

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF MBALE AT MBALE  
ELECTION PETITION NO. 12 OF 2016  
IN THE MATTER OF PARLIAMENTARY ELECTION  
ACT, 2005 AS AMENDED

10

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTION  
(ELECTION PETITIONS) RULE, S1-142-2

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS HELD  
ON THE 18<sup>TH</sup> DAY OF FEBRUARY 2016

15      CHEBROT STEPHEN CHEMOIKO ::::::::::::::::::::: PETITIONER

VERSUS

1. SOYEKWO KENNETH

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

BEFORE: HON MR. JUSTICE BASHAIJA K.ANDREW

20

JUDGMENT

CHEBROT STEPHEN CHEMOIKO (*hereinafter referred to as the Petitioner*) filed this petition against SOYEKWO KENNETH and the THE INDEPENDENT ELECTORAL COMMISSION (IEC) (*hereinafter referred to as the "1<sup>st</sup>" and "2<sup>nd</sup>" Respondent respectively*) seeking

25 declaration that the 1<sup>st</sup> Respondent was not validly elected Member  
of Parliament (MP) for Tingey County Constituency; that the election  
of the 1<sup>st</sup> Respondent as MP be annulled and a fresh election be  
conducted; that the Respondents pay costs of the petition; and that  
the Petitioner be awarded such other remedies available under the  
30 electoral laws as the court may consider just and appropriate in the  
circumstances.

***Background:***

The Petitioner along with the 1<sup>st</sup> Respondent, Chemutai Kalifani,  
and Wodada Nasif contested in the elections held on the 18<sup>th</sup>  
35 February, 2016 for MP for Tingey Country Constituency, Kapchorwa  
District. The 1<sup>st</sup> Respondent was declared winner by the 2<sup>nd</sup>  
Respondent with a margin of 162 votes as against the Petitioner.  
Dissatisfied with the result, the Petitioner petitioned this court  
seeking the remedies above.

40 At the scheduling conference the following issues were framed for  
court's determination;

- 1. Whether the Parliamentary election for Tingey County  
Constituency was conducted in non-compliance with the  
electoral laws and the principles therein.***

- 45      2. *If so, whether the non-compliance affected the results of the election in a substantial manner.*
3. *Whether or not the 1<sup>st</sup> Respondent committed any illegal practice and or any electoral offence in person or by his agent with his knowledge and consent or approval.*
- 50      4. *Whether the parties are entitled to the reliefs sought.*

The Petitioner was jointly represented by Mr. Blaise Babigumira and Mr. Nandaha Wamukota Charles, while the 1<sup>st</sup> Respondent was jointly represented by Mr. Mutembuli Yusufu and Mr. Anukur - the latter now deceased (R.I.P). The 2<sup>nd</sup> Respondent was represented by  
55      Mr. Mwassa Jude. All counsel filed written submissions and supplied court with authorities. I am grateful to them for that. The submissions are on court record and I will make specific reference to them without reproducing them in detail.

***Resolution of Issues:***

- 60      ***Issue No.1: Whether the Parliamentary election for Tingey County Constituency was conducted in non-compliance with the electoral laws and the principles therein.***

The Supreme Court in ***Mukasa Harris vs. Dr. Bayiga Michael Lulume, SC EPA No.18 of 2007*** gave guidance that the burden of

65 proof in election petitions lies on the petitioner who seeks to have the election of the respondent annulled and set aside. The petitioner is under duty to discharge the burden on balance of probabilities to the satisfaction of court as required under **section 61 (3) PEA**

Under *Issue No.1*, the Petitioner essentially contends that the  
70 conduct of election for Tingey County Constituency was non compliant with the electoral laws and the principles therein. He singled out disenfranchisement of voters, failure to control the use of ballot papers, intimidation and violence, and the failure to manage the environment of the election and several other  
75 irregularities as the specific instances of the non compliance.

Under "disenfranchisement", the Petitioner, at paragraph 4, 5 (a) of the petition and paragraph 8 of his affidavit supporting the petition, avers that he was informed by his agents and supporters that without any justification the Presiding Officer cancelled results of  
80 Chebonet polling station and denied 589 registered voters from exercising their democratic right to chose their leader.

It is noted that the Petitioner does not disclose the particulars of his sources of information, but in general terms only swears that he

was informed by his agents and supporters. Also to note is that only

85 one Chebet Nancy Bukose who swore an affidavit in rejoinder supports the particular allegation. She was one of the 2<sup>nd</sup> Respondent's polling officials, and at paragraph 5 of her affidavit, states that the results of Chebonet were not properly counted and tallied as the agents abandoned the polling station before finishing  
90 the entering of the results in the DR forms due to the violence and intimidation meted out by the 1<sup>st</sup> Respondent's supporters.

It is observed from the outset that the Petitioner's evidence of the alleged disenfranchisement of voters is purely hearsay and legally inadmissible, and hence it cannot support the allegation. The  
95 Petitioner's allegations are solely premised on his sources of information from persons whose names he does not disclose. The general averments of having been informed by agents and supporters whose names he does mention would not suffice.

In paragraph 3 and 5 of his affidavit supporting the petition, the  
100 Petitioner basically states that he appointed many people as campaign agents, co-coordinators, and election monitors from among the many of his supporters. It was thus incumbent upon him to name who of the many agents and supporters were sources

of his information. It could not be left to be speculated that just  
105 because he appointed many agents and supporters, then the  
deponents of the affidavits supporting the petition were necessarily  
the agents and supporters his sources of information.

Since the sources of his information remained quite anonymous,  
they cannot simply purport to emerge from the shadows, as it were,  
110 just to fill in the gaps left by the Petitioner as to his sources of  
information. Needless to state, that the Petitioner's evidence being  
hearsay, no amount of evidence can corroborate it since it is  
inadmissible ab initio. See: ***Mutembuli Yusufu vs. Nagwomu***  
***Moses Musamba, (Mbale) HC EP No.3 of 2016.***

115 The position in the case of ***Nsubuga Jonah vs. Mathias***  
***Kagganda Lwanga & Electoral Commission, HC EP No. 34 of***  
***2011*** is to the effect that when a statement is made to a witness by  
a person who is not called as a witness, such evidence is  
inadmissible particularly where the object of the evidence is to  
120 establish the truthfulness of what is contained in the statement.  
The rationale of the rule against hearsay, in a strict legal sense, is  
on the premise that a witness who proves an out - of - court  
statement has no personal knowledge of the facts stated.

As applicable to the instant petition, it cannot be said with any  
125 degree of certainty that the deponents of affidavits supporting the petition are the agents or supporters whom the Petitioner alleges made the statements attributed to them which is his sources of information.

**Order 19 r 3(1) CPR** mandates that affidavits shall be confined to such facts as the deponent is of his own knowledge able to prove. In  
130 the case of **Uganda Journalist Safety Committee & Or's vs. Attorney General, Const. Petition No.7 of 1997** it was also held that the failure to disclose the source of information will normally render the affidavit null and void, and that an affidavit is not  
135 evidence unless it complies with that legal requirement. Similarly in the instant petition the failure to properly disclose particulars of the sources of his information renders the Petitioner's affidavit null and void as regards the specific allegation of disenfranchisement.

The trend of non disclosure of sources of his information cuts  
140 across all the other allegations in the petition as supported in paragraph 6,8,9,10, 11, and 12 of the Petitioner's affidavit supporting the petition. The mainly affected ones concern the

alleged non - compliance with electoral laws; intimidation and assaults by the 1<sup>st</sup> Respondent's agents and supporters; neglecting  
145 to record complaints of agents by the presiding officers; connivance between the 2<sup>nd</sup> and 1<sup>st</sup> Respondent to deny the Petitioner's agents DR forms; and denying access to the Petitioner's agents at the tallying centre. The evidence canvassed by the Petitioner in respect of all these allegations is purely hearsay evidence. This also has the  
150 ripple effect of rendering the affidavit evidence of the other witnesses supporting the same allegations disjointed from the Petitioner's. There is no tangible nexus.

It must be emphasised that proper and full disclosure by a deponent of an affidavit of the particulars of his sources of  
155 information is a crucial requirement. It is necessary to enable the opposite party to know well in advance with precise specificity the basis of the deponent's evidence in case the opposite party wishes to cross - examine the source of the information on his or her affidavit, if he or she swears any. It also potentially curtails persons  
160 jumping on the band wagon of witnesses just because they happen to fit in the general random category of sources of information of a

given deponent. It is primarily owing to these reasons that the particular allegations in the petition would automatically fail.

Before taking leave of this point, it is necessary to observe that the  
165 affidavit of Chebet Nancy Bukose, which incidentally is the only evidence on disenfranchisement of voters whose source is properly disclosed, cannot be relied. It fails the legal test ***Mutembuli Yusuf vs. Nagwomu Moses Musamba (supra)*** and she is considered merely a stranger who cannot rejoin to matters she was never privy  
170 to in the first place. That leaves the allegation of disenfranchisement totally unsupported, and on that account alone it would totally fail.

Even on the merits, the alleged disenfranchisement of voters is unsustainable. Mr. Wamukota cited the ***Black's Law Dictionary***  
175 definition of the term "disenfranchisement" which means to be deprived of the right to vote. He argued that the right to vote entails not only casting a ballot paper for candidates of one's choice but also equally important, that the vote be treated equally, as all the other votes cast in the election before candidate is declared a  
180 winner thereof. Further, that given that people of Chebonet polling station voted but their votes were not counted and or used to

determine the leader they intended to elect, they were denied of their constitutional right to express their will and consent on who should govern them and how they should be governed in accordance with ***Article 1(4) of the Constitution***. He opined that the people of Chebonet polling station were disenfranchised contrary to ***Article 59 of the Constitution***.

The 1<sup>st</sup> Respondent denied that there was any disenfranchisement of voters or the failure to control use of ballot papers, or intimidation and violence and irregularities. He conceded that the results of Chebonet polling station were not considered in the final tally of results, but maintained that the Returning Officer cancelled them due to falsification of results which were in the tamper proof envelope and that upon opening the ballot box no DR forms were found there.

In paragraph 5 - 8 of his affidavit supporting the answer to the petition, the 1<sup>st</sup> Respondent maintains that voters of Chebonet polling station cast their votes, which were counted and announced at the polling station to the public. Further, that Chepsigor Ignatius and Chemsto Ronald his agent, and two of the Petitioner's agents one Kulany Fred and Tongo Fred, and the Presiding Officer one

- Musobo Milton; all signed the DR form. That the ballot box was taken at night to Kapchorwa Central Police Station and that on the 19<sup>th</sup> February, 2016 when it was delivered to Kapchorwa tally centre and opened there were no ballot papers found. That it was by agreement of all candidates and their agents and IEC that the results should not be considered. The 1<sup>st</sup> Respondent claims that he was disadvantaged as he had won with 272 votes at this polling station.
- The 2<sup>nd</sup> Respondent also denied having disenfranchised voters of Chebonet polling station. The Returning officer, Michael Oguttu, in his affidavit supporting the answer to the petition, states that the cancellation of results was lawfully done due to the material alterations on the DR forms and upon failure to get alternative results from the ballot box. In cross – examination, he told court that even if the results from Chebonet polling station were ascertained, there was no evidence to show that they would have been in favour of the Petitioner, who could not show that the cancellation of the results was in favour of the 1<sup>st</sup> Respondent.
- Counsel for the 2<sup>nd</sup> Respondent submitted that in circumstances where a DR form obtained from the tamper proof envelop is found

to contain material alterations, and an attempt to secure alternative copy from the ballot box proves futile, the only option open to the Returning Officer is to cancel such results or disregard them, and  
225 that it would not amount to disenfranchisement.

From the pleadings and evidence in support thereof, it is not in dispute that the votes of Chebonet polling station were cancelled and not considered or included in the final tally of results for Tingey County Constituency. What is disputed is whether the non  
230 inclusion of the results amounted in law to disenfranchisement.

Mr. Wamukota correctly restated the ***Black's Law Dictionary*** definition of the term "disenfranchisement", which means to be deprived of the right to vote. What needs to be clarified in this case is whether the failure to include votes of Chebonet polling station in  
235 the final tally of the results would fit within the context of the definition.

In strict legal sense of the term it does not; and more so in the context of the instant petition. The people of Chebonet were never deprived of their right to vote at all. They properly cast their votes,  
240 their votes were counted, and the results announced to the public and the DR forms were filled in. What transpired thereafter, which

is the centre of controversy, cannot in law or even in the plain meaning of the word amount to disenfranchisement. It was simply a result of systemic errors inherent in the electoral process that led to  
245 the failure to include results of the particular polling station in the final tally, but the people had voted. As to whether such systemic errors could be legally justified or not, reference has to be had to what the law stipulates in such exigencies of the electoral process. I will, however, first set out the facts in evidence and apply them to  
250 the law thereafter.

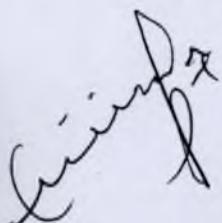
The 1<sup>st</sup> Respondent, at paragraph 7 of his affidavit supporting the answer to the petition, states that the issue of the missing ballots was reported to police and is still under investigation vide *Kapchorwa CRB 245/2016*. Annexures "A" and "B" to the said  
255 affidavit show that one Musobo Milton, Chemonges Moses, Sande Martin, Chelangat Newton, and Chebet Nancy, the polling officials of the 2<sup>nd</sup> Respondent involved in overseeing the voting at Chebonet polling station recorded police statements in respect to the missing ballots. Copies of their respective police statements and bond are  
260 also attached.

Also attached is DR form for Chebonet polling station showing the altered and the unaltered results. The unaltered DR form shows that the 1<sup>st</sup> Respondent obtained 272 votes and the Petitioner 175 votes. The altered DR form shows that the Petitioner obtained 275  
265 votes and 1<sup>st</sup> Respondent 272 votes. The name of Chepsigor Ignatius, who was the agent of the 1<sup>st</sup> Respondent appears on the DR form *Annexure B* to his affidavit. Under paragraph 3 and 4, he avers that the voting, counting, signing and DR forms went on well at the polling station and that the 1<sup>st</sup> Respondent got 272 votes and  
270 the Petitioner got 175, Khalifani got 43, Wodada got 03 votes. The DR form also indicates that it was duly signed by all the agents of all the candidates including Kulany Fred and Tongo Fred the agents of the Petitioner. They never denied being agents of the Petitioner or that they duly signed the DR form. Under paragraph 5 and 6,  
275 Chepsigor Ignatius states that he was surprised to hear that the results had been altered to favour the Petitioner.

The position of the law in the case of **Amongin Jane Francis Okilli vs. Lucy Akello & Anor (Gulu) HC EP No. 01 of 2014** is that where the agents of a candidate sign the DR form and there is  
280 no complaint from the agents, it is confirmation of the accuracy of

the results obtained by their candidate. Similar stance was taken in the case of ***Halima Nakawungu vs. Electoral Commission & Susan Managanda, (Masaka) HC EP No. 2 of 2011***, relying on ***Babu Edward Francis vs. Electoral Commission & Elias Lukwago, (Kampala) HC EP No.10 of 2006***; that when an agent signs a DR form, he or she is confirming the truth of what is contained in the DR form, and is confirming to his or her principal that it is the correct result of what transpired at the polling station; and the candidate is therefore estopped challenging the contents of the DR form because he is the appointing authority of the agent. I find that none of the Petitioner's agents at Chebonet polling station bears out the allegations of disenfranchisement.

On the cancellation of the results of Chebonet polling station by the Returning officer, it is evident that he acted properly within the law and his mandate. There was glaring evidence of material alterations and falsification of the results. Upon opening the ballot box which was the fall-back position, he did not find any DR forms which prompted him to cancel the results, and none of the candidates was awarded any votes for Chebonet polling station.



300 The action of the Returning officer is fortified by **Section 12 (1) (e)** of the ***Electoral Commission Act*** which empowers him to take measures for ensuring that the entire electoral process is conducted under conditions of freedom and fairness. In the case of ***Wesswa David vs. The Independent Electoral Commission and Makatu Augustus, (Mbale) HC EP No 21 of 2016*** it was held that such measures may include, inter alia, cancellation of the results, if that could meet the principle of freedom and fairness. To that end, I do not find that the voters of Chebonet were disenfranchised at all.

***Failure to control the use of ballot papers.***

310 The Petitioner alleges that the 2<sup>nd</sup> Respondent failed to control the use of ballot papers. This is at paragraph 5(b) of the petition, and paragraph 7, 8, 17 and 18 of the affidavit supporting the petition. The Petitioner states that the recount by the Chief Magistrate Court showed that 141 ballot papers from only one polling station of 315 Chesabit were missing from the ballot box. He attached a copy of the certificate of the recount as *Annexure D*.

Mr. Wamukota submitted that the fact of the missing ballots was even confirmed by the Returning Officer, at paragraph 30 and 31 of his affidavit supporting the answer to the petition, and also during

320 cross - examination. Counsel submitted that **Section 12 of the Electoral Commission Act (supra)** enjoins the Commission to design, print, distribute and control the use of ballot papers among other duties. That in this case the 2<sup>nd</sup> Respondent failed to control the use of ballot papers in the constituency which resulted into vote  
325 rigging, ballot stuffing, and multiple voting.

Mr. Wamukota argued that ballot papers are legal tender of the electoral process, and that proper control and use of the same is very important in ensuring a free and fair election. Further, that there is clear evidence that 141 ballot papers went missing at  
330 Chesabit polling station, and the Petitioner had applied for a recount for all the polling stations, but the Chief Magistrate allowed a recount of only two polling stations. That if the recount was done for all the polling stations, more missing ballot papers would have been discovered.

335 Mr. Wamukota also submitted that the Returning officer admitted that ballots papers were missing in the ballot box and confessed that he does not know where they disappeared. Counsel argued that if the 2<sup>nd</sup> Respondent was in full control of the ballot papers and electoral process, there is no way the ballot papers would go

340 missing; which was the source of the subsequent cancelation of the results in the mentioned polling stations.

In reply Mr. Mutembuli submitted that while it is not in dispute that during recount the unused ballot papers for Chesabit were not found in the box they were supposed to be, that issue was clarified  
345 by the Returning officer in his evidence in court that there was wrong labeling of envelope by the presiding officer. That the results of Woman MP were found in the directly elected MP and that the Returning officer even suggested that the unused ballot papers could have been in the box in a different envelope. Further, that  
350 during the recount, he pointed out this fact to the Chief Magistrate who nevertheless ignored it.

Mr. Mutembuli further submitted that Chesan Pisson, in his affidavit denied having received the ballot papers from Chesang Samuel. Further, that Musulubu Fred and Denis Musau all confirm  
355 that there were no ballot papers that were taken away by Chesang Pisson and that the DR form reflects the unused ballot papers as 141 and that all the agents signed the DR form including Sorowen Hussein the Petitioner's agent. Mr. Mutembuli argued that this confirmed that there was no evidence of ballot stuffing and multiple

360 voting on record, and that the election was conducted in compliance with the provisions of the law.

Mr. Mwassa Jude submitted that the 2<sup>nd</sup> Respondent never failed to control the use of ballot papers. Counsel submitted that Sorowen Hussein's claims that the sub county supervisor of Amukol sub county picked unused ballot papers from Chesabit polling station Presiding Officer and took them away are false and were effectively denied by the Presiding officer for Chesabit polling station, who also denied knowledge of Pison Chesang or that he never gave away any unused ballot papers to him. Counsel further submitted that Pison 370 Chesang's evidence is corroborated by Musulubu Fred, and that both state that they do not know Chesang Samuel the Presiding officer of Chesabit polling station.

Mr. Mwassa further submitted that Pison Chesang stated that on polling day he was busy supervising elections in his jurisdiction of 375 Amukol sub county and could not have at the same time been at Kapsinda sub county where Chesabit polling station is located and is far apart. Counsel argued that since the Petitioner failed to place the Pison Chesang at Chesabit polling station, the evidence as against the 2<sup>nd</sup> Respondent is false.

380 Mr. Mwassa also submitted that whereas the recount by the Chief Magistrate established that the unused ballot papers for Chesabit polling station were not in the ballot box, it was never concluded that they were misused, stuffed, or manipulated to benefit any candidate. Counsel argued that this ground is substantially of no  
385 consequence to the quality of the election and should be ignored.

It is generally acknowledged by all the parties that some of the unused ballots of Chesabit polling station were missing from the ballot box. This fact was confirmed even after the recount conducted by the Chief Magistrate. Some unused ballots were  
390 unaccounted for and they could not be traced. What is in dispute is what happened to them, and the effect, if any; it might have had on the overall result of the election for MP for Tingey County Constituency

The Petitioner vehemently contends that the failure to control the  
395 unused ballots led to ballot stuffing, rigging and multiple voting and that it affected the result of the election is a substantial manner. This was denied by Respondents.

After evaluating the whole evidence, none if it was found to support the allegations of multiple voting, vote rigging or ballot stuffing.

400 What is on record are the simply the denied allegations of one Sorowen Hussein that the sub county supervisor of Amukol sub county picked unused ballot papers from the Presiding Officer of Chesabit polling station and took them away. There is no other credible evidence of ballot stuffing or multiple voting at all or that it  
405 was in favor of the 1<sup>st</sup> Respondent. The recount by the Chief magistrate did not make any finding of ballot stuffing or multiple voting or vote rigging.

On that point, I respectfully disagree with Mr. Wamukota that if the Chief Magistrate had done a recount for all the polling stations, it  
410 would have been found that the missing ballots were many. This proposition is fundamentally untenable mainly for two reasons. The first one is that it is based on mere speculation that more missing unused ballots would have been found even for other polling stations. There is therefore no factual basis for it. No other polling  
415 stations were in controversy over the alleged missing unused ballots. The Petitioner never contested the results in those other stations and had no good reason to demand for a recount in all of them. They are not even in contention under this petition. It was hence unnecessary for the Chief Magistrate to go on a fishing

420 expedition in order to unearth the alleged missing unused ballots in other polling stations which were not contested.

Secondly, if the Petitioner was indeed dissatisfied with the outcome of the recount, he ought to have exercised the legal options that were open to him at the time. He did not; and cannot now be heard  
425 to fault the Chief Magistrate as there is no legal basis for it. Overall, this issue has not been proved by the Petitioner to the required standard. *Issue No.1* is answered in the negative. That also disposes of *Issue No.2* which is also answered in the negative.

***Issue No. 3: Whether or not the 1<sup>st</sup> Respondent committed any illegal practices and or any electoral offence, in person or by his agent with his knowledge consent and or approval.***

The particular issue is at paragraph 7 and 8 of the petition, and paragraph 13 and 14 of the affidavit supporting the petition, and in the 35 other affidavits supporting the petition and in rejoinder. The  
435 Petitioner enumerates a number of alleged illegal practices and electoral offences.

The first one relates to fundraising at Kapkwata PCM Church. The Petitioner, at paragraph 7(b) states that the 1<sup>st</sup> Respondent personally participated in a fundraising and gave donations during

440 the campaigning period contrary to **Section 68(7) of the Parliamentary Elections Act** (supra). This is supported in paragraph 14 of his affidavit that he was informed by one Khalifani  
Towet Mohamed and Chemo Michael. Several other witnesses also  
swore affidavits that the 1<sup>st</sup> Respondent personally attended  
445 fundraising and donated two bags of cement and pledged two trips  
of sand for construction of the Church.

Khalifani Towet Mohamed, at paragraph of 2-10 of his affidavit,  
narrates the events of the fundraising at Kapkwata PCM Church on  
the 14<sup>th</sup> February, 2016. That the 1<sup>st</sup> Respondent was in the church  
450 during the fundraising and that he told the people that he had been  
praying in his home church at Kapkwirwok Church of Uganda  
where he belongs. That he gave two bags of cement and pledged two  
trips of sand for the construction of the church, which were handed  
over to the Master of Ceremonies (MC) one Musobo Joseph Bukose  
455 and the 1<sup>st</sup> Respondent asked the congregation to votes for him on  
the 18<sup>th</sup> February, 2016. The allegations are repeated in the  
affidavits of Michael Chemo, Pastor John Nakitari Naphtali, Musobo  
Joseph Bukose, Sande Fredrick and Kiplangat Micahel.

Mr.Wamukota submitted that **Section 68 (7) & (8) PEA** prohibits a  
candidate or his agent carrying on fundraising or giving donations  
during the period of campaigning and that a person who acts to the  
contrary commits illegal practices. That the law enjoins persons  
participating in politics to keep charitable donations and  
fundraising in abeyance so as not to have a brush with the law.

Counsel cited ***Odo Tayebwa vs. Basajja Balaba Nasser and  
Electoral Commission EPA No. 13 of 2011***, where the Court of  
Appeal set aside the decision of the High Court and nullified the  
election on the ground of a candidate giving out donations at a  
fundraising during the campaign period.

Mr. Wamukota further pointed out Pastor John Nakitari Naphtali,  
Musobe Joseph Mukose, Sandy Patrick, Kiplangat Michael, Siwa  
Alex Celibe, Kabanga Samwiri, Ouma Augustine Chemonges and  
Chelipei Fred are all independent witnesses who confirmed that the  
1<sup>st</sup> Respondent attended fundraising and gave the donations.

Counsel argued that the evidence of Kiplangat Michael and Sande  
Fredrick was credible and cogent even under cross - examination as  
they were never shaken.

Mr. Wamukota also submitted that Francis Kabera from Airtel (U) Ltd testified on the issue of call data record print out of the 1<sup>st</sup> Respondent's telephone No. 0704945252; which is annexed to the affidavit of the Petitioner in rejoinder. Counsel stated that the 1<sup>st</sup> Respondent admitted that it was his telephone number. That whereas the 1<sup>st</sup> Respondent claims he was on that day in Kapkwirwok Church of Uganda at Sipi from 10:00am to 4:00pm, the print out of both incoming and outgoing call shows that between 2:02:00pm and 3:02:50pm he was at Kapkwai where Kapkwata Church is found. Counsel argued that this proves that the 1<sup>st</sup> Respondent was not at Kapkwirwok Church of Uganda, but Kapkwai just within the area where the fundraising took place, and hence he could not be in two places at the same time. Mr. Wamukota argued that the phone print out evidence corroborates the other evidence to place the 1<sup>st</sup> Respondent at the scene of the fundraising. Counsel opined that the 1<sup>st</sup> Respondent personally attended the fundraising and gave out donations with the intention to influence voters.

At paragraph 8 of his answer to the petition and paragraphs 12, 13, 14, 25, 26 and 27 of his affidavit, the 1<sup>st</sup> Respondent denied ever

attending the fundraising at all or giving the donations. He stated  
that he was at his home church at Kapkwirok from 10:00 am to  
500 3:30 – 400 pm attending prayers and later a meeting. To  
corroborate this he relied on the affidavits of Cheprop Michael,  
Mashandich John, Chesang Fred, Chelimo Alex, Nakitari Patrick,  
Salama Weke, Sabila Sanny Wilfred, Chesang Crispus, Musau Fadil  
and Pastor John Nakitari Naphtali. They all attest to the 1<sup>st</sup>  
505 Respondent being at Kapkwirwok C.O.U from 10:00 am to 3:30 –  
400 pm on 14<sup>th</sup> February, 2014, and that never attended the  
fundraising Kapkwata PCM Church as he was with them in his  
church at Kapkwirok.

The denial by the 1<sup>st</sup> Respondent finds more credence in evidence of  
510 members of Kapkwata PCM church, who held the fundraising on  
the 14<sup>th</sup> February, 2016. These include Chesang Fred, and Chelimo  
Alex, the Chairperson and Vice Chairman Construction Committee  
respectively of the Church, Musau Fadil and Arapsiwa Moses who  
stated that they did not see the 1<sup>st</sup> Respondent at the fundraising  
515 Mr. Mutembuli submitted that for Petitioner to succeed on this  
allegation, he must prove that there was fundraising carried on by  
the 1<sup>st</sup> Respondent; or that he gave out a donation; and that this

should be during the period of campaigning. Mr. Mutembuli argued that the 1<sup>st</sup> Respondent did not carry on fundraising since there is  
520 no evidence on record that he was part of the organizers of the fundraising at Kapkwata PCM church, if at all there was such a function on that day.

Mr. Mutembuli faulted the claim by Towet Khalifani Mohamed in his affidavit that 1<sup>st</sup> Respondent gave donations and that Towet  
525 Khalifani went to church at 1:00pm and found the 1<sup>st</sup> Respondent there. Counsel argued that Towet Khalifani Mohamed's claim cannot stand in face of the credible evidence of Kabangi Samwiri, Emu Augustine, Siwa Alex, Chelibe Fred and Musau Moses; all of whom confirmed that they attended services at Kapkwirwok Church  
530 of Uganda with the 1<sup>st</sup> Respondent that day and time.

Mr. Mutembuli further submitted that there were glaring contradictions in evidence of Kiplangat Michael who claimed that together with Sande Fredrick they went to Kapkwata PCM church after prayers from their church and that when they reached  
535 Kapkwata PCM church they immediately proceeded with the fundraising. That this sharply contradicted Sande Fredrick who told court that they left their church at 1:00p.m for the fundraising at

Kapkwata PCM church and when they reached Kapkwata they first had prayers in church before proceeding with the fundraising.

Further, that Sande Fredrick exhibited more material contradictions during cross examination that they when they went to Kapkwata PCM church they were with other people while Kiplangat Michael states that they were only two people from Sipi Church who went to Kapkwata PCM church. Counsel opined that 45 these two did not go to Kapkwata PCM Church and did not see the 1<sup>st</sup> Respondent.

Mr. Mutembuli also submitted that the affidavits in rejoinder sworn by the various witnesses do not meet the legal test of affidavits in rejoinder as was stated in ***Mutembuli Yusuf vs. Nagwomu Moses Musamba & A' nor case (supra)***. The particular affidavits were sworn by Pastor John Naftali; Siwa Alex Chelipei, Labu Yasin,Muzungu Bashir,Lona Nabuloyi,Mama Asadi,Chepkwoti Magaret,Modo Aggrey, Soyekwo Andrew,Shepsikor Stephen,Bariteka Viscent,Chebet Nancy Bukose,Siwa Alex Chelipei, 555 Kabangi Samwiri, Omu Agustine Chemonges,Masau Moses and Chelipei Fred. Counsel the affidavits were sworn by strangers who did not swear any affidavit in support of the petition and therefore

cannot rejoin. Further, that the evidence of Arapsiwa Moses, Chemonges William and Chemonges Patrick should also  
560 disregarded for swearing affidavits on both sides i.e. for the Petitioner and 1<sup>st</sup> Respondent.

Regarding the evidence of the telephone print out, Mr. Mutembuli submitted that the witness from Airtel (U) Ltd. conceded that the network fluctuates depending on the circumstances. That this was  
565 after the witness was shown a transaction which showed that on 14<sup>th</sup> February, 2016; at 3:02:23pm Telephone No. 070495252 received a call from Telephone No.0753994173, which was indicating two different boosters at Kapkwai and Mukuju PTC. That Kapkwai is in Kapchorwa yet Mukunju PTC is in Tororo. Counsel  
570 submitted that this is an indication that not much reliance can be placed on the telephone print out to place the 1<sup>st</sup> Respondent at Kapkwata PCM church on 14<sup>th</sup> February, 2016.

The law was correctly restated by all counsel for the parties.

**Section 68 (7) and (8) PEA (*supra*)** prohibits a candidate or his  
575 agent from carrying on fundraising and giving donations during the period of campaigning, and a person who acts to the contrary commits illegal practices. Once proved, the act has the effect of

nullifying the election. This is the stated position of the law in **Odo Tayebwa vs. Basajjabalaba Nasser and Electoral Commission**

580 (supra).

The Petitioner brought evidence of witnesses who state that the 1<sup>st</sup> Respondent attended a fundraising at Kapkwata PCM church on 14<sup>th</sup> February, 2016 at 1:00pm and gave out donations of two bags of cement and pledged two trips of sand for construction of the 585 church and asked the people present to give him votes. The 1<sup>st</sup> Respondent denied the allegations and equally adduced evidence of several witnesses who also state that on that date he was at Kapkworok church of Uganda from 10:00am – around 4:00pm and never attended the alleged fundraising.

590 Analyzing the evidence together on the issue, it is basically the word of one witness against that of the other witness. In such circumstances, there law requires the Petitioner who bears the burden of proof to adduce independent cogent corroborative evidence to prove the allegations he has set forth. See: **Paul Mwiru vs. Igeme Nathan Nabeta Samson & Election Commission & Anor, CA EPA No. 6 of 2011.**



After weighing both versions together, it leaves no doubt that the Petitioner failed to adduce credible cogent independent evidence to prove the fact in issue to the required standard. All the evidence his  
600 witnesses brought is discredited in some material way or the other.

Khalifani Towet Muhamad and Chemo Michael were effectively portrayed as merely agents of the Petitioner who would naturally swear affidavits to bolster his case. It is even more doubtful that Khalifani Towet Muhamad would have been in a church. Even for  
605 witnesses who were not agents, their evidence contains material contradictions especially as to the time the fundraising took place and the 1<sup>st</sup> Respondent is alleged to have attended and made the donations.

The evidence of Kabera Francis from Airtel (U) Ltd regarding the telephone print – out was not helpful either. After his clarification that under certain circumstances, which he labored to explain, the network fluctuates and more than one booster located in different places in the same vicinity can pick the calls. Indeed when some specific instances were pointed out to him from the phone print out,  
615 which indicated two different boosters at Kapkwai and Mukuju PTC, where the one at Kapkwai is in Kapchorwa and yet another at

Mukunju PTC is in Tororo, he conceded that they fall within the net work fluctuation ambit. This invariably demonstrated that the telephone print out evidence is not a reliable tool for placing a  
620 person at a particular given place. It can only reinforce other material evidence on the issue; which is lacking in this case.

In addition, the particular witness from Airtel (U) Ltd was not helpful as to the location of Kapkwai or whether that is where  
625 Kapkwata PCM church is found. It just featured in Mr. Wamukota's submissions with no backing evidence. Kabera Francis from Airtel (U) Ltd only pointed out the locations of telephone booster masts and nothing more.

On the other hand, the version supporting the view that the 1<sup>st</sup> Respondent never attended the fundraising at Kapkwata PCM  
630 church on 14<sup>th</sup> February, 2016 at 1:00pm appears more credible. Cheprop Michael, Mashandich John, Chesang Fred, Chelimo Alex, Nakitari Patrick, Salama Weke, Sabila Sanny Wilfred, Chesang Crispus, Musau Fadil and the others; consistently stated that the 1<sup>st</sup> Respondent was at Kapkwirok Church of Uganda from 10:00am  
635 – around 4:00pm on 14<sup>th</sup> February, 2014. Further, Chesang Fred and Chelimo Alex who are respectively the chairman and vice

chairman of the Construction Committee of Kapkwata PCM church,  
who stated that they attended the fundraising at their own church,  
confirmed that the 1<sup>st</sup> Respondent never attended the fundraising at  
640 their church on the said date and time.

In my opinion, Chesang Fred, and Chelimo Alex, given their  
prominent positions on the Construction Committed of the Church  
would ordinarily be at the centre of the fundraising activity if any.  
They would be better placed to know who attended and who made  
645 what donations. They are not in the category of agents of any of the  
candidates who would naturally have the motive to swear affidavits  
against the opposite candidate.

As for the affidavits in rejoinder of Pastor John Naftali, Siwa Alex  
Chelibei, Labu Yasin, Muzungu Bashir, Lona Nabuloyi, Mama  
650 Asadi, Chepkwoti Magaret, Modo Agrey, Soyekwo Andrew,  
Chepsikor Stephen, Bariteka Vincent, Chebet Nancy Bukose, Siwa  
Alex Chelibei, Kabangi Samwiri, Omu Agustine Chemonges, Masau  
Moses, and Chelibei Fred; I agree with submissions of Mr.  
Mutembuli that they all fail the legal test in ***Mutembuli Yusuf vs.***  
655 ***Nagwomu Moses Musamba & A' nor (supra)***. This only leaves the  
evidence of Arapsiwa Moses, Chemonges William, and Chemonges

Patrick who deponed affidavits for both the Petitioner and 1<sup>st</sup> Respondent at the same time. No any amount of reliance can be placed such evidence of spineless and clueless witnesses who could 660 swear affidavits for anybody on anything. The net effect is that the Petitioner has not proved to the required standard the alleged illegal practice of making donations during campaign period by the 1<sup>st</sup> Respondent

***Bribery at various places.***

665 The Petitioner, at paragraph 7(a), (b) and (c) of the petition and paragraph 13 of the affidavit supporting the petition, contends that the 1<sup>st</sup> Respondent personally or through his agents bribed voters contrary to ***Section 68 (1) of the PEA.***

***Bribery at New Apostolic Church.***

670 Malewa Satya Leonard, at paragraph 3 of his affidavit supporting the petition, states that he saw 1<sup>st</sup> Respondent seated in his car and Daudi Robert standing near him. That as he moved closer and greeted them, he heard 1<sup>st</sup> Respondent telling Daudi Robert to go and give the money to the mobilizers to give to the voters, and that 675 Daudi Robert was given a bundle of money.

Sabri Roboto Geoffrey also states in his affidavit in support of the petition at paragraph 3, 4, 5 and 6 that while at his home near Apostolic church polling station, he saw 1<sup>st</sup> Respondent give Daudi Robert a bundle of Shs.200,000/= , and that Daudi Robert gave  
680 him Shs 5,000 and asked to vote for 1<sup>st</sup> Respondent. In his affidavit in rejoinder, Sabri Roboto at paragraph 2,3, 4 and 5 restated that he personally saw 1<sup>st</sup> Respondent giving Daudi Robert money and that he was given only 5,000/=.

Mr. Wamukota submitted that Sabri Roboto Geoffrey is a voter as  
685 shown in paragraph 1 of his affidavit, and that the money was given by the 1<sup>st</sup> Respondent to Daudi Robert who handed over Shs. 5,000/= to Sabri Roboto Geoffrey. That this completes the cycle and the 1<sup>st</sup> Respondent personally and through his agent bribed Sabri Roboto Geoffrey to vote for him. Counsel relied on **Bakaluba Peter Mukasa vs. Nambooze Betty Bakireke, SC EPA No. 4 of 2009**, where it was held that proof of one act of an illegal practice is enough on its own to annul an election.

The 1<sup>st</sup> Respondent denied the allegation, at paragraph 1 of the answer to the petition and paragraph 14 and 32-33 affidavit  
695 supporting the answer to the petition. He stated that he did not

commit any illegal practice or give money to Daudi Robert and that  
Daudi Robert was not his agent.

Daudi Robert also swore an affidavit, and at paragraph 3, denied  
being an agent of the 1<sup>st</sup> Respondent or receiving any money from  
700 the person called Obama.

The offence of bribery under **Section 68 PEA** is defined as follows;

*“.. 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, give or other consideration to that other person,  
commits the offence of bribery.”*

In the case of **Achieng Sarah Opindi vs. Ochwo Nyakecho Kezia CAEPA No. 39 of 2011** relying on the case of **Col.(Rtd) Dr. Kiiza Besigye vs. Museveni Yoweri Kaguta & Another Presidential Election Petition No. 01 of 2001** it was held that for the petitioner to prove bribery, it must be proved that; a gift was given to a voter; the gift was given by a candidate or his agent; and the gift was given to induce the person to vote for the candidate. The  
710 same position was taken in **Odo Tayebwa vs. Bassajjabalaba**

(*supra*). In ***Achieng Sarah Opendi vs. Ochwo Nyakecho Kezia***

(*supra*) where the court emphasized the need for corroborative evidence from an independent source to confirm the truthfulness or falsity of the allegation of bribery. Furthermore, in ***Paul Mwiru***

720 ***vs.Nathan Nabeta & Another (supra)*** the Court of Appeal held that it is essential in allegations of bribery for the party alleging the same to prove on a balance of probabilities that the person or the persons allegedly bribed were registered voters.

For this particular incident, it was Sabri Roboto Geoffrey who

725 claims to have been given money as a bribe by Robert Daudi the alleged agent of the 1<sup>st</sup> Respondent with the consent and knowledge of 1<sup>st</sup> Respondent. Malewa Satya only claims to have heard 1<sup>st</sup> Respondent telling David Robert to go and give money to the Mobilizers to give to the voters, but he never saw the said Daudi

730 Robert give the money to Sabri Roboto Geoffrey, who in any case was not a mobilizer of the 1<sup>st</sup> Respondent. The story of giving and receiving Shs.5000 as a bribe immediately starts and ends with Sabri Roboto Geoffrey only. No other person could attest to it. It

fails the test in ***Achieng Sarah Opendi vs. Ochwo Nyakecho***

735 ***Kezia case (supra)*** of corroborating evidence from an independent

source to confirm the truthfulness or falsity of the allegation of bribery. The Petitioner's evidence to prove the alleged bribery at the New Apostolic Church is too weak for the purpose. It fails.

***Bribery at Bony village Kaptono Parish, Kaserem:***

- 740 In his affidavit supporting the petition, at paragraph 3, 4, 5, 6 and 7, Kukwai Asadi avers that on 17<sup>th</sup> February, 2016, Barishaki Bony Cheborion and Gadaffi gave him Shs.100, 000/= while at his home and asked him to distribute it to the voters and that he distributed it to the voters who included Stephen Guga, Bashir and Cherop and  
745 asked them to vote for the 1<sup>st</sup> Respondent

The 1<sup>st</sup> Respondent, under paragraph 8(a) of his answer to the petition, and at paragraph 12,13,32 of the affidavit supporting the answer to the petition, denied ever giving any bribe, donations or any other gift whatsoever to voters personally or through his agents,  
750 friends or relatives with his knowledge and consent or approval. Cheborion Barishaki who is said to have given out the bribe money on behalf of the 1<sup>st</sup> Respondent to be distributed to voters, at paragraph 3 of his affidavit, states that Kukawi Asadi's affidavit is full of falsehood. At paragraph 6, he states that he does not know  
755 Gadaffi or Kukwai Asadi or his home. At paragraph 7, he states that

he did not ask anyone to convince voters to vote for the 1<sup>st</sup> Respondent since he does not know Gadaffi or Kukwai Asadi. Cherop Alozio, at paragraph 3,4, and 5 of his affidavit also denies ever seeing Barishaki Bony Cheborion and Kukwai Asadi at his home. He also denies the allegation of Asadi that the latter gave him money.

Chemonges Gadaffi, at paragraph 3 of his affidavit, also denies having seen or interacted with Barishaki Bony Cheborion, or gone to see Kukwai Asadi at his home. At paragraph 4, he states that Kukwai Asadi told lied in his affidavit. Gadaffi denies having been with Kukwai Asadi and states that on 17<sup>th</sup> February 2016, he went to Ngenge trading centre to buy goats at 7:00am and came back at 8:00pm while very tired and decided to enter bed. That he neither saw Barishaki Bony Cheborion nor Kukwai Asadi on that day.

In his submissions Mr. Mutembuli pointed out that Kukwai Asadi purportedly signed on his affidavit, but that his national identity card shows that he cannot sign. Counsel raised the question as to who signed for him on the affidavit. Further, that Kukwai Asadi does not mention any name of the family members he purportedly gave money to, and that none of them swore affidavits to

corroborate his evidence of bribery. Counsel also submitted that Cherop Alozio denied ever receiving any money from Kukwai Asadi. After carefully evaluating all the evidence on this particular allegation, clearly the Petitioner's version fails the test in **Achieng**

780 **Sarah Opindi vs. Ochwo Nyakecho Kezia case (supra)**. There is no corroborating evidence from an independent source to confirm the truthfulness or falsity of Kukwai Asadi's allegation of the bribery. Since he was the only source of the Petitioner's information on this particular allegation of bribery at Bony village Kaptono Parish, Kaserem, the Petitioner totally failed to prove the same.

#### **Bribery at Fell Free Square/Trading Centre.**

This particular allegation is contained in the affidavits in rejoinder of Musungu Bashir, Mama Asadi, Chepsikor Stephen, Agrrey Modo, and Soyekwo Andrew. They all aver that Cheborion Bonny 790 Barishaki with the consent and approval of the 1<sup>st</sup> Respondent at Fell Free square at 7:00pm campaigned for the 1<sup>st</sup> Respondent and gave out money to Chesikor Stephen who in turn gave out to groups asking them to vote for 1<sup>st</sup> Respondent.

As correctly submitted by Mr. Mutembuli, the alleged incident of 795 bribery at Fell Free Square/Trading Centre was neither pleaded by

the Petitioner in the petition nor supported in his affidavit supporting the petition. It follows that even the affidavits sworn in support of an allegation that was not pleaded are in vain.

Apart from that, the affidavits of Maama Asadi, Chepsikor Stephen,

800 Aggrey Modo, Soyekwo Andrew fail the legal test in the **Mutembuli Yusufu case** (supra). They are strangers who cannot rejoin to an issue they were not privy to in the first place, and to which the 1<sup>st</sup> Respondent had no opportunity to respond to. This also goes for the allegations of bribery at Gamogo Primary School that the 1<sup>st</sup> Respondent bribed Chemonges Michael, Chemonges Abas, Furuta Michael, Soyekwo John, and Chekwel Martin with a sum of 20,000/= each with the aim of influencing them to vote for him. Nowhere does this incident appear in the petition or the affidavit supporting the petition.

810 **Bribery of Chema Women Group.**

This allegation appears in the petition at paragraph 7(a) and paragraph 13(b) of the Petitioner's affidavit supporting petition. He states that that the 1<sup>st</sup> Respondent through his agents Koron Denis with his knowledge and approval gave out 3 saucepans and 100 plates to Chema Women Group and asked them to vote for the 1<sup>st</sup>

Respondent. This was supported by the affidavits of Lorna Nabulobi and Chepkwoti Margaret in rejoinder. They all aver that they were given the said items and asked to vote for the 1<sup>st</sup> Respondent.

For his part the 1<sup>st</sup> Respondent denied knowledge of Koron Denis as  
820 his agent at all. This is further buttressed by evidence of Yeko Farantine, at paragraph 2 of her affidavit, who avers that she is the Chairperson of Chema Women Group and that the group has never received any saucepans or plates from Koron Denis and that she does not know the said Koron Denis at all.

Upon carefully evaluating the evidence, it is clear that the Petitioner once again relied on hearsay evidence for this particular allegation. It is not clear who among his agents were the source of his information. The source whose names were not disclosed did not swear any affidavit to corroborate the Petitioner's allegations.  
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In addition, the affidavits of Lorna Nabulobi and Chepkwoti Margaret which support the particular allegation were sworn in rejoinder without them having initially sworn affidavits in support of the petition, which renders their evidence legally untenable.

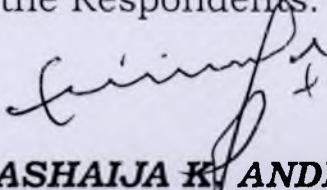
There is no evidence showing that Koron Denis was in fact an  
835 agent of the 1<sup>st</sup> Respondent. There is also no supported evidence

that the said Koron Denis gave out the saucepans and plates to Chema women group. The evidence to prove this incident of bribery is totally lacking, and the Petitioner has failed to prove it to the satisfaction of court on a balance of probabilities.

I have labored to delve through the entire evidence in the case for avoidance of doubt purposely to demonstrate that even on merit the Petition would still fail. Otherwise, it is wholly devoid of the factual and legal basis to sustain it as earlier found. It was premised largely on hearsay evidence which is inadmissible for the same reasons assigned.

***Issue No.4: Whether the parties are entitled to any of the reliefs sought.***

The Petitioner has failed to prove any of the grounds to the satisfaction of court on a balance of probabilities. The petition is dismissed with costs to the Respondents.

  
**BASHAIJA K. ANDREW**  
**JUDGE**  
**22/07/2016.**