

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT FORT PORTAL  
HCT – 01 – CV – 0006 – 2016

SPENSER GEORGE WILLIAM ::::::::::::::: PETITIONER

VERSUS

1. ABAS AGABA MUGISA
2. ELECTORAL COMMISSION :::::::::::::::RESPONDENTS

JUDGEMENT

BEFORE: THE HON. LADY JUSTICE E. K. KABANDA

Spencer George William, the petitioner and Abba Agaba Mugisa, the 1<sup>st</sup> respondent were candidates for Parliamentary Elections for Member of Parliament for Kitagwenda County Constituency held on 9<sup>th</sup> March 2016. Abaine Bulegeya Jonathan, Nturagye Rashid and Charles Ahimbisibwe were the other candidates who contested in the elections. At the end of the exercise, the Electoral Commission, the 2<sup>nd</sup> respondent returned the 1<sup>st</sup> respondent as the validly elected Member of Parliament for Kitagwenda County Constituency. He polled 20510 of the votes cast for candidates while the petitioner came second with 8015 of the votes cast for candidates. Consequently, the results were published in the Uganda gazette dated 23<sup>rd</sup> March 2016.

The petitioner was dissatisfied with the outcome of the elections. He filed a petition in the High Court at Fort Portal challenging the results. The petitioner alleged generally in paragraph 5 of the petition that the elections were conducted in contravention of electoral laws and that noncompliance with provisions and principles in the electoral laws affected the final result of the election in a substantial manner. The petitioner further alleged that malpractices and other election offences were committed by the 1<sup>st</sup> respondent personally or through his agents, with his knowledge, consent or

approval. A couple of malpractices and other electoral offences are raised in paragraph 6 of the petition. The petitioner further alleged that the 2<sup>nd</sup> respondent incompetently managed the election exercise thus giving an unfair election victory to the 1<sup>st</sup> respondent.

Consequently, the petitioner prayed for the following reliefs,

- a. That the election of the 1<sup>st</sup> respondent as Member of Parliament be annulled and instead the petitioner who came 2<sup>nd</sup> in the election be declared winner of the Parliamentary election for Kitagwenda County Constituency.
- b. A declaration that the 1<sup>st</sup> respondent was not validly elected as Member of Parliament for Kitagwenda County Constituency.
- c. The 1<sup>st</sup> respondent, as a result of the electoral malpractices and offences be banned for a period of 10 years from participating in any electoral exercise in any part of Uganda
- d. In the alternative, fresh elections be conducted in Kitagwenda County Constituency.
- e. The respondents pay costs of the petition.
- f. Such other remedies as the court considers just and appropriate.

The affidavit in support to the petition and an affidavit in rejoinder were filed by the petitioner himself along with two supplementary affidavits in support of the petition. In addition, a couple of about 30 other affidavits from his witnesses were filed in the capacity of agents and/or voters.

The respondents in answers to the petition refuted allegations in the petition and in turn they prayed that the petition be dismissed with costs. In particular in paragraph 6 and 7 of the answer, the 1<sup>st</sup> respondent denied commission of illegal practices and other election offences personally or through his agents, with his knowledge, consent or approval together with agents /officials of the 2<sup>nd</sup> respondent. He alleged that the elections were conducted in compliance with electoral laws, and even if there were any

malpractices and election offences, they did not affect the elections substantially to warrant cancellation of the results. The 1<sup>st</sup> respondent filed a couple of about 13 affidavits in reply.

In the affidavit in support of the 2<sup>nd</sup> respondent's answer to the petition, Mr. Numara K. Abas the returning officer for Kamwenge District refuted allegation that he had knowledge of any malpractices and electoral offences attributed by the petitioner to the 1<sup>st</sup> respondent. In particular, he averred in paragraph 7 of the answer to the petition that the election of Member of Parliament for Kitagwenda County Constituency was conducted in a free, fair and transparent manner in accordance with electoral laws. He further averred that the elections were never tainted with illegal practices and election offences as alleged. In paragraph 9, Mr. Numara K. Abas stated that through the election process, the 2<sup>nd</sup> respondent did not receive any complaint from the petitioner. In further answer in paragraph 10, he averred that such noncompliance did not affect the results of the elections in a substantial manner.

Five issues came up for determination,

1. *Whether election offences were committed by the 1<sup>st</sup> respondent personally or by his agents with his knowledge, consent or approval during elections for Member of Parliament for Kitagwenda Constituency.*
2. *Whether malpractices were committed by the 1<sup>st</sup> respondent personally or by his agents with his knowledge, consent or approval.*
3. *Whether the elections for Member of Parliament for Kitagwenda Constituency were properly conducted by the 2<sup>nd</sup> respondents,*
4. *Whether there was noncompliance with provisions and principles laid down in election laws and whether any such noncompliance affected the results of the elections in a substantial manner.*
5. *Whether parties are entitled to remedies prayed.*

In view that they are cross cutting, the 1<sup>st</sup> & 2<sup>nd</sup> issues have to be merged. It is whether malpractices or any election offences were committed by the 1<sup>st</sup> respondent personally or by his agents with his knowledge, consent or approval.

The petitioner was represented at the hearing by Mr. Musana Johnson and Mr. Businge Victor jointly. The 1<sup>st</sup> respondent was represented by Mr. Nsamba Abas Matovu and the 2<sup>nd</sup> respondent by Mr. Samuel Kiriaghe. During the hearing of the petition, counsel for each party cross-examined witnesses who filed affidavits. Those witnesses were reexamined by counsel representing the adverse party.

In the first place, affidavits in support by Godfey Mwijukye, Mukasa Leo, Twinomujuni Moses, Byamukama Eric and Isingoma Nicholas offend the requirement for the commissioner for oaths before whom an affidavit is deposed to state at what place and date the affidavit is taken. It has been held that a defect in the Jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (e) of the Constitution, 1995. A Judge has the powers to order that an affidavit be dated in court or that it may be resworn and may penalize the offending party in costs - see, Saggu versus Road Master Cycles (U) Ltd [2002] 1 EA 258. This was not done in the present case. However, no prejudice will be occasioned to the petitioner given that the said affidavits contain generalized averments of bribery without specific amounts and/or names of the persons who offered the money. In the case of intimidation, the affidavits do not state names of persons allegedly intimidated and dates when the malpractice was committed. There are affidavits sworn by Arinaitwe Moses and Gumisiriza Moses purporting to be affidavits in rejoinder in the absence of corresponding affidavits in support. These will not be taken into consideration.

Secondly, the remaining affidavits in support by Kabasinguzi Immaculate, Baingana Kaleju, Bwomezi Elizeus, Tumuranye Vicent, Kutesa Lauben,

Obed Bagambe, Gucumba Abala Innocent, Ngabirano Gerald Abenawe Immaculate, , Ngabirano Lawrence and Akankwasa Benald offends the provisions in section 4 of the Commissioner for Oaths (advocates) Act so far as they are not commissioned. They contain only a literacy clause. An affidavit not attested in the presence of a commissioner for oaths is incurably defective. The affidavit in support by Akankwasa Benald, Abenawe Immaculate, Spenciano Bamurima and Kutesa Lauben offend Order I9 Rule 3 of the CPR S.I 71-I so far as they contain inadmissible hearsay. Hence it seems that the petition is virtually not supported with affidavit evidence, meaning that the petition is liable to be dismissed for lack of evidence.

Major complaints of malpractices and other electoral offences are pleaded in general terms in paragraph 6 of the petition with no single attempt made to particularize the allegations. They are, bribing petitioner's agents and voters, making the petitioner's polling agents to sign blank declaration of results forms, campaigning beyond the time of 6.00 p.m., use of words defamatory of the petitioner, use of religious and ethnic connotations to incite people not to vote for the petitioner, undue influence, ferrying voters to polling stations, nomination of the 1st respondent with no formal tax clearance certificate, and chasing the petitioner's polling agents from polling stations. Others are, conniving with election officials to make false returns, some polling officials being openly biased, allowing soldiers to be deployed at polling stations to scare away voters leading to a voter turnout of less than 45%, and deploying fake biometric voter verification machines in the petitioner's strongholds of Iharagatwa, Ruhamara and other polling centers. The law requires that allegations of malpractices must be specifically pleaded – See also *Kizza Besigye versus Electoral Commission and Yoweri Museveni E.P No. 1 of 2006 (SCU)* (per Katurebe J.). In this case the respondents was not provided the opportunity to adequately answer the allegations. Therefore failure to specifically plead particulars of malpractices and various charges of election offences gravely prejudiced the respondents thus causing a miscarriage of justice and rendering the petition fatal.

Averments of vote stating and donations in the petitioner's affidavits in support are not contained the petition. These surfaced for the first time in paragraphs 6, 8 & 18 of the petitioner's affidavit in support of the petition. He averred in paragraph 6 that the malpractice of vote stuffing was committed in Nyarusiza Catholic Church polling station, Bwensamba Church of Uganda polling station and Kabale Parish headquarters. With regard to the alleged donations, the petitioner further averred in paragraphs 8 & 18 of the affidavit in support that the Ist respondent held a meeting with Muslim voters at Mahyoro Mosque, gave money to those present and contributed 10 bags of cement to the mosque. He commissioned a bore hall at Kicwamba Catholic Church allegedly donated to the church by the Kingdom of Saudi Arabia. In the same vein, evidence from Gucumba Abala Innocent raises averments of a donation of computers by the Ist respondent to three catholic parishes in Kitagwenda and Kicwamba Catholic Church. Other allegations of donations are contained in the evidence of Nturagye Rashid. He states that he was told by the chairperson LCIII Mahyoro Sub-county and the vice chairperson of Mahyoro not to stand against a fellow Muslim in exchange for a job after the elections and that the Ist respondent promised to make a facelift of the mosque which he did. As a result one Mugabe Khussein stood down in favor of the Ist respondent.

It is accepted in the case of Rtd. Col. Dr. Kizza Besigye versus Electoral Commission & Yoweri Kaguta Museveni E.P No. 1 of 2006 (SCU) (unreported), (per Odoki J. that, allegations of non-compliance contained in affidavits but which are not particularized in the petition do not form part of the complaints raised in the petition. Accordingly allegations against the respondents relating to vote stuffing and donations will not be considered. It should follow that the petition is fatally incompetent, non-compliant with rules on drafting pleadings and not supported by valid and proper affidavit evidence thus rendering it liable to be dismissed for lack of evidence.

It should also be noted that not a single witness supported the petitioner's averments that the Ist respondent conducted campaigns beyond the time of

6.00 p.m.; that he used words defamatory of the petitioner such as “*akasaija*” and religious and ethnic connotations to incite people not to vote for the petitioner. No such religious and ethnic connotations are specifically pleaded. Moreover, the context in which such statements are made has to be stated given that certain expressions that may be otherwise abusive and defamatory may be permissible under certain forums such as an outright political context. The petitioner did not prove that any phrases were used by the 1<sup>st</sup> respondent in a context which is not permissible.

The allegation of undue influence was neither particularized in the petition nor proved. Additionally, there is no proof that the petitioner’s polling agents were chased from polling stations as no affected polling stations are listed in the petition and in addition no affected agents were called. There is in addition no evidence to support the petitioner’s allegations that the 1<sup>st</sup> respondent connived with election officials to make false returns; that some polling officials were openly biased; or that there was deployment of fake biometric voter verification machines in the petitioner’s strongholds of Iharagatwa, Ruhamara and other polling centers. The burden is on the petitioner to prove allegations contained in the petition to the satisfaction of court. Accordingly, the said allegations are dismissed due to lack of evidence.

In the event that the petition is not fatally incomplete I proceed to evaluate the evidence of alleged malpractices and other election offences.

## **BURDEN OF PROOF IN ELECTION PETITIONS**

In the case of an election petitions, the burden lies upon the petitioner to prove every allegation contained in the petition to the satisfaction of the court. Under section 61 (3) of the Parliamentary Elections Act, 2005 (EPA), the standard of proof required to prove an allegation in an election petition is upon the balance of probabilities. The petitioner must prove that there was noncompliance with provisions in the EPA. He or she must prove that there was failure to conduct the election in accordance with the principles laid down in those provisions and that noncompliance with the

provisions and principles laid down in those provisions affected the results of the elections in a substantial manner. The petitioner has to prove that a malpractice or other election offence prescribed under the EPA was committed in connection with the election by the 1st respondent personally, or with his or her knowledge or approval. The standard of proof is slightly higher than the preponderance of probabilities but short of proof beyond reasonable doubt. – see, Odo Tayebwa versus Bassajabalaba Nasser and another EPA No. 13 of 2001 (COA), Rtd.Col Dr. Kizza Besigye versus Electoral Commission and Yoweri Museveni EP No. 1 of 2006 (SCU), Masiko Winfred Komuhangi versus Babihuga T. Winnie EPA No. 9 of 2012. See also, Kikukunyu Faisal versus Muwanga Kivumbi Mohammed EPA No. 44 of 2011 (COA), Mukasa Anthony Harris versus Dr. Bayiga Michael Philip Lulume EPA No. 18 of 2007 (SCU), Kabusu Moses Wagaba versus Lwanga Timothy EPA No. 53 of 2011, and Paul Mwiru versus Nathan Igeme Nabeta & 2 others EPA No. 6 of 2011. (COA). However, there are authorities such as Rtd.Col Dr. Kizza Besigye versus Electoral Commission and Yoweri Museveni (supra), per Katurebe J, which are of the view that the offence of bribery has to be proved beyond reasonable doubt and not on the balance of probabilities.

Section 61(1) of the Parliamentary Elections Act requires that the petitioner has to prove one or combination of the following grounds;-

- (a) Noncompliance with statutory provisions in the Act relating to elections and that the noncompliance affected the results of the election in a substantial manner.
- (b) The person other than the one elected won the election.
- (c) an 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; or,
- (d) The candidate was at the time of his or her election not qualified or was disqualified for election as a Member of Parliament.



*I. Whether malpractices or any election offences were committed by the I<sup>st</sup> respondent personally or by his agents with his knowledge, consent or approval.*

## BRIBING VOTERS

The Ingredients of the election offence of bribery are specified in section 68 of the Electoral Commissions Act. There must be evidence to prove that,

1. Money, a gift or other consideration was given.
2. The recipient is a voter.
3. It was given with the intent to influence the voter to vote or refrain from voting for any candidate.
4. The bribery was committed by the respondent personally, or through his or her agent with his knowledge, consent or approval.

Essentially, the petitioner's averments of bribing voters are set out in general terms in paragraphs 8, 9, 14, 16, and 19 of the affidavit in support of the petition. He states that the I<sup>st</sup> respondent held a meeting with Muslim voters in Mahyoro mosque, told them not to vote for the petitioner, a non-Muslim and gave out money to those present in different sums and in addition contributed 10 bags of cement. He further states that the I<sup>st</sup> respondent donated to every cell in Nyabani sub-county shs. 250,000/= as facilitation to go and vote for him and vote the bus *'likewise in every other sub-county'*. The petitioner further averred that one Mrs. Bakahumura whose husband is an agent of the Ist respondent and Rugumayo another agent of the Ist respondent together with the Ist respondent went around several polling stations openly handing out money and threatening the petitioner's agents who declined to be bribed. The police and army at the various polling stations did nothing to stop these actions. The petitioner contends that the I<sup>st</sup> respondent approached several of his campaign agents and offered them money, cows and goats to have them turn to his side, some declined and others took the money. Clearly, the petitioner deponed to matters which are generalized hearsay. His averments do not specify the several polling stations and names of petitioner's agents who were given

money as an inducement to vote the 1<sup>st</sup> respondent thus rendering them incurably unreliable.

Bwomezi Elizeus states that in the just concluded elections, the 1<sup>st</sup> respondent visited the parish of Kigoto in the company of the LCIII chairperson of Kicheche one Musana and the area councilor only known as Phiona and they distributed shs, 250,000/= per village. He further states that the residents were happy to receive the money and decided to vote the 1<sup>st</sup> respondent on polling day. Erias Kiiza was the petitioner's polling agent at Bunene polling station. He states that on 9<sup>th</sup> March 2016 while voting was going on, he met the LCIII chairperson Kicheche one Musana and Chance Charles known agents of the 1<sup>st</sup> respondent distributing money to voters at the gate outside the polling station and asking them to vote for the 1<sup>st</sup> respondent. Atamwine Ronald and Baingana witnessed the incident. Baingana Kaleju states that on the polling day on 9<sup>th</sup> March 2016, he proceeded to the polling station with Atamwire Ronald and they met Musana Nathan and Chance Charles giving money to voters and asking them to vote for the 1<sup>st</sup> respondent. There is no mention of the particular amounts allegedly minted out to voters. More so, not a single name of voter allegedly given money is listed by the petitioner's witnesses.

There is the affidavit of Samson Bagonza. He states that during the campaigns, the NRM chairperson for Kanara Sub- county distributed Shs 250,000/= to every cell and asked people to vote for NRM bears including the 1<sup>st</sup> respondent. He contends that on the voting day on 9<sup>th</sup> March 2016, Zakayo Julius Ndahayo approached him with shs 10,000/= to induce him to stop acting as the petitioner's agent and he refused the money. Apparently, there is nothing to show that the giver of the money was at the time acting with knowledge, consent or approval of the 1<sup>st</sup> respondent. Abanawe Immaculate states that the 1<sup>st</sup> respondent visited the cell of Bwera and distributed Shs 250,000/= per village upon which the deponent and others decided to vote for the respondent on polling day. John Baheisa states that the 1<sup>st</sup> respondent visited cells of Bwera and Kitogo and distributed shs

250,000/= per village. The residents were so have that they decided to vote for the 1<sup>st</sup> respondent on polling day. He was not present at the specified areas of Bwera and Kitogo at the time of the alleged bribery was committed thus rendering his evidence inadmissible as hearsay. Ngabirano Lawrence states that a few days to the voting day, the 1<sup>st</sup> respondent gave him shs 200,000/= and asked him to start campaigning for him.

Mugenyi Mathew attached an appointment letter from the petitioner to his supplementary affidavit dated 20th May 2016. The letter is dated 15<sup>th</sup> October 2015 (see annexure 'A'). He talks about accepting an inducement of shs 300,000/= from the 1<sup>st</sup> respondent on 2<sup>nd</sup> March 2016. The money was sent to his phone number 0774 425 026 using phone number 0772 628 660. In the affidavit in rejoinder dated 12<sup>th</sup> May 2016, Mugenyi Mathew states that the money he received from the 1<sup>st</sup> respondent was meant to induce him. In due course of cross examination he informed court that he received an additional shs 50,000/= on behalf of Fred and Tayebwa Andrew and gave it to them. His evidence is supported by Musinguzi Akidas. Musinguzi Akidas states that met the 1<sup>st</sup> respondent on 1<sup>st</sup> March 2016 at 9.00 p.m. At the meeting, he was asked by the 1<sup>st</sup> respondent to ask for anything in order to start campaigning for him. He refused the offer. They met again on 2<sup>nd</sup> March 2016, in the company of Mugenyi Mathew and Tindebwa Ben. He accepted shs. 400,000/= from the 1<sup>st</sup> respondent. Shs. 300,000/= was sent to his mobile phone number 0772 18 7 121 and shs 100,000/= was sent using mobile phone number 0772 628 660. Copies of MTN mobile statements are annexed to the affidavit evidence of Mugenyi Mathew and Musinguzi Akidas - see annexure 'B' there to. Musinguzi Akidas (PW3) was cross examined by 1<sup>st</sup> respondent's counsel. He confirmed receiving money from the 1<sup>st</sup> respondent.

Other corroborative evidence came from Tindyebwa Ben. He attaches a copy of the appointment letter in the capacity as campaign agent of the petitioner. - see annexure 'A'. He states that on 2<sup>nd</sup> March 2016 at 8.00 pm., he met the 1<sup>st</sup> respondent at another life bar in the company of Mugenyi Mathew,

Musinguzi Akidas, and Isuura Byaba. The 1<sup>st</sup> respondent gave him shs 300,000/= as an inducement to start supporting him. He was promised an additional shs 100,000/=. He annexed the MTN mobile money statement – see annexure ‘B’. When cross examined, Mugenyi Mathew informed court that he was present when Isuura Byaba received the money on behalf of witness Tindyebwa Ben.

It is true, the 1<sup>st</sup> respondent in paragraph 19 and 20 of the affidavit in support of the answer to the petition admitted sending money to the three persons above. Apparently, the 1<sup>st</sup> respondent claim is that these were his agents. To the contrary, the campaign agents’ appointment letters to the trio from the petitioner were not challenged, Fortunately Mugenyi Mathew (PW2) was cross examined on his affidavit. His evidence is consistent with the fact that he was not a campaign agent of the 1<sup>st</sup> respondent. There is particular mode of appointing a campaign agent for the purpose of elections. In this case, there is credible evidence that the said persons were the petitioner’s e campaign agents. In his paragraph 20, the 1<sup>st</sup> respondent states that *‘the sent money was to be used for among others facilitation in mobilization for votes, venue payments for meetings, bodaboda transport, taxi, refreshments at meetings.’* The petitioner chose to wave the opportunity to cross examine the 1<sup>st</sup> respondent. Other evidence in rebuttal came from Kakuru Anthony, Byabagambe Vicent, Nabikunda Richard, Kaheru Juma, Katome Deogratiuous, Byaruhanga Steven and Atwongere Grimbold. With the exception of Katome Deogratiuous, the 1<sup>st</sup> respondent’s witnesses made plain averments that the 1<sup>st</sup> respondent has never given money to anyone to vote for him. The burden is on the petitioner to produce cogent evidence to support the allegations and not rely on the weakness of the respondent- *Sale Kamba versus versus Namuyangu Jeniffer EPA No. 2017.*

Katome Deogratiuous states that Mugenyi Mathew, Musinguzi Akidas and Tindyebwa Ben requested the 1<sup>st</sup> respondent to join his camp. His evidence is supported by Atwongere Grim Bald who states that he was present on 1<sup>st</sup>

& 2nd March 2016 when the 1st respondent met them Ben at another life bar in Ntara, Kamwenge District. He further depones that Mugenyi Mathew received shs 100,000/= to organize a meeting of bodaboda cyclists for Kicwamba parish and a further shs 50,000/= to hire bodaboda to transport him around those areas. He states that Tindyebwa Ben received shs 100,000/= to mobilize voters in Kabanga/Kitonzi parish. The deponent further states that Musinguzi Akidas was given shs 100,000/= to mobilize voters in Nyakachwamba parish. Katome Deogratiuous (DW4) and Atwongere Grimbald (DW3) were present in court and they were not cross examined about the purpose of the money. Kakuru Anthony's affidavit in reply does show if he was present at any of the areas where the 1st respondent allegedly bribed the petitioner's agents and voters, meaning that it is inadmissible hearsay.

Counsel Businge Victor invited court to treat paragraphs 17 to 21 of the 1<sup>st</sup> respondent's affidavit in support of the answer to the petition as an admission that the 1<sup>st</sup> respondent sent money to witnesses Mathew Mugenyi, Musinguzi Akidas and Tindebwa Ben. He relied on the case of Busingye Fred versus Katende Kariboge & another E.P No. 0005 of 2006 (HCT -FTP). For his part, counsel Nsamba Abas Matovu invited court firstly, to rely on the 1<sup>st</sup> respondent's evidence because it remained uncontroverted. Secondly, he submitted that a person who receives a bribe becomes an accomplice whereby his evidence must be corroborated. He relied on the authority of Kabusu Moses Wagaba versus Lwanga Timothy and Electoral Commission, EPA No. 53 of 2011 (COA). Thirdly, counsel argued that averments of bribery from Mugenyi Mathew, Tindyebwa Ben were made by persons who are not proven registered voters under section 68 (I) of the Parliamentary Elections Act and Musinguzi Akidas. He argued that there was a missing link that the bribery was to a voter. To counsel, it was incumbent on the petitioner to adduce evidence to show that their witnesses were registered voters by way of documentary evidence of the voter's register.

The Kabusu Moses Wagaba versus Lwanga Timothy and Electoral Commission casee (supra), compliment section 68 (I) of the PEA where by it is an offence for a person to receive a bribe. The evidence of the receiver of the bribe is that of an accomplice and as such, it would require independent corroborative evidence. Moreover, section 19 of the Electoral Commission Act, (Cap.140) provides that no person shall be qualified to vote at any election if that person is not registered as a voter in accordance with Article 50 of the Constitution. Hence the bribe must be to a registered voter to influence his or her vote. Because of the higher standard of proof in cases of allegations of bribery of voters, the accepted principle is that it is not enough to swear an affidavit that one is a registered voter and even quote the voter's card. It is necessary to produce the voters register showing the name of person bribed. Section 106 of the Evidence Act, Cap. 6 requires that where any fact in civil proceedings is especially within the knowledge of any person, the burden of proving that fact is on that person.

The case of Kizza Besigye versus EC & Yoweri Museveni EP No. 1 of 2006 sets out the position thus,

*“ in the case of bribery, I think it is not enough for a deponent to say ‘people were being bribed at road junctions’. This must be stated with precision as to who gave the money, who received it and the purpose must be to influence their vote. Merely being seen giving money to a person or receiving money to a person or receiving money from a person cannot per se be evidence of bribery upon which a court can rely. in the book ‘ELECTION LAWS, BEING commentaries on the REPRESENTATION OF THE PEOPLE ACT by S.K GHOST, which deals with election laws in India but which laws are similar to ours, the learned authors at page 151 have the following to say about allegations of bribery to voters,*

*“a plain reading of the petition would reveal the essential materials and particular are conspicuous (sic) by their absence. With regard to the allegation that the petitioner paid Rs.25,000/= to two sepals to purchase votes from the Harjan Colony, the omission*

of material significance is provided by absence of any averments to the effect that the offence of bribery is made to two persons who actually received the money were voters. What stands out in this behalf is the further fact that one of the recipients of any of such alleged bribe has not been named in the petition. In this situation, there can be no escape from the conclusion that this allegation constitutes no cause of action for the respondent to answer. The Election petition is liable to be dismissed" (emphasis added)

It is a notorious fact that the electoral Commission is the custodian and has the custody of voter registers at all times. – see Kikulukunyu Faisal versus Muwanga kivumbi Mohammed EPA 13 of 2011(COA) (unreported). In this case the Electoral Commission, the 2<sup>nd</sup> respondent was ably represented by Mr. Samuel Kiriaghe through the hearing of the petition and he did not contest the fact of any of the witnesses not being registered as a voter. Am not able to hold that any of the witnesses was not a registered voter.

What is more, with the exception of Mugenyi Mathew, Erias Kiiza, and Baingana Kaleju, the other petitioner's witnesses do not **specify dates** and the sums of money they were allegedly given money by the 1<sup>st</sup> respondent. Moreover, the witnesses do not specify the persons who received the money. With the exception of Ngabirano Lawrence, the people who allegedly received the money have not been adduced. Nobody came to corroborate the petitioner's averments that they personally received money as a result of which they were induced to vote for the 1<sup>st</sup> respondent. Additionally, the petitioner has not proved that the receivers were acting with the 1<sup>st</sup> respondent's knowledge, consent or approval. Accordingly, from the evidence as a whole, the petitioner has failed in the onus to prove the election offence of bribery to the required balance of probabilities standard to the satisfaction of court.

## INTIMIDATION.

The petition contains generalized allegations of intimidation. For example, in paragraph 6 (vi), the petitioner alleged that intimidation led to a low turn up of voters of less than 45%. He avers in paragraphs 10, 11 & 12 of the affidavit accompanying the petition that the 1st respondent sent threatening messages to petitioner's agents telling them not to vote for a person not of his ethnic group and he threatened retaliation to those who did not heed especially in Kicheche, Buhanda and Ntara sub counties. The petitioner further contends that his campaign agents namely, Isingoma Nicholas, Tindikahwa Jafari, Bagambe Obed, Gucumba Innocent, Agaba Charles and Ngabirano were held by police and army on voting day and this prevented them from supervising the exercise. Others were harassed and chased away from polling stations.

Other acts of intimidation by armed personnel are contained in the affidavit in support by Kabasinguzi Immaculate, the petitioner's campaign agent. She avers that on 9th March 2016, she was arrested by armed personnel near a polling station and detained at Kabajogera police post. Witness Gucumba Abala Innocent dated 12th April 2016. It shows that the 1st respondent sent him threatening messages when he decided to support the petitioner. The witness further states that on the polling day on 9th March 2016, he met the petitioner's county mobiliser and coordinator under arrest by army and police at Kabujogera trading center. They were set free without charge upon intervention of the petitioner and told not to go back to the field to supervise the exercise. To the contrary, the petitioner does not state that he ever intervened to secure release of his alleged county mobiliser and coordinator. Ngabirano Gerald deposed an affidavit in the capacity as a security guard at a nearby fuel station. Ngabirano states Jafari Tindikahwa, Isingoma Nicholas and Gucubwa innocent were arrested by police personnel at an area called Rwensamba trading center on polling day. He further states that he was arrested and detained until 9.00 when the voting exercise was over after he intervened and told the security personnel to take their matters to the police post.



Further evidence of intimidation by police and army personnel in Kitagwenda County constituency on polling day came from Bomezi Elizeus. He states that on 9th March 2016, he was intimidated by one Bakahumura and Mrs. Agaba Abas in the company of soldiers. They ordered him not to go back to the polling station and to prove their threat, they left a soldier guarding him until 6.00 pm. Witness Nturagye Rashid states generally that on polling day, the heavy deployment of police and army who were heavily armed intimidated some voters who did not come to the polling stations and the turnout was very low.

Clearly, there is nothing to show that voters were prevented from voting due to presence of the army and police personnel in the constituency. It has not been proved that voters did not exercise the right to vote because of intimidation. Moreover, there is no linkage between the presence of police and army personnel in the constituency and the 1<sup>st</sup> respondent because there is no indication that they were acting with the knowledge, consent or approval of the 1<sup>st</sup> respondent. The unanswered question remains; who deployed the armed personnel? Therefore, it cannot be said that the petitioner has proved that the 1<sup>st</sup> respondent committed acts of intimidation which resulted in the low turn up of voters. The petitioner has not proved that the 2nd respondent was privy to the alleged acts of intimidation by police and army personnel.

## **EMPTY DECLARATION OF RESULTS FORMS**

Allegations that the petitioner's agents were made to sign empty declaration of results forms are contained in paragraph 6 (x) of the petition. The allegation is supported of Besigirensi Charles. His affidavit does not particularize a single polling station and names of a petitioner's agent who signed empty declaration forms. Added to this, He states that on polling day, he found the petitioner's polling agents being chased by GISO Kanara and the movement chairperson LCIII from virtually every polling station in the sub county. He further depones that he was informed by the said petitioner's

polling agents that no sooner had the exercise stated that they were made to sign empty declaration forms. He further depones;-

*'I believe the said polling agents abandoned their work because they were compromised and or bribed by abas Agaba Mugisa's agents and they were chased away by the soldiers and the GISO and that is why the petitioner garnered few votes in Kanara.'*

Essentially, no single polling agent came up to prove that they signed empty declaration of results forms. What is more, no documentary evidence of empty declaration forms was adduced. Even if such empty declaration of results forms existed, there is no evidence to show that the 1<sup>st</sup> respondent was involved in the malpractice personally with his knowledge, consent or approval together with agents /officials of the 2<sup>nd</sup> respondent as alleged. It follows that allegation that petitioner's agents were made to sign empty declaration of results forms ought to fail due to lack of evidence.

## **FERRYNG VOTERS**

Only Tumuranye Vicent supported the allegation of ferryng of voters. He states that he was rode a bike hired by Byamukama and transported people advising them to vote for the 1<sup>st</sup> respondent. There is no evidence connecting the respondents to the malpractice of ferryng voters.

To a minimize overlap, the 3<sup>rd</sup> & 4<sup>th</sup> issues will be decided concurrently.

**3. *Whether the elections for Member of Parliament for Kitagwenda Constituency were properly conducted by the 2nd respondents.***

**4. *Whether there was noncompliance with provisions and principles laid down in election laws and whether any such noncompliance affected the results of the elections in a substantial manner.***

The complaint that the petitioner reported the alleged malpractices such as bribery, donations, messages with religious and ethnic tones and ferryng voters to the responsible returning officer for Kamwenge District and he was non-reactive only came up belatedly during cross examination of the petitioner. They are not particularized in the petition, meaning that the

evidence concerning such reports to the 2nd respondent is an afterthought and will not be relied on. Am in agreement with the submission of learned counsel Kiriaghe for the 2<sup>nd</sup> respondent that the 2<sup>nd</sup> respondent cannot be blamed for irregularities that were never brought to her attention. Hence it cannot be concluded that the elections for Member of Parliament for Kitagwenda Constituency were not properly conducted by the 2nd respondent. The outcome of the elections for Member of Parliament for Kitagwenda County Constituency were gazetted on 23rd March 2016. The gazette indicates results as follows;-

1. Spencer George William	-	8015
2. Nturagye Rashid	-	781
3. Ahimbisibwe Charles	-	366
4. Agaba abas Mugisa	-	20510
5. Abaine Jonathan Bulegeya	-	1384

It is true there is no specific number of witnesses required to prove a given fact. Even one witness can prove a case if he or she is credible- see Mukasa Anthony Harris versus Dr. Bayiga Micheal Philips Lulume EPA No. 18 of 2007 (SCU). I agree that it is not only the arithmetic figures are not the only determinant in determining the quality of elections. In addition, the entire exercise of elections has got to be subjected to a qualitative test – see Beatrice Mpiirwe vrs Nyendoha Bigirwa EPA No. 18 of 2011 (COA). Over all, no voters turned up to corroborate the petitioner's allegations of massive bribery and other election offences. Accordingly, the petitioner has failed in the onus to prove any malpractices and other election offences alleged in the petition. He has not shown that the 1<sup>st</sup> respondent committed the alleged malpractices personally or through his agents, with his knowledge, consent or approval together with officials of the 2nd respondent.

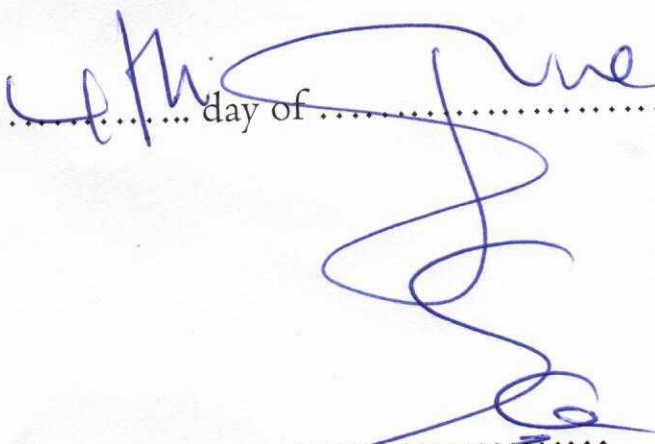
With regard to whether noncompliance with electoral laws affected the result of the elections in a substantial manner, the petitioner's allegation that presence of soldiers near polling stations scared away voters leading to a voter turnout of less than 45% remains unsubstantiated. He has not proved that the presence of security personnel in Kitagwenda County constituency on

polling day was responsible for the turnout of voters. In this case, only Nturagye Rashid states in general terms that the polls were marred by so many irregularities and cannot be said to be a reflection of the will of the people of Kitagwenda County. Therefore the petitioner has not advanced proven malpractices and election offences to support allegation of low turn up of voters.

The petitioner has not shown that the 1<sup>st</sup> respondent committed malpractices and election offences constituting noncompliance with election laws personally or through his agents, with his knowledge, consent or approval together with officials of the 2<sup>nd</sup> respondent. He has not established that there was noncompliance with Electoral laws and that any such noncompliance affected the results of the elections in a substantial manner. It flows from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> issues that the petitioner is not entitled to the remedies in the petition.

In the final result, the petition is dismissed with costs to the respondents.

Dated the 14<sup>th</sup> day of June 2016.



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E.K KABANDA  
Judge