

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT LIRA

ELECTION PETITION NO. 002 OF 2016.

OKELLO OKELLO JOHN BAPTIST=====PETITIONER

=VERSUS=

1. AMOURU PAUL

2. THE ELECTORAL COMMISSION =====RESPONDENTS

BEFORE HIS LORDSHIP JUSTICE WILSON MASALU MUSENE

JUDGMENT

This judgment arises out of an election petition filed by the Petitioner, Okello Okello John Baptist (herein referred to as petitioner), against Amour Paul (1st respondent) and the Electoral Commission (2nd respondent).

The constituency in question is Dokolo North Constituency, in Dokolo District.

The Petitioner and the first respondent were the only two candidates for election to the Parliamentary seat for Dokolo North Constituency, Dokolo District. The Petitioner polled **14,978 votes** as opposed to the 1st respondent's **15,442 votes**. The second respondent, upon the basis of that result, declared the First Respondent winner of the Parliamentary seat and published his name on the Gazette. The First Respondent has since assumed that seat in Parliament.

The Petitioner filed this Petition, in Court, upon a number of allegations or grounds. Briefly, he alleged:-

- That electoral process in Dokolo North Constituency was not conducted in compliance with the provisions of the Parliamentary Elections Act, 2005 (PEA, No.17 of 2005).
- The failure of conduct of the elections in compliance with the provisions in the Parliamentary Elections Act affected the result of the election in a substantial manner.
- That the First respondent personally or through his agents, with his knowledge, consent or approval, committed numerous election offences and illegal practices.

The Petitioner seeks, from this Honourable Court, Orders that:-

1. There was non-compliance by the 2nd Respondent with the Parliamentary Elections Act relating to elections in Dokolo North Constituency.
2. The First Respondent, personally, and/or with his knowledge, consent or approval committed illegalities under the Act and electoral offences that affected the result of the election in a substantial manner.
3. The results of 8 polling stations in Dokolo North Constituency were declared in non-compliance with the law hence affecting the result in a substantial manner.
4. The Election of the First Respondent as Member of Parliament Dokolo North Constituency be set aside and a new election held.
5. The Respondent pays the cost of this Petition.

The Frist Respondent, in his answer to the petition, denied that the election was conducted in contravention of the provisions Parliamentary Elections Act, No 17 of 2005. He contended that if any contravention of the Parliamentary Elections Act No. 17 of 2005 had occurred, then it did not affect the result of the election in a substantial manner.

The First respondent denied that he personally or his agents with his knowledge, consent or approval, committed any election offences or illegal acts.

The Second Respondent in its answer also denied all the allegations made against it in the petition. It contended that the election of the Member of Parliament, for Dokolo North Constituency, was conducted in accordance with the provisions of the Constitution of the Republic of Uganda, 1995, the Electoral Commissions Act Cap. 140 (as Amended), and the Parliamentary Elections Act (as Amended).

ISSUES:-

Three issues were framed for resolution, to wit;

1. Whether there was non-compliance by the 2nd Respondent in relation to elections in Dokolo North Constituency and if any non-compliance affected the results of the elections in a substantial manner.
2. Whether the 1st Respondent personally, or through his agents, with his knowledge, consent or approval committed any illegal practices or electoral offences.
3. What remedies are available to the parties?

Before I outline and discuss the submissions by the parties, I shall briefly state on whom the burden and standard of proof lays in Elections Petitions of this nature and the standard of proof. The election of a candidate as a Member of Parliament shall only be set

aside on any of the grounds set out in **section 61 of the Parliamentary Elections Act, No. 17 of 2005**. Such grounds have to be proved to the satisfaction of the court.

For emphasis, the grounds and for purposes of this petition are:-

“61 (1) (a) non-compliance with the provisions of this Act relating to elections, if the court is satisfied there has been failure to conduct the elections in accordance with the principles laid down in those provisions and that the non-compliance and the failure affected the result of an election in a substantial manner.

***(b) That a person other than the one elected won the elections;
or***

That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval or

(d).....

And the duty is on the petitioner who bears the burden of proof.

In ***Presidential Election Petition No.1 of 2001, Retired Col. Dr. Kizza Besigye Vs Kaguta Museveni and Electoral Commission***, the Supreme Court Justices were unanimous that the burden of proof must lie on the Petitioner as the Petitioner is the one who wants Elections to be annulled. Furthermore, and by virtue of sections 101-102 of the Evidence Act, Cap. 6 Laws of Uganda, the party who asserts the Existence of certain facts on which Judgment is sought to be based and in the absence or failure to prove such facts, such party would fail, that is the party that bears the burden of proof.

On the **Standard of Proof**, the law is clearly stated under section 61 (3) of the Parliamentary Elections Act. It reads:-

61 (3) Any ground specified in the subsection (1) shall be proved on the basis of balance of probabilities.

In ***Miller vs Minister of Pensions [1947] 2 all E.R. 372***, Denning J. as he then was expresses the civil standards of proof as follows:-

“It must carry reasonable degree of probability but not so high as required in criminal cases. If the evidence is such that the tribunal can say, “we think, it is more probable”, then it is discharged, but if the probabilities are equal it is not.”

That is the law and applicable. Even Supreme Court of this country had the occasion to discuss the same principle in another case of ***Mukasa Anthony Harris vs Dr. Michael Phillip Bayiga Lulume Election Petition Appeal No. 18 of 2007. Justice Tsekooko JSC, at page 13 reiterated as follows:-***

“It is settled law that the burden of proof in an Election Petition lies on the Petitioner who is required to prove every allegation contained in the Petition to the satisfaction of court. The Standard of Proof is a matter of Statutory regulation by sub-section 3 of section 61 of the Parliamentary Elections Act, 2005.”

Lastly, in ***Election Petition Appeal No. 9 of 2001, Masiko Winifred Komuhabgi and Babihuga J, Winnie***, emphasis was that the petitioner has a duty to adduce credible or cogent evidence to prove his allegation at the required standard of proof.

So bearing in mind the above stated legal position, I shall now apply the same in the context of the present Election Petition or directly elected Member of Parliament for Dokolo North Constituency.

ISSUE NO.1: Whether there was non-compliance the by second respondent in relation to elections in Dokolo North Constituency any if any non-compliance affected the results of the elections in a substantial manner.

As far as non-compliance with the Electoral law by the second respondent is concerned, I shall deal with the same under the sub-headings of:-

- (a) Failure to include 254 votes cast, in favour of the Petitioner at Amonoloco Polling station.
- (b) Failure to account for 1,070 ballot papers supplied to Alenga Catholic Church Polling station.
- (c) Declaring results of eight (8) polling stations in Dokolo North with unsigned Declaration of Results Forms by the Presiding Officers.
- (d) The invalidation of 1,617 votes whether it was unlawful or not.

(a) Failure to include 254 votes cast in favour of the Petitioner at Amonoloco polling station.

The submissions by counsel for the Petitioner was that there was non-compliance with the Parliamentary Elections Act by the second Respondent when its agent, the Presiding Officer transmitted the results for Amonoloco Primary School polling Centre without accompanying them with Declaration of Results Forms. And under paragraph (9) of the Petitioner's Affidavit in support of Amended Petition, it is stated that the results of Amonoloco Primary School polling station were rejected by the Returning Officer on grounds that it never had copies of the Declaration Form accompanying it from the Polling station. The same information is contained in the affidavit of **Muge Nelson**, a member of the campaign team of the Petitioner.

The relevant paragraphs of Muge Nelson's affidavit are as follows:-

31. "That our agent from Amonoloco Primary School Polling station had given to us fully signed Declaration of result (DR)

forms for Amonoloco where Okello Okello had polled 254 votes.”

32. “That when the envelope arrived later from Amonoloco, the Returning Officer declined to include it in the Final Tally of Results.”

33. “That the duty to include (DR) form during the return of results to the Tally Centre is the duty of the second Respondent.”

In answer to the above, Mr. Ewal Benjamin, the Returning Officer of Dokolo District depones in his affidavit **Paragraphs 4,5,6,7 and 10** that the election was proper, free and transparent. And under paragraph (7), Mr. Ewal Benjamin states that the Petitioner and first respondent agreed to declare the results minus results from Amonoloco Primary School Polling station.

The second respondent on this crucial issue of Amonoloco submitted that the second respondent’s Returning Officer explained the circumstances under which the Petitioner’s 254 votes from Amonoloco were left out.

In my view, no explanation would be acceptable in view of clear provisions of **Section 50 (1) (c) of the Parliamentary Elections Act** which provides that each presiding officer shall fill the necessary number of copies prescribed form for the Declaration of Results and one copy shall be enclosed in an envelope supplied by the Electoral Commission for the purpose, sealed by the Presiding Officer and delivered to the sub-county Headquarters of Division Headquarters together with the report black book for transmission to the Returning Officer.

The law makes it an offence under section 50 (2) for a Presiding Officer who fails to cause to be posted a copy of the duly filled and signed Declaration of Results Form in contravention of subsection 1 (c). So once an offence had been committed, it was no excuse that the parties to an election cannot by themselves agree to change the

position of the law. A similar position was discussed in the case of **Joy Kabatsi Vs Kawooya and Electoral Commission, Election Petition Appeal No. 25 of 2007**, where **Mulenga JSC, (RIP)** held that an agreement between the parties to appoint the Returning Officer for Ssembabule District in contravention of the Constitution and the Parliamentary Elections Act could not remedy the illegality.

I therefore, agree with the submissions by Counsel for the Petitioner that the Petitioner has proved that the Presiding Officer of Amonoloco Primary School Polling centre committed an offence under section 50 (2) (a) of the Parliamentary Elections Act and as such it is an illegality. And as was held in **Makula International vs His Eminence Cardinal Emmanuel Nsubuga [198] HCB 11**, courts cannot shut their eyes to the illegality because once an illegality is brought to the attention of court; it overrides the questions of pleading. The illegality committed by the Presiding Officer of Amonoloco Primary School polling station in this case cost the petitioner 254 votes, which is quite a substantial number considering that the margin between the winner and the loser was only 464 votes.

I therefore, reject the submissions by Counsel for the second Respondent that the Returning Officer decided to make some logical conclusions as he discovered that even if he decided to add the 254 votes that the Petitioner got from Amonoloco polling station, that the first Respondent with a total of 15,442 votes would beat the Petitioner's 15, 132 votes. The rejection was wrong particularly in view of the holding of Justice Remmy Kasule in the case of **Hon. Oboth Markson Jacob vs Otaala Emmanuel, Election Appeal No. 38 of 2011** that the results should not be rejected merely because a copy was not deposited in the box. That is because the results would have been already announced at the polling station in the presence on a candidate's agent.

My conclusion therefore is that the exclusion of **254 votes** belonging to the Petitioner where the difference was **464 votes** affected the results in a substantial manner considering other

matters to be discussed herein after. The winning margin would have not only reduced, but the exclusion puts the victory of the first respondent in doubt.

(b) Failure to account for 1,070 Ballot Papers supplies to Alenga Catholic Polling Station.

Counsel for the Petitioner submitted that section 27 of the Parliamentary Elections Act (PEA) lays down the procedures for distribution materials. That under that section, every Returning Officer shall within 48 hours prior to the polling day furnish each Presiding Officer in the District with:-

(a) A sufficient number of Ballot Papers to cover the number of voters likely to vote at the polling station for which the presiding officer is responsible.

(b) A statement showing the number of Ballot Papers supplied under paragraph (9) with the serial number indicated in the statement:

Counsel for the Petitioner added that it was intended to ensure that there is transparency of the election process. However, counsel for the petitioner referred to the Petitioner's Affidavit, Paragraphs, 21, 22, and 23, whereby whereas at Alenga Catholic Church polling station the total number of Ballot Papers supplied by the Electoral Commission was 2,400, there was a discrepancy in the number used, unused and the total number supplied. The relevant extracts from the Petitioner's Affidavit are:-

21. "That meeting of 22nd February, 2016, it also came out clearly that whereas in Alenga Catholic Church Poling station 2,400 Ballot papers were issued and only 535 Ballot papers were used, the second Respondent declared only 795 as unused, leaving 1,070 Ballot papers un accounted for (a copy of Declaration of Results Forms for Alenga attached as Annexure "OJB-C")."

22. “That the missing Ballot papers are substantial in number and their absence raises doubts as to whether the elections were conducted in transparent and honest manner.”

23. “That at the same meeting it also came to light that whereas 450 Ballot Papers were issued to AweloWot Primary School “B” Polling Station and 345 Ballot Papers used, the unused Ballot papers were more by 22 Ballot papers whose source was not known.”

Counsel for the Petitioner submitted on the premise that where one subtracts 535 which is the total number of used ballot papers from 2,400 supplied to Alenga, the difference is 1,865 and not 795 as shown on the DR forms and that the lingering question was where the other 1,070 Ballot papers went.

In reply, the second respondent in paragraph 11 of Ewal Benjamin’s affidavit contends that this was a mere miscomputation which did not affect the Petitioner as he won at Alenga Catholic Church with 289 votes as opposed to 192 votes polled by the first respondent.

Learned counsel for the First Respondent also submitted that the Returning Officer of the Second Respondent was cross-examined on this area and he clearly stated that it was a “miscomputation” they added that it was just an arithmetical error and that the Returning Officer was clear that they normally receive excess Ballot Papers per polling station to cater for any votes that may be spoilt.

With all due respect to learned counsel for the first and 2nd respondents, it does not matter that it was the petitioner who won at the Alenga Catholic Polling centre with 289 votes as opposed to 192 polled by the 1st Respondent **but what is in issue is process whereby 1,070 Ballot Papers were unaccounted for in such a hotly contested election where the margin between the First Respondent and Petitioner was only 464 votes.** Such a matter cannot be taken lightly as a mere miscalculation because it casts a lot of doubt as far as the whole election process in Dokolo North Constituency was concerned. And one cannot say that these were

mere miscalculations since the 2nd Respondent never came out to disown the Declaration of Result Forms for Alenga Catholic Church as the official record of election for that Polling Station.

In fact, during cross-examination the Returning Officer admitted that the figures on the Declaration of results Forms for Alenga Catholic Church represented the official record for that particular Polling station.

This is not to forget the 22 un accounted for Ballot papers recorded at Awelo Wot Primary School “B” Polling station as stated under paragraph 23 of the Petitioner’s affidavit.

Having conceded that the DR forms for Alenga Catholic Church Polling Station remains the official record, and whed added to the 22 excess ballot papers from Awero Wot Primary School “B” Polling station that total number of Ballot Papers in Dokolo North Constituency which have not been accounted for comes to a staggering **1,092**.

As already stated, that figure was too high compared to the margin of 464 between the 1st Respondent and the Petitioner and was definitely substantial.

I, accordingly reject the submissions by Counsel for 1st Respondent that the Petitioner does not show in his affidavit that the 2nd Respondent mismanaged those 1,070 for Alenga Catholic Church as well as 22 for Awero Wot Primary School “B” for the benefit of the 1st Respondent.

The crucial question is where are those 1,070 Ballot Papers and 22 respectively and what purpose did they serve? As already noted failure to account for those high numbers of Ballot Papers in the circumstances casts shadow of deliberate dishonesty on the 2nd Respondent in the conduct of election for Dokolo North Constituency and fails the test of transparency that Parliamentary Elections are expected to exhibit.

In my humble view, failure to account for the 1,070 Ballot Papers for Alenga Catholic Church Polling Station was a highly significant number and it affected the results of the election in a substantial manner given the winning margin of 464 votes. This court cannot in such circumstances leave the election of the 1st Respondent to stand.

(c) Declaring results for 8 polling stations in Dokolo North Constituency with unsigned Declaration of Results Forms by the Presiding Officers.

Counsels for the Petitioner's submissions were that the results for the 8 polling stations in Dokolo North were declared without signed DR forms. He emphasized that signing of DR Forms is a Constitutional requirement under Article 68 (4) of the Constitution and sections 47 and 50 of the PEA.

The Polling Stations in question were Abengo Primary School, Tetugu Primary School, Awongikobo Market, Kima PAG church, AcanPii Primary School, Apor Catholic Church, Bar Opila and Otima PAG.

Counsel for the 1st Respondent submitted that the 2nd Respondent has duly filed certified copies of the DR forms, duly signed by the agents of the Respondent and the Presiding Officers.

Counsel for the 2nd Respondent added that there was an affidavit sworn by the Returning Officer and filed in court on 24/05/2016 to the effect that the DR forms from 8 polling station complained of were signed. The DR forms from the 8 Polling Stations were marked as **Annexure "A"**.

However, counsel for the Petitioner raised a point of law regarding the competence of the said Affidavit, to the effect that the Affidavit had **unsealed Annexure** in violation of Rule 8 of the Commissioner for Oaths Rules. Rule 8 aforesaid provides ***"all exhibits to Affidavits shall be securely sealed to the Affidavits under the***

Seal of the Commissioner for Oaths and shall be marked with serial letters of identification.”

Counsel for the 1st Respondent in their submission stated that failure to mark the said Annexure in an irregularity which can be cured under Article 126 (2) of the Constitution and that the Annexures are public documents. With respect, I don't agree with the submissions by counsel for the 1st Respondent on that point because the wording of Rule 8 is mandatory and even the Supreme Court in ***Utex Industries vs Attorney General, Supreme Court Civil Application No. 52 of 1995***, on Article 126 (2) (e) held it was not the intention of the makers of the Constitution to do away with the Rules of Procedures as the Rule of Procedure are hand maiden justice.

In ***Ateker Ejalu vs Ramza Ral Hashan Mitha, Soroti HC MISC. APP. No.07 of 2007***, my brother Musota J held:-

“Further to this, the Affidavits refer to the Annexures which are not identified and marked as required by law. This offends Rule 8 of the schedule to the Commissioner for Oaths, Advocates Act. The omission renders the entire Affidavit and Annexure bad in law and incompetent.”

I entirely agree with the ruling of my brother Musota J and therefore uphold the point of law raised by Counsel for the Petitioner. The Annexure is accordingly disregarded.

Having disregarded the Annexure, then I find and hold that non-signing of the DR forms in the 8 Polling stations before announcing results was non-compliance with **Section 47 (5) of the PEA**.

The effect of unsigned DR form was considered by the Supreme Court in ***Kakooza John Baptist Vs Electoral Commission and Yiga Anthony, Election Petition Appeal No.11 of 2007***, where Katureebe JSC as he then was, had this to say:-

“Clearly, the Declaration of Result Form must be signed at the very least by the Presiding Officer and their candidates or the

agent must retain a copy. A signed Declaration of Result Form becomes the basis for the immediate Declaration of Result at the Polling Station. An unsigned DR Form cannot be validly used as a basis for Declaring Results.”

And in my view, that affected the results in a substantial manner because 8 polling stations cannot be taken for granted.

Learned counsel for the 1st Respondent on page 19 of their submissions stated that even if the results of the 8 polling stations were discounted, that the Petitioner could lose **1,418 votes** while the 1st Respondent could lose **1,308 votes**. And that in the end, the first Respondent could win with a bigger margin of 564 votes.

With respect, I totally disagree with the above reasoning because what is at stage is whether there was non-compliance with the law or not. It is a matter of the results of 8 polling stations when DR forms had not been signed by the Presiding Officer. The Court therefore, finds and holds that the 2nd Respondent or their officials acted in contravention of the Constitutional Provisions and the Parliamentary Elections Act (Section 47 (5)). That was another flaw in the election process which affected the results in a substantial manner.

(d) Invalidation of 1,617 votes, whether it was unlawful or not.

Section 49 of the PEA provides:-

1. A vote cast is invalid if;
 - (a) The Ballot Paper is torn in two or more parts.
 - (b) Where the voting is by placing a mark of choice on the ballot paper:-
 - (i) The Voter marks the Ballot Paper with a mark other than the authorized mark of choice. Or
 - (ii) Places the authorized mark of choice on the Ballot paper in such a way that the choice of the voter cannot be reasonably ascertained.

- 2. A Ballot Paper shall not be taken as invalid under this section irrespective of where the authorized mark of choice can be reasonably ascertained.**

The Petitioner in ground 3(a) of the Petition complained of invalid votes. And several Affidavits were attached to the Petition on the issue of invalid votes. They included that of Muge Nelson and Charles Ochero Okello.

The complaints were to the effect that the valid votes for the Petitioner were counted as invalid and that it amounted to non-compliance by the 2nd Respondent during the counting of votes at most polling stations.

It was the contention of the Petitioner that such votes which were declared invalid were within the ambit of section 49 (2) of the PEA and as such should not have been rejected.

I shall in this regard refer to the Affidavit of Muge Nelson in support of the amended Petition dated 12th April 2016. Paragraphs (7), (9), (10) and (11) are as follows:-

“7. That I was later informed by our campaign agent from Apye Polling centre “A” Mr. Okello Basil that he witnesses a number of Ballot Papers being unreasonably rejected by the Returning Officer.”

“9. That the Returning Officer and Polling Assistant for Apye Polling station “A” refused to consider his complaint and went on to declare as invalid any tick or mark of choice not placed in the designated box.”

“10. That as a result, a number of votes totaling to 74 were rejected as invalid, yet they were valid.”

“11. That this was done in total disregard of the law regarding invalid and valid votes.”

Charles Ochero Okello in his affidavit in support of the amended Petition avers in paragraphs (12), (13) (14) and (19) that during the

counting of votes at Alenga Catholic Church Polling Station, the presiding officer and Polling Assistants declared many votes as invalid despite the attention he drew to them as samples of valid and invalid votes. He added in his Affidavit that the samples were contained in a book entitled **“Voters Education for Effective Participation of Uganda Citizens in Electoral Process.”** He concluded that they rejected the advice and one could reasonably discover which candidate the voters preferred.

Another Affidavit (out of many on record) was that of Engaw Michael Labito of Aweiwot trading Centre polling station where 36 votes were declared invalid as illustrated in paragraph (5), (6), (7), (8), (9) and (10) of his Affidavit.

According to Counsel for the Petitioner, the narrative in the many affidavits in the support of the Petition with regard to alleged invalid votes was a manifestation of non-compliance by the second Respondent during the counting of votes at most polling station in Dokolo North Constituency. On the other hand, Counsel for the first Respondent submitted that whereas the Petitioner had his agents and supervisors at all the polling stations *vis a vis* the number of registered voters who actually voted that day. He also added that the agents of the Petitioner endorsed on the DR Forms in the places complained of without any complaints thereby validating the results. Counsel added that in the same DR Forms, there is provision for the Presiding Officer to make comments, which one Mr. Okori George did not do. He therefore, challenged the evidence of Mr. Okori George in his Affidavit in support of the Petition as an afterthought.

Counsel for the first Respondent cited the case of ***Kidega Nabinson James vs Electoral Commission and Hon. Odonga Otto, Gulu High Court Election Petition No. 003 of 2011.*** In that case, it was held that as far as invalid votes were concerned, it was the duty of the Petitioner’s agent to raise the issue while signing DR Forms which they did not.

Counsel for the 1st Respondent further added that the Petitioner relied on unnecessary reports as he should have adduced cogent evidence from his polling agents or other curious and alternative voters or other persons who witnesses the tallying exercise.

They concluded that section 46 of the PEA provides for the complaints during polling to be raised by any candidate's agent or Voter from the polling station in writing to the Presiding Officers concerning the counting exercise.

Counsel for the 2nd Respondent also added that or emphasized that the petitioner did not prove that he raised any objections as required by law under **Section 48 of the PEA** in order to verify the invalid votes.

They further emphasized that the petitioner did not prove that the invalid votes were all his and not for the 1st respondent too. They concluded that court should consider the fact that there were 86 polling stations in Dokolo North Constituency and that the polling stations where the petitioner alleges non-compliance were few.

With respect to the Counsel for the 2nd Respondent, it is not in how many polling stations out of so many that non-compliance was committed, but whether or not there was non-compliance in any of the polling stations in Dokolo North Constituency, however few they were and on complaints, Ewayu Charles, one of the Petitioner's agents was cross-examined by counsel for the 2nd Respondent as to whether he had complained about the invalid votes and his answer was that he complained to the Presiding officer about the invalid votes numbering 83, but his complaint was not recorded.

And in Re-examination, Ewayu Charles further told court that as the agents for the Petitioner at Barlela polling station, he and others were never informed by the Presiding Officer or any electoral officials that they had a right to note their complaints on the DR Forms. So it is not a matter of Advocates for the 1st and 2nd Respondents to submit that the agents of the Petitioner should have complained when the 2nd Respondent did not provide any evidence

of sensitizing and training of the Electorate about the relevant Electoral laws and guidelines in sufficient time.

In my view the 2nd Respondent or their agents had no right whatsoever to cause a significant number of votes casts either in favour of the Petitioner or the 1st Respondent to be disregarded as invalid, which is an offence and non-compliance under **Section 78 (e) of the PEA.**

For avoidance of doubt, it provides:-

“78 (e) An Election Officer, or other person having duty to prefer in relation to an Election who willfully rejects or refuses to count any paper which he or she knows or his reasonable cause to believe is validly cast in favour of a candidate commits an offence and is liable on conviction to a fine not exceeding One Hundred and Twenty currency points or Imprisonment not exceeding Five years or both.”

It is very serious matter and this court is surprised that learned counsel for the 2nd Respondent have chosen to ignore the Affidavits of the petitioner, Okello Okello (Paragraphs (17) and (18)); of Muge Nelson, (Paragraphs (7), (8), (9), (10) and (11)), Patrick Ebyau (Paragraphs (12), (13), (14), (15), (16), and (17) and others which are on record about valid votes wrongly declared invalid.

In fact, and on a more serious note, the Affidavit of Patrick Ebyau supports the 1st Respondent. It provides:-

“22. That the Presiding Officer came across a Ballot Paper where the voter had ticked for Amoru Paul but the tick protruded outside the box.”

“24. That the Presiding Officer insisted that the voter had ticked wrongly and therefore it was an invalid vote.”

“25. That supporters of Amoru Paul wanted the vote to be included in the valid ovtes but the Presiding Officer refused.”

“26. That the Complaint degenerated into a verbal exchange between the sides supporting candidate Amoru Paul and candidate Okello Okello.”

“27. That at that point, the Presiding Officer decided that any Ballot which is marked in such a way that the tick protruded outside the box, or thumb print is placed on the candidates portrait or anywhere besides the candidates’ portrait in invalid.”

That Affidavit of Patrick Ebyau shows that the Petitioner’s case is about non-compliance with the law, irrespective of whether the non-compliance affected Petitioner or 1st Respondent. It is an offence of non-compliance with **Section 78 (e) PEA**.

Furthermore, and as submitted by Counsel for the petitioner, it was the duty of the Presiding Officer to perform the function of recording complaints **NOT** the agents. I entirely agree because under **Section 48 of the PEA**, the Agent’s role is to complain or raise objections.

For avoidance of doubts, Section 48 is on complaints during the counting of votes. It provides:-

Section 48 (1). A candidate or a candidate’s agent or nay other voter present may raise any objection during the counting of the votes, and each Presiding Officer shall:-

- (a) Keep a record, in the report book, of every objection made by any candidate or a candidate’s agent or any voter present, to any Ballot Paper found in the Ballot Box and
- (b) Decide every question arising out of the objection.

(2). Every objection recorded under subsection (1) shall be numbered and a corresponding number placed on the back of the Ballot Paper to which it relates and the Ballot Paper shall be initialed by the Presiding Officer and it shall be witnessed by the Polling Assistants and Candidate’s Agents.

So whereas there is evidence on record that complaints and objections were raised by Petitioner's agents, **the documentation by the Presiding Officers did not happen as required by the law and that was non-compliance.**

The Returning Officer for Dokolo District during cross-examination conceded that the Petitioner petitioned him for a recount on the basis on invalid votes. That was the time when he should have checked the boxes and inspected the alleged invalid votes but he chose not to.

The Returning Officer also stated under paragraph (15) of his Affidavit in support to the 2nd Respondent's answer to the petition that the Electoral Commission indeed instructed Presiding Officers and Polling Assistants to regard all votes marked outside the box to be invalid and that it affected all candidates.

In my view, the threshold under section 49 (2) of the PEA for determining an invalid vote was therefore not complied with by the 2nd Respondent and this significantly affected the outcome of the election in Dokolo North Constituency.

In the case of **Hon. Oboth Jacob Vs Dr. Otaala, Election Petition Appeal No. 38 of 2011 (already referred to)**, Justice Remy Kasule held:-

“Accordingly, a free and fair Election process must have sufficient time given for all stages of election. A Candidate's right to stand for an election must be assured and two, the right of citizens to register and vote for a candidate of that voter's choice. There must be no intimidation, bribery, violence or coercion or anything to take away the will of the people. That Ballot must be secret, the counting accurate and the results announced in a timely manner. The Electorate must be knowledgeable and sensitized about Electoral Laws and guidelines in sufficient time. Fairness and transparency must be maintained and those committing wrongs must be punished.”

I totally agree with the Judgment of Justice Remmy Kasule above, and add that this court, not only as a Court of Law, but also a Court of Justice cannot turn a blind eye to such a flawed electoral process and atrocities committed by officers of the Electoral Commission in Dokolo North Constituency. As far as this case in concerned, one can imagine what such non-compliance caused because a figure of 1,617 votes declared as invalid amidst complaints and under unclear circumstances compared to a margin of 464 votes is almost four times the difference between the declared winner and loser. It casts a lot of doubt in the mind of this Court as to whether the electoral officials in those polling stations clearly understood what invalid votes were within the context of **section 49 (2) of the PEA**. The Petitioner's case has on this ground among others passed both the Qualitative and Quantitative test to determine a substantial effect.

ISSUE NO.2: Whether the 1st Respondent personally or through his Agents, with his knowledge, consent or approval committed any illegal practices or electoral offences.

The Petitioner's contention in the petition is that the first Respondent personally, with his knowledge, consent or approval bribed voters with money, gave donation of saucepans, cement, salt, plates and building materials to some people or community in Dokolo North Constituency during campaign period with intent to induce them to vote for him.

The Petition further provided other grounds of ferrying of voters to various polling stations with intent to influence them to vote for him. And lastly, that the 1st Respondent engaged in voter harassment and intimidation with intent to dissuade voters from voting for the petitioner.

Reference was made by Counsel for the Petitioner to the Affidavit of Okello Okello John Baptist paragraphs (28), (29), (30) and (31) as evidence in support.

Learned Counsel for the Petitioner also dwelt at length on the issue that given the multi-party democracy in Uganda, there was need to determine who an agent is in terms of one's political affiliation. To that extent, he quoted the Canadian case of **Albert Sideleau Vs Robert Greigh Davidson**, in Electoral District of Stanstead, decided by Supreme Court of Canada in 1942. He submitted that the Canadian case supported the claim that NRM functionaries were involved in Electoral malpractices in favour of the 1st Respondent.

Counsel for the 1st Respondent on the other hand submitted that there was no complaint raised by the Petitioner and or his Agents during the campaign period to show that the 1st Respondent and or his agents were involved in illegal acts of bribery and voter intimidation.

He added that Agent should be interpreted to mean a representative or Polling Agent of a Candidate, and that the relationship of Principal and Agent should exist before a candidate can be held vicariously liable for the conduct of any person with the consent, knowledge or approval of the candidate.

He concluded on that point that not everybody who campaigns for a candidate qualifies to be an Agent of that Candidate. Learned counsel for the 1st Respondent reiterated that the Petitioner has to prove existence of Principal Agent relationship by way of Appointment Letters for Polling Agents since they represent the candidate in electoral process to avoid anyone holding out and committing electoral offences which would be imputed on a candidate. Reliance was placed on **Gulu High Election Petition No.001 of 2014, Amongin Jane Frances Okilo Vs. Lucy Akello and Electoral Commission** decided by my Learned sister Justice Margaret Mutonyi.

Counsel for the 1st respondent further submitted that the case of **Albert Sideliew and Robert Greig Davidson** cited by Counsel for the Petitioner is not applicable in the present case, and that what is

applicable in **Section 68(1) of the PEA**. They added that the burden of proof was upon the Petitioner to bring cogent evidence to show that those were agents and/or supporters of the 1st Respondent.

Counsel for the 2nd Respondent did not make any submissions on this second issue but instead concurred with the submissions of the 1st Respondent. I have considered submissions of all Advocates on this matter.

Section 61 (1) of the PEA provided that the election of a candidate as a Member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of court:-

- (c) That illegal practice or any other offence under the Act was committed in connection with the election by the candidate personally, or with his or her knowledge and consent or approval.

The law also defines an agent in reference to a candidate to include representative and/or Polling Agent.

As far as the submissions for the Petitioner are concerned on this issue, he concentrated on the roles played by NRM mobilisers as far as acts of bribery were concerned, and the basis of the Canadian case of **Albert Sideleau and Robert Greig Davidson**. He concluded that the allegations had been proved. Since the NRM mobilisers or whatever they were did not have Appointment Letters from the 1st Respondent, and it has not been proved, then I hold that they were not agents of the 1st Respondent for purposes of the law under the PEA.

And I agree with counsel for the 1st Respondent that the Canadian case cited by counsel for the Petitioner, being of persuasive value is not binding on this Court and not applicable in the circumstances of Uganda Elections. What is applicable is Section 68 (1) of the Parliamentary Elections Act. It provides:-

“68 (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.”

Having disregarded the issue of NRM mobilisers whereby three quarters of the Petitioner’s Affidavits on bribery were concentrated on them, then I shall now dwell on the allegations of bribery by the 1st Respondent himself.

And this is contained in the Affidavit of Otima Joseph in support of the petition. It states:-

1. That I am an adult male Ugandan of sound mind and resident of Aputi Village, Apye Parish, Adok Sub-County and I make this Affidavit in that capacity.
2. That I am a member of Aputi Catholic Church, in Adok Parish.
3. That on the 14/02/2016, I was at Aputi Catholic Church during Sunday mass.
4. That Amoru Paul physically delivered 15 bags of cement as his donation to the Chapel.
5. That after handing over the donation, Amoru Paul campaigned in the church and requested the congregation to vote him on the 18th February 2016.
6. That I make this Affidavit in Support of the Petition.

The 1st respondent does not swear any affidavit in rebuttal to the averments by Otima Joseph. Instead, someone called Oming Charles Leonard swore an affidavit giving vague answers that there was no one called Otima Joseph in Aputi “B” village and that he was not aware of any donation in any form given to the voters or church members .

I am not satisfied with that reply by Charles Oming Leonard as he is silent on whether he was a member of Aputi Catholic Church and whether he was present at the church during that Sunday mass of 14.2.2016 when the donation in question was delivered.

And as correctly submitted by counsel for the petitioner, Oming cannot challenge that affidavit of Otima Joseph as false when he does not state where he was on that day.

And to make matters worse no other person or a church leader swore an affidavit to rebut the allegation. In fact I expected none other than the 1st respondent himself to swear an affidavit in rebuttal, detailing where he was on that day either before or after the mass. He did not do so and even counsel for 1st Respondent did not apply to this court to cross-examine Otima Joseph on the 15 bags of cement.

It is now settled law and practice that where the respondent does not file an affidavit in reply or rebuttal as was in this case by 1st respondent, then he is taken to have admitted such piece of evidence. (***See Emmanuel Kinote Mulindula Vs Tomusauge Emmanuel and Nabisubi Norah [2009] I.V.L.R***)

In the premises, I find and hold that the affidavit of Otima Joseph is unchallenged and so Amoru Paul the 1st Respondent donated 15 bags of cement to the Aputi Catholic Church and immediately thereafter campaigned to the congregation of which Otima Joseph was present and a member.

Otima Joseph saw the 1st Respondent deliver 15 bags of cement to the church and then begged people to vote for him on 18th February 2016. That unchallenged evidence was an illegal practice of bribery and has therefore been proved to the satisfaction of this court under section 61(1) (c) of the PEA.

The first respondent therefore personally committed an illegal practice under the Parliamentary Elections Act. A bribe is a bribe no matter in what context or amount. The “**donation**” of 15 bags of cement to Aputi Catholic Parish was a bribe by the 1st respondent. Justice Arach Amoko in the case of ***Namboze Betty Bakireke vs Bakuluba Mukasa & Another, Election Petition No. 14 2006*** echoed the principle of the law that “***In law a bribe is a bribe. The amount is immaterial.***”

And in ***Election Petition No. 29 of 2011, Kasta Hussein Bukenya vs Balibaseka Gilbert Bukenya & Electoral Commission***, it was held by Justice Musoke Kibuka that under section **61 (1) (c) of the PEA**, once proved to the satisfaction of court, one incident of bribery is sufficient to have the election of a Member of Parliament set aside by the court hearing the petition.

That indeed is the position in the present petition as outlined. The election has to be set aside.

REMEDIES AVAILABLE.

In view of what I have outlined above, and having found and held that the petitioner has adduced credible and cogent evidence to the satisfaction of this court, notably that the 2nd respondent did not comply with the laws while conducting elections for the directly elected Member of Parliament for Dokolo North constituency.

The particulars of instances of non-compliance by the 2nd respondent being:-

- (i) Exclusion of results for Amonolocoo polling station.
- (ii) Failure to account for 1,070 ballot papers at Alenga Catholic Church polling station.
- (iii) Declaring results for 8 polling stations without signed Declaration of Result forms.
- (iv) Unlawfully declaring 1,617 votes as invalid contrary to the law.

This court also found and held that the petitioner proved to the satisfaction of the court that the 1st respondent committed an act of bribery by personally delivering 15 bags of cement as “A donation” to Aputi Catholic church on 14th February and immediately thereafter campaigning and requesting the congregation to vote for him on 18th February 2016.

In the premises I do hereby make the following orders:-

1. The election of the 1st respondent, Amoru Paul as a validly elected Member of Parliament for Dokolo North Constituency is hereby nullified and set aside.

2. Fresh elections should be held as soon as possible for Member of Parliament, Dokolo North Constituency.
3. The Petitioner is hereby awarded costs of the petition.

HON. JUSTICE WILSON MASALU MUSENE

JUDGE

08/07/2016.

REPRESENTATION:

Mr. Justine Gumtwero for the Petitioner present.

Petitioner present.

Mr. Ben Ikilai and Emmanuel Eguaru for the 1st respondent present.

1st respondent absent.

Ms Caroline Akware for 2nd respondent present.

HON. JUSTICE WILSON MASALU MUSENE

JUDGE

08/07/2016.