

THE REPUBLIC OF UGANDA

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IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION APPEAL NO.44 OF 2016

(ARISING FROM ELECTION PETITION NO.0002)

ERNEST KIIZA:.....APPELLANT

VERSUS

10

KABAKUMBA LABWONI MASIKO:.....RESPONDENT

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

HON. MR JUSTICE BARISHAKI CHEBORION, JA ✓

HON. MR. JUSTICE ALFONSE OWINY DOLLO, JA

15

JUDGEMENT

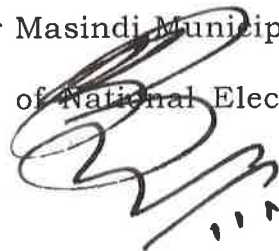
Introduction

This is an Election Petition Appeal arising out of the Judgment of Elizabeth Ibanda Nahamya, J, delivered on the 20th day of July, 2016 in which she nullified the election of the appellant as the Member of Parliament, Masindi

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Municipality and made the following orders;

1. "The process of conducting the elections for Masindi Municipality contravened the provisions and principles of National Electoral laws and other laws.



2. The 1st Respondent was not validly elected as Member of
5 Parliament for Masindi Municipality in Masindi District and
accordingly, Court hereby declares the Parliamentary seat for
Masindi Municipality vacant pursuant to S. 63 (6) (b) (i)
Parliamentary Elections Act.

3. The 2nd Respondent is hereby directed to organize and conduct
10 fresh elections in the Masindi Municipality constituency as is
prescribed by the law in Sections 61 (2) and 63 of the
Parliamentary Elections Act.

4. The petitioner is also awarded costs against the first respondent.
The 2nd respondent will bear his own costs

15 **Background**

The facts giving rise to this Appeal as accepted by the trial Judge are
that the petitioner Kabakumba Labwoni Masiko (now respondent),
Lennox Mugume, Moses Kabboto Byensi Tugume, Rogers Kanti and
Ernest Kiiza were candidates in the Parliamentary Elections in
20 Masindi Municipality Constituency held on the 18th day of February
2016. The 2nd respondent (Electoral Commission) declared the 1st
respondent (now the appellant), Ernest Kiiza winner of the said
elections with 14125 votes as against the petitioner, Kabakumba



Labwoni Masike who got 9076 votes. The number of valid votes was
5 29329 against the total number of 1378 invalid votes. The petitioner
was dissatisfied with the above results and she filed a Petition
contending that the election was conducted in contravention of the
provisions of the Constitution of the Republic of Uganda and the
Electoral Commission Act, 2005 (as amended). Judgment was given in
10 favor of the petitioner/respondent in the terms above. Being
dissatisfied with the decision, the appellant appealed to this Court.

Grounds of Appeal

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

- 15 1. *The learned trial judge erred in law and fact when she failed to
properly evaluate the evidence, thereby arriving at the wrong
decision.*
2. *The learned trial judge erred in law and fact when she considered
and ruled that the Appellant's supplementary affidavits were*
20 *illegally filed and would not be considered as part of the record.*
3. *The learned trial judge erred in law and fact when she held that the
unanswered question was whether the Appellant committed the
election offence of bribery by constructing the wells in Masindi*



Municipality during the election period.

- 5 4. *The learned trial judge erred in law and fact when she held that the respondent had proved to the satisfaction of the court that wells were constructed with funding from the Appellant.*
- 10 5. *The learned trial judge erred in law and fact when she held against the Appellant that the Respondent had proved that there was distribution of football jerseys and a yellow ball as an aspect of voter bribery.*
- 15 6. *The learned trial judge erred in law and fact when she held against the Appellant that the Respondent had proved to the satisfaction of court that there was distribution of salt by the Appellant.*
- 20 7. *The learned trial judge erred in law and fact when she held against the Appellant that the agents were acting for and on behalf of the Appellant and the Respondent had proved to the satisfaction of court that there was voter bribery by the Appellant in the elections held in Masindi Municipality.*
8. *The learned trial judge erred in law and fact when she held against the Appellant that the Respondent had proved to the satisfaction of court that the Appellant directly or indirectly through his agents, with his consent approval committed electoral offences to wit; construction of wells, donations of money, football jerseys, a ball*

and salt.

- 5 9. The learned trial judge erred in law when she shifted the burden
and lowered the standard of proof in determining the alleged
commission of illegal practices by the Appellant.
10. The learned trial judge erred in law when she expunged offending
parts and/or the whole of the Respondent's witness affidavits
10 during submissions and/or in her judgment.

Representation

On Appeal, the appellant was represented by Mr. Wandera Ogalo and
Kato Sekabanja (counsel for the appellant), while the respondent was
represented by Mr. Simon Peter Kinnobe, Mulalira Faizal Umar,
15 Mutyaba Najib, Sozi Stephen and Kasozi Ronald, (counsel for the
respondent).

Submissions of counsel for the appellant

Counsel for the appellant argued the grounds of Appeal in the
20 following order, grounds 3, 4, 5, 6, 8, 1, 2, 7, 9 and 10.

Counsel argued grounds 3, 4, 5, 6 and 8 together with the view of showing
that there was no evidence to prove bribery.

It was counsel's submission that no single recipient of salt was named in the
Petition and no evidence was led to show that salt was distributed contrary

to the law on bribery. He fortified his submissions with **Kiiza Besigye V**
5 **Yoweri Museveni SC Election Petition No.1 of 2006.**

Counsel submitted that the existence of agency was not sufficiently
established. He contended that the only evidence adduced by witnesses was
that Isingoma Edward was a known agent of the appellant. He argued that
out of all the acts of bribery, only one is attributed to the appellant himself
10 the rest are by agents contrary to the law of agency which requires cogent
proof of agency and the consent, knowledge and approval of the candidate.

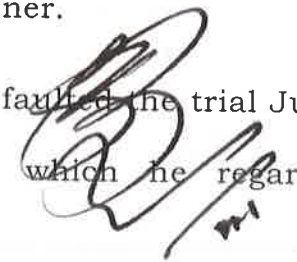
He faulted the trial Judge for relying on Justice Oder's view on agency in
Kiiza Besigye V Yoweri Museveni (supra) because, according to him, it was
a minority view and therefore not binding.

15 In counsel's view, the respondent had failed to prove the elements of
bribery i.e. that the person who was bribed was a voter and that
because witnesses are partisan, independent evidence ought to have
been adduced to corroborate their evidence. He relied on **Kwijuka**
Geofrey Vs Electoral Commission and Anor , Election Petition No.
20 **007 of 2011 , Achieng Sarah Opendi v Ochwo Nyakecho Keziah,**
Election Petition Appeal No.39 of 2011 and Kamba Sarah Moses v
Hon. Namuyangu Jennifer Election Petition Appeal No. 0027 of
2011 to support his submissions.



On grounds 5 and 8 regarding bribery through distribution of sports
5 jerseys and football, counsel submitted that there was evidence of
single witnesses (Alex Jawiya and Bagonza Ronald) to each of the two
incidences of the alleged bribery which was inadequate to prove
bribery to the required standard. He argued that the appellant himself
in his affidavit rebutted the respondent's allegations and denied ever
10 giving any balls to Benjamin Okira to distribute. He contended that
the people who are alleged to have received jerseys were not named
and those alleged to have distributed the balls such as Coach
Emmanuel Auchu and Okwede Eitoi were not called upon to give
evidence to corroborate the evidence of the witnesses. He argued that
15 Rwakaikara Sam does not depone that Innocent Businge, who is
alleged to have distributed jerseys, was an agent of the appellant. He
therefore submitted that the respondent had failed to prove bribery to
the required standard. Further, he submitted that Businge raised an
alibi in his affidavit in reply although the trial Judge found that it was
20 not plausible. He faulted the trial Judge for shifting the burden of
proof to the respondent instead of the petitioner.

Regarding bribery by use of money, counsel faulted the trial Judge for
relying on the evidence of Susu Media which he regarded as



accomplice evidence because she was an agent of the respondent and
5 therefore partisan and needed corroboration. Further, counsel argued
that Susu Media deponed that she was given money to buy and
distribute salt but no evidence was led to establish the same. Counsel
therefore contended that bribery was not proved. Counsel supported
his submissions with **Kamba Saleh** (supra).

10 Regarding polling day bribery, counsel contended that the witnesses in 7 out
of the 10 polling stations were partisan because they were agents or
supporters or supervisors of the respondent. He argued their evidence
required corroboration as well as that for Masindi secondary school polling
station, Pefa polling station and Kaljabu polling station. According to
15 counsel the evidence of Byaruhanga Sudaici at Pefa polling station and
Bagenda Livingstone at Kalujubu Primary School polling stations was
unreliable because their affidavits were the same although they were talking
about incidences of bribery from two different polling stations for instance,
they both talk about bribing Busobozi and Bagonzi with 5000shs and
20 3000shs respectively. Counsel argued that the evidence in regard to bribery
was not cogent as the people who allegedly received the bribes were not
mentioned and their particulars were not given.



5 Turning to the construction of wells, it was counsel's contention that Robert Wamani's evidence on Bulyango well was hearsay thus leaving the evidence of a single witness Tumusiime Daniel. He therefore submitted that the offence of bribery had not been proved. As far as Kagire well was concerned, counsel submitted that the evidence of
10 Jawiya Alex was also evidence of a single witness which did not establish bribery. Counsel submitted that regarding Kigona Kikorogo water well, the evidence of Kambona David and Daniel Tusiime was hearsay and could not be relied upon.

On the evidence of the photographs to prove allegation of bribery through
15 the building of wells, counsel contended that they were erroneously admitted because the people who were said to have printed them from their USB cables in Kampala were not called as witnesses.

In respect to Kabalye settlement well, counsel argued that out of the evidence of four witnesses (David Kambona, Wamani Ronald, Musana
20 Robert, Monday Robert, and Talemwa Richard), it was only the evidence of Wamani Robert who claimed that he was contracted by Abitekaniza Robert to construct the said well but Abitekaniza Robert was not called to testify,



thus there was no cogent evidence to prove that Abitekaniza Robert was an
5 agent of the Appellant and the offence of bribery.

Counsel reiterated his earlier submissions and prayed that the Appeal be
allowed, the decision of the lower Court and a grant of a certificate for 2
counsel be set aside.

Submitting on ground 2 of the Appeal, counsel for the appellant faulted the
10 trial Judge for striking out the supplementary affidavits that she held to
have been illegally filed. Counsel argued that our law does not bar the filing
of additional affidavits before pleadings are closed. According to him the
impugned affidavits were filed before the parties conferenced and there was
no objection during the conferencing and the respondent filed additional
15 affidavits in reply to those including new affidavit. To counsel it was an
injustice to the appellant for the trial Judge to strike out the affidavits in her
judgment because it denied the appellant the chance to rebut the evidence
of agents who were not his that had been raised in the respondent's
affidavits in reply.

20 On ground 10 of the Appeal, the learned trial Judge was faulted for
expunging offending parts of the respondent's witness affidavits during
submissions and in her judgment. Counsel contended that when there is
contradiction in the evidence of a witness, the rest of that evidence needs to



be treated with caution and be examined as against all other evidence.

5 Counsel submitted that the Judge could not have severed a particular part of Grace Apio's affidavit just because it contradicted the whole of Susu Media's evidence.

On ground 9 of the Appeal, the learned Judge was faulted for shifting the burden and lowering the standard of proof in determining the alleged
10 commission of illegal practices by the appellant. In regard to lowering the standard, counsel argued that the Judge held that the agents of the respondent were giving out money without naming them and without proof that they were acting with the consent and knowledge of the appellant. Regarding burden of proof, counsel pointed out two instances where he
15 submitted that the trial Judge had shifted the burden of proof. First, was the evidence of Kamanyire Richard and Isingoma Edward whom the respondent deponed that she had seen giving salt and the appellant rebutted the said evidence and deponed that he didn't know them and that they are not his agents. He submitted that the appellant could not be
20 expected to bring forth Kamanyire Richard and Isingoma Edward to prove that he did not know them. Secondly, the trial Judge did not believe the evidence of Businge because he did not adduce any evidence to prove that his mother was in hospital yet she accepted Kambona's evidence even



without producing the second set of photographs to prove that the
5 inscriptions in the well had been erased.

On ground 1 of the Appeal regarding evaluation of evidence, counsel
submitted that the trial Judge failed to properly evaluate evidence. He
argued that there were contradictions in a number of affidavits in support of
the Petition such as the affidavit of Kambona David where he talks about
10 Bulyango 1 well in the first affidavit and in the next affidavit, he talks of
Bulyango 2, Wamani Robert who claims in one affidavit to taken two trips of
sand to the well and the rest were taken by the truck driver while in another
affidavit, he deponed that he took one trip of sand and the rest were done by
the truck driver and Jawiya Alex who claimed to have been in the truck with
15 Okira Benjamin in one part of his affidavit and in another paragraph, he
deponed that he asked an 8 year old boy about Okira Benjamin among
other. Counsel submitted that the trial Judge treated some contradictions
as minor and did not consider others at all which did not favor the
appellant. That if the Judge had properly evaluated the available evidence
20 on record, she would have come to a different conclusion. He prayed that
her decision be overturned and the appellant maintained as the validly
elected MP for Masindi Municipality.



5 Counsel for the respondent sought to adopt their submissions in the lower Court and the conferencing notes before this court and supplement them with oral submissions. Counsel opted to adopt the same format that was adopted by counsel for the appellants in their response.

In reply to grounds 3, 4, 5, 6 and 8 of the Appeal which concerned bribery,
10 counsel supported the trial Judge's findings and argued that the trial Judge evaluated one piece of evidence after another and rejected what the respondent did not prove to the satisfaction of court and upheld what the parties had proved.

Regarding the construction of the well, counsel submitted that there was
15 sufficient evidence to prove that it was the appellant who was responsible. Counsel made reference to the evidence of Wanani Ronald who testified that he had been hired and given money for purposes of selling construction materials by Robert Abitikenaza and was being paid by the appellant, Tusiime Daniel testified that he worked on the wells. Further, that the
20 photographs that were exhibited on court record contained inscriptions of the appellant's names and the date captured therein (15th of February 2016) was within the campaign period. He conceded that the photographs do not contain any person erasing the inscription. However, he argued that Odaga



Godfrey (the appellant's witness) admitted that he told the people that not everyone in the village supported the appellant so his name should be removed. Counsel contended that the appellant's deponement that it was Dr. Kahunde and the Mulimba family that funded the construction of the well was inconceivable because it did not make sense for them to allow the appellant's name to be inscribed on the wells instead of theirs even if they were not campaigning. Counsel submitted that there was cogent evidence to prove that the appellant constructed the wells as established from the evidence of his agents and that people such as Jamiya Alex, Kirya William, Odaga Godfrey benefited from the well. He relied on **Oddo Tayebwa vs. Basajjabalaba Election Petition Appeal No. 013, James Serunjogi Mukiibi vs. Lule Mawiya Court of Appeal Election Petition Appeal No.15 of 2006, Kirunda Kivejinja vs. Abdu Katuntu Court of Appeal Election Petition Appeal No. 24 of 2006 and Fred Badda and Anor v Prof. Muyanda Mutebi Election Petition Appeal No.25 of 2006** case to support his submissions.

Regarding counsel for the appellant's argument that the words "*funded by Ernest Kiiza*" were imaginary since most of the voters could not read or write English, counsel for the respondent submitted that the respondent's



witnesses were not cross examined and that the assumption that they were
5 illiterate was not founded.

On the issue of sports jerseys and yellow balls, counsel submitted that the
learned trial Judge properly evaluated the evidence on the same at page
733-735 of the judgment. Counsel argued that counsel for the appellant
misled this court that the learned trial Judge relied on evidence of one
10 witness only (Jawiya Alex). Counsel submitted that the appellant
contradicted himself in his affidavit when it came to knowledge about
Benjamin Okira. In one paragraph he denies while in another he admits.
Further, that in Muwengero Dennis's affidavit paragraphs 3, 4, 5, 6, 7, 8
and 9, he stated that at a campaign rally in Bulyangu, the appellant
15 introduced Benjamin Okira as his agent to the crowd in which he was.

In reply to expunging the appellant's supplementary affidavits, counsel
contended that there was no new evidence that the appellant was
responding to save Susu Media's deponement that she had been threatened
to swear an affidavit and, that the appellant was not prejudiced in any way
20 by the affidavits being expunged from Court record.

Regarding the shifting of the burden of proof in respect to Businge's
evidence, counsel submitted that Businge never at any one time in his
affidavit deponed that he was in Kampala to take care of his mother.



Counsel submitted that the issue only arose during cross examination after
5 he had been placed at the scene to set up an alibi

Counsel submitted that the sponsoring of football teams by way of
incentives such as sportswear, bulls and cows constitute an election offense.
He argued that the evidence of Arinaitwe Patrick, Byenkya David and
Lokura Benjamin in respect of the sports jerseys and balls was
10 unchallenged. He relied on **Fred Badda** (supra) to support his submissions

In reply to bribery by way of distribution of salt, counsel supported the trial
Judge's finding because in Bingi Moses' affidavit, he pinned Santi Oryem,
Isingoma Edward and Kabanyire Richard and on the contradiction in the
number plate, counsel argued that submission of counsel that it belonged to
15 a car rather than a motorcycle was evidence from the bar which could not
bind the Judge and there was no evidence from the Registrar General of
motorcycles to verify the same.

Counsel supported the trial Judge's finding on bribery using money then he
argued that there was sufficient evidence adduced by Babendo Livingstone,
20 Muhumuza Mubiito, Bagonza Margaret and Mukisa Emmanuel to prove that
the appellant's agents bribed people who had lined up to vote on voting day.



Responding to the issue of striking out of the appellant's supplementary
5 affidavits, counsel submitted that in addition to the affidavits containing
nothing new they were responding to, pleadings have a time frame under the
law and in respect of affidavits, 0.9 of the Civil Procedure Rules is
applicable. He argued that the said Rule only provides for affidavits in
support, affidavits in reply and affidavits in rejoinder and thus, any other
10 affidavit would be admissible only with leave of Court which the appellant
did not seek. Regarding counsel for the appellant's argument that the
respondent's counsel did not raise objection to the affidavits during
conferencing, counsel argued that an illegality can be brought to the
attention of court at any time as a matter of law.

15 In reply to severance of offending parts of an affidavit, counsel submitted
that in line with **Bitaitana Vs. Kananura Civil Appeal No.47 of 1976** once
an affidavit has a mistake, however slight it might be, it should be struck
out. However, counsel conceded that Court has started adopting a liberal
approach to such affidavits so that the offending parts of an affidavit are
20 severed instead of the whole affidavit being struck out.

On contradictions and inconsistencies, counsel submitted that the trial
Judge properly evaluated the evidence on record, rejecting major
inconsistencies which went to the root of the case and ignoring the minor



inconsistencies. Regarding inconsistencies between the Judge's hand
5 written notes and the transcribed copy, counsel submitted that this Court
should rely on the transcribed copy. Counsel argued that the trial Judge
evaluated evidence on both sides before reaching her conclusion contrary to
counsel for the appellant's submissions.

In reply to the need for corroboration, counsel submitted that there is no
10 particular number of witnesses required to prove a single act and proof of a
single election offence is enough to set aside an election. He prayed that the
decision of the lower court be upheld and the Appeal be dismissed with
costs in this Court and in the lower court with a certificate for 2 counsel.

In rejoinder, Counsel for the appellant submitted that it was incumbent
15 upon the respondent to produce Abatekaniza who was said to have hired
Rogers Wamani because the appellant denied knowing him. Counsel
submitted that the appellant only got to know that the Robert who was
referred to in the affidavit in support of the Petition was Abitekaniza in the
respondent's affidavits in rejoinder. Responding to the authority of **Bakaluba**
20 **Mukasa v Nambooze Betty Election Petition Appeal No.4 of 2009 (SC)**
which had been cited to support the view that a group can be bribed,
counsel submitted that the holding of Justice Katureebe, JSC, as he then
was that you can bribe a village irrespective of whether they were registered



or not was *obiter*. Counsel maintained that the legal requirement is that you
5 can only bribe registered voters which the respondent failed to prove.

Counsel reiterated his submissions regarding the jerseys and the
construction of wells and submitted that the trial Judge failed to break the
evidence of the witnesses per well. He maintained that there was a single
witness for each well save for one well where there were two witnesses
10 Tumusiime and Wamani.

In rejoinder to bribery of people in line on voting day, counsel submitted
that the witnesses who gave evidence about it were agents of the respondent
at the polling stations who were obliged to write their complaints and submit
them to the Presiding Officer under S.46 of the PEA, which they failed to do.
15 Counsel reiterated their earlier prayers.

We have studied the Record of Appeal and the judgment of the lower Court.
We have also considered the submissions of counsel for both parties and the
authorities that were availed to Court. Before delving into the merits of the
Appeal, we are mindful of the duty of this Court.

20 This being the first and the final Appellate Court, it has the duty to subject
the evidence adduced at trial to a fresh and exhaustive reappraisal, scrutiny
and to reach its own conclusions. We shall resolve the grounds of appeal in
the order in which they were argued.



Submitting on grounds 3, 4 and 6 of the Appeal, counsel for the appellant
5 argued that the respondent failed to prove the electoral offence of bribery. The bribery was said to have been by construction of wells and distribution of salt. The trial Judge was also said to have erred in her application of the law of agency because it had been argued that the offence was committed by the agents of the appellant.

10 Bribery is defined as an offence committed by one who gives or promises to give or offers money or valuable inducement to an elector, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, or as a reward to the voter for having voted in a particular way or abstained from voting. See Black's Law Dictionary 6th Edition.

15 Section 68 (1) of the P.E.A provides that, "*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*
20 *fine not exceeding seventy two currency points or to imprisonment not exceeding three years or both*".



The Supreme Court in **Col.(Rtd). Dr.Besigye Kizza V. Museveni Yoweri**

5 **Kaguta & Anor. Election Petition No. 1 of 2001**, outlined the 3 ingredients of the offence of election bribery. There ought to be evidence that; a gift was given to a voter, the gift was given by a candidate or his agent and that it was given with the intention of inducing the person to vote.

It is now trite law in electoral petitions that the petitioner must adduce
10 cogent evidence to prove their case to the satisfaction of Court. In **Masiko Winifred Komuhangi v Babihuga J. Winnie Election Petition Appeal No.9 of 2002**, Justice Mukasa-Kikonyogo DCJ, held that the decision of Court should be based on the cogency of evidence adduced by the party who seeks judgment in his or her favor. It must be that kind of evidence that is
15 free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's favor.

Black Law Dictionary (supra) defines the word "*cogent*" to mean compelling or convincing.

20 From the above definition, it is clear to us that unequivocal evidence is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery especially when it is done secretly but because of the dire consequences it carries on the person alleged to have



committed the offence, the Court cannot be satisfied by anything less than
5 the best evidence which is always direct evidence given first hand.

The burden of proof rests on the petitioner and the quality of evidence
adduced has to be considered with complete thoroughness commensurate to
the gravity of the matter and the consequences that follow by virtue of
Sections 61(1)(c) and 68 of the PEA.

10 In deciding whether there was bribery through distribution of salt, the trial
Judge relied mainly on the evidence of Bingi Moses. In her opinion, the
Court would be in error to hold that the testimony of Bingi Moses had been
ably destroyed through the testimony of Owino Santa when the question of
Isingoma Edward and Kamanyire Richard remained unanswered. To her it
15 was the Petitioner's evidence that Kamanyire Richard was among those who
distributed the salt and to her, this piece of evidence remained unanswered
and uncontroverted. Concluding on this issue she resultantly held that the
Petitioner had managed to prove this aspect of voter bribery to the
satisfaction of Court.

20 The relevant parts of Biingi Moses' affidavit in support of the Petition
state as follows;

1. *THAT on that night Isingoma Edward the known agent and ardent
campaigner of Ernest Kiiza brought salt and gave it to Owino Santa and*



Kamanyire Richard whom he instructed to distribute it in the village

5 2. *THAT the salt was brought in a black Toyota car and handed over to Santa and Kamanyire*

3. *THAT many other assorted items were also brought by Isingoma Edward on different days and were distributed in the village.*

4.

10 ..

5. *THAT when Owino Santa saw me, she ran away on a motorcycle owned by Lopio James Reg. No UAE 350W*

In reply to this affidavit, Santa Oryema Awino deponed as below;

15 1. *That I know Biingi Moses as a resident of Bulyango II. That in paragraph 5 of his affidavit he stated that on the night of 17th February 2016 one Isingoma Edward brought salt and gave it to me with instruction to distribute it in the village which I refute as false.*

20 2. *That on the night of 17th/February 2016 I was with Anyoli Chairman LCI Bulyango II at the house of Anyoli Joseph also in Bulyango II till late. When I returned home, didn't meet Isingoma Edward (who I know) nor Kamanyire Richard.*

3. That on 18th February 2016 I left home at 5:30am on a motorcycle to go
5 to Kihuuba (about 15km away) where I had been appointed a ward
election supervisor on behalf of candidate Yoweri Kaguta Museveni.

4. That it is not true as alleged by Biingi Moses in paragraph 8 and 9 that
I was giving out salt to people in Bulyango II nor that I ran away when
he saw me. That all is a criticism of lies

10 The appellant denied the above allegations in paragraph 53 of his affidavit in
support of the answer to the petition.

We are of the considered view that the trial Judge failed to properly evaluate
the evidence before her and found that the question of Isingoma Edward and
Kamanyire Richard remained unanswered. Santa refuted meeting Isingoma
15 Edward and Kamanyire Richard (whom she knew) at all on the night of 17th
February, 2016 or receiving salt from Isingoma with instructions to
distribute it. It was erroneous for the trial Judge to have held that Biingi's
evidence was uncontroverted.

The trial Judge reviewed Counsel for the appellant's submissions
20 regarding the issue of voter bribery by giving out money and agreed
with them in one respect concerning the evidence of Apio Grace who
deponed that she was male and yet her annexed identity card showed
that she was female and the petitioner's prayer that her evidence be



expunged. Regarding the evidence of Mugisha Emmanuel and taking
5 into account the law on agency, she concluded that the agents were
acting for and on behalf of the 1st respondent. It was her finding that
Mugisha's evidence concerning voter bribery was corroborated and
cited the evidence of Susu Media to support her conclusion. To the
trial Judge, bribery using money was not a one off incident and even
10 when Susu Media did not state how much she was given, her evidence
proved that there was distribution of money as a way of bribing voters.
At the same time, the judge recognized counsel for the respondent's
questioning of Media's evidence that she saw a Ugx.3000 shilling note
and expunged that portion of Media's evidence. To her, "the petitioner
15 had managed to prove to the satisfaction of court that there was voter
bribery by the 1st respondent in the elections conducted in the
Masindi Municipality".

The relevant parts of Mugisa Emmanuel's evidence affidavit read as follows;

- 4 *That on arrival at Kirasa II Catholic Church Polling Station, I saw a one Muga*
20 *a known L.C Chairman whom I met with the daughter of the Chairman Kirasa*
II L.C.I sharing money that was in bundles of denominations of UGX 1,000
5. *That I then saw the said Muga starting to give Ugx 1,000 to voters who were*
in the line and instructing them to go and vote Kiiza Ernest



6. That I immediately felt offended and informed Police Elections Constable
5 present at the station who asked the said Muga why he was giving out money
to voters
7. That immediately a scuffle ensued (sic) and when the Chairman saw this, he
disappeared behind the housed (sic) and moved to another polling station at
Kirasa I
108. That I followed them there too and I saw them standing on the road
waylaying people who were going to vote on the way giving them 1,000 each
with requests to vote Ernest Kiiza

Upon perusal of the above affidavit, we note that the deponent did not state
that Muga was an agent of Ernest Kiiza and neither does he state that the
15 alleged money that was being given to people was from the appellant. More
importantly the particulars of those in the line that were being bribed were
not given. In **Besigye's** case (supra), Justice Katureebe, JSC stated that "it
is therefore not enough for a Petitioner or any person to merely allege that
agents gave money to voters, a high degree of specificity is required. The
20 agent must be named, the receiver of the money must be named and he/she
must be a voter; the purpose of the money must be to influence his vote".



We are of the considered view that the trial Judge erred in deducing that an
5 agency relationship existed between Muga and the appellant. The evidence
was not cogent to prove bribery by giving money.

We have also perused the affidavit of Susu Media which the trial Judge held
to have corroborated Mugisa Emmanuel's evidence. We note that Susu
Media deponed to events of 13th Febuary, 2016 at a meeting in Ochama
10 Penel Chairman Bulyango I's place where she alleged that the appellant
personally gave money to her and about 340 women to buy salt, which they
were to distribute to the people in the village. With due respect, we find that
Susu Media's affidavit cannot be considered corroboration to Mugisa's
evidence because they talk of events of different days, involving different
15 people and at different locations. **Black's Law Dictionary** defines
"corroboration" as support by additional evidence or authority. It defines
"corroborating evidence" as one that differs from but strengthens or confirms
what other evidence shows.

What would perhaps have corroborated Mugisa's evidence was the affidavit
20 of Ayesiga Robert Manyuru who claimed to have seen the same Muga on
voting day bribing voters in the line. However, Ayesiga stated that he was an
agent of the respondent at Kirasa Muslim Madarasa polling station L-Z and
saw Moga bribing voters in the line with 2,000/=each as he persuaded them



to vote for the appellant. He also stated that he was chased away by a Police
5 Election Constable whereof he left his friend Kaija in his place. Kaija Julius
deponed that he was the respondent's agent at Kirasa II Madarasa Primary
School Polling Station L-G where he saw Moga giving out 2,000/= to voters
in the line. That after seeing Haji Nuru their supervisor, Muga ran away to
Kirisa Catholic Church Polling Station. On the other hand Mugisa stated
10 that Moga was giving 1,000/= to those in the line at Kirasa II Catholic
Church Polling Station. That after confrontation, Moga went to a polling
station at Kirasa I. Moga himself denied the said allegations and deponed in
paragraph 17 of his affidavit in support of the respondent's answer to the
Petition that he voted at Madarasa A-K polling station after which he went
15 home and returned at 3:00pm to get results. He also deponed that he was
an NRM supporter but not the appellant's agent.

We have analysed the evidence in regard to Moga and giving out money on
voting day as a whole but we do not find it to be cogent. It is difficult in our
view, for the same person to be at five different venues within the same time
20 frame (morning) on the same day. Further, the witnesses do not mention
any of the people who were allegedly bribed in the line which weakens the
credence of their evidence. The affidavits raise questions of how for instance
Kaija Julius knew that Moga ran to Kirisa Catholic Church Polling Station
and Mugisa knew that Moga ran to Kirasa I Polling Station.



5 We accept counsel for the respondent's submission that the general position of the law is that no particular number of witnesses is required to prove a given fact. In **Kikulukunyu Faisal v Muwanga Kivumbi Mohammed Election Petition Appeal No.44 of 2011**, it was held that; "*Lastly, the well-known principle in law is that there is no specific number of witnesses*
10 *required to prove a given fact even one witness can prove a case if he or she is credible.*" We agree with the position of the law stated above but hasten to add that there are exceptions to this general rule where corroboration is called for such as credibility of the witnesses.

In the **Besigye** case (supra), Justice Oder observed that "*the deponents of*
15 *nearly all the affidavits could not be described as independent because they were supporters of one party or another. The election was hotly contested. The necessity that the side of a deponent of an affidavit should win must have been a high motivation for testifying the way he or she did. There were, indeed, some apparently independent witnesses. These were few. The vast*
20 *majority of witnesses may be described as partisan, because they supported the side for which they swore the affidavits. In this case, as nearly in all litigations in our jurisdiction, where the adversarial system of litigation is the norm, a person normally gives evidence favorable to the party which has*

called him or her as a witness and according to what is within the knowledge
5 of the witness. His or her evidence may be honest and truthful but it is given
to enable the party calling the witness to win in the dispute. A witness called
by his or her employer or boss in an office, department or organization is far
less likely to be an independent witness than the one not in a similar position.
The witness has to protect his or her office. Similarly there is no way a
10 witness who is alleged to have committed a criminal offence or malpractice in
an official or personal position is going to own up to such an accusation. This
kind of behavior applies to all human beings. Accusations of wrong doing or
criminal conduct are normally vehemently denied by the person accused
unless there is absolutely no choice for not doing so. It becomes a question of
15 evidence given in self-serving interest. This is common knowledge for which
proof is unnecessary. It is on that basis that we shall consider the credibility
or otherwise of the deponents of the affidavits in this case on individual
basis.”

Many of the witnesses of the respondent were either her agents or
20 supporters and as such their evidence is suspect and needed corroboration
from independent witnesses. (See **Kamba Saleh Moses v Hon Namfuyangu
Jennifer** (supra))

5 We therefore find that the witnesses in regard to bribery using money were not credible and their evidence was not cogent to prove the offence of bribery by giving money.

It was alleged that the appellant constructed the following wells at Kibwona-Kikorogo, Bulyango I, Kabalye, Nyangahya, Butoobe, Kyangulya,
10 Katasenywa, Rwijere, Bulyango II, Kizindizi, Kijogo, Mirasau/Masaka, Kyamujwara, Kirasa and Kisengenge. We note that evidence was led in respect of Kabalye, Kibwona-Kikorogo and Bulyango by David Kambona, Talemwa Richard, Tumusiime Daniel and Wamani Ronald.

The trial judge found the petitioner's witnesses credible and relied on their
15 evidence to determine the petitioner's case. She found that "the petitioner through the evidence of David Kambona, Talemwa Richard, Tumusiime Daniel and Wamani Ronald proved to the satisfaction of Court that the said Wells were indeed constructed with funding from the appellant/1st respondent. She was convinced that this explains why his name was
20 severally inscribed on each of the wells that were constructed in Masindi Municipality during the election period. This was clearly a well calculated inducement as everyone needs safe clean water".



5 We have perused the above affidavits that the trial Judge relied upon
to reach the conclusion that the wells were indeed constructed with
funding from the appellant and we do not find the said evidence
cogent. The said affidavits did not sufficiently establish that Eng
Aligaruka was an agent of the appellant and was acting with his
10 instructions. We believe that their evidence was an imagination to
make up a case to incriminate the appellant.

S.2 (1) of the PEA provides that an "agent" by reference to a candidate
includes a representative and polling agent of a candidate.

In **Odo Tayebwa v Basajjabalaba Nasser & Anor (SUPRA)**, Mpagi-
15 Bahegaine, DCJ held that "there is no precise rule as to what would
constitute evidence of being an agent. Every instance in which it is
shown that either with the knowledge of the member or candidate
himself a person acts in furthering the election for him, trying to get
votes for him, is evidence that the person so acting was authorized to
20 act as his agent. It is thus any person whom the candidate puts in his
place to do a portion of his task, namely to procure his election as a
Member of Parliament is a person for whose acts he would be liable".



5 With regard to alleged bribery by agents of the appellant, it was not
enough to show that the persons constructing the wells were agents of
the appellant. It was incumbent on the petitioner/respondent to prove
that the appellant authorized, knew of and or sanctioned the
construction, inscription and subsequent erasure of the inscriptions
10 on the wells which she failed to do. On the contrary, it was Kirya
William, chairman of the Water resources Committee in Kibwona Cell
who explained circumstances surrounding the construction, funding ,
inscription and erasure if inscription in respect of Kibwona well. He
stated as follows;

15 3. *That the well (referring to the Kibwona well) was constructed in
1992 and built with walls and has been repaired several times by
money collected from the community*

4. *That we have been collecting money and had started getting
materials in preparation for the repairs as early as January 2016.
20 These were mainly stones and sand.*

5. *That Aligaruka stays in village (sic) and I asked him to assist as
repair the well. That he mobilized other people to work with him.*



5 *The work started in January 2016 and was only completed in February*

6. *That all labour expenses were met out of money raised by the community and we also got contribution from Ben Mulimba and the family of Masindi Municipality sometime in February 2016. That I was surprised to find the words "funded" by Ernest Kiiza some days towards the election date of 18th February 2016.*

10

7. *That I told Aligaruka that not everybody supported Hon. Ernest Kiiza and the community would stop giving us money and could not use it for politics.*

8. *That I asked him to remove the words. That when I returned a day later the words had been removed.*

15

9. *That we did not receive any money from Ernest kiiza.*

Regarding the well in Bulyango I and Kabakagere II, Odaga Godfrey, the Secretary of Water Sources for the said wells deponed that their repairs were funded by money collected from house hold contributions and a generous offer from Mr. Ben Mulimba. He further deponed that the Bulyango II well was not constructed by Aligaruka but by Opari Genesisio. We are of the considered view that the respondent failed to

20



prove that the appellant funded the well repairs. Therefore grounds 3,
5 4 and 6 of the Appeal succeed.

Grounds 5 and 8 were argued together and deal with bribery through
distribution of sports jerseys and a yellow ball. The finding of the
learned trial Judge on these grounds is at page 44 of the judgment
where she held that; *"When the two sides are considered, I find the*
10 *Petitioner's version of events more credible in this regard. The Petitioner*
produced several witnesses to prove this aspect of voter bribery. The 1st
Respondent would only succeed in discrediting their testimonies
through vigorous cross examination otherwise their evidence remained
persuasive and I agree with Counsel for the Petitioner that there was
15 *distribution of football jerseys and a yellow ball. Busingye's allegation*
that he had taken his mother to hospital is not plausible since he
attached no documentary evidence to prove this fact".

The witnesses that the trial Judge held to have proved that aspect of voter
bribery were Jawiya Alex, Bagonza Ronald and Rwakaikara Simon. Upon
20 perusal of the affidavits of the said witnesses, we accept counsel for the
appellant's contention that the evidence of the three were of single
identifying witnesses. While Jawiya and Bagonza talk of events of the same
day (14th February, 2016), the venues were different. Jawiya deponed to



events that took place at Bulyanga Primary School where he claimed an
5 agent of the appellant, a one Okira Benjamin gave a yellow ball to coach
Awucha Emmanuel. On the other hand, Bagonza deponed to events at
Kihuuba Primary School where he alleged that a one Businge Innocent gave
out 14 pairs of shirts and shorts to be worn by the football team. We note
that the said football team was not mentioned and neither did this witness
10 describe who Busingye is.

Regarding the affidavit of Rwakaikara Simon, he deponed to events of 18th
February, 2016 in Kijura North where he alleged that Busingye Innocent
requested him to get all residents in his village to receive jerseys (kabali one)
yellow with black stripes but the one for the goal keeper was black. We find
15 this particular affidavit unreliable because all residents of this village are
portrayed as being part of a football team (which is not mentioned) with one
goal keeper who is also not mentioned. We find this affidavit to be of little
evidential value.

In as much as we accept counsel for the respondent's submission that one
20 can bribe a community, the law is that the person bribing and the one being
bribed must be known in order to affect the elections. The people who are
said to have received the jerseys and balls were footballers whose details



were not known. Evidence that they were registered voters needed to be
5 adduced (**See Kwijuka case** (supra)).

For the offence of bribery through donation of sports jerseys and a ball to be
complete, it was imperative to prove by evidence that the persons who
received the items were registered voters. We find the three affidavits
tantamount to evidence of a single witness which counsel for the appellant
10 rightly submitted, needed corroboration.

Further, we find that by holding that Businge's allegation that he had taken
his mother to hospital as not being plausible since he attached no
documentary evidence to prove this fact, the trial Judge shifted the burden
of proof to the appellant. It is settled law that the petitioner in an Election
15 Petition has the burden to prove their case, not the respondent. Even where
the respondent raises the defence of alibi, as was the case with Businge, the
Petitioner still had the burden to place the witness at the scene.

We are of the considered opinion that the actual act of bribery must be
described in sufficient details for the court to reach a determination that
20 indeed such bribery took place. There must be sufficient evidence to
establish a nexus between the person giving the bribe and either the 1st
respondent/appellant or his known agent who must be proved to have been
acting with the appellant's knowledge or with his approval. It is only then



that the requirements of Section 68 of the PEA would be met. We find that
5 this was not so in this case.

Therefore, grounds 5 and 8 of the Appeal succeed.

Ground 2 concerned expunging the appellant's supplementary affidavits
from the record for having been illegally filed. In this respect, the trial Judge
held that counsel for the appellant cannot seek to hide under **Article 126**
10 **(2) (e)** of the Constitution in a matter where he clearly had an opportunity to
seek leave of court and more so where the documents in issue were
systematically avoided in his submissions. For that reason, court did not
consider the offending documents as part of the record.

We note from the judgment that the petitioner's submission was that
15 S.111-112 and 113 of the Evidence Act were to the effect that once
affidavits in reply and affidavits in rejoinder are filed, then one can't
file further documents without the leave of court. However, upon
reading the above provisions of the law, we find nothing related to
affidavits. Further, S.1 of the same Act provides that the Evidence Act
20 is not applicable to affidavits.

Be that as it may, counsel for the appellant rightly submitted all evidence at
the trial of an Election Petition is required to be adduced by affidavits.



Cross-examination of the deponents may be permitted only with the leave of
5 court as stipulated under Rule 15 of the **Parliamentary Elections (Interim
Provisions) (Election Petitions) Rules.**

Rule 15 which deals with evidence at trial provides that all evidence at the
trial in favor of or against the Petition shall be by way of affidavit read in
open court. With the leave of the court, any person swearing an affidavit
10 which is before the court may be cross-examined by the opposite party and
reexamined by the party on behalf of whom the affidavit is sworn. The court
may, of its own motion, examine any witness or call and examine or recall
any witness if it is of the opinion that the evidence of the witness is likely to
assist it to arrive at a just decision. A person summoned as a witness by the
15 court under subrule (3) of this Rule may be cross-examined by the parties to
the Petition.

Rule 17 of the same rules provide that the Civil Procedure Rules is
applicable to Electoral Petitions. It provides that the practice and procedure
in respect of a Petition shall be regulated, as nearly as may be, in
20 accordance with the Civil Procedure Act and the Rules made under that Act
relating to the trial of a suit in the High Court, with such modifications as
the court may consider necessary in the interests of justice and expedition
of the proceedings.



The CPR which are applicable to election Petitions does not specifically
5 provide guidance on filing of Supplementary Affidavits, but rather provides
for the filing of subsequent pleadings generally under Rule 18.

Rule 18 which deals with subsequent pleadings allows a plaintiff to file a
reply within fifteen days after the defence or the last of the defences has
been delivered to him or her, unless the time is extended. No pleading
10 subsequent to the reply shall be filed without leave of the court, and then
shall be filed only upon such terms as the court shall think fit. Where a
counterclaim is pleaded, a defence to the counterclaim shall be subject to
the rules applicable to defences.

As soon as any party has joined issue upon the preceding pleading of the
15 opposite party without adding any further or other pleading to it, or has
made default in pleading, the pleadings as between those parties shall be
deemed to be closed, and all material statements of fact in the pleading last
delivered shall be deemed to have been denied and put in issue.

We find that the trial Judge was right to have struck out the appellant's
20 supplementary affidavits in reply to the respondent's rejoinder. Be that as it
may, we are of the considered view that having rejected the appellant's
supplementary affidavits in reply to the rejoinder, the trial Judge should
have severed the new evidence adduced in the respondent's affidavits in



rejoinder in the interest of justice.

5 Therefore, ground 2 of the Appeal fails.

Ground 10 is that the learned trial Judge erred in law when she expunged offending parts of the respondent's witness affidavits during submissions and/or in her judgment. Counsel for the appellant took issue with Susu Media's affidavit where she deponed that they were given denominations of
10 Shs 3000/=. He contended that her affidavit was full of contradictions and should have been rejected all together and that the **Besigye case** (supra) was not applicable to her affidavit. The trial Judge held that *"I deduce that the agents were acting for and on behalf of the 1st Respondent. I equally find Mugisha's evidence concerning voter bribery well corroborated by other
15 witnesses like Susu Media. Her evidence proves that bribery using money was not a one off incident. Whereas she did not state how much she was given, her evidence goes to prove that there was distribution of money as a way of bribing voters. I am cognizant of Counsel Sekabanja's questioning of Media's evidence that she saw a Ugx.3000 shilling note. This part of her
20 Affidavit can be expunged and I accordingly do so"*.

We do not accept counsel for the appellant's submission that **Besigye's case** is not applicable to Susu Media's case or that it should not have been expunged during submissions/judgment. In the **Besigye case** (supra), the



Supreme Court held that "an affidavit should be rejected in its entirety
5 because it is vitiated by a defective aspect of the document if there are parts
of the affidavit which conform to O.17.r3 of the C.R.R or the affidavit is
otherwise valid. Defective parts of affidavits should be severed from valid
ones. This in my view should be done in the interest of substantive justice
without undue regard to technicalities. Courts do accept and act on parts of
10 oral evidence from witnesses who personally give testimony in Court, where
some evidence is credible or otherwise conform to legal requirements and
reject those which do not. The same consideration should be given to evidence
by affidavit. To me, there would appear to be no proper reason for treating
evidence by affidavit differently. A part or parts of an affidavit which are
15 defective should be severed from the part or parts which is credible or conform
to legal requirements. While the valid part should be admissible evidence, the
defective part should be rejected. This should be done in the interest of
administering substantive justice without undue regard to technicalities. In
reaching this conclusion the Court referred to its earlier decisions in; **Motor**
20 **Mart Application No. 6/99 (SCU) (unreported), Reamation Ltd vs.**
Uganda CP-operative Creameries Ltd., Civil Appeal 7/2000,
(SCU)(unreported), Nandala v Father Lyding 1963 EA 706 Mayers and
Another VS Akira Ranch 1969 E.A. 169- and Zola VS Ralli (1969)
E.A.691."



5 In light of the above decision, we uphold the trial Judge's decision to expunge Susu Media's evidence which was untruthful. Accordingly ground 10 of the Appeal fails.

For ground 9 of the Appeal, the trial judge is faulted for shifting the burden and lowering the standard of proof in determining the alleged commission of
10 illegal practices by the appellant.

It is settled law that the burden of proof in Election Petitions lies on the petitioner and the standard of proof is on a balance of probabilities.

In **Paul Mwiru v Hon. Igeme Nabeta and Ors Election Petition Appeal No.06/11** this Court held that Section 61(3) of the PEA sets the standard of
15 proof in Parliamentary Election Petitions. The burden of proof lies on the petitioner to prove the allegations in the Petition and the standard of proof required is proof on a balance of probabilities. The provision of this subsection was settled by the Supreme Court in the case of **Mukasa Harris v Dr Lulume Bayiga (supra)** when it upheld the interpretation given to the
20 subsection by this Court and the High Court.



The issue regarding shifting of the burden of proof in regard to Businge
5 Innocent has already been resolved above and we shall not belabor to
discuss it here.

With regard to Kamanyire Richard and Isingoma Edward, the trial Judge
held that the two were among those who distributed salt and this piece of
evidence remained uncontroverted. Further, that the petitioner managed to
10 prove this aspect of voter bribery to the satisfaction of Court. We are of the
considered view that the trial Judge did not shift the burden of proof to the
appellant but failed to properly evaluate the evidence before her because the
affidavits of the appellant and Santa Awino Oryema controverted the above
evidence.

15 We further find that the trial Judge erred in law by selectively applying the
standard of proof in respect of the parties to this suit. This was evident
when counsel for the appellant challenged the fact that the second set of
photographs of the well(s) taken by David Kambona were not availed to
Court and the trial Judge held that she had carefully considered the
20 submissions of counsel pertaining to this witness. His concern was that
Kambona in his 1st affidavit deponed that he took photographs of the well at
Kabalye yet in his 2nd Affidavit, he deponed that he took photographs of all
the Wells. She agreed with counsel that this was contradictory. However she



found that this was a minor contradiction as the fact remains that the
5 witness remained on track when he stated that he took photographs of the
well(s). To the Judge, the major contradiction would be that he never took
photographs which is not the case considering the evidence at hand. That
the mere fact that he did not attach photographs taken on the second
occasion cannot be the basis for rejecting his evidence.

10 However, she rejected the evidence of the appellant's witness Businge
Innocent because he failed to attach documentary evidence to prove his
alibi. She held that Busingye's allegation that he had taken his mother to
hospital was not plausible since he attached no documentary evidence to
prove this fact.

15 We are of the considered view that the same standard of proof ought to have
been applied while evaluating the evidence of both parties, which the trial
Judge failed to do.

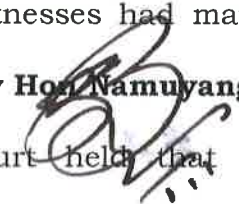
Regarding the lowering of the standard of proof, counsel for the appellant's
submission was that the trial Judge did not follow the law of agency in
20 electoral matters which required that for a candidate to be found liable for
the acts of his/her agent(s), the agent(s) must be named and it must be
proved that the said agent(s) was/were acting with the knowledge and
consent of the candidate.



From Jawiya Alex's affidavit, he mentioned Okira Benjamin as being an
5 agent of the appellant and in respect of bribery by constructing a well, all
that the said Okira did was to board the truck with some boys shouting
"Ernest oyee, oyee, oyee" from behind and they headed to the well. In
paragraph 9, he deponed that he kept on visiting the well and work was
concluded on 16/ 2/2016, all the time Ernest's agents went on telling
10 people how Ernest had built a well for them that he cares more about them.
However, he does not mention the said agents.

As mentioned earlier, Rwakaikara Simon and Bagonza Ronald who allege
that Businge Innocent bribed the youths and footballers in their affidavits
they do not state that Businge was an agent of the appellant and that he
15 acted with his knowledge or consent.

Consequently ground 9 of the Appeal succeeds.

Ground 1 of the Appeal relates to evaluation of evidence. Counsel for the
appellant took issue with the affidavits of the following witnesses; Bigirwa
Dan, Kambona David, Musana Robert, Wamani Ronald, Jawiya Alex and
20 Susu Media. His main concern was that the above witnesses had many
contradictions in their evidence. In **Kamba Saleh Moses v Hon. Namuyangu
Jennifer Election Appeal No.0027 of 2011**,  Court held that in
determining election matters involving bribery allegations, the law requires

caution on the part of court to subject each allegation of bribery to thorough
5 and high level scrutiny and to be alive to the fact that in an Election
Petition, in which the prize is political power, witnesses may easily resort to
telling lies in their evidence, in order to secure judicial victory for their
preferred candidate.

Bigirwa Dan deponed in his affidavit in support that cement was delivered
10 on 20th December, 2016 at church by one "Happy" a resident of Kiisita and a
known campaign agent of Hon. Ernest Kiiza in a tipper, white in colour
while in rejoinder, he stated that cement was brought by Businge, Ernest's
agent in an Ipsum UAP series about 2:00pm. Further, he stated that he had
gone to prepare for Christmas carols when he met Mugisa Dickson with 5
15 bags of cement who told him that Ernest Kiiza had delivered on his earlier
promise; while in rejoinder, he said he was coming from digging his land
and was passing at the church when he saw the Ipsum. We find the
evidence of Bigirwa unreliable because of the several contradictions therein.
The trial Judge should not have relied on it to conclude that there was
20 bribery.

Musana Robert deponed that he was offered a casual job of a "porter" at the
site at Kabalye Settlement. That after construction, they inscribed the words
"Funded or donated by Hon. Ernest Kiiza Apuuli" on the wells constructed.



He stated that after realizing that this had now turned into a voter trap, he
5 immediately called Abdul a known agent of Kabakumba Masiko who
immediately came and took photos of the inscription which were attached.
On the other hand, Kambona David deponed that he took photos of Kabalye
settlement well, Kibwona kikorogo well and Bulyango well. There is a doubt
as to the person who took the photographs. Further, Kambona deponed that
10 it is Aligaruka who took him to the three wells where he took photos. We
find this evidence unbelievable because it is unlikely that someone who was
described by others such as Talemwa Richard and Tusiime Daniel as an
agent of the appellant would be the same person to take the opposite party's
supporters/agents to go and gather evidence against their candidate.

15 Musana Robert deponed that it was the appellant through Eng Aligaruka
David that instructed them to erase the inscription and Kambona David
stated that Musana Robert informed him that the inscription was removed
on the orders of Ernest Kiiza. This makes Kambona David's evidence
hearsay. The photographs to show that the inscriptions were erased though
20 mentioned in Musana's affidavit were not attached. The above allegations
were denied by the appellant and Odaga Godfrey, Secretary of the Water
source Committee of Bulyango I Cell, Kabakagere I and II.

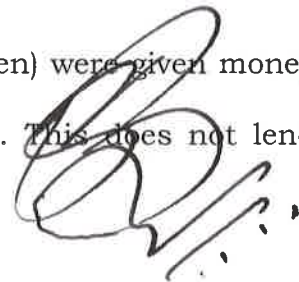


In Jawiya Alex's affidavit in rejoinder, he does not mention that the driver of
5 the tipper truck stopped an 8 year old to ask for directions to Ben Okira's
residence. We are of the considered view this was a minor omission.

In Wamani Robert's affidavit in support, he deponed that he took one trip of
sand to Kabalye settlement while in rejoinder; he stated that he took two
trips. This casts doubt as to the number of trips that he took but we agree
10 with the trial Judge that this was a minor contradiction.

In Biingi Moses' affidavit, he deponed that Santa ran away on a motorcycle
Reg No.UAE 350W yet during submission, counsel for the petitioner
submitted that the number plate belonged to a car. We are of the considered
view that this tantamounts to evidence from the bar which Court should not
15 have relied on.

In Susu Media's affidavit, she deponed that they (women) were given money
but she did not state the amount that they received. This does not lend
credence to her evidence.



Regarding counsel for the appellant's concern about the trial Judge's notes
20 at page 676 of the Record of Appeal, we are of the view that they cannot be



relied on to fault the Judge. We find that it was her analysis behind the scene which eventually culminated into a judgment.

We are of the considered view that if the trial Judge had properly evaluated all the evidence on record, she would have reached a different conclusion.

Therefore, ground 1 of the Appeal succeeds.

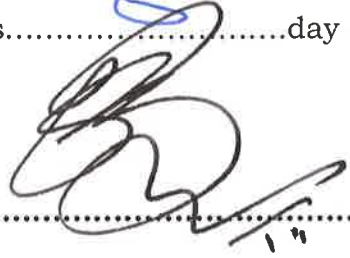
In light of our holding on grounds 1, 3, 4, 5, 6, 7, 8 and 9, the Appeal substantially succeeds.

In the result, we make the following declaration and orders;

1. The decision and orders of the trial Judge are hereby set aside.
2. The appellant is the validly elected Member of Parliament for Masindi Municipality Constituency.
3. The respondent shall bear the costs of the Appeal.

We so order.

Dated this 5th day of May 2017



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

8/5/2017
 Geoffrey Komabech for holding brief for Wandera Ogilo for Appellant
 Eric Sabiti
 Faisal Dhillani for Respondent also holding brief for Kumbale & both parties present



5 HON. MR. JUSTICE BARISHAKI CHEBORION, JA



HON. JUSTICE ALFONSE OWINY DOLLO, JA

8/5/2017

- Geoffrey Komakech holding brief for Wander Ogal for Appellant
 - Faisal Dufanre for Respondent
and also holding brief for Kinobe
- Both parties present
Annex c/c

51 | Page

ci. Judgment read in Court

