwar anam'* with a sectarian connotation. However, the evidence of Ociro Sam, D/CPL Okori George and Otila Jimmy was independent and corroborative on the above issue. Therefore, the learned trial Judge was justified in finding that mere denials by the 1st appellant were not acceptable as a defence as compared to the respondent's affidavit evidence.

In rejoinder, Counsel for the 1st appellant rejoined while the extract of the definition of the term *sectarian* the **Black's Law Dictionary, (8th Ed),** which stated that "...of or relating to a particular religious sect," was supplied to court by the appellant, the different definition relied upon by the respondent in the 6th edition was not supplied to court for comparison. He further

rejoined that the learned trial Judge failed to make a distinction between Section 23 and 24 of the PEA. Under paragraph 5(b) of the petition, the respondent pleaded the expression *'akwar anam'* within section 23 of the PEA, and yet the proper offence of using a verbal sectarian campaign based on tribal sentiments to support one's campaign, which the learned trial Judge erroneously found the 1st appellant guilty of, would only fit under Section 24(a) of the PEA. In Counsel's view, there was no evidence that the 1st appellant uttered the expression *'akwar anan'* or that if he uttered the said expression, he did so for the purpose of preventing the election of the respondent either directly or indirectly, and/or that the respondent was so affected which are the requirements of Section 24(a).

Further that the meaning attributed to the words *'akwar anam'* by both the respondent and Ocero Sam was different but the learned trial Judge was oblivious of the same.

Counsel referred to his earlier submissions and prayed that this appeal be allowed.

Regarding the alleged second electoral offence on violence, it was the 1st appellant's case that the evidence of the respondent's witnesses was inconsistent and contradictory, and only named Otuko Robert.

On allegations of paragraph 6 (ii) of the petition that on 18th February, 2016, the 1st appellant personally slapped and assaulted the respondent's official agent Ocero Sam aka Okora, counsel submitted that there was no evidence of any report made to police and /or any such evidence that the alleged violence or threat thereof was in order to induce or compel Ocero Sam to

refrain from voting the respondent. Counsel contended that the preference of Ocero's evidence by the learned trial Judge on the basis of his age and being a chief campaigner was not justified since this placed him in a partisan position with propensity to exaggerate in favour of his candidate of choice.

Counsel further submitted that there was no specific evidence on the alleged incident under paragraph 6(iii) of the petition where the 1st appellant was stated to have sent his campaigner and supporter, Lero Moses to warn Mzee Oculi Joel Okwi, a resident of Akalo Trading Centre that his family would be killed unless they stopped supporting the respondent. Mr. Okwi's affidavit was nevertheless relied upon by the learned trial Judge. Further, that the evidence of Mzee Oculi's son Cong Robert whose affidavit was relied upon by the learned Judge, that he was pursued by assailants including Ojok Adiga, Okello Wesley, and Ongu Bonny to his homestead setting it ablaze was untenable since he was not a voter and the National ID he alleged to own was never attached to his affidavit. Counsel contended that paragraph 5 of his affidavit was meaningless and ought to be struck out under Order 6 Rule 18 of the Civil Procedure Rules.

On allegations under paragraph (iv) of the petition, counsel contended that the affidavits of Otuko Bonny and Rose Atapi ought to be struck out since both deponents did not state where the alleged incident took place. They merely stated that they were attacked at their home by a gang sent by the 1st appellant. They also did not furnish any evidence that they were registered voters; neither were their National Identity cards exhibited.

Further, Atapi Rose's evidence contrasted with her son Otuko Bonny who did not depone to being with his mother and being unconscious as Rose's evidence suggested. Further that since the incident is alleged to have occurred at 10:45pm; the lights of the alleged motorcycle which the attackers were riding and moonlight were not conducive for proper identification.

Regarding the evidence of Ocuni Denis who deponed that he was cut near the heart by the 1st appellant's people near Acung Apenyi Church of Uganda, Counsel for the appellants submitted that the learned trial Judge relied on this evidence in error since the incident deponed to by this witness was neither pleaded nor replied to by the respondent.

Counsel finally challenged the evidence of DCPL Okori George and the DPC of Kole District, Musakana Ahamed, as not worthy of belief since it was generalized, full of hearsay, speculative, presumptive and incredible.

In his reply, Counsel for the respondent submitted that the people of Kole South Constituency were indiscriminately hacked and their houses torched with the intention of instilling fear in the hearts of supporters and would be supporters or electors of the respondent and other candidates. **(See definition of violence in the International Foundation for Electorate Systems (FES))**

Counsel submitted further that under paragraph 6(i) of the Petition, it was pleaded that on the 17th of February, 2016 at Akalo swamp near Akalo Trading Centre, a group headed by the 1st appellant's son, Otuko Robin, while under the instructions of the 1st appellant, inflicted harm on Abong

Mike and Ojok Tommy all known supporters of the respondent smashing the car in which they were moving, and cutting the duo with pangas and machetes.

Further, there was affidavit evidence that on the 16th of February, 2016, Lero Moses was sent by the 1st appellant to warn the family of Oculi Joel Okwi in Akalo Village to stop supporting the respondent or suffer death. On the night of 17th February, 2016, Ojok Adiga, Okello Wesley, Ongu Bonny among others while under the command of Otuko Robert set the house of Okwi's son, Oculi Joel on fire by the appellant's son and others. The same gang also cut Otuko Bonny in the eye indicating that as a DJ, he was de-campaigning the 1st appellant.

Ocuni Denis deponed that he was cut near the heart by the 1st appellant's goons near Acung Apenyi Church of Uganda, and that they drove off with his motorcycle. The DPC of Kole District, Musakana Ahammed and the Officer in-charge of Election and Political Offences D/CP Okori George also gave sworn evidence of the mayhem orchestrated by a gang led by the 1st respondent's son throughout Kole South Constituency. Counsel concluded that considering the massive electoral violence and undue influence, the learned trial Judge was justified in his decision.

In rejoinder, Counsel for the 1st appellant submitted that the opening statement by the respondent on this ground was from the bar not worthy of consideration by this court; neither were the International Foundation for Electorate Systems (IFPS) reliable since their citation was not availed to Court.

He reiterated his earlier submissions and added that whereas Ocero Sam deponed that he reported the alleged assault to Akalo Police Post vide SD No. 14/20/2/16, D/CPL Okori George in his evidence did not refer to any such report. Further D/CPL Ogwal Tom who allegedly recorded the statement from Ocero Sam did not testify about this incident. No other witnesses save for Ocero Sam testified to this incident and such evidence was therefore wrongly relied upon by the learned trial Judge.

Further, that the allegations that the 1st appellant made allegations of homosexuality against the respondent were not pleaded. The evidence of Ocero Sam relied upon by the learned Judge, on utterance of disparaging words comprised of generalizations. The deponent being the chief campaigner of the respondent ought to have furnished all relevant details. Neither was it disclosed when the alleged utterances were made; in whose presence they were made; nor were dates and months disclosed. Further no report was made to any authority, including the respondent, the 2nd appellant or the police.

Counsel pointed out that during cross-examination, the respondent stated that he did not attend any of the alleged events since there were no joint campaigns; and the respondent sought to rely on an alleged video and transcript whose tendering in evidence were successfully resisted throughout.

In reply, Counsel for the respondent contended under paragraph 5(a) of the petition, and paragraphs 8, 9 and 10 of the affidavit in support that the making by the appellant of disparaging and false statements that the

respondent was braggart and a descendant of the bantu tribe who practices homosexuality, were pleaded. Counsel relied on **Fred Badda & Another versus Prof. Muyanda Mutebi, Court of Appeal Election Petition Appeal No. 025 of 2006,** to state that in order for an offence under Section 73(1) of the PEA to be committed, any derogatory statement made anyhow suffices if the mischief is to sway away voters. He also relied on **Timothy Denis Morrison & Others versus Alstair Carmichael, MP & Another [2015] ECIH 71** for a similar provision.

Counsel concluded that the reference to the respondent as a homosexual and a braggart who greeted people with sticks, per the available evidence contravened Section 73(1) of the PEA. The learned trial Judge, therefore, committed no error in finding so.

We have considered the record of proceedings, the written submissions of Counsel, the Judgment from which this appeal is generated as well as the law and authorities cited to us.

Duty of Court

This being the 1st and last appellate Court in election matters, it has the duty to re- hear the case and re-consider the evidence and all the materials placed before the trial Judge and make its own conclusions bearing in mind, however, that it did not have the advantage of seeing the witnesses testify. See **Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I. 13-10, and Kifamunte Henry versus Uganda SCCA No.10 of 1997 (Unreported).**

In so doing, this Court is further to be guided by the principles that the burden of proof in election matters lies squarely on the petitioner to prove all the allegations. This burden never shifts to the respondent. **See Mugema Peter v. Mudyobole Abed Nasser, Election Petition Appeal No.30 of 2011.** Meanwhile the standard of proof in election matters is on the basis of a balance of probabilities and that the burden lies upon the petitioner to prove his case to the satisfaction of Court. The degree of proof is higher in petitions (election) than that which is required in ordinary suits because of the public importance and seriousness of the allegations normally contained in the petitions. **See Rtd. Col. Dr. Kiiza Besigye versus Y.K Museveni SC Election Petition No. 001 of 2001.**

We shall therefore bear the above principles in mind while resolving the grounds and/or issues in the instant appeal.

Ground (b)

Regarding the evidence of the alleged sectarian campaign, according to affidavit in support of the petition deponed on 21st March, 2016, the respondent stated:-

> ***"7. That throughout his campaign rallies and meetings, the 1st respondent referred to me as 'akwar anam' meaning that I am a grandson of Bantu speaking people who is not supposed to be elected by Lango's as all benefits of my being MP would not benefit the Lango people of Kole South Constituency.***
>
> ***8. That the 1st respondent further stated that I went to Parliament a small man but I developed big buttocks like the tail of a sheep meaning that I eat all the money I earn from Parliament yet the voters***

languish in poverty all of which statements were simply calculated to make voters shun my candidature.

8. That the 1st respondent further said during his campaigns that I am bragant as I greet the people of Kole South using sticks because I fear that they would bewitch me and make me sick with their dirty hands, which was false and a campaign gimmick.

9. That the 1st respondent further branded me a homosexual because according to him, I am a descendant of Bantu tribe who practice homosexuality.

13. That all the above offences were captured on video [see video recording attached hereto and marked EB-2]

14. That the Transcribed and translated versions of the above video from the College of Humanities and Social Sciences Makerere University was obtained and is annexed hereto and marked EB-3 accordingly."

Section 22(6) of the PEA prohibits the making false, malicious, sectarian, divisive, and mudslinging statements against a fellow candidate. It was the respondent's case that the 1st appellant at his campaign rallies in Kole Constituency made sectarian statements. We note that the respondent during cross-examination, testified that he did not attend any of the 1st appellant's rallies since no joint campaign rallies were prepared for all candidates. We find that whatever he stated in his affidavit as set out above was hearsay. We shall now turn to the other evidence in support of the petition.

We note that the learned Judge relied on the affidavits of Ocero Sam aka Okora and D/CPL Okoli George to corroborate the respondent's affidavit evidence. According to Ocero Sam in his affidavit, the 1st appellant throughout his campaign was uttering that Hon Ebil Fred was *'akwar anam'*

that is to say, a cousin to the Bantu speaking tribes and it was an insult to the Langis for him to stand in Kole South Constituency; and that some people believed this smear and sectarian campaign. Further, that the 1st appellant shamelessly insulted the respondent that he had gone to Parliament a small man but had developed big buttocks like the tail of a sheep, and that he had been sodomized by the Baganda.

Meanwhile, D/CPL Okori George deponed that the respondent told him that whenever the 1st appellant went for campaigns, he would say Ebil is *'akwar anam'* meaning, a grandson of Bantu and that his huge buttocks had been sodomized among other things. When he raised this with the 1st appellant, he denied having made any such statements.

The learned trial Judge in handling this issue found at page 11 of his Judgment that:-

> ***"I have no doubt that the statements were defamatory in nature and amounted to a sectarian campaign. It was clear in the evidence testimonies of the two witness above that Ocen Peter was sectarian by stating that Ebil Fred should not be elected as he was not a pure Langi but 'akwar anam...'***
>
> ***I therefore reject the submissions of Counsel for the 2nd respondent that the 1st respondent did not use a symbol or a color which was symbolic with Langi tribe or Bantu tribe. Verbal sectarian campaign was bad enough and therefore an offence under section 23(1)(a) of the Parliamentary Elections Act."***

We respectfully disagree with the learned trial Judge's finding on this issue and find that the evidence regarding this issue was wrongly applied and it could not have corroborated the evidence of the respondent since it was hearsay evidence. D/CPL Okori George was informed of the alleged sectarian

campaign by the respondent and yet the respondent was absent at the said rally where these statements were allegedly made. The evidence of Ocera Sam could not be relied upon for corroboration. He deponed that he was the Chief Campaigner of the respondent but did not attach his appointment letter and neither was his voters ID attached to prove that he was a registered voter in this constituency.

Election Petitions are highly partisan and supporters are likely to go to any length to seek to establish adverse claims against their opponents and it is, therefore, important to look for cogent independent and credible evidence to corroborate claims to satisfy Court that the allegations made by the Petitioner are true. **See Kabuuso Moses Wagabo versus Lawrence Timothy Mutekaya, Election Petition No. 015 of 2011 (unreported).**

The learned trial Judge misdirected himself on the interpretation of sectarian campaigns. **Section 23(1)** of the Parliamentary Elections Act which forbids non-sectarian campaign provides:-

> ***"A person shall not use a symbol, or color which has a tribal, religious affiliation or any other sectarian connotation as a basis for that person's candidature for election or in support of that person's campaign."***

Section 23 (1) (supra) prohibited the use of a symbol or colour which had a tribal, religious affiliation or any other sectarian connotation. The words *"...tribal, religious affiliation or any other sectarian connotation"*, must relate to a symbol or colour. Nowhere in the evidence of the respondent did he allege the use by the 1st respondent of a symbol or colours.

We agree with counsel for the appellants' submission that Section 23(1) had no application in this respect. A verbal sectarian campaign based on tribal sentiments to support one's campaign which the learned trial Judge erroneously found the 1st appellant guilty of would fit under **Section 24 (a)** of the PEA which was not pleaded at all in the lower court.

Further the ingredients for the electoral offence of sectarianism under Section 23(1) of the PEA were laid out in **Amongin Jane Francis Okili versus Lucy Akello and Electoral Commission, High Court Election Petition No. 001 of 2014, which we accept,** are as follows:-

i. ***That the respondent used a symbol or color with tribal, religious, or other sectarian connotation.***
ii. ***That the symbol, color or other sectarian connotation was the basis for her candidature or campaign.***

The learned Judge further held that:

> ***"Sectarian connotations relate to or are characteristic of a sect. One must have a sectarian mind or conduct herself or himself in a sectarian manner. One must exhibit intolerance of the other or intolerance by the electorate as a result of the sectarian campaign in order to amount to sectarian connotations.***
>
> ***Under Section 24 of the Parliamentary Elections Act which forbids interference with electioneering activities of other persons, the allegation must also be specifically pleaded. The petitioner must prove that:-***
>
> 1) ***The respondent used spoken or written words, or presented herself or himself in a manner that interfered with the election activities of another person.***
> 2) ***The words promoted disharmony, enmity and hatred against the petitioner.***

3) That the disharmony, enmity, hatred was based on the petitioner's tribe, sex, race, color, ethnic origin, creed or religion."

From our perusal of the Record of Appeal we found no evidence that the 1st appellant used any symbol or color which was symbolic with tribal, religion or any other sectarian connotation as was required to prove an offence under Section 23(1) (supra).

We also find that no evidence was adduced to the effect that as a result of the use of a symbol or color, the respondent was hated and disharmony or enmity were created between him and his supporters as a result.

The above notwithstanding, we find no evidence adduced to prove that the respondent lost because he was rejected for not being a Langi. In fact according to the results, the competition was tight and the respondent came at a distant 3rd place in the race. There was also no evidence that the supporters of the petitioner/respondent turned against him as a result of any sectarian campaign; nor that there was intolerance of the respondent based on tribal sentiments. With the above said, we are of the view that the petitioner failed to prove the electoral offences under S.23 (1) of the Parliamentary Elections Act.

The second electoral offence alleged under the petition was that of electoral violence. Regarding this issue, the respondent in his affidavit in support of the petition stated:-

17. That most of the violence escapades were committed by the 1st respondent's son Otuko Robin and a plethora of goon campaigners of

the 1st respondent with his knowledge imputed or otherwise, consent and approval.

18. That most of the campaigners and agents of the 1st respondent were arrested and charged with assault and being armed with pangas in public before the Chief Magistrates Court Lira.

In Uganda Journalist Safety Committee & others Vs Attorney General, Constitutional Petition No. 7 of 1997, it was stated that:-

> ***"Court should not act on an affidavit, which does not distinguish between matters stated on information and belief and matters to which the deponent swears from his own knowledge. Where averments are based on information, the source of information should be clearly disclosed and where the statement is a statement of belief, the grounds of belief should be stated with particularity, so that Court can judge whether it is safe to act on the deponents affidavit. Failure to disclose the source of information will normally render the affidavit null and void and an affidavit is not evidence unless it complies with these legal requirements".***

Yorokamu Bamwine, J (as he then was) in **Banatib Issa Taligola versus Electoral Commission and Wasugirya Bob Fred, Election Petition No. 15 of 2006** observed:-

> ***"Court is cutely aware that in election contests of this nature, witnesses, most of them motivated by the desire to secure victory against their opponents, deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain"***

Further in **Karokora vs EC and Kagonyera, Election Petition No. 002 of 2001, Musoke –Kibuuka J** had this to say:-

> ***"... It would be difficult for a Court to believe that supporters of one candidate behaved in a saintly manner, while those of the other candidate were all servants of the devil"***

Additionally in **Paul Mwiru versus Igeme Nathan Samson Nabeeta, EC & *NCHE*, Monica Mugyenyi, J** stated that:-

> ***"... The evidence of both parties is, in its entirety, quite subjective and cannot be relied upon without testing its authenticity from a neutral and independent source. Indeed in Mbayo Jacobs vs. Electoral Commission & Anor, Election Petition Appeal No. 7 of 2006 Byamugisha JA alluded to such subjectivity when she said of evidence in election petition:***
>
> ***Some other evidence from an independent source is required to confirm what actually happened".***

From the above authorities which we accept, it is imperative where such allegations are made, to look for independent evidence to corroborate the respondent's evidence.

The learned trial Judge while deciding this issue found at page 17 of his Judgment as follows:-

> ***"As far as this court is concerned, there are about 10 affidavits or so in support of the petition confirming serious acts of violence before and during the contested election. These include that of Fred Ebil, the petitioner, then Abong Mike, Ojok Tommy, Oculi Denis, Otuko Bonny, Rose Atapi, Musakana Ahamed the District Police Commander of Kole District and No. 34533 D/CPL in-charge of Electoral and Political offences in Kole District. There is also mention that the 1st respondent personally assaulted the petitioner's official campaign agent by slapping him several times.***
>
> ***...It is the finding of court that by and large, the evidence of the petitioner on election violence in uncontroverted. In paragraphs 11 and 12, the 1st respondent generally states that none of his agents was involved in election violence and that he did not assault Ocero Sam. There was for example no affidavit sworn by Otuko Robin, the***

son of the 1st respondent to clarify or avert the serious allegations labelled against him. "

The evidence to support the above allegations was to be found in the affidavits of the following:-

Ojok Tommy claimed that he had been butchered by a gang under orders of the 1st appellant's son, Otuko Robin; that the alleged incident occurred at Akalo swamp where the assailants had ambushed him together with Abong Mike; he identified the motor vehicle carrying the assailants as a Sahara and further stated that the assailants were led by Otuho Robin who was talking on phone with the 1st appellant, and who cut him on the head with a panga. Further that, members of the gang drove his motor vehicle, while others sat on him and the said unidentified agents took him to Akalo Police Post.

Regarding the same incident, Abong Mike deponed that on that same day the motor vehicle allegedly driven by Okello Tonny one of the assailants was UAW 513W.That Okello Tonny was commanding a group of about 20 goons chanting the 1st appellant's name. He dragged him out of his motor Vehicle Reg. No. UAX 276M and they butchered him. His car was driven by Ayo Jimmy. He attached evidence of a photograph of himself showing injuries and a medical report as proof.

With regard to the evidence of Abong Mike, we find that for such a serious crime of grievous bodily harm to be reported to police and no arrest and/or charge is made against the persons named, and yet some of the assailants were known, casts doubt on the truthfulness of the allegations. The alleged assailants drove the victims to police station together with Abong Mike's

motor vehicle and abandoned them there. The fact that they were not apprehended by police yet they were allegedly chanting slogans of the 1st appellant is difficult to believe. Indeed there was no proof that any of the 20 'goons' who included Otuko Robin and Okello Tonny were agents of the 1st appellant acting with his knowledge, consent and/or approval.

The evidence of Ojok Tommy and Abong Mike fell short of connecting the 1st appellant to the offence through his knowledge, approval or consent. Section 80(1) (a) of the PEA requires proof of agency because such an offence can only be committed by a person directly or through another person. Further still, Musakana Ahamad, the DPC never testified about this incident and yet these two witnesses stated that he went to Akalo Police Post where they were dumped.

Ocero Sam aka Okora stated that on 18th February, 2016, the 1st appellant personally slapped and assaulted him. He reported a case of assault at Akalo Police Post under SD 14/20/02/16, and that he could not report assault immediately because he was still managing the respondent's campaign. We note no other witness corroborated this evidence. There was no evidence of any report made to police and /or any such evidence that the violence or threat was in order to induce or compel Ocero Sam to refrain from voting the respondent. We find the preference of this evidence by the learned trial Judge on the basis of his age and being a chief campaigner was not justified. As chief campaigner of the respondent, he was placed in a partisan position with high likelihood to exaggerate in favour of his candidate of choice.

Mzee Oculi Joel Okwi stated that on 16-02-2016, Lero Moses, a boy, was sent to warn him that he would be killed because his family was supporting the respondent. Further that his son's house Cong Robert was torched by assailants who included Ojok Adiga, Okello Wesley, and Ongu Bonny and he saw him since he was standing in the compound. He reported the incident to police.

Cong Robert stated that the assailants who included Ojok Adiga, Ongu Dan, Otuko Robin and others pursued him and torched his house on 17-02-2016 at around 8:00pm.

We find that that paragraph 5 of Cong Robert's affidavit was meaningless. We strike out the offending part and in analyzing the rest of the paragraphs find that Cong Robert testified that he was a resident of Akaidebe village in paragraph 2 of his affidavit, and that he was chased from Akalo Trading Centre to his home which they torched. His father on the other hand deponed that he was a resident of Akalo Trading Centre. Further that he was outside in the compound 50 away from the scene and stones were thrown on his house before his son's house was torched. We note that no form of identification was attached and find that Oculi couldn't have been in the compound of his son's house at Akaidebe village and in his compound at Akalo Trading Centre at the same. This evidence was therefore not to be relied upon.

The trial Judge erred by finding that there was sufficient evidence in the affidavits of these two witnesses linking the allegations therein to the 1st appellant as there was no proof that Ojok Adiga, Okello Wesley and Otuko

Robin were agents of the 1st appellant acting with his knowledge, consent or approval.

Rose Atapi stated that at about 10:00pm her son, Otuko Bonny had just returned from work and he was attacked by Otuko Robin in the company of Ogwal and others. He became unconscious.

Otuko Bonny averred that he was cut by Otuko Robin and Ogwal Denis. They came with Motor Vehicle Registration No. UAW 492T. He reported the matter to police and the chairman LC1 vide SD 23/17/02/16.

We find that at page 17 of his Judgment, the learned trial Judge while relying on the affidavits of Otuko Bonny and Rose Atapi, erred when he found that the said affidavits contained evidence confirming serious acts of violence during the contested elections. The two witnesses neither stated nor proved the relationship between Ogwal Denis and the 1st appellant. Rose Atapi deponed that her son was cut with a panga at about 10:00pm in the presence of lights from a motor vehicle and moonlight. Further, that her son became unconscious, she and the son's wife made an alarm. No medical report or photographs were adduced in evidence as proof of the allegations. Otuko Bonny even stated that his eye still hurt from the assault and yet no medical evidence or PF Form 3 were attached. We therefore find this unreliable and in our opinion an after-thought.

Ocuni Denis deponed that he was cut near the heart by the 1st appellant's supporters named Anyung and Ayo near Acung Apenyi Church of Uganda, who picked his motor cycle Registration No. UDJ 950H and put it in their car and drove off. They reversed and took him to police. That he was taken

by police to hospital and when he had improved he reported the matter to police and was examined on PF3.

Regarding this evidence, we find that the particulars of the motor vehicle which carried him and his motorcycle to the police post were not given. The ownership of the motorcycle was speculative as he did not furnish any log book. No evidence was availed to court to prove that Anyungu and Ayo were the 1st appellant's agents. It was also surprising that Ocuni's assailants drove and dumped him at the police station yet the offenders were not arrested in the act. Further, nothing about this was mentioned by the DPC and DCPL Okori in their evidence.

The evidence of Musakana Ahamed the District Police Commander, Kole District was also relied upon by the trial court. Musakana averred that he learnt that the 1st appellant had formed violent gangs to terrorize supporters of other candidates. He dispatched a patrol led by D/CL Okori George who found a blue Diana Registration NO, UAX 414 Q carrying gangs with pangas and knives, who were moving around terrorizing homesteads and trading centers on behalf of the 1st respondent. Further that six members of the gang were apprehended, that is to say, Olwol Peter, Odongo Daniel, s/o Ocen Peter, Ojok Sam, Ogwal Maurice, Opulo Denis, and Oyugi Jackson.

He stated that Odongo Daniel, a son to the 1st appellant was the gang commander and upon being arrested the six people said that they had been sent by the 1st appellant to go and way-lay other candidates' supporters to stop bribing voters.

The DPC further stated that further investigations were conducted and the above named gangsters were charged with being armed in public and election violence. Later complaints were made regarding assaults and the file was sanctioned, and the suspects were produced in the Chief Magistrate's Court at Lira.

We have critically analyzed the evidence of this witness and note that, the 1st appellant was not implicated in whatever happened at Kole except as hearsay. The six people who were arrested and charged in Chief Magistrates Court were not proved to be agents of the 1st appellant. Whereas all the victims of assault stated that the gangs were led by Otuko Robin, son of the 1st appellant, this independent witness deponed that on the night of 17th February, 2016, the gang was commanded by Odongo George, son of the 1st appellant. There was no evidence that his sons and/or the other 5 people arrested were either agents of the 1st appellant or that they acted with his knowledge, consent and/or approval. We note that the alleged arrest, and the charges at the Chief Magistrate's Court were not proved as no evidence was annexed to this witness' affidavit or the respondent's affidavit in proof of such court case. Further still, ownership of motor vehicle UAX 414Q was not disclosed; the victims of the assault were not disclosed, and neither were the findings of the police investigations and /or any relevant reports thereto availed in evidence.

We note that generally the respondent made assertions and expected the court to come up with the evidence. All the relevant documents, transcribed

audios and videos which could have helped court to come to a correct conclusion were not part of the evidence in Court.

We have re-examined the said 10 affidavits in support of the averments therein and we find that they fall short of proving the allegations against the 1st appellant to the satisfaction of court. None of the above instances point to the fact that the 1st appellant either knew of the malpractices and that they were committed and approved or condoned him. He cannot therefore be made responsible for the actions of the police and the unnamed supporters, gangs and un-proven agents or even his sons.

The alleged third electoral offence, was that the 1st appellant committed the offence of making false statements concerning the character of the respondent contrary to Section 73 of the PEA.

Character is defined in **Advanced learner's dictionary** as:-

> ***"the inherent complex of attributes that determines a person's moral and ethical actions and reactions or a person of a specified kind such as referring to capability, friendliness, a person of good repute and may include describing a person's qualifications and dependability to help the potential future employer make a decision either to employ a person or not."***

Section 73 of the PEA provides inter alia:-

> ***1) A person who before or during an election for the purpose of effecting or preventing the election of a candidate, makes or publishes or causes to be made or published by words whether written or spoken or by being in relation to the personal character of a candidate, a statement which is false.***
>
> ***a) which he or she knows or has reason to believe to be false, or***

b) in respect of which he or she is reckless whether it is true or false commits an offence and is liable on conviction to a fine not exceeding six months or both.

2) this section does not take away the right of a person to sue for defamation of character.

Section 73 is, therefore, intended to penalize whoever assassinates the character of a candidate during campaigns, thereby forbidding defamation of character. The offender must attack the personal character of the candidate and the attack must be on the good name of the candidate, or a malicious misrepresentation of the candidate's words or actions. Consequently, the exact words complained of must come out clearly in the pleading.

For this offence to suffice, the said statements must be false or if true, must be said in bad faith with the intention of damaging the good image or reputation of a candidate. It is also intended to attack the capability of the petitioner given the fact that being a Member of Parliament calls for a person who will represent the interest of the voters and ably articulate on the issues that concern the electorate in her constituency and also ably participate in parliamentary debates on issues of public interest for the Ugandans as citizens. The words complained of must also be specific words attacking the personal character of a candidate. **See Rtd. Col. Kiiza Besigye versus Yoweri Kaguta Museveni and EC, Supreme Court Election Petition No. 001 of 2006.**

The respondent under paragraph 5(a) (i) of his petition stated that the 1st appellant/ 1st respondent committed the electoral offence of uttering false and disparaging statements, to wit that the petitioner is *'Akwar Anam'* and

greets people with sticks for fear of that they would bewitch him and because he thinks that the voters are dirty. We find that the exact false words and tribal statements alleged herein were not quoted in the petition. It is, therefore, difficult for court to gauge the exact words uttered or the circumstances under which the same were made.

In **Presidential Election Petition No.1 of 2001: Rtd. Col. Dr. Kiiza Besigye versus Electoral Commission and Y.K.Museveni**, Odoki CJ (as he then was) stated in his judgment:-

> ***"I accept the submission of Dr. Byamugisha that charges in the petition relating to false, malicious or defamatory statements were defectively framed as they did not set out verbatim the statements complained of in the petition. Words take their meaning from the contest or background and if the contest or background is not provided or a full statement not produced, their malicious or defamatory effect may not be easy to discover. The particulars of the statement also enable the respondent or defendant to know what case he or she has to meet or defend."***

This court is bound by the above decision which lays down the principles to follow when dealing with character assassination during campaigns.

The Court in **Amongin Jane Frances Okili versus Lucy Akello and the Electoral Commission (Supra)**, set out the elements which must be proved under Section 73 (1) of the PEA as follows:-

i. ***There must be words either spoken or written;***
ii. ***These words should therefore be pleaded verbatim;***
iii. ***The words complained of must be published;***
iv. ***The words must attack the personal character of a candidate knowing they are either false or true;***
v. ***The words must be uttered recklessly;***

vi. The intention must be to prevent the election of a candidate.

The respondent in our opinion ought to have adduced evidence to the effect that because of the specified words complained of the electorate, who held him in high esteem, shunned him. Further that, the electorate or a very good portion of it lost all the respect they had for him after the said words.

From the perusal of the Record of Appeal, we find that no evidence whatsoever was adduced to the above effect. This is out of the failure by the respondent to quote the words which were alleged to have been uttered verbatim. We respectfully disagree with the findings of the learned trial Judge that the affidavit of Ocera Sam Okora an elderly man, aged 63 years who was the chief campaigner for the respondent supported this evidence, yet there was no evidence to prove that the said witness was either a registered voter or an appointed chief campaigner. The alleged video recording and the evidence of Alobi Bonny which purportedly corroborated the evidence presented on this issue were not adduced as evidence in court. We accordingly find that the learned trial Judge wrongly found that electoral offences had been committed under Sections 23 (1), and 73 of the PEA and proved.

We find merit in this ground of appeal which forms part of the first issue.

Ground (d)

Regarding the evaluation of evidence as a whole, Counsel for the 1st appellant adopted the submissions made under grounds (b), and (c) above, and prayed that the appeal be allowed, the orders granted in the judgment of the High Court be quashed and set aside.

In reply, Counsel for the respondent reiterated his earlier submissions and argued that the learned trial Judge re-appraised the evidence and came to the right conclusion that the first appellant committed electoral offences under Sections 23(1), and 73(1) of the PEA.

In rejoinder, Counsel for the 1st appellant invited this Court to re-evaluate the evidence as the first appellate court, and upon doing so, a satisfactory explanation would be found on record.

We have found earlier on that the respondent failed to prove to the satisfaction of court any of the allegations in his petition about non-compliance and illegal practices or acts against both appellants. There is no evidence of a tilted playing field. The failure to adduce sufficient evidence and yet allude to various unsupported allegations was a deliberate falsehood intended to mislead Court. **See Hon. Justice S.G. Engwau in Civil Application No. 5 of 2003 Checkunir Sungohor Christopher vs Electoral Commission and Anor.**

Both the respondent and the 1st appellant competed favorably and the 1st appellant was lawfully declared the winner by the 2nd appellant. The results reflected the majority of the people's democratic will for those who participated in the election by casting their vote. The parliamentary election was conducted in accordance with the law, and we have found no incidence of non-compliance, that would affect the results in a substantial way.

This ground of appeal which is part of the first issue also succeeds.

Grounds (e) and (f)

Counsel for the 1st appellant submitted that the learned trial Judge erred when he treated submissions of the appellant as submissions in reply and relied on them and yet the appellant had no opportunity to reply thereto.

Counsel contended that on 7th July, 2015, when the parties appeared for further hearing of the petition and closed their respective cases, the learned trial Judge directed the petitioner to file written submissions in chief and serve them on counsel for the appellants by 12th July, 2016. The appellants would then file replies and serve them on counsel for the petitioner by 18th July 2016. Counsel pointed out that the respondent failed to comply with the timelines and also failed to file and/or serve the appellants. The appellants, therefore, went ahead and filed their submissions sans submissions from the petitioner which were filed subsequent to the appellant's submissions.

In conclusion, Counsel submitted that it was erroneous for the learned trial Judge to consider and rely on the submissions of the respondent without giving an opportunity to the appellants to challenge or respond to them by way of reply, and as a result, he deprived the appellants of their inviolable right to a fair hearing enshrined in **Article 28(1) and 44(e) of the Constitution of Uganda 1995. See also Hon. Kipoi Tony Nsubuga vs. Ronny Waluku Wataka & 2 Others Court of Appeal Election Petition Appeal No. 007 of 2011.**

In reply, it was conceded by the respondent that the appellants filed their submissions prior to the respondent in the lower court. However, Counsel

for the respondent submitted that there was no prejudice occasioned by referring to the appellants' submissions as 'submissions in reply' which they naturally ought to have been. Further that, not every mistake or error committed by the trial court may be appealable unless it occasions a miscarriage of justice.

We find that under **Order 8 r.19 of the Civil Procedure Rules Cap 71,** service on the opposite party must be done within the time allowed and that the provision is mandatory. **See Nile Breweries Ltd versus Bruno Ozunga T/a Nebbi Boss Stores HCT-CS-580-2006.**

From perusal of the record, we note the respondent's written submissions in chief were not filed and served on time as directed by the High Court. The appellants, nonetheless, went ahead and filed their own written submissions in reply answering to various issues raised in the petition even though they had no opportunity to peruse the submissions in chief. The learned trial Judge extended the time within which they could file the submissions in chief from 12th July, 2016 to 26th July, 2016 and endorsed on the said letter granting the extension that the appellants were to be served. They were never served. In our opinion, this shows that the appellants were at all material times interested in having their response heard on merits despite the procedural lapses of the failure by the respondent to comply with time limits set by court in filing.

Nonetheless, we find that courts do not exist for punishing erring parties that fail to strictly adhere to procedural requirements but rather to adjudicate the real substance of disputes and to ensure that justice is

administered without undue regard to technicalities in the context of **Article 126 (2) (e) Constitution of Uganda,** which the learned trial Judge did in this case, when he decided in the interest of justice, to abridge them.

Grounds (e) and (f) of appeal which are part of the first issue fail.

Ground (g)

Counsel for the 1st appellant in his Memorandum of Appeal stated that the learned trial Judge erred in law when he shifted the burden of proof to the appellant. Counsel however did not make specific submissions on this aspect.

In reply, it was submitted for the respondent that the circumstances leading to this criticism of the learned trial Judge were neither expressly shown in the Memorandum of Appeal nor the appellants' submissions. Counsel for the respondent submitted that the learned trial Judge in his Judgment at pages 295 -297 of the Record of Appeal, was alive to the law as to who bore the burden of proof. Further, that the burden was never shifted from the petitioner to the respondent. Counsel concluded that this ground was misconceived since it did not augur with Rule 86(1) of the Rules of this Court.

The law regarding the burden of proof and standard of proof in election matters is settled since both matters are regulated by statute under Sections 61(1) and (3) of the PEA .

Section 61(1) thereof requires the person seeking from the court an order setting aside an election of a Member of Parliament to prove the allegation to the satisfaction of the court.

Section 61(3) provides that any ground for setting aside an election of a Member of Parliament is proved to the satisfaction of the court if it is proved upon the balance of probabilities.

We note that a petitioner remains with the duty to adduce credible and cogent evidence to prove his or her case and that the level of probability in election matters is higher than that required in ordinary civil suits. **See Mukasa Anthony Harris vs. Dr. Bayiga Michael Phillip Lulume, SC Election Petition Appeal No.18 of 2007 and Masiko Winfred Komuhangi vs. Babihuga J. Winnie, Court of Appeal, Election Petition Appeal No.001 of 2002.**

According to **Rule 86(1) of the Rules of this Court**, a Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against specifying the points which are alleged to have been wrongly decided, and the nature of order, it is proposed to ask the court. (Emphasis added).

Be that as it may, from our perusal of the Judgment and the Record of Appeal, we find that even though the learned trial Judge was alive to the law regarding the burden of proof in Election Petition matters and relied on a number of authorities, as he considered the petition, by rejecting the 'bare' denials of the 1st appellant and relying on 10 affidavits which we have referred to herein above, he went against the above law on burden of proof

when he intimated that the 1st appellant ought to have satisfied court that the said person(s) were not his agents, that the alleged agents ought to have specifically denied their involvement and proved that they had not been arrested and/or charged. The burden at all material times lay on the respondent (then petitioner) and he did not discharge it to the satisfaction of court.

We find merit in this ground of appeal and it succeeds.

Ground (i)

It was submitted for the appellants that the learned trial Judge erred when he misdirected himself in proposing that all affidavit evidence regardless of its evidential value should be challenged by way of an affidavit in rejoinder.

Counsel submitted that the 1st appellant pleaded a general denial of the commission of the alleged offences in paragraph 10 of his affidavit in answer to the petition. He faulted the learned trial Judge for finding that mere denials are not acceptable as a defence when compared to the strong affidavit evidence of Ocero Sam aka Okora which in his Judgment was supported by that of D/CPL Okori George. In his Judgment, Masalu Musene, J found that the evidence of those two witnesses was never challenged by the 1st and 2nd appellants. Further that learned counsel for the appellants did not apply to cross-examine those two key witnesses with a view of discrediting their testimony.

Counsel referred court to the authority of **S.N Shah vs. C.M Patel & Others [1961] EA 397** for the proposition that mere/general denials are acceptable

as a defence. In that case, under paragraphs 6 and 7 of the plaint, the defendant had stated that without admitting the accuracy or correctness of the allegations set out, the defendant would maintain that the second charge is invalid. It was held by Sir Kenneth O'Connor P that there was no express or implied admission in the said defence which would modify the said general denial.

In reply, counsel for the respondent contended this court is not enjoined to criticize a Judge on deluded holdings he never made. Counsel stated that this ground of appeal was mere speculative ingenuity of the appellants since the learned trial Judge never proposed that all affidavit evidence regardless of its evidential value should be challenged by way of an affidavit in reply or rejoinder.

It was further contended that the authority of **Shah vs. C. M Patel & Others [1961] EA 395**, relied upon by the appellants for the proposition that a general denial of any kind in that case was valid and effectual, was of no merit since the defence in that case related to a charge on property which the Court of Appeal for Eastern Africa found not to be a general denial since the charge was assailed as invalid. Further that, in the current case, the appellant without making any positive or specific assertions simply denied each allegation against him.

Counsel submitted that the learned trial Judge did not disregard the first appellant's general denials, but found that the respondent's evidence pointed to the culpability of the appellant with reasonable certainty that the

appellant personally and through his agents or gangs with his knowledge, connivance and approval committed the electoral offences alleged therewith.

Counsel further submitted that Answers in election petitions are guided by the **Parliamentary Elections (Interim Provisions) Rules S.I 141-2** and so, they must be accompanied with affidavit evidence detailing reasons in support thereof under Rule 8(3). Further, that an Answer to a petition includes evidence unlike ordinary suits where a general denial may suffice in certain circumstances as in **A.N. Shah vs. Patel Case (supra).**

Counsel referred court to **Practitioner's Guide to Civil Litigation (3rd Ed) Law Society of New South Wales, pages 112, 114 and 115**, and stated that every fact alleged in a statement of claim should be expressly answered in the defence, otherwise it may be construed as an admission. Counsel concluded that the appellant's Answer, therefore, fell short of, and did not controvert with specificity the allegations contained in the petition. The trial Judge was entitled to find as he did that such general denials could not compete against the uncontroverted evidence of the respondent.

The learned trial Judge in his Judgment regarding this issue at page held:-

> ***"It is trite law that where facts are sworn to in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that such facts are accepted..."***

We find that regarding the issue of failure to cross examine Ocero Sam aka Okora and DCPL Okori George, the authority of **Ngoma Ngime versus EC and Anor, High Court Election Petition No. 001 of 2001** is instructive and accordingly, we note that the evidence of such affidavits whose

deponents were not cross-examined is of the weakest kind. There must be an opportunity for Counsel to cross examine the witness and where the right is not exercised, it is taken as if the witness has been cross-examined.

Respectfully, the learned trial Judge erred when he found that the bare denials of the 1st appellant could not stand because he failed to cross-examine two witnesses whose evidence was found to be uncontroverted. We find that the right to cross-examine notwithstanding, **Rule 15 (1)** of Parliamentary Election Petition Rules provides for evidence at the trial to be by affidavit read out in open court. Under **Rule 15(2)**, cross-examination of witnesses on affidavit evidence is by leave of court. This means the Court has discretion to disallow cross-examination. This in turn means the rules envisage that evidence in election petitions shall be principally by affidavit. Allegations that are made in the said affidavit must be proved by annexed evidence. Cross examination is therefore not mandatory. The 1st appellant did not have to file an affidavit to supplement his general denial evidence considering that the burden was on the respondent at all material times to prove that the 1st appellant committed electoral offences which substantially affected the outcome of the election in Kole South Constituency.

We find merit in this ground of appeal which hereby succeeds.

Ground (j)

Counsel for the 1st appellant submitted that the learned trial Judge erred in failing to appreciate the importance of the principal and agent relationship.

Counsel for the appellants submitted that under **Section 80 of the PEA**, it was necessary to prove that the successful candidate directly or indirectly through use of force or violence compelled another person to vote for him or refrain from voting. The respondent did not did not produce cogent evidence to show that the 1st appellant participated in the alleged acts of violence directly or indirectly.

In reply, it was submitted for the respondent that the fact that the appellant committed electoral offences through his agents was effectively pleaded, proved undeniably, and never controverted to-date. Further that, the learned trial Judge was very alive to the tenets of election agency thus finding that the appellant committed electoral offences both personally and through his agents with his knowledge, connivance, consent and/or approval.

In rejoinder, Counsel submitted that this ground was argued as integral to the issue of competence of the petition in the lower court and the said submissions had accordingly been adopted hereto. He stated that the importance of the agency relationship was underscored by the provisions of Section 11(i) & (iii) of the Parliamentary Elections Act No. 17 of 2005 which learned counsel for the respondent did not seem to appreciate.

Section 61 (1) (a) and (c) of the Parliamentary Elections Act, Act No. 17 of 2005 provides for grounds for setting aside an election. **Section 61 (1)** provides:-

1) The election of a candidate as a member of parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court.

a) ...

b) ...

c) That an illegal practice or any other offence under this act was committed in connection with the election by the candidates personally or with his or her knowledge, consent or approval."
(Emphasis added)

Section 80 on the offence of undue influence provides:-

1) Where a person_

a) Directly or indirectly in person or through any other person_

(i) Makes use of, or threatens to make use of , any force or violence;

(ii) Inflicts or threatens to inflict in person or through any other person any temporal or spiritual injury, damage, harm or loss upon or against any person.

In order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting; or

b) ...

That person commits the offence of un due influence.

With regard to alleged violence by agents of the 1st appellants, it was not enough to show that the persons traumatizing and intimidating candidates in Kole South Constituency were agents of the 1st appellant. It was incumbent on the respondent to prove that the 1st appellant knew of, and consented to such violence.

We find that the learned trial Judge erred by implying that the fact that the 1st appellant did not expressly deny that Okori Robin was his son meant an

admission that the same Robin was operating (if at all) on his behalf and with his consent and approval. We retaliate our findings earlier under (b) and (g) regarding this issue and find that this ground of appeal therefore succeeds. Issue 1 therefore succeeds in part on grounds (b), (d), (g), (i) and (j), and fails on grounds (e) and (f).

Issue 2: Whether the learned trial Judge erred in law and in fact when he annulled the election of the Member of Parliament for Kole South Constituency and ordered a fresh election where there was a run-up candidate to the appellant whose election was not challenged. (ground C)

Ground (c)

Counsel for the appellants contended that the learned trial Judge erred in annulling the election of Kole South Constituency Member of Parliament and ordering a fresh election when there was a run-up candidate to the appellant whose election was not challenged.

Relying on **Section 63(6) of the PEA**, Counsel pointed out that there was a runner up to the first appellant, Mr. Alula David who garnered 12,714 votes representing (36.46%), and who should have been declared duly elected with effect from the date of Judgment since his results were not challenged in the petition. Further that, the 2nd appellant should have been ordered to act in line with Section 63(6), (b) (ii) of the PEA. Counsel, therefore, faulted the learned trial Judge for nullifying the election of the appellant, declaring the Member of Parliament seat for Kole South Constituency vacant and ordering the 2nd appellant to conduct fresh elections for that constituency.

Counsel for the respondent did not agree. He submitted in reply that the law under Section 63 of the PEA did not envisage that it is only the run up or the next candidate with the 2nd highest votes who should petition court nor are the reliefs therein restricted to declaration of runner up as winner. Counsel contended that since the issue raised in ground (c) was never pleaded by the first appellant nor canvassed by the parties in the lower court, it should not be entertained by this court by virtue of the decision in **Azizi Kasujja vs. Nauni Tibenkanya Nakato, Court of Appeal Civil Appeal No. 063 of 1995.**

It was further contended for the respondent that Alula David was not a party to the petition and court could not issue orders against or in favour of a person who was not a party to a suit. Counsel referred court to the authority of **Caroline Turyatemba & 4 Others vs. Attorney General & Another, Constitutional Petition No.015 of 2006**, where this court while sitting as a Constitutional Court held that the right to a fair hearing dictated that it could not issue orders against or in favour of non-parties to the suit as to do so would be contrary to the *audi alterum partem* rule.

We accept the submissions of the respondent and note that under **Section 60(2)** of the PEA, an election petition may be filed by any of the following persons:-

a) 'a candidate who loses an election, or

b) a registered voter in the constituency supported by signatures of not less than five hundred voters.'

Section 63 of the PEA provides:

"4. ***After due inquiry the court hearing an election petition may_***

a) Dismiss the petition; or

b) <u>Declare that a candidate other than the candidate declared elected was validly elected; or</u>

c) <u>Set aside the election and order a new election;</u>

1. The High Court before coming to a decision under subsection (4), may order a recount of votes cast.

2. At the conclusion of the trial of an election petition the court shall determine whether the respondent was duly elected or whether any, and if so which person other than the respondent was or is entitles to be declared duly elected, and if the court determines that _

(a)...

(b) the respondent was not duly elected but that some other person was or is entitled to be declared duly elected_" Emphasis added.

It is trite that the respondent was one of the candidates who lost the election, and that the reliefs in High Court Election Petition No. 001 of 2016, did not include a declaration of any other person as having been validly elected other than the appellant. The relief sought fell within Sections 63 (4) (c) and (6) (b).

We further find the argument that there was a runner up who should have been pronounced as having been validly elected as a basis of Counsel's contention untenable. **See Ngoma Ngime vs. Electoral Commission & Winnie Byanyima Election Petition No. 011 of 2002.**

Accordingly this ground of appeal which forms part of the second issue fails. This issue is therefore answered in the negative.

Issue 3: Whether the offence of use of a Government motor vehicle was neither pleaded nor the basis of the trial, and so, the learned trial Judge's finding on the offence, was therefore, an error. (ground k)

Ground (k)

It was submitted for the 1st appellant that the offence of use of a Government motor vehicle was not pleaded, and so the respondent testified outside the pleadings when he gave evidence on the same. Further that the only other witness who testified on this ground was Musakana Ahamed who averred that he received reports that one of the candidates for the Member of Parliament Parliamentary seat of Kole South Constituency had continued to use a government motor vehicle Reg. No LG 001-058 which had been given to him while he was the LC5 Chairman. Further, that he referred the said matter to the 2nd appellant which warned him but he none the less continued with the use of the same.

Counsel contended that the said evidence neither specifically stated that the person reported to the deponent was the 1st appellant, nor the source of the reports and /or whether they were made orally or in writing.

Additionally, DCPL Okori George deponed that he had received information that the 1st appellant was using a Government motor vehicle during the campaigns but that he couldn't apprehend the 1st respondent since he continually escaped the traps set by police to arrest him. Counsel contended that he did not provide the motor vehicle Registration No. for the said Government car and yet he was in charge of the electoral and political offences in Kole District. According to Counsel therefore, the deponent's

evidence that the police failed to arrest the appellant with the Government motor vehicle because he was elusive was not credible enough for the learned trial Judge to be justified in finding that the 1st appellant committed this offence.

It was Counsel's further contention that the appellant specifically denied ever using the said motor vehicle for his campaigns at all under paragraph 13 of his affidavit. He was also never cross-examined on this evidence. His evidence was corroborated by the affidavits of Aloi James and Alaju Ceasar who swore that he had never used the said car. Further, Mary Claret Ekima, the Returning Officer for Kole District testified that this complaint was brought to her attention by Andrew Omara, on behalf of the respondent and she requested the Inspector General of Police (IGP) to investigate the allegations but she did not receive a report of the outcome.

It was further submitted that the respondent during cross-examination testified that a letter was written to the 2nd appellant about the 1st appellant's use of a government motor vehicle during campaigns. The 2nd appellant replied but there was no follow-up. Further, that the respondent had reported to the DPC and sought to rely on evidence of a video to support this assertion which video was not produced in evidence. Counsel concluded that the police did not investigate because it did not believe the complaint or if it investigated, there was no evidence to prove the said allegations and it, therefore, closed the said investigations.

In reply, Counsel for the respondent submitted that the issue of use of Government motor vehicle Reg. No. LG 001-058 was pleaded under

paragraph 19 of the petitioner's affidavit in support of the petition together with paragraph 6 (v) of the petition, wherein the respondent averred that the first appellant used government resources during his campaigns. Further, Annexture EB-4, a letter from the 2nd appellant warning the 1st appellant to stop using the said government motor vehicle, was attached to the said affidavit and presented to court.

It was further submitted that the 2nd appellant in its Answer to the petition under paragraph 6 had conceded that the issue of the government motor vehicle and conducting partisan campaigns by the 1st appellant been brought to its attention and it had written a letter dated 10th December, 2015 to the IGP for investigations. Further that this evidence was corroborated by averments from D/CPL Okori George and Musakana Ahmed who deponed that the 1st appellant used the said Government motor vehicle.

In rejoinder, Counsel reiterated that the fact that the 2nd appellant did not deal with the complaint in terms of **Section 15 of the Electoral Commission Act** meant that the offence was not committed. Counsel also did not agree with Counsel for the respondent's submissions that **Rule 3 (c)** of the Parliamentary (Elections Petitions) Rules meant that one could plead the grounds relied on in the petition in an affidavit in answer to the petition and not in the petition. In his view, Rule 4(2) (b) provides that the ground relied on must be contained in the petition, while Rule 4(8) provides the petition shall be accompanied by an affidavit setting out the facts on which the petition is based together with a list of any documents on which the petitioner intends to rely. Therefore, while the petition comprises the

grounds, the affidavit in support contains facts or evidence to prove the grounds. For that reason, the facts in the affidavit in support of the petition could not substitute a ground which was not pleaded in the petition.

Counsel further referred to **annexture EB-4**, a letter of the 2nd appellant which the respondent averred that it had been attached to the affidavit in support of the petition. The said annexture was non-existent and Counsel submitted that the respondent did not attach annextures to his affidavits and yet he constantly relied on them in his submissions.

We note that regarding this issue, the respondent stated in his affidavit in support of the petition as follows:-

> ***19. That in abuse of the office the 1st respondent used Government resources during his campaigns to wit motor vehicle registration No. LG 0001-058 which was the car he used as Chairman LC5 before the campaigns and even when the 2nd respondent warned him against continued use of the government vehicle during his campaigns the 1st respondent bragged as shown in the video recording that he would continue using it and indeed continued using it. [See annexture EB-4]***

Further, the learned trial Judge while relying on this evidence found that the 1st appellant had committed this offence whereas there was no cogent evidence to prove the said allegations. **Annexture EB-4** in proof of a report made against the 1st appellant's use of a government vehicle was never presented to court in evidence. Even if it had been brought, we find that it was a mere warning. The investigations which were instituted by the Inspector General of Police were never concluded and it simply remained an allegation. The respondent ought to have appealed against the decision of the 2nd appellant to merely issue a warning on this matter under **Section 15**

of the Electoral Commission Act (Cap. 140 Laws of Uganda), if he had been dissatisfied with how the 2nd appellant handled this matter, but he did not.

This ground of appeal which forms part of the 3rd issue also succeeds. This issue is accordingly answered in the affirmative.

Issue 4: Whether the learned trial Judge erred in law and in fact when he failed to find that the petition was incompetent. (ground h)

Ground (h)

Counsel for the appellants faulted the learned trial judge for not considering issue 3 regarding competence of the petition. He relied on the submissions made in the lower court wherein the appellants argued that the word PEA was not explained in the petition. The appellants further argued that the petition was said to have been filed pursuant to sections 60 and 61 of PEA cap 17, Laws of Uganda and Rule 4 PEP Rules and all enabling laws and yet the said Cap 17 dealt with Maintenance Orders Enforcement (Extension) Act.

Counsel further submitted that assuming that the petition was brought under Sections 60 and 61 of the Parliamentary Elections Act No. 17 of 2005, the respondent did not plead the necessary and material particulars contrary to **Order 6 Rules 1 and 3 of the Civil Procedure Rules**. He referred court to **Madi vs. Tropical Plantations Ltd Civil Suit No. 054 of 1970** cited in **Amended Civil Procedure in East Africa 2010 at page 107 by Spry** for the proposition that a petition which is grounded on no evidence

and which does not plead the necessary ingredients of the alleged election offences on which it is based is incompetent.

Counsel for the respondent was of a different view. In reply, he submitted that this ground of appeal lacked merit and the learned trial Judge had rightfully handled this issue and held that he would not waste much time on it. Counsel stated that whereas it is true that instead of writing Act No. 17 of 2005 on the petition, it was written Cap 17 Laws of Uganda, the appellants fully understood that the petition was brought under Act No. 17 of 2005.

Counsel contended that the petition clearly stated "In the matter of the *Parliamentary Elections Act* " and that in many of the Judgments of this court, the abbreviation PEA was used in lieu of the Parliamentary Elections Act. He further contended that the appellants in their Answers did not raise the issues of incompetence of the petition. Counsel then referred court to **Mathina Bwambale vs. Crispus Kiyonga & Anor, High Court Election Petition No. 007 of 2006**, for the proposition that issues must arise from pleadings. He concluded that there was no way the acronym PEA could have misled any reasonable person or advocate to mean 'Maintenance Enforcement Orders Act and that citing a wrong law did not vitiate a pleading. **See also Mbayo Jacob & Electoral Commission vs. Sinani [2007]2 EA 316.**

In rejoinder, Counsel for the appellant retaliated his earlier statements and argued that the respondent had only responded to the contention that the petition had been commenced under an improper law. Counsel stated that the respondent did not plead the necessary ingredients of the alleged

offences on which the petition was based and further, that the petition did not plead that the said offences were committed by the 1st appellant or with his knowledge, consent or approval. He concluded that the petition was incompetent and prayed that this court finds as such.

In Supreme Court of Uganda **Presidential Election Petition No. 1 of 2001: Col. (Rtd) Dr. Kizza Besigye vs. Museveni Yoweri Kaguta and the Electoral Commission**, Odoki CJ, (as he then was), cited with approval the authority of **Borough of Hackney Gill vs. Reed [1874] XXXI L.J. 69**, where Grove, J emphasized that an election should not be annulled for minor errors or trivialities. He stated thus:

> ***"An election is not to be upset for informality or for a triviality. It is not to be upset because the clock at one of the polling booths was five minutes too late or because some of the voting papers were not delivered in a proper way. The objection must be something substantial, something calculated to affect the result of the election. ... so far as it appears to me the rational and fair meaning of the section appears to be to prevent an election from becoming void by trifling objections on the ground of informality, but the Judge is to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect."*** Emphasis added.

Relying on the above authority we agree with the learned Counsel for the respondent that citing a wrong law did not necessarily vitiate the pleadings and the acronym PEA could not have misled any reasonable person or advocate to mean 'Maintenance Enforcement Orders Act.

Be that as it may, during trial Counsel for the appellants rightfully submitted that the respondent did not plead the necessary and material

particulars in the petition contrary to Order 6 Rules 1 and 3 of the Civil Procedure Rules. We agree with the appellants.

This ground of appeal which forms part of the 4th issue succeeds. This issue is therefore resolved in the affirmative.

Regarding remedies, Counsel for the appellants prayed that this appeal be allowed, the judgment and orders of the trial court be set aside with costs to the appellants in this Court and the lower court.

On the other hand, the respondent prayed that the appeal be dismissed with costs to the respondent in this Court and the lower court.

Having found for the appellant on grounds (b), (d), (g), (h), (i), (j), and (k) it follows naturally that the remedies pleaded for by the respondent are not available to him. We must therefore, as we hereby do, allow the appeal with costs to the 1st appellant here and in the court below, as indicated herein.

However, since the petition in the High Court was not completely unmeritorious; the only problem being that insufficient evidence was availed to Court as against the appellants, in order to promote reconciliation among the parties, we order that each party bears their own costs here and in the Court below.

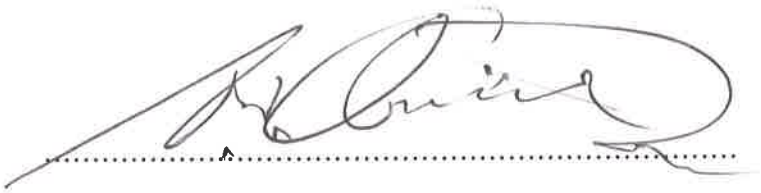
In conclusion, the appeal is allowed and we make the following orders:-

1. The 1st appellant was validly and duly elected as a Member of Parliament for Kole South Constituency.
2. The election, return, and gazetting of the 1st appellant as the Member of Parliament for Kole South Constituency are hereby upheld.

3. Each party shall bear its own costs here and in the courts below.

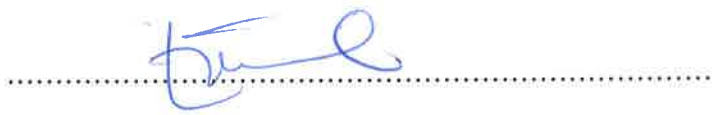
We so order.

Date at Kampala this 31 day of May 2018.



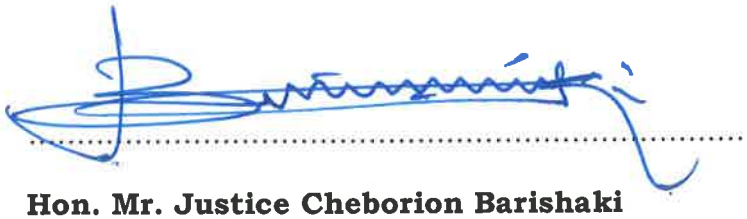
Hon. Mr. Justice Alfonse Owiny Dollo.

Deputy Chief Justice



Hon. Lady Justice Elizabeth Musoke

Justice of Appeal



Hon. Mr. Justice Cheborion Barishaki

Justice of Appeal

31/5/18.

Nkeka Byamugisha for the appellants

1st appellant is in court

Respondent is absent together with his counsel.

Juliet Eboil sister to the respondent is in court on behalf of the respondent.

clk Mellissa Mutsande.

<u>Nkeka Byamugisha</u>

The case is coming up for judgment.

<u>Court</u>

Judgment is read out in court in the presence of the parties by Esk Namboye

D/R.

31/5/18.