THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO.56 OF 2016

(Arising from Mbale High Court Election Petition No. 12 of 2016)

CHEBROT STEPHEN CHEMOIKO :::::::::::::::: APPELLANT

VERSUS

1. SOYEKWO KENNETH

2. THE ELECTORAL COMMISSION :::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE S.B.K KAVUMA, DCJ
HON. JUSTICE ELIZABETH MUSOKE, JA
HON. JUSTICE PAUL KAHAIBALE MUGAMBA, JA

(Appeal from the Judgment and Orders of the High Court of Uganda sitting at Mbale before Hon. Justice Bashaija K. Andrew dated 22nd July, 2016, in Election Petition No.012 of 2016).

JUDGMENT

This is a first appeal arising from the Judgment and Orders of the High Court at Mbale dismissing the appellant's Petition seeking to annul / set aside the election of the 1st respondent as a Member of Parliament for Tingey County Constituency, Kapchorwa District.

Background to the appeal:-

On the 18th February, 2016, the 2nd respondent conducted general parliamentary elections where Chebrot Stephen Chemoiko, the appellant, Soyekwo Kenneth, the 1st respondent, Chemutai Kalifani and Wodadada Nasif

contested for the Tingey County Constituency Member of Parliament seat. At the conclusion of the polling exercise, the 2nd respondent declared the 1st respondent the winning candidate with 8469 votes while the appellant was runner-up with 8307 votes, with a margin of 161 votes. The 1st respondent's name was so published in the Uganda Gazette of 3rd March, 2016.

Aggrieved with the outcome of the election and the declaration of the 1st respondent as the winner, the appellant Petitioned the High Court at Mbale challenging the results and seeking to annul and set aside the election. He raised allegations of non-compliance with the provisions of the law and commission of illegal practices / offences during the electoral process by the respondents and/or their agents. Specifically, the appellant alleged that:

1. There were gross irregularities, malpractices, violence, lack of freedom and transparency, disenfranchisement of voters and commission of electoral offences and illegal practices.
2. The 2nd respondent failed to take measures to ensure that the electoral process in Tingey County Constituency was conducted under conditions of freedom and fairness.
3. The 2nd respondent failed to control the use of ballot papers which led to multiple voting, ballot stuffing and manipulation of results in favour of the 1st respondent.
4. The 2nd respondent disenfranchised the voters of Chebonet Sub-County.

The appellant sought for the following declarations:-

1. The 1st respondent was not validly elected as a Member of Parliament for Tingey County Constituency.
2. The election of the 1st respondent as directly elected Member of Parliament for Tingey County Constituency be annulled and a fresh election be conducted in the Constituency.
3. The respondents pay the costs of the Petition.

The 1st respondent filed an answer to the Petition in which he denied the allegations raised by the appellant against him. He specifically denied involvement in any illegal practices / offences by himself or through his agents with his knowledge, consent or approval. It was his contention that the election was conducted in compliance with the law and that he was the legally and validly elected Member of Parliament for Tingey County Constituency.

In its Reply, the 2nd respondent contended that the election was conducted in a peaceful, free and fair manner, and in accordance with the principle of transparency laid down in the electoral laws. It added that the results of the election in Tingey County Constituency reflected the true will of the people. In the alternative, the 2nd respondent contended that if there were any irregularities or noncompliance, such non-compliance or irregularities did not affect the outcome of the Election in a substantial manner.

The 2nd respondent prayed for the dismissal of the Petition with costs.

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

1. Whether the Parliamentary Election for Tingey County Constituency was conducted in non-compliance with the electoral laws and the principles therein.
2. If so, whether the non-compliance affected the results of the election in a substantial manner.
3. Whether or not the 1st respondent committed any illegal practice and or any electoral offence in person or by his agent with his knowledge and consent or approval.
4. Whether the parties are entitled to the reliefs sought.

The trial Judge answered all the issues in the negative and dismissed the Petition with costs to the respondents. The appellant, being dissatisfied with the findings of the trial Judge on all the issues, filed this Appeal. The Memorandum of Appeal raises the following grounds of appeal:-

1. The Learned trial Judge erred in law and fact and caused injustice to the petitioner when he relied on the 1st respondent's evidence to decide the Petition disregarding the Petitioner's evidence.
2. The Learned trial Judge erred in law and fact when he failed to properly evaluate evidence and came to the wrong conclusion that the voters of Chebot Polling Station were not disenfranchised.
3. The Learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that the 2nd respondent failed to control the use of ballot papers.

4. The Learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that there was no non-compliance with the electoral laws and that the effects did not affect the result in a substantial manner.
5. The Learned trial Judge applied double standards and erred in law and fact in placing reliance on the evidence of the 1st respondent relating to Police statements which were inadmissible.
6. The Learned trial Judge erred in law and fact when he failed to properly evaluate evidence and came to a wrong decision when he failed to find that the 1st respondent attended the fundraising at Kapkwai.
7. The Learned trial Judge erred in law and fact when he failed to find that the 1st respondent gave out donations during the campaign period.
8. The Learned trial Judge erred in law and fact when he failed to properly evaluate the evidence and came to a wrong conclusion that the petitioner failed to prove that the 1st respondent bribed voters.

Representation:-

At the hearing of the Appeal, the appellant was jointly represented by Mr. Charles Wamukota and Mr. Geoffrey Ojok (Counsel for the appellant); the 1st respondent was jointly represented by Mr. Nelson Nerima and Mr. Yusuf Mutembuli (Counsel for the 1st respondent); while Mr. Jude Mwasa (Counsel for the 2nd respondent represented the 2nd respondent.

Counsel for either party adopted their Conferencing Notes filed in this Court and written submissions filed at trial. They highlighted the same when the Appeal came up for hearing.

Counsel for the appellant argued grounds 1 and 5 of the appeal jointly, followed by grounds 2, 3 and 4 together, and concluded with grounds 6, 7 and 8 together. We shall adopt the same approach in addressing the Appeal.

The duty of this Court:

The duty of this Court, as a first appellate Court, is set out in rule 30 of the Rules of this Court. On a first appeal, an appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate Court has a duty to reappraise the case and to reconsider the materials that were before the trial judge. The appellate Court must then make up its mind by carefully weighing and considering the evidence that was adduced at trial.

Nevertheless when the question arises as to which witness is to be believed, and resolution of that question turns on the manner and demeanour of the witness, then the appellate Court must be guided by the impression made by the trial judge who saw the witness at trial.

The duty of a first appellate Court to re-evaluate the evidence applies to both oral testimony of a witness in Court as well as to affidavit evidence, except in case of the affidavit evidence where the deponent is not cross-examined on the affidavit in Court, the issue of demeanour of a witness does not arise: See ***Judgment of Oder, JSC, (RIP) in Supreme Court of Uganda Civil Appeal No. 8 of 1998: BANCO ARABE ESPANOL VS BANK OF UGANDA.***

This being an appeal in an Election Petition of first instance, this Court cautions itself that, in re-appraising and re-evaluating the evidence adduced at trial, regard must be had to the fact that witnesses, though not necessarily always, tend to be partisan in supporting their candidates against the rivals in the election contest. This may result in deliberate false testimonies or exaggerations and to render the evidence adduced very subjective. This calls upon Court to have the authenticity of such evidence tested from an independent and neutral source by way of corroboration. See: ***Uganda Court of Appeal Election Petition Appeal No. 7 of 2006: MBAYO JACOB ROBERT VS ELECTORAL COMMISSION & ANOTHER, Judgment of C.K. Byamugisha, JA.***

Burden and standard of proof:

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

Though the standard of proof is set by the statute to be on a balance of probabilities, because of the public importance of an Election Petition, the facts in the Petition must be proved to the satisfaction of the Court. A Petitioner has a duty to adduce credible and/or cogent evidence to prove the allegations to the stated standard of proof. See: ***Court of Appeal Election Petition Appeal No. 9 of 2002: Masiko Winifred Komuhangi Vs***

Babihuga J. Winie and also ***Court of Appeal No. 6 of 2011: Paul Mwiru Vs Hon. Igeme Nathan Nabeta and Two Others (Byamugisha, JA).***

In ***Blyth Vs Blyth [1966] AC 643*** Lord Denning observed as to the import and meaning of the word "satisfied" that:

> ***"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 reasonable doubt....."***

Odoki, C.J. as he then was, in ***Col. (Rtd) Dr. Besigye Kiiza Vs Museveni Yoweri Kaguta and Electoral Commission, Election Petition No. 1 of 2006,*** agreed and applied the above observations of Lord Denning. He stated:

> ***"It is true Court may not be satisfied if it entertains a reasonable doubt, but the decision will depend on the gravity of the matter to be proved.....".***

Bearing in mind the principles of law stated above as to the duty of this Court as the first appellate Court and the burden and standard of proof required in an Election Petition, we now proceed to re-evaluate the evidence and thereafter resolve the issues in this appeal.

Grounds 1 and 5.

The Learned trial Judge erred in law and fact and caused injustice to the petitioner when he relied on the 1st respondent's evidence to decide the Petition disregarding the petitioner's evidence.

The Learned trial Judge applied double standards and erred in law and fact in placing reliance on the evidence of the 1st respondent relating to Police statements which were inadmissible.

On grounds 1 and 5 of the Appeal, counsel for the appellant submitted that the trial Judge erred in law when he disregarded the petitioner's evidence on grounds that it was hearsay evidence and that some witnesses were strangers to the Petition. It was counsel's contention that contrary to the trial Judge's finding that the appellant had not named the persons from whom he got information, the appellant had stated in the Petition that it was his agents and supporters who had informed him. Further, that the said agents and supporters had sworn affidavits in support of the Petition and were readily available for cross examination, but the respondents chose to cross examine only two witnesses.

In Counsel's view, the trial Judge applied double standards in evaluating evidence when he relied upon and believed the evidence of Chesang Fred and Chelimo Alex who deponed affidavits in support of the 1st respondent's Petition yet they were not mentioned in the answer to that Petition by the 1st respondent. In counsel's view, following the trial Judge's reasoning, the said witnesses' pieces of evidence were within the bracket of hearsay evidence. Further, that while the trial Judge had considered the supplementary affidavit

of Pastor John Naphtali as hearsay evidence on the part of the appellant, at the same time he found the evidence material in favour of the 1st respondent.

Counsel further complained that the trial Judge relied on inadmissible Police Statements, which prevented him from arriving at a fair and just decision. He contended that when a statement was made to a witness by a person who was not called as a witness, such evidence was inadmissible. He indicated that the persons who made the statements at Police and the Police Officers who certified the Statements did not depone affidavits to that effect. Further, that the Declaration of Results Forms for Chebonet polling station were not certified by the 2nd respondent and no reliance should have been placed on them. Counsel relied on ***Mwithali Versus M'itobi (1986-1989) EA 389,*** for the above submission.

The 1st respondent's Counsel was of a different view. He submitted that the trial Judge had considered the gist of each party's case before reaching his decision that a stranger to a Petition could not swear an affidavit in rejoinder. Counsel invited this Court to give guidelines as to who had locus or competence to file an affidavit in rejoinder. In his view, it was only the Petitioner and his original witnesses who had the locus to file affidavits in rejoinder considering that there ought to be an end to allegations and the filing of affidavits.

In regard to the Police statements which the appellant alleged were inadmissible; counsel submitted that the same were adduced in evidence to prove that the issue had been reported to Police and not to prove the substance of the statements. Further, that the trial Judge's findings

concerning alteration of results were not based on the Police statements but on other independent evidence. He concluded that the trial Judge rightly found that the appellant's evidence was hearsay. He however correctly exercised his discretion in relying on the 1st respondent's evidence having established the same to be relevant as opposed to that of the appellant.

The gist of the appellant's complaint as we understand it is that the trial Judge wrongly disregarded the evidence of the appellant's witnesses on grounds that some of them were strangers to the Petition and that part of the evidence was hearsay. Further, that the trial Judge wrongly relied on inadmissible evidence of Police statements that were tendered in evidence by the 1st respondent.

The first issue of the complaint to be resolved is whether or not the trial Judge wrongly disregarded the appellant's evidence as being hearsay.

In rendering the appellant's evidence hearsay and resultantly disregarding the evidence of the appellant's witnesses, the trial Judge opined that the appellant had not disclosed the source of information in the Petition and his affidavit in support of the same. In his view, it could not be said with any degree of certainty that the deponents of the affidavits supporting the Petition were the persons whom the appellant alleged had made the statements attributed to them, which was the source of information.

It is trite law that failure to disclose the source of information in an affidavit renders the affidavit null and void. ***(See Uganda Journalist Safety Commission & Ors Versus Attorney General, Constitutional Petition No. 7 of 1997)***. In the present case, in raising issues of non-compliance

with electoral laws, the petitioner stated the source of his information as being his "supporters and agents" without specifically stating their names. However, several witnesses swore affidavits in support of the Petition in regard to the allegations of non-compliance. The trial Judge treated their evidence as being without tangible nexus to the Petition. He stated as follows on page 8 of the judgment. (See page 111 of the Record of Appeal).

> ***"It must be emphasised that proper and full disclosure by a deponent of an affidavit of the particulars of his sources of information is a crucial requirement. It is necessary to enable the opposite party to know well in advance with precise specificity the basis of the deponent's evidence in case the opposite party wishes to cross – examine the source of the information on his or her affidavit, if he or she swears any. It also potentially curtails persons jumping on the band wagon of witnesses just because they happen to fit in the general random category of sources of information of a given deponent. It is primarily owing to these reasons that the particular allegations in the Petition would automatically fail".***

We are satisfied that the appellant disclosed the sources of his information in the Petition. The appellant stated in his Petition that it was his supporters and agents who were the sources of his information, and the said agents and supporters went ahead to file affidavits in support of the Petition, giving substance to the issues raised in the Petition. The Petitioner filed his Petition together with his affidavit in support, and the other affidavits in support of his Petition. These were all filed on 01/04/2016. One cannot say that these

witnesses just jumped on the band wagon. The affidavits are considered as part of the pleadings in the Petition. The respondents had the opportunity to cross examine the said witnesses and we do not accept the trial Courts finding that the agents/supporters remained quite anonymous.

We do not accept the trial Judge's finding that the appellant's evidence in that regard was hearsay since the sources of his information were known and their affidavits were filed together with the Petition. The case of ***Mutembuli Yusuf Versus Nagwomu Moses Musamba, High Court Election Petition No. 3 of 2016,*** which was relied upon by the trial Judge is distinguishable from the present case. In the former, the Petitioner alleged that he had received information which he believed to be true, but he did not disclose the source of information. Further, the person who apparently was the source of the information was not produced as a witness in Court, and it was on that basis that the Court classified the Petitioner's evidence as being hearsay. In that regard, we find that the appellant's evidence contained in the affidavits of the agents and the supporters and the friends of the petitioner, and filed together with the Petition on the 1st April, 2016, was not hearsay. The affidavits in this category are those deponed by Towett Khalifani Mohamed, Madewa Satya Leonard, Muyet Bonny, Sabri Roboto Geoffrey, Kukwai Assad, Chemo Micheal. There were also 15 supplementary affidavits filed by the appellant. Supplementary affidavits are filed with leave of Court. In the instant case, it is clear from pages 7 – 8 of Volume Two of the Record of appeal, that the trial Judge allowed the Petitioner and the respondents to file supplementary affidavits and the parties were to file relevant replies/rejoinders. A joint Scheduling Memorandum would then be

filed by the parties. Further, the record indicates that before the commencement of the hearing, all the affidavits were read in Court. (See page 16 of Volume II of the Record of Appeal). The same affidavits could not later be discarded as hearsay, once admitted on record. It is only their veracity that could be challenged through cross-examination or otherwise. We find that the affidavits in support of the Petition were, therefore, valid. The trial Judge erred in disregarding the same as hearsay. We shall, therefore, subject them to our own scrutiny during the course of our evaluation of the entire evidence.

The next issue for determination is whether the trial Judge wrongly disregarded the evidence of some of the appellant's witnesses for being strangers to the Petition.

From perusal of the Judgment in the lower Court, the trial Judge disregarded the affidavits in rejoinder sworn by Siwa Alex Chelibei, Labu Yasin, Muzungu Bashir, Lona Nabuloyi, Mama Asadi, Chepkwoti Margaret, Modo Aggrey, Soyekwo Andrew, Chepsikor Stephen, Bariteka Vincent, Chebet Nancy Bukose, Kabangi Samwiri, Omu Augustine Chemonges, Masau Moses and Chelibei Fred, on grounds that they did not meet the legal test of affidavits in rejoinder. He relied on ***Mutembuli Yusuf Versus Musamba & Anor (Supra)***, in finding as he did.

It is not in dispute that the witnesses stated above swore affidavits in rejoinder to the respondent's answer to the Petition, although they had not deponed affidavits in support of the Petition. It is on that basis that the trial Court regarded the said witnesses as strangers to the Petition.

Affidavits in rejoinder are essentially sworn for the purpose of giving an opportunity to the Petitioner to rejoin to and controvert or dispute matters introduced by the respondents in their affidavits in reply, or rejoining to affidavits sworn on his or her behalf. It is not in dispute that the appellant had a right to file affidavits in rejoinder if he found it necessary to rejoin to the contents of the respondents' replies to the Petition. A rejoinder allows the petitioner to present a more responsive and specific statement challenging allegations made by the respondent in his reply, which are new in character. They are, however, not meant to come up with new facts to buttress the Petitioner's case. We find that in principle, there is nothing in law that barred persons who had not sworn affidavits in support of the Petition from swearing affidavits in rejoinder to the respondents' reply, if it is that they are possessed with the facts forming the rejoinder.

We have carefully looked at the said affidavits in comparison with the respondents' reply to the Petition and we find that the said affidavits in rejoinder were essentially raising evidence to controvert the 1st respondent's assertion that on the 14th February, 2016, he attended a church service at Kapkwirwok Church of Uganda and did not attend the fundraising at Kapkwata PCM Church.

We may categorise the affidavits in rejoinder into two, to wit, the affidavits whose deponents did not file any affidavits in support of the Petition; as opposed to those affidavits in rejoinder whose deponents had also deponed to affidavits in support of the Petition. We have just indicated above that in principal deponents of affidavits in rejoinder need not have filed affidavits in

support, as long as they are responding to particular averments in a particular affidavit in reply, which they indicate in the rejoinder.

We note that the affidavits of Labu Yasi, Musungu Bashir, Lorna Nabuloni, Mama Asadi, Chapkwot Margaret, Modo Aggrey, Soyekwo Andrew, Chepsikor Stephen, Bariteka Vincent, Siwa Alex Chelibei, Kabanga Samuel, Omu Augustine Chemonges, and Cheliberi Fred did not qualify as affidavits in rejoinder since in their affidavits they never referred to any affidavits in support of the answer to the Petition that they were rejoining to or what particular allegations in the 1st respondent's answer or the affidavits in support of the answer to the Petition. They mainly seemed to depone that they saw the 1st respondent in church at Kapkwata, but this had been the same averment in the affidavits in support. These affidavits in rejoinder were in effect buttressing what had been averred in the affidavit in support, without bringing out anything new.

We cannot therefore fault the trial Judge when he discarded them as strangers to the Petition.

The other affidavits in rejoinder deponed by Muyet Bonny, Malawa Satya Leonard, Sabri Robito Godfrey, Kukwai Assad, though qualifying as affidavits in rejoinder, did not, in our view, add any value to the appellant's case as they only reiterated what they had stated in their earlier affidavits in support of the Petition.

PetitionThe appellant also criticized the trial Judge for relying on inadmissible Police statements and drawing inferences and conclusions from the same. The said Police statements were part of the 1st respondent's annextures to

his affidavit and the same were for the purpose of proving that the issue of missing ballot papers at Chebonet Polling Station was reported to Police and that polling officials recorded statements at Police to that effect.

We accept the submission of counsel for the appellant that when a statement is made to a witness by a person who is not called as a witness, such evidence is inadmissible, particularly where the object of the evidence is to establish the truthfulness of what is contained in the statement. (***See Mwithali Versus M'itobi (1986-1989) EA 389***). In the present case however, the certified copies of the Police statements were only relied upon to prove that the issue of altered results of Chebonet Polling Station was reported to Police, rather than to prove their veracity. We find that the said statements were relevant in determining whether the issue of missing ballots was reported to Police. The Police statements were duly certified, and it was not mandatory that the person who certified the copies should have been called as a witness in Court. Besides, the trial Judge based his finding mainly on other independent evidence and not on the Police statements to arrive at his decision.

We, therefore, find that the Police statements constituted valid evidence. We cannot fault the trial Judge for relying on them in his evaluation of the evidence before him.

Accordingly, grounds 1 and 5 of the appeal partly succeed.

Grounds 2, 3 and 4.

The Learned trial Judge erred in law and fact when he failed to properly evaluate the evidence and came to the wrong conclusion that the voters of Chebonet Polling Station were not disenfranchised.

The Learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that the 2nd respondent failed to control the use of ballot papers.

The Learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that there was no non-compliance with the electoral laws and that the effects did not affect the result in a substantial manner.

The core of these grounds of appeal is that the trial Judge failed in his duty to properly evaluate the evidence in regard to the allegations of non-compliance with electoral laws, thereby arriving at a wrong decision. The allegations of non - compliance with electoral laws were that voters at Chebonet Polling Station were disenfranchised and that the 2nd respondent failed in its duty to control the use of ballot papers during the election held on 18th February, 2016.

On the issue of disenfranchisement of voters, counsel for the appellant made reference to the evidence of the 1st respondent and that of Chebet Nancy Bukose that the results of Chebonet Polling Station were not considered in the tally of the results. Counsel submitted that while the Returning Officer had testified during cross-examination that he had cancelled the results of the said Polling Station, he had not recorded the reasons for the cancellation.

Counsel further submitted that the right to vote did not only entail casting a ballot paper for a candidate of one's choice, but the vote had also to be treated equally as all the other votes cast. It was counsel's contention that the people of Chebonet Polling Station were disenfranchised and denied their Constitutional right to express their will on who should govern them.

With regard to the issue of failure to control the use of ballot papers, counsel submitted that the recount by the Chief Magistrate's Court had revealed that 141 ballot papers from one polling station of Chesabit were missing from the ballot box. Further, that the Returning Officer had admitted the above fact during cross examination. The 1st respondent had also confirmed the allegation in his affidavit in answer to the Petition. Basing on the above, counsel submitted that the 2nd respondent failed in its duty to control the use of the ballot papers in Tingey, which resulted into ballot stuffing and multiple voting.

Counsel further submitted that the appellant had applied for a recount for all the polling stations but the Chief Magistrate only allowed a recount of only 2 polling Stations. In counsel's view, if the recount had been done for all the Polling Stations, more missing ballot papers would have been discovered.

Counsel therefore concluded that the non-compliance stated above affected the results in a substantial manner. This was considering that the tally sheet and the Uganda Gazette indicated that the 1st respondent beat the Petitioner in the election with a margin of **161** votes. In counsel's view, the disenfranchised voters and the unaccounted for 141 ballot papers had a

substantial effect on the outcome of the results in Tingey County Constituency.

In reply, counsel for the 1st respondent conceded that the results of Chebonet polling Station were cancelled. However, he contended that the trial Judge had correctly evaluated the evidence surrounding the cancellation and made a finding that the Electoral Commission had the power to cancel results if it was found necessary in meeting the principle of freedom and fairness. It was his contention that there was overwhelming evidence on record to show that the 1st respondent had won at Chebonet Polling Station, but the results were later altered to create the impression that it was the appellant who had won, and that it was for those reasons that the results of Chebonet Polling Station were cancelled.

With regard to the alleged failure to control the use of ballot papers, counsel for the 1st respondent submitted that while the appellant contended that the recount showed that 141 unused ballot papers were missing, the Certificate of Recount indicated that Chesabit Polling Station did not have any unused ballot papers.

On the other hand, Counsel for the 2nd respondent submitted that cancellation of results of Chebonet Polling station was lawfully done, following material alterations on the Declaration of Results Forms, and upon failure to find alternative results from the ballot box. This was as stated by the Returning Officer, Michael Oguttu, in his affidavit in reply and during cross examination. Further, that even if the results from Chebonet Polling Station were ascertained, there was no evidence led by the Petitioner to prove that

the results would have been in favour of the appellant. Counsel, therefore, concluded that the non-inclusion of results from Chebonet Polling Station was justifiable; and since it was not done in favour of either party, the effect was not substantial in nature.

With regard to the allegations of the 2nd respondent's failure to control the use of ballot papers, counsel for the 2nd respondent submitted that whereas it was true that the recount conducted by the Chief Magistrate had established that unused ballot papers for Chesabit Polling Station were not in the ballot box, Court did not conclude that the unused ballot papers were misused or manipulated to benefit any candidate.

In evaluating the evidence before him, the trial Judge stated the burden and standard of proof in Parliamentary elections. While citing Section 61(3) of the Parliamentary Elections Act, he rightly stated that the petitioner had the burden to prove the allegations in the Petition to the satisfaction of Court and the standard of proof as being on a balance of probabilities. ***(See Paul Mwiru Versus Hon. Igeme Nathan Nabeta Samson & 2 Others, Court of Appeal Election Petition Appeal No. 6 of 2011)***. In re-evaluating and re-appraising the evidence in this appeal, we bear the above stated burden and standard of proof in mind.

Disenfranchisement of voters.

The evidence as to disenfranchisement of voters was contained in Chebet Nancy Bukose's affidavit. She stated that she was a polling official appointed by the Electoral Commission and assigned to Chebonet Polling Station. It was her evidence that on the 18th February, 2016, while she was at Chebonet

Polling Station conducting the polling exercise, a group of the 1st respondent's supporters and agents became violent and started rioting alleging that there was malpractice at the polling station. As a result, the votes of Chebonet Polling Station were not properly counted and tallied as the Polling Station was abandoned before completion of the entering of results in the Declaration of Results Forms.

The 1st respondent and the 2nd respondent on the other hand denied that there was any disenfranchisement of voters. The 1st respondent, in his affidavit in support of the answer to the Petition, averred that the people of Chebonet cast their ballots, which were counted and tallied accordingly and that his agents signed the Declaration of Results Forms. It was his contention that the Chebonet Ballot Box was taken to the Central Police Station but upon being delivered to the tally centre the following day it was discovered that there were no ballot papers in the ballot box. This had prompted cancellation of the results of Chebonet Polling Station upon agreement of all the parties. He contended that the cancellation of the results was to his disadvantage considering that he had won at the polling station with a total of 272 votes, while the appellant had obtained 175 votes. He added that the incident of missing ballots was reported to Police.

The Returning Officer, Michael Oguttu, in his affidavit supporting the answer to the Petition stated that the cancellation of the results of Chebonet Polling Station was lawfully done owing to the material alterations on Declaration of Results Forms and upon failure to get alternative results from the Ballot Box.

Disenfranchisement of voters is one of the instances of non-compliance; which may result into an election being set aside if it is proved that the non-compliance affected the results of an election in a substantial manner. The right to vote is a constitutional right and denial of the same is against the principles underlying a free and fair election.

It was not in contention that the results of Chebonet Polling Station were not included/ considered in the final tally of the results for Tingey County Constituency. In finding that the voters of Tingey County Constituency were not disenfranchised, the trial Judge applied a strict interpretation to the meaning of disenfranchisement. He stated as follows:

> ***"Mr. Wamukota correctly restated the Black's Law Dictionary definition of the term "disenfranchisement", which means to be deprived of the right to vote. What needs to be clarified in this case is whether the failure to include votes of Chebonet polling station in the final tally of the results would fit within the context of the definition.***
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> ***In strict legal sense of the term it does not; and more so in the context of the instant Petition. The people of Chebonet were never deprived of their right to vote at all. They properly cast their votes, their votes were counted, and the results announced to the public and the DR forms were filed in. what transpired thereafter, which is the centre of controversy, cannot in law or even in the plain meaning of the word amount to disenfranchisement. It was simply a result of systematic***

errors inherent in the electoral process that led to the failure to include results of the particular polling station in the final tally, but the people had voted". sic

Respectfully we do not accept the strict interpretation of the meaning of disenfranchisement adopted by the trial Judge above. We are persuaded by the submission of counsel for the appellant that disenfranchised voters are those persons who are deprived of their right to vote or deprived from or having their votes counted and considered.

Be that as it may, in the present case it was contended by the respondents that the failure to include the results of Chebonet Polling Station was due to the cancellation of results owing to the material alterations on the Declaration of Results Forms, and upon the failure to get alternative results from the ballot box. The 1st respondent attached Declaration of Results Forms from Chebonet Polling Station showing the altered and the unaltered results. The Declaration of Results Forms were duly signed by the agents of the contestants in the election and the appellant does not dispute the fact that his agent's signature appears on the said Declaration of Results Forms. Both the altered and the unaltered Declaration of Results Forms are duly signed by the Presiding Officer called Musobo Milton.

We find that the respondents gave a more credible account of the events surrounding the cancellation of the results of Chebonet polling station.

The evidence of Chebet Nancy Bukose to the effect that the results were not properly counted and tallied because the Polling Station was abandoned before completion of the entering of the results in the Declaration of Results

Forms confirms that indeed the results of the said Polling station were materially tampered with. Therefore the Returning Officer was right to cancel the same.

Section 12(1) (e) of the Electoral Commission Act enjoins the Electoral Commission to take measures to ensure that the entire electoral process is conducted under conditions of freedom and fairness. In our view and in the circumstances of the instant case, the above provision gave jurisdiction to the Returning Officer to cancel the results of Chebonet Polling Station, while the circumstances surrounding the voting process at the polling station in issue, gave him the justification so to do.

We find that the Returning Officer acted within the law and properly exercised his powers in cancelling the results of Chebonet Polling Station. In any case, the unaltered results indicated on the DR Form in respect of Chebonet Polling Station signed by the parties' agents had indicated the 1st respondent as the winner at that polling station. The non-inclusion of those results, therefore, would negatively impact on the 1st respondent most.

Failure to control the use of ballot papers.

It was the evidence of the appellant that he applied for a recount of all polling stations but a recount was conducted for only two of them namely Chesabit and Sukut. Further that the recount showed that 141 of the unused ballot papers for Chesabit Polling Station were missing, and that some of the invalid votes were not a true reflection of what was declared as the results of the polling stations. He attached a Certificate of Recount issued by the Chief Magistrate's Court of Kapchorwa.

Sorowon Hussein and Ngaryawu Micheal averred in their evidence that after the counting of the votes at Chesabit Polling Station, the total number of unused ballot papers was 141 as was indicated in the Declaration of Results Form. However, he added that at around 5:30 p.m a person known as Pison Chesang, who was the sub-County supervisor of Amukol sub-county, arrived at Chesabit Polling Station and was given the unused ballot papers by Chesang Samuel. Pison Chesang later took them away.

Pison Chesang in his evidence denied having received ballot papers from Chesang Samuel. It was his testimony that by 5:00pm, he was at Amukol Sub-County to receive results for onward transmission to the Returning Officer. He denied going to Chesabit, which was in a different sub-county and contended that he did not know the Presiding Officer of Chesabit Polling Station. Chesang Samuel testified that he did not know Pison Chesang and did not give the unused ballot papers to any person as had been alleged by Sorowon Hussein.

The Returning Officer, Michael Oguttu, testified that the unused ballots of Chesabit Polling Station totaling 141 were kept in the ballot box. However, that during the recount, the unused ballot papers were not found in the ballot box. He testified that there were errors in packaging by the Presiding Officer and some envelopes for the directly elected Woman Member of Parliament were labeled differently.

Section 12(1) (b) of the Electoral Commission Act empowers the Electoral Commission to design, print, distribute and control the use of ballot papers. In the present case, it was alleged that the 2nd respondent failed in its duty of controlling the use of ballot papers.

First of all, we find that if the appellant was dissatisfied with the Chief Magistrate's decision to allow a recount for only two polling stations, he ought to have taken the appropriate steps to challenge the decision. Given that such necessary steps were not taken, we find unacceptable the speculative evidence of the appellant that if the Chief Magistrate had allowed a recount for all the Polling Stations, it would have been discovered that there were many missing ballot papers.

Further, we are not convinced by the allegations that the unused ballot papers of Chesabit Polling Station were given to Pison Chesang, who was the Sub-County supervisor of Amkol Sub-County. The evidence of the said Pison Chesang that the location of Amkol Sub-County and that of Chesabit Polling Station were far apart was not challenged by the appellant. We find also that Pison Chesanga's evidence that by 5:00pm he was at Amukol Sub-County receiving election results for onward transmission to the Returning Officer was not challenged by the appellant.

However, it was undisputed that indeed 141 ballot papers from Chesabit Polling Station were missing from the ballot box during the recount by the Chief Magistrate. The Certificate of Recount indicates that there were no unused ballot papers during the recount. We do not find the explanation by the Returning Officer satisfactory. Section 52 of the Parliamentary Elections

Act enjoins the Returning Officer to keep safely all election documents until they are destroyed in accordance with the directions of the Commission. In the present case, there was no clear explanation concerning the whereabouts of the missing ballot papers or how they went missing. We draw the inference that the said ballot papers were not kept safely and, were therefore, tampered with. That in our view amounts to non-compliance with the electoral laws.

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

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

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

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

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

Also in ***Amama Mbabazi & Another Vs Musinguzi Garuga James, Election Petition (supra) Appeal No. 12 of 2002,*** Odoki CJ said,

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

Therefore, it is not sufficient that there have been irregularities in the election, it must be proved that the non-compliance/irregularities affected the results of the election in a substantial manner. The principle is that an election should not be set aside basing on trivial errors and informalities. ***(See Gunn Versus Sharpe [1974] 2 ALLER 1058.***

While the appellant contended that the failure to control the use of ballots led to ballot stuffing, rigging and multiple voting, and that it affected the results in a substantial manner, we find that neither of those allegations were proved by the appellant.

We have taken into consideration the fact that the 1st respondent had a winning margin of 162 votes from the electorate of Tingey County Constituency. It is not in dispute that the unaccounted for ballot papers from Tingey Polling Station were 141 in total. We have already found that the appellant failed to adduce evidence showing that the 141 unused ballots were used to the advantage of the 1st respondent. It would be speculative to presume so. It appears to us that all the candidates suffered equally as there was no evidence that one candidate was advantaged over another.

We therefore find that there is no evidence to the satisfaction of Court that the non-compliance with electoral laws that has been proved by the appellant did affect the results of the election for the Member of Parliament for Tingey County Constituency in a substantial way.

Therefore, grounds 2, 3 and 4 of appeal are answered in the negative.

Grounds 6, 7 and 8.

The Learned trial Judge erred in law and fact when he failed to properly evaluate evidence and came to a wrong decision when he failed to find that the 1st respondent attended the fundraising at Kapkwai.

The Learned trial Judge erred in law and fact when he failed to find that the 1st respondent gave out donations during the campaign period.

The Learned trial Judge erred in law and fact when he failed to properly evaluate the evidence and came to a wrong conclusion that the Petitioner failed to prove that the 1st respondent bribed voters.

The appellant was aggrieved by the holding of the trial Judge that the 1st respondent did not participate in the fundraising at Kapkwata PCM Church during the campaign period. It was counsel's submission that the trial Judge analysed evidence selectively in determining this allegation. Consequently, the evidence of Pastor John Naphtali, who was the pastor at Kapkwata PCM Church and the evidence of Musobo Joseph Bukose, who was the master of ceremonies at the fundraising, was not considered by the trial Judge as against the evidence of Chesang Fred and Chelimo Alex, who had no active role in the organization of the fundraising. Counsel submitted that Pastor John Naphtali, as a man of God and leader of the Church was one of the independent witnesses who could not have a negative motive in swearing an affidavit against any candidate. Counsel relied on ***Mugame Peter Versus Abedi Nasser Mudiobole, Election Petition Appeal No.30 of 2011,*** for the above submission.

Counsel further contended that while the trial Judge disbelieved the appellant's witnesses on grounds that there were material contradictions in regard to time in their evidence, the said contradictions were minor and did not go to the root of the matter. He submitted that the evidence of Kabera Francis, who was an official from Airtel (U) Ltd, was important because it proved that between 1:00 pm and 3:30 pm, the 1st respondent was not at his home church as he had alleged. Counsel further contended that the issue as to the time when the 1st respondent attended the fundraising was estimated and that as such a difference of 30 minutes could not be considered going to the root of the matter, and therefore fatal.

The respondent's counsel did not agree. He submitted that the evidence on record indicated that on the 14th February, 2016, the 1st respondent attended a church service at Kapkwirwok Church of Uganda. What was in contention was whether or not after the Church Service at Kapkwirwok Church of Uganda, the 1st respondent proceeded to Kapkwata PCM Church and attended a fundraising thereat. Counsel contended that there was nothing on record to show that the 1st respondent was invited for the fundraising in issue and there was no evidence to show that he actually went to the said church.

Counsel made reference to the phone printout and submitted that the same indicated that on the 14th February, 2016, the 1st respondent's phone was located interchangeably in Sipi and Kapkwai, not Kapkwata. In that regard he argued that there was no proof that the 1st respondent was at Kapkwata on the 14th February, 2016.

In re-examining the allegations of illegalities/offences, we caution ourselves that in Petitions of this nature, witnesses usually tend to be partisan in giving evidence in support of a candidate of their choice. In ***Rt. Col. Dr. Kizza Besigye Versus Yoweri Kaguta Museveni & anor (Supra),*** Mulenga, JSC (as he then was), stated as follows:

> ***"An election Petition is a highly politicized dispute arising out of a highly politicized contest. In such a dispute, details of incidents in question tend to be lost or distorted as the disputing parties trade accusations each one exaggerating the others' wrongs while down playing his or her own. This is because most witnesses are the very people who actively participated in the election contest".***

We shall first consider the allegations of bribery against the 1st respondent at a fundraising held at Kapkwata PCM Church on the 14th February, 2016, at around 1:00Pm.

Section 68(7) of the Parliamentary Elections Act provides as follows:

> ***"(7) A candidate or an agent of a candidate shall not carry on fundraising or giving of donations during the period of campaigning.***
>
> ***(8) A person who contravenes subsection (7) commits an illegal practice."***

In ***Odo Tayebwa Versus Bassajjabalaba Nasser & Electoral Commission, Court of Appeal Election Petition Appeal No. 013 of***

2011, Court stated that a charitable donation may be unobjectionable so long as no election was in prospect; but if an election was imminent, the danger of the gift/donation being regarded as bribery increased.

The appellant in his evidence contended that the 1st respondent personally participated in a fundraising held at Kapkwata PCM Church, donated two bags of cement and pledged 2 trips of sand to build the Church. Khalifani Towet Mohammed stated in his affidavit that he attended the fundraising at Kapkwata PCM Church on the 14th February, 2016. He said he saw the 1st respondent at the fundraising and that when he was invited to speak, he said that he had earlier been praying at Kapkwirwok Church of Uganda. Further, that as part of his contribution towards the fundraising, he gave two bags of cement and pledged 2 trips of sand for the construction of the church. The above account of events was repeated in the evidence of Michael Chemo, Musobo Joseph Bukose, who was the master of ceremonies at the fundraising, Pastor John Nakitari Naphtali who was the pastor at Kapkwata PCM Church, and Kiplangat Micheal and Sande Fredrick who allegedly also attended the fundraising.

In order to prove that the 1st respondent was at Kapkwata PCM Church, the appellant tendered in evidence a printout of the 1st respondent's phone number from Airtel (U) Ltd and an official from Airtel explained the content of the printout to Court.

On the other hand, the 1st respondent in his answer to the Petition denied attending the fundraising at Kapkwata PCM Church on the 14th February, 2016. It was his evidence that on the said day, he was at his home church at

Kapkwirwok Church of Uganda from 10:00am to 4:00pm, and he prayed with, among others, Cherop Michael Cheborion, Nakitari Patrick and Mashandich John Yeko. He contended that he did not participate in the fundraising at Kapkwata PCM Church. Cherop Michael testified that on the 14th February, 2016, he attended the church service with the 1st respondent at Kapkwirwok Church of Uganda between 10:00am and 2:00pm, and thereafter had an elders meeting which was also attended by the 1st respondent and it lasted up to 3:30PM. Sabila Sammy Wilfred, Nakitali Patrick and Mashadich John also gave the same account of the event as Cherop Michael.

Chesang Fred testified that he was the Chairperson Construction Committee at Kapkwata PCM Church, and that he attended the fundraising which took place on the 14th February, 2016. It was his contention that the 1st respondent did not attend the fundraising on the said date and that the allegations of Khalifani Towet Muhammed and Chemo Michael were unreliable considering that they were the appellant's agents. Chelimo Alex, Chesang Chrispus, Musau Fadil and Arapsiwa Moses also testified that they attended the fundraising but the 1st respondent was not in attendance.

From the evidence above, it is not in dispute that on the 14th February, 2016, a fundraising event for the construction of the Church was held at Kapkwata PCM Church. What is in contention is whether the 1st respondent attended the said event or donated 2 bags of cement and two trips of sand towards the construction of the Church, during the campaign period of the general elections held in 2016.

As observed by the trial Judge, the evidence on record is basically the word of one witness against that of the other. In such circumstances, the burden of proof was upon the appellant to prove the allegations he set forth, and to place the 1st respondent at the event.

We do not find credible the evidence of Arapsiwa Moses and Chemonges Patrick who swore affidavits for both the appellant and the respondent and changed their account of events in each affidavit. We find their evidence unreliable considering that they are inconsistent. Therefore, we shall disregard their evidence.

While Khalifani Towet Muhammed and Chemo Michael were referred to as being the appellant's agents and therefore unreliable, the said evidence was not challenged by the appellant. Therefore, little reliance can be placed on the evidence of the two witnesses.

The appellant also relied on the evidence of Francis Kabeera, who was the Security Manager of Airtel (U) Ltd to explain the call data record (EXH P1) that was obtained at the request of the appellant for the purpose of proving that at the material time, the 1st respondent was at the fundraising held at Kapkwata PCM Church. The said Data Record indicated that the 1st respondent was at Kapkwai for the period between 1:02 and 3:02 pm. It was the same time when the 1st respondent was alleged to have been at Kapkwata PCM Church. Francis Kabeera explained that there could have been a momentary fluctuation, and that depending on the consistency of the network, the data could show that a person was in a place which he/she was not in. We agree with the trial Judge that the telephone printout was not

helpful in placing the 1st respondent at the fundraising event. This is more so considering that there was no evidence to show that Kapkwata PCM Church was located at Kapkwai where the call data had placed the 1st respondent at the material time.

The appellant invited this Court to believe the evidence of Pastor John Nakitali Naphtali and that of Musobo Joseph Bukose because they actively participated in the organization of the fundraising. We find that it is the same people who were in a position to avail records showing the contributions and pledges at the event where the name of the 1st respondent would have featured since he allegedly pledged and contributed towards the event. However, neither of the two witnesses endeavored to bring any such evidence at trial. Besides, Chesang Fred and Chelimo Alex who held top positions in the fundraising also testified that the 1st respondent did not attend the event.

We find that the appellant did not discharge the required standard of proof in satisfying the question as to whether the 1st respondent attended and participated in the fundraising event held on 14th February, 2016 at Kapkwata PCM Church.

The appellant also alleged that the 1st respondent personally or through his agents with his knowledge, consent or approval bribed voters at various places.

Section 68 of the Parliamentary Elections Act relates to illegal practices in Parliamentary elections and bribery is one of the illegal practices mentioned. Under section 68(1), bribery is defined as:

"(1) A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy two currency points or imprisonment not exceeding three years or both".

Under Section 61(1) (c), commission of an illegal practice/offence in connection with the election is one of the grounds for setting aside an election. The appellant has the burden to prove that a gift/money was given to a voter(s) by the 1st respondent or his agents in order to induce that person to vote for him. (See ***Col. Dr. Kizza Besigye Versus Yoweri Kaguta Museveni & anor (Supra).***

Alleged bribery at New Apostolic Church:

The allegations of bribery at New Apostolic Church were contained in the evidence of Sabri Roboto Geoffrey. It was his testimony that on the 18th February, 2016, while at his home near Apostolic Church Polling Station, at around 1:00pm, he saw the 1st respondent giving Daudi Robert UGX 200,000/=, and they thereafter had a small conversation. He contended that thereafter, Daudi Robert went to Sabri Roboto's home and convinced him to go and vote for the 1st respondent, while handing to him UGX 5000/=. Malewa Satya Leonard also testified that he personally saw the 1st respondent in a Land Cruiser Motor vehicle, giving a bundle of money to Daudi Robert to give out to voters so that they could vote for him.

The 1st respondent denied the allegations and stated that he did not give money to Daudi Robert, neither was Daudi his agent. On his part, Daudi Robert stated in his affidavit that he was not an agent of the 1st respondent and that he did not receive any money from the 1st respondent or give out money to voters including Sabri Roboto Geoffrey who was a known supporter of the appellant.

In his evaluation of the evidence on this allegation of bribery, the trial Judge stated that while Malewa Satya Leonard had claimed that he heard the 1st respondent telling Daudi Robert to go and give money to mobilizers so that they could distribute it to voters, he never saw the said Daudi Robert give the money to Sabri Roboto Geoffrey. In that regard, Court found that the incident of giving UGX 5000 as a bribe was not corroborated. The trial Judge cited ***Achieng Sarah Opendi Versus Ochwo Nyakecho Kezia, Court of Appeal Election Petition Appeal No.29 of 2011***, and made a finding that the uncorroborated evidence of Sabri Roboto Geoffrey was weak in proving the bribery allegation.

We accept the above analysis by the trial Judge and find that the evidence of Sabri Roboto Geoffrey was suspect. It is highly unlikely that the said witness who was at his home could tell the exact amount of money which the 1st respondent allegedly handed out to Daudi Roboto. Further, the evidence of Malewa Satya Leonard does not prove that money was given out to voters. Indeed, apart from Sabri Roboto Geoffrey, whose evidence was not believable, there was no other voter who came out to attest to having received money from Daudi Roboto.

We find that the evidence adduced by the appellant on this allegation of bribery was weak and, was not proved to the required standard.

Alleged bribery at Bonyo Village Kaptono Parish, Kaserem.

The affidavit of Kukwai Asadi in support of the Petition was to the effect that on the 17th February, 2016, Barishaki Bonny Cheborion and Gadafi went to his home at Bonyo, and informed him that they were seeing him on behalf of the 1st respondent respecting the election which was the next day. Further he testified that Barishaki Bonny Cheborion then requested him to convince people and voters in the area to vote for the 1st respondent, and proceeded to give him UGX 100,000/= to distribute to the voters. He stated that he gave some of the money to his family members and that the next day he distributed some money to voters including Stephen Guga, Bahir and Cherop while informing them that the money was from the 1st respondent.

Regarding the above allegations, Cheborion Barishaki denied participation and testified that he did not know Kuwai Asadi, nor did he know Gadafi. He admitted that the 1st respondent was his brother, but denied ever asking Kukwai Asadi or anyone else to vote for the 1st respondent. Chemonges Gadaffi in his affidavit denied seeing Cheborion Barishaki on 17th February, 2016, and that he did not go to Kukwai Asadi's home on the said date. It was his testimony that on the 17th February, 2016, at around 7:00 am, he went to Ngenge Kween District Trading Centre to buy goats for sale and returned home at around 8:00pm.

While Kukwai Asadi contends that he gave the money to voters and his family members, neither of the said persons he allegedly gave the money, swore

affidavits to confirm the allegations. The appellant did not adduce any independent evidence that Cheborion Barishaki and Chemonges Gadafi went to Kukwai Asadi's home on the 17th February, 2016.

We accept the trial Judge's finding that the appellant's version on this particular allegation fell short of the test in ***Achieng Sarah Opendi Versus Ochwo Nyakecho Kezia (Supra),*** on the need for corroboration, given the circumstances of this case.

Alleged bribery at Feel Free Square /Trading Centre.

The affidavits of Musungu Bashir, Mama Asadi, Labu Yasin, Chepsikor Stephen, Aggrey Modo and Soyekwo Andrew state that on the 16th February, 2016, at around 7:00pm, Cheborion Bonny Barishaki went to Feel Free Square with loud speakers, together with supporters of the 1st respondent. Further, that he campaigned for the 1st respondent and organized people in groups of old men, old women, and the youth, upon which he gave to them UGX 350,000/=. Further, that he informed the people in the groups that the money was from the 1st respondent.

We find that this allegation of bribery was not pleaded in the Petition. These allegations were raised during the rejoinder to the answer to the Petition. We reiterate that affidavits in rejoinder are essentially for the purpose of giving an opportunity to the Petitioner to rejoin to and controvert or dispute the contents of the affidavits in reply sworn by the respondent or affidavits sworn on his or her behalf. In the instant case, the allegations of bribery at Feel Free Square were neither pleaded by the appellant nor raised in the affidavits

sworn in answer to the Petition by the respondents. We, therefore, disallow the above evidence.

Alleged bribery of Chema Women Group.

It was the appellant's evidence that the 1st respondent through his agent Korono Denis, gave out 3 saucepans and 100 plates to Chema Women Group and asked them to vote for the 1st respondent. He contended that this was done with the knowledge and approval of the 1st respondent. These allegations were supported by the evidence of Chepkwoti Margaret and Lorna Nabulobi, who swore affidavits in rejoinder to the affidavits sworn in reply to the Petition. Lorna Nabulobi and Chepkwoti Margaret testified that the 1st respondent went to Chema Women Group, and pledged 3 saucepans and 100 plates, and requested them to vote for him. It was their testimony that the 100 plates were delivered to the group through the 1st respondent's agent known as Korono Denis, in the company of other supporters.

The 1st respondent on the other hand denied the above allegations of bribery and intimated that he did not know Koron Denis. Yeko Frantine stated in her affidavit that she was the Chairperson of Chema Women Group. She testified that the Women Group did not receive any saucepans or plates from the said Koron Denis on behalf of the 1st respondent. She added that she did not know Koron Denis and that the allegations that he delivered plates to Chema Women Group on behalf of the 1st respondent were false.

We are not persuaded with the evidence of Chepkwoti Margaret and Lorna Nabulobi, that Denis Koron delivered plates or sauce pans to the Women Group on behalf of the 1st respondent. The identity of the said Denis Koron is

uncertain and it has not been proved that he was an agent of the 1st respondent. We find the evidence of Yeko Frantine, who was the Chairperson of the Group more credible considering that she was better placed to know if the donations were actually made to the group.

We should observe that we find the affidavits in rejoinder of these two particular witnesses distinguishable from the affidavits in rejoinder which we held to have been properly sworn in grounds 1 and 5 above. In this incidence, the appellant alleged in his Petition and affidavit that the source of his information for this particular allegation of bribery was his agents and supporters. However, neither of the alleged supporters and agents swore affidavits in support of the Petition giving evidence on the allegation. In that regard, we accept the trial Judge's finding that the appellant's evidence on this particular allegation was hearsay and the affidavits in rejoinder by Chepkwoti Margaret and Lorna Nabulobi were untenable.

In the circumstances we find that the appellant did not prove this allegation of bribery to the required standard.

Grounds 6, 7 and 8 of appeal are, therefore, disallowed.

In conclusion, the appeal as a whole fails. The appellant however succeeds in part on grounds 1 and 5.

It is also apparent that the appellant had some reasonable cause of action with regard to some of the allegations of non-compliance with electoral laws contained in grounds 2, 3 and 4 of the appeal, although the Court's finding was that any non-compliance did not affect the results in a substantial way.

Grounds 6, 7 and 8 on allegations of bribery against the 1st respondent were not proved to the satisfaction of Court. CourtOn the issue of costs, and in view of our conclusion above, we order that;

1) The appellant is to recover 1/3 of the costs of the appeal from the 2nd respondent.

2) The 1st respondent is to recover 2/3 of the costs of appeal of which 1/3 is to be recovered from the appellant and 1/3 from the 2nd respondent.

3) The 1st respondent shall recover 2/3 of the costs in the High Court jointly and severally from both the appellant and the 2nd respondent.

We so order.

Dated at Kampala this 4th day of May 2017

.....

S.B.K Kavuma,

DEPUTY CHIEF JUSTICE

.....

Elizabeth Musoke,

JUSTICE OF APPEAL

.....

Paul Kahaibale Mugamba,

JUSTICE OF APPEAL

4/5/2017

Nelson Nelson for 1st Respondent appearing together with Mutembuli Yusuf ~~for~~ & Jude Mwasa for 2nd Respondent