

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
*(Coram: Elizabeth Musoke, Muzamiru M. Kibeedi and Monica K. Mugenyi, JJA)*  
**ELECTION PETITION APPEAL NO. 0066 OF 2021**

5 **THE ELECTORAL COMMISSION ..... APPELLANT**

**VERSUS**

**MWOSUKO JACOB ..... RESPONDENT**

10 *[Appeal from the judgment of the High Court of Uganda at Mbale (Kakooza Sabiiti, J) in Election Petition No. 32 of 2021 delivered on the 19<sup>th</sup> day of October 2021)*

**JUDGMENT OF THE COURT**

**BACKGROUND**

15 This appeal is rooted in the election of the Local Council III Chairperson for Mugiti Sub County Local Council, Budaka District, which was conducted by the appellant on the 3<sup>rd</sup> day of February 2021 in which the respondent and 4 others contested as candidates. The subcounty consisted of 11 Polling Stations established by the appellant. Using the results from only 10 Polling Stations out of the 11 Polling Stations, the appellant declared a one Kanene Enoch the successful candidate with a winning margin of 60 votes, having obtained 936 votes. The respondent was the runner up having obtained 876 votes. The respondent  
20 being dissatisfied with the outcome of the election lodged Election Petition No.32 of 2021 in the High Court of Uganda at Mbale against the said Kanene Enoch and the appellant seeking to set aside the election result on the ground that the winner, Kanene Enoch, was not validly elected in so far as the polling results from one Polling Station, Bunawera Polling Station, were not included in the final tally of results used by the Returning Officer to declare  
25 the election results. The respondent also alleged that the appellant failed to take adequate measures and steps to ensure that the entire electoral process was fair and transparent. The respondent also alleged that there was noncompliance with the electoral laws and principles which affected the result of the election in a substantial manner.

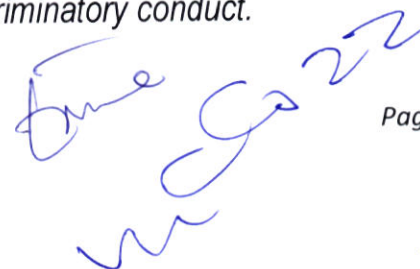
In their respective Answers to the Petition, the appellant and the winning candidate denied  
30 the claims made against each one of them by the respondent.

The trial of the matter proceeded by way of Affidavit Evidence filed by the parties to the  
Petition. None of the witnesses was cross examined on the contents of their Affidavits.

On 19<sup>th</sup> October 2021 the learned trial judge, Hon. Lady Justice Cornelia Kakooza Sabiiti,  
decided the Petition in favour of the respondent and nullified the election of Kanene Enoch  
35 as the LC3 Chairman of Mugiti Sub-county. Court ordered that, *inter alia*, the appellant  
conducts a fresh election at Bunamwera Polling Station for the Local Council III Chairperson  
and the results obtained from the fresh election be added to the results from the other 10  
polling stations which were not contested. The court also awarded the costs of the petition to  
the respondent.

40 The Appellant being dissatisfied and aggrieved with the decision of the trial court appealed to  
this Court based on the six grounds of appeal contained in the Memorandum of Appeal  
dated 2<sup>nd</sup> November 2021 namely:

1. *The learned trial Judge erred in law and fact when she held that the election was not  
45 held in accordance with the electoral laws and the principles governing elections  
which affected the results in a substantial manner in the absence of evidence on  
record.*
2. *The learned trial Judge erred in law and fact when she made a finding that the results  
of Bunamwera polling station would have had an impact on the final tally of votes  
before first ascertaining whether or not there were any results from the said polling  
50 station and their substantial effect on the outcome of the final result.*
3. *The learned trial Judge erroneously arrived at the conclusion that the decision by the  
Appellant to conduct fresh elections for the Councilors and not for LCIII Chairperson  
Mugiti Sub-county amounted to unfair and discriminatory conduct.*





- 55 4. *The trial Judge erred in law and fact when she held that the Appellant had cancelled the results of Bunamwera without citing any evidence on record to support her finding.*
5. *The learned trial Judge erred in law and fact when she failed to expunge all the Respondent's affidavits in rejoinder for contravening statutory provisions.*
- 60 6. *The learned trial Judge erred in law and fact when she failed to properly appraise and evaluate the evidence and legal arguments on record thereby reaching an erroneous decision thus occasioning a miscarriage of justice.*

### **REPRESENTATION**

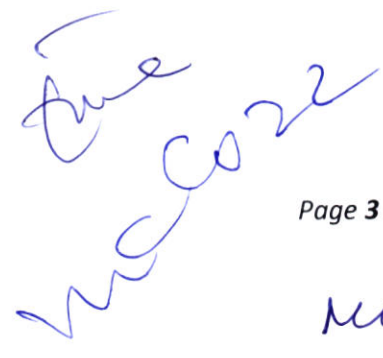
The appellant was represented in this court by Ms Landwell Advocates while the respondent was represented by Ms Nangulu & Mugoda Advocates.

65 Both parties having filed their Written Submissions in court, this court proceeded under Rule 98 of the Court of Appeal Rules to consider the said Written Submissions, the Authorities relied upon by the parties and the Record of Appeal to prepare Court's judgment in this appeal.

### **DUTY OF COURT**

70 As a first Appellate Court, the duty of this Court in an appeal of this nature is to re-appraise the evidence before the Trial Court and draw its own inferences of fact while making allowance for the fact that it did not have the opportunity enjoyed by the Trial Court of seeing or hearing the witnesses testify. **See Rule 30(1) of the Judicature (Court of Appeal) Rules S.I 13-10, Pandya Vs R [1957] EA 336, and The Executive Director of National Environmental Management Authority (NEMA) Vs Solid State Limited, Supreme Court Civil Appeal No.15 of 2015(unreported).**

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It is with the above principles in mind that we now proceed to consider and resolve the grounds of appeal in the order in which they were argued by the parties in their Written Submissions: Grounds 1, 2, 3, 4 and 6 will be considered together while ground 5 will be  
80 considered separately.

### **GROUND 1, 2, 3, 4 AND 6**

The above grounds were couched as follows:

**Ground 1** - *The learned trial Judge erred in law and fact when she held that the election was not held in accordance with the electoral laws and the principles governing elections  
85 which affected the results in a substantial manner in the absence of evidence on record.*

**Ground 2** - *The learned trial Judge erred in law and fact when she made a finding that the results of Bunamwera polling station would have had an impact on the final tally of votes before first ascertaining whether or not there were any results from the said polling station and their substantial effect on the outcome of the final result.*

90 **Ground 3** - *The learned trial Judge erroneously arrived at the conclusion that the decision by the Appellant to conduct fresh elections for the Councilors and not for LCIII Chairperson Mugiti Sub-county amounted to unfair and discriminatory conduct.*

**Ground 4** - *The trial Judge erred in law and fact when she held that the Appellant had cancelled the results of Bunamwera without citing any evidence on record to support her  
95 finding.*

**Ground 6** - *The learned trial Judge erred in law and fact when she failed to properly appraise and evaluate the evidence and legal arguments on record thereby reaching an erroneous decision thus occasioning a miscarriage of justice.*



## THE APPELLANT'S SUBMISSIONS ON GROUNDS 1, 2, 3, 4, and 6

105 In his Written Submissions, Counsel for the appellant stated that grounds 1,2,3, 4 and 6 relate to the circumstances that occurred at Bunamwera polling station during the elections and whether or not there were any results from there to be considered and/or included in the final tally of election results for the Local Council III Chairperson (LCIII Chairperson) Mugiti sub-county, Budaka district.

110 Counsel submitted that contrary to the Respondent's assertions, there were no election results for the Presiding Officer to declare or for the Returning Officer to include in the final tally of the election results. In support of this submission, Counsel referred to the evidence of the Appellant's witnesses in the trial Court contained in the Affidavits of Lunyolo Norah (Returning Officer-Budaka District), Kageni Gerald Munghoono (Mugiti sub-county Supervisor), Kaigo Erifazi (Parish supervisor) and Kwiri Joseph (Presiding officer, Bunamwera polling station).

115 Counsel argued that according to the evidence of all the above Appellant's witnesses no results were obtained from the electoral process at the Bunamwera polling station to be declared or included in the final tally. That, the Presiding Officer, **Kwiri Joseph** stated in his Affidavit that after voting and prior to counting of votes, violence erupted and interrupted the process. That the Police intervened by firing of tear gas to quell the situation in vain and, as a result, the electoral materials were taken to the sub-county without the Declaration of Result Forms being filled in.

125 That the sub-county supervisor (**Kageni Gerald Munghoono**) corroborated the evidence of the Presiding officer and further stated that the chaotic situation perpetrated by the Respondent's agents continued at the Sub-county offices leading to damage or destruction of Government property and that this rendered it impossible for the electoral process to continue. He further confirmed that only the results from 10 polling stations were submitted to

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the Returning Officer and that Bunamwera Polling Station had no results for the reasons aforesaid.

130 That in her Affidavit, Lunyolo Norah, the Returning Officer also re-affirmed the above narrative that there was disruption right from Bunamwera Polling Station to the sub-county Head Quarters and at the tally center and that since no results from Bunamwera polling station were submitted she recorded Zero for all the candidates.

135 Counsel submitted that since there were no results from Bunamwera polling station for the reasons already advanced, the actions of the Returning officer, Lunyolo Norah to proceed to tally and finally declare the results of Mugiti LC III Chairperson elections based on total results of the other polling stations is clothed in the law. For this submission Counsel relied on Sections 132, 133 and 135 of the Local Government Act Cap 143 and Section 12 1(e) & (f) of the Electoral Commission Act.

140 Counsel criticised the evidence relied upon by the Respondent and his witnesses to prove the results from Bunamwera Polling station which were alleged to have been omitted from the final tally by the agents of the Appellant. Counsel submitted that the evidence consisted of an uncertified Declaration of Results Form (DR Form) which was presented at Scheduling of the Case and was admitted by court for identification purposes. Counsel submitted that the said DR Form is inadmissible and carries no weight at all. For this submission, Counsel relied on the case of **Mashate Magomu Peter Vs Electoral Commission & Sizomu Gershom Rabbi Wambedde, Election Petition Appeal No.47 of 2016** where the Court of Appeal held that:

150 *"The position of the law is that documents have to be proved by primary evidence.....Declaration of Results Forms are public documents and a party who wishes to rely on them has to have them certified in accordance with sections 75 and 76 of the Evidence Act. Without such certification, such documents cannot prove any fact which they seek to prove."*

Counsel further submitted that after disregarding the DR Form of Bunamwera polling station and in the absence of evidence by the Respondent of the Register of voters for Mugiti Sub-



County to aid the Court ascertain whether the omission of the results from Bunamwera  
155 Polling Station would substantially affect the results, the trial Court erred when it arrived at  
the conclusion that failure to include results from Bunamwera affected the results in a  
substantial manner. Counsel argued that the incontrovertible evidence on record shows that  
Mugiti sub-county electoral area consists of 11 Polling Stations and no incidences of any  
malpractices occurred at all in the 10 Polling Stations out of the 11 Polling Stations.

160 Counsel further argued that the absence of results from Bunamwera Polling Station affected  
the candidates across board and to insinuate that the situation benefited some candidates or  
that the Respondent would have garnered majority votes in that polling station is merely  
speculative and not factual. As such, so submitted Counsel, the nullification of the election  
successfully conducted in 10 Polling Stations on account of the unfortunate incidents that  
165 transpired in one Polling Station - which were not even occasioned by the Appellant would  
be to disenfranchise the majority of the voters from the 10 polling stations in Mugiti sub-  
county. For this submission Counsel relied on the case of Akuguzibwe Lawrence Vs  
Muhumuza David & E.C, Election Petition Appeal No.22 of 2016.

Counsel faulted the trial court for finding that organizing a re-election for the Councilors and  
170 not LCIII Chairperson was selective and amounted to discrimination. Counsel reiterated his  
argument that the cancellation and/or omission of the results affected all candidates and  
there was no evidence adduced before the trial court to show who benefited from the  
decision of the Returning Officer. Counsel justified the reason for conducting fresh elections  
for only Councilors to be that their electoral areas are relatively small and consist of few  
175 polling stations compared to other elective offices like the LCIII Chairperson which covers a  
whole Sub-County. That in those circumstances, the lack of results from only one Polling  
Station would substantially alter the results for election of Councilors as opposed to the  
bigger elective posts.

Counsel concluded by praying that this Court finds that the decision of the appellant not to  
180 conduct a re-election at Bunamwera polling station for LCIII Chairperson for Mugiti Sub-

County did not offend any electoral laws and in particular, Article 21 of the Constitution. Further, that the whole of the election for LCIII Chairperson, Mugiti sub-county was conducted in a free and fair manner and in compliance with the electoral laws and that the incidents of non-compliance or electoral irregularities at Bunamwera polling station, if any, did not affect the results in a substantial manner.

### **RESPONDENT'S REPLY TO GROUNDS 1, 2, 3, 4 and 6**

Counsel for the respondent supported the trial judge's decision. He submitted that the crux of Election Petition No. 23 of 2021 was that the Appellant's Returning Officer illegally and/or erroneously omitted or excluded polling results from Bunamwera polling station, Mugiti sub-county, Budaka district. That the reason given by the Returning Officer for nullification of the Results from the said polling station was violence and disruptions at the Polling Station. Counsel submitted that whereas the Appellant had the power to cancel results that would not meet conditions of freedom and fairness pursuant to Section 12 (e) and (f) of the Electoral Commission Act, the Returning Officer exercised that power in breach of the principles of natural justice.

Counsel faulted the Returning Officer for contravening **Section 57 of the PEA** which provides for the course of action in the event of any interruption in the counting and tallying of electoral results. Counsel submitted that Section 57 (1) of the PEA empowers the Presiding Officer in the event of disruptions caused by violence, to adjourn the counting to the next day or any other time that same day and to notify the Returning Officer of any such incident immediately. However, there was no supporting evidence to confirm that indeed the electoral process was interrupted before completion of the counting of results. That the Presiding Officer did not indicate in his electoral record book any form of electoral malpractice. He did not adjourn the counting or even notify the Returning Officer. Counsel argued that the decision to nullify the election results was therefore arbitrary and malicious. That it was undertaken in connivance with the winning candidate because there wasn't any justifiable basis to warrant the nullification of the said results.



As regards the decision of the Appellant's Returning Officer to conduct a re-election in respect of only the Councilors' election and not for the instant election, Counsel supported  
210 the trial judge's finding that the decision was discriminatory and a fundamental abuse of the rights of the electorate under Article 1 and 21 of the Constitution. That the trial court therefore rightly found that the Returning Officer acted in abuse of her mandate under Section 12 of the Electoral Commission Act.

Counsel further submitted that even the appellant and the winning candidate by their own  
215 admissions acknowledged that the process was not free and fair and/or in compliance with the electoral laws on account on the incidences of violence and disruption witnessed at Bunamwera Polling station, the sub-county headquarters and the district tally center. That accordingly, the real issue is whether the decision of the appellant to nullify the results from the impugned Polling Station affected the election in a substantial manner.

It was Counsel's submission that the vote difference between the winning candidate and the  
220 respondent was only 60 votes. That the result from the impugned Polling Station indicated that the respondent obtained 186 votes while the Winning Candidate obtained 126 votes. That the simple arithmetic would indicate that if the results from the impugned Polling Station had been considered, then Kanene Enoch would not have emerged victorious. Counsel  
225 concluded by submitting that the trial judge was justified to find that the omission of the results from the impugned Polling Station affected the final election results in a substantial manner. In the circumstances, it was only fair and just for the trial Court to order a re-election at Bunamwera polling station so as to enable the affected citizens/voters exercise their constitutional right. Counsel prayed that this Court be pleased to dismiss the appeal with  
230 costs.

#### **RESOLUTION OF GROUNDS 1, 2, 3, 4 and 6**

The complaint of the appellant in grounds 1, 2, 3, 4 and 6 relates to the trial judge's evaluation of the evidence as to the existence of election results for Bunamwera Polling

Station and the effect of the omission of the said results (if any) on the final results of election  
235 of the LCIII Chairperson of Mugiti Subcounty in Budaka District as declared by the appellant.  
It is the appellant's case that there was no election result from Bunamwera Polling Station to  
be included by the Returning Officer of the appellant in the final tally of the results for election  
of the LCIII Chairperson. That the DR Form relied on by the respondent as evidence of the  
election results was inadmissible in evidence on account of not being certified and having  
240 been admitted by court simply for identification. That without evidence of the DR Form and  
the Voters Roll for Bunamwera Polling Station, there was no evidence upon which the trial  
court based to conclude that the omission of the results of Bunamwera Polling Station from  
the declaration of the winning candidate of the LCIII Chairperson, and the general complaints  
about non-compliance and breaches of the electoral principles and laws reported at the said  
245 Polling Station affected the final result in a substantial manner in order to warrant an order to  
conduct fresh elections for the said polling station.

The respondent disagreed. The respondent supported the trial judge's findings that there  
was violence at the impugned Polling Station which the appellant failed to control and that  
the omission of the results of the impugned Polling Station from the final tally of results  
250 disenfranchised voters and affected the results in a substantial manner.

The starting point for resolution of the complaint in grounds 1, 2, 3, 4 and 6 is establishing  
the existence of election results for the impugned Polling Station before delving into the  
impact of their omission on the final tally and Declaration.

The document prescribed by the law to contain the election results of any Polling Station  
255 used during the election of the LCIII Chairpersons is the "Declaration of Results Form" (DR  
Form) duly filled in by the Presiding Officer (**Section 136 of the Local Government Act,  
Cap. 243.**) The detailed particulars and format of the DR Form are set out in the Seventh  
Schedule of the Local Government Act as "Form EC9". Such particulars include the number  
of valid votes obtained by each candidate, the total number of valid votes cast for the



260 candidates, the total number of invalid ballot papers, the total number of ballot papers counted, the total number of spoilt ballot papers and total number of ballot papers issued.

Section 136 of the Local Government Act provides for the detailed process of generation of the DR Form by the Polling Officer and its transmission to the Returning Officer. The Section provides thus:

265 **"S. 136. Declaration of Results Forms**

(1) *Each presiding officer shall complete the necessary number of copies of Form EC 9 prescribed in the Seventh Schedule for the declaration of results, sign them and do the following—*

270 (a) *one copy shall be retained by the presiding officer for display at the polling station;*

(b) *one copy shall be enclosed in an envelope supplied by the Electoral Commission for the purpose, sealed by the presiding officer and delivered to the nearest result collection Centre prescribed by the returning officer, together with the report book, for transmission to the returning officer;*

275 (c) *one copy shall be delivered to each of the candidates' agents or, in the absence of those agents, to any voters present claiming to represent the candidates; and (d) one copy shall be deposited and sealed in the ballot box.*

280 (2) *The presiding officer shall, in the presence of the candidates and the candidates' agents as may wish to be present, seal the ballot box with a seal provided for the purpose by the Electoral Commission.*

(3) *The sealed ballot box referred to in subsection (2) shall contain the following items—*

(a) *one duly signed declaration of results form;*

285 (b) *the ballot papers received by each candidate, tied in separate bundles;*

(c) *the invalid ballot papers, tied in one bundle;*

(d) *the spoilt ballot papers, tied in one bundle;*

(e) *the unused ballot papers; and*

(f) *the voters roll used at the polling station.*

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(4) *The declaration of results form shall be signed by the presiding officer and the candidates or their agents present who wish to do so, and the presiding officer shall there and then announce the results of the voting at that polling station before communicating them to the returning officer."*

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We have reviewed the Record of Appeal in this matter with the objective of establishing who had the burden to prove the existence of the results of the impugned Polling Station and how the burden was discharged. From the Petition of the respondent as filed in the trial court, the claim of the existence of the DR Form containing the election results for the impugned Polling Station was raised by the current respondent. The gist of the dispute of the respondent, as set out in the Petition, was that the appellant had gone ahead to declare Kanene Enock the winning candidate without including the results of Bunamwera Polling Station in the final tally despite the fact that there was a Declaration Form for Bunamwera Polling Station duly signed by the Presiding Officer. As such, he sought from the trial court, *inter alia*, a declaration that the results of Bunamwera Polling Station be included in the final tally of results. He also sought the nullification of the election for non-compliance with the electoral laws and principles which affected the results of the elections in a substantial manner. The Respondent attached a copy of the Tally Sheet and the DR Form for Bunamwera Polling Station to his Affidavit in Support of the Petition.

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In Kanene's Answer to the Petition, he stated that there was no DR Form prepared and signed by the Presiding Officer and the candidates' agents as claimed by the respondent due to the violence that had erupted at the Polling Station before the voting process being concluded. Further, that the DR Form relied upon by the respondent was a forgery. He also denied the claim that the omission of the results of the impugned Polling Station had a substantial effect on the final result.

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As for the appellant, it filed a general denial of the allegations of the respondent against it and stated that after polling, there was a disruption right from the impugned Polling Station, Sub-County Headquarters and finally the District Tally Centre, where the results were



rejected for not having been declared at the Polling Station and Zero results recorded for all the candidates.

320 In the circumstances above, it is our finding that proof of the existence of the DR Form for the results of the impugned Polling Station and the effect of the omission of those results from the final tally lay on the respondent who alleged the same in his pleadings. And that takes us to the next question: How was the burden of proof discharged by the respondent?

325 The DR Form that the respondent sought to rely on to prove the election results of the impugned Polling Station was attached to his Affidavit in Support of the Petition sworn on the 18<sup>th</sup> of May 2021 and marked "C". It was a photocopy. The respondent did not indicate from which document the photocopy (annexture "C") was made and how the respondent came to obtain the photocopy which he attached to his Affidavit in Support of the Petition. But from the Affidavit of one of the respondent's agents at the impugned Polling Station, PW2 Naguti Christine, it is stated that the DR Form was given to the respondent by the said PW2 Naguti.  
330 But even then, the respondent did not indicate in his evidence that the photocopy he was relying on was made out of the original of the said DR Form.

During the Scheduling Conference held by the trial court on 01<sup>st</sup> September 2021, Counsel for the appellant objected to the admission of the DR Form of the impugned Polling Station whose photocopy had been attached to the respondent's Affidavit in Support of the Petition.  
335 The grounds for the objection were stated to be that it was not certified by the Electoral Commission and that its source was not known to court. In its Ruling, the trial court held:

*"DR Form is not certified and cannot be admitted as an Exhibit. It remains an ID document."*

The above Ruling has not been challenged on appeal.

340 In her judgment, the trial judge never addressed herself as to whether the appellant adduced sufficient evidence to discharge the burden of proof of the existence of the election results of the impugned Polling Station. The record of the trial court proceedings indicates that after the



Scheduling Conference the Court Order as to the admissibility of the DR Form was not complied with. The consequence of the non-compliance with the Court Order is that the DR Form was never formally proved and admitted into evidence as an exhibit. It remained an "ID Document". Instead, the parties proceeded to file Written Submissions as per the timelines set by the trial court during the Scheduling Conference. As such, it is our finding that without the DR Form being formally proved and admitted into evidence as an exhibit as directed by the trial Court, the respondent failed to discharge his burden of proof of the existence of the results of the impugned Polling Station to warrant a rebuttal of the said fact by the appellant. Accordingly, the appellant was justified to fault the trial judge for not evaluating the evidence as to the existence of election results for Bunamwera Polling Station. Had she done so, she would have held that the respondent did not adduce evidence as to the existence of the results of the impugned Polling Station which were allegedly omitted from the final tally of the results for the election of the LCIII Chairperson of Mugiti Subcounty in Budaka District. And this takes us to the second leg of the appellant's complaint in grounds 1, 2, 3, 4 and 6 namely: Whether the omission of the election results of the impugned Polling Station substantially affected the outcome of the election of the LCIII Chairperson of Mugiti Subcounty in Budaka District.

When dealing with this issue, the trial judge stated thus in her Ruling:

*'All the parties and their witnesses agree that election at Bunamwera went on smoothly but there was violence after the voting. However, they disagree on whether or not the votes were counted, a declaration form was signed and who caused the violence. The Petitioner and the 1<sup>st</sup> respondent each accuse the other's side of perpetuating the violence...'*

***In Dr. Kiiza Besigye v Yoweri Museveni, Supreme Court Election Petition Appeal No. 1 of 2001, Mulenga JSC at p.355 explained thus: "To my understanding therefore the expression non-compliance affected the result of the election in a substantial manner...can only mean that the votes a candidate obtained would have been different in a substantial manner, if it were not for the non-compliance substantially. That means that to succeed, the petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced. Such reduction however would have to be such as would put victory in doubt."***



375 As submitted by the 1<sup>st</sup> respondent, it would have been helpful for the parties to  
inform court of the number of registered voters at the polling station in issue. Be that  
as it may, I am of the considered opinion that by making the decision to cancel the  
votes at this polling station, and not organizing a re-election specifically for only this  
380 station as was done for the councilors, the 2<sup>nd</sup> respondent applied the law selectively  
in violation of article 21 of the Constitution and the principles of equity and natural  
justice.

In addition to the above, despite the voters at Bunamwera voting all day, they were  
disenfranchised because their will was not reflected in the results announced by the  
2<sup>nd</sup> respondent. This affected the results in a substantial manner especially given the  
385 margin of votes the Petitioner and the 1<sup>st</sup> respondent. The results obtained at this  
polling station could impact the final tally of votes obtained by each candidate. I  
therefore find that there was noncompliance which affected the results in a  
substantial manner. Issue one is resolved in the affirmative.'

It appears from the above quotation that the trial judge was alive to the meaning of the  
390 expression "non-compliance affecting the result of the election in a substantial manner". She  
was alive to the fact that in the circumstances of this case, it all boils down to adducing  
evidence as to the number of votes under scrutiny which would reduce the winning margin in  
such a way as to put the victory of the winning candidate in doubt. So, the question that  
follows is whether the trial judge applied the said definition to the evidence before her.

395 We have reviewed the record of appeal to determine the evidence as to the effect of the  
omission of the election results of the impugned Polling Station on the final result. There is  
consensus between the witnesses of the respondent and appellant who directly witnessed  
the happenings at the impugned Polling Station that the voting exercise went smoothly upto  
the time the voting was closed at 4PM. This is evident in the Affidavit Evidence of the  
400 respondent's two Polling Agents at the impugned Polling Station namely, PW2 Naguti  
Christine and PW4 Kirwaniro Micah, and the Affidavit Evidence of the Presiding Officer, RW7  
Kwiri Joseph, RW5 Kageni Gerald Munghoono (the appellant's Subcounty Supervisor), and  
RW6 Kaigo Erifazi (the appellant's Parish Supervisor). There is also agreement that chaos  
was witnessed at the Polling Station after the voting had ended and that the Police  
405 intervened to quell the chaos which interrupted the last activities at the Polling Station  
especially the counting of the votes, entering the election results into the DR Form and



signing it off by the Presiding Officer and the candidates' agents. But there is contradicting evidence as to the point at which the chaos started: Whereas the respondent's witnesses state that the chaos started after the counting of the votes had been completed and the DR Form signed by the Presiding Officer, the Affidavit Evidence of the Appellant and the winning candidate is to the effect that the chaos started when the votes were still being counted which led to the failure to complete the vote counting exercise and signing of the DR Form by the Presiding Officer and the candidates Polling Agents.

We note that **Section 133** of the **Local Governments Act** sets out the procedure for the Electoral Commission to follow when the vote counting process is disrupted. The section is couched thus:

***"133. Interruption and postponement of counting, tallying or recounting***

(1) *Where counting, tallying or recounting of votes is interrupted by a riot or violence or any other reasonable cause, the presiding officer or returning officer shall adjourn the counting, tallying or recounting to the next day or to any other time of the same day and shall immediately inform—*

(a) *in the case of the presiding officer, the returning officer; or*

(b) *in the case of the returning officer, the Electoral Commission, of that fact.*

(2) *Where the counting, tallying or recounting of votes is adjourned to the following day under subsection (1), the time, procedure and manner of the subsequent counting, tallying or recounting shall be as on the original occasion.*

(3) *Where counting is adjourned under this section, the ballot boxes shall be kept in safe custody and the candidates or their agents shall be entitled to be present to keep watch on the boxes until counting resumes."*

From the evidence before the trial court, the appellant's officials did not follow the procedure set out in Section 133 of the Local Governments Act when faced with the violence and disruption at the polling station. Instead, they merely opted for actions the end result of which was to omit the results for the impugned polling station from the final tally of results. Thus, for that reason, it can be stated that there was non-compliance with the provisions of the



435 Local Government Act, Cap. 243 during the election of the LCIII Chairperson of Mugiti Sub-county.

There is no doubt that the non-inclusion of the election results of the impugned Polling Station disenfranchised the voters who turned up to vote as the trial judge rightly found. So, the issue for this court is to determine the impact of the non-inclusion on the final result.

440 Determination of the impact of the omission extends upto ascertaining the number of voters disenfranchised and whether such a number would reduce the winning margin in such a way as to put the victory of the winning candidate in doubt.

The best evidence to prove the actual number of voters who turned up to vote at the impugned Polling Station and were thus disenfranchised would have been the DR Form for the Polling Station. But this court has already found that no admissible evidence of the said

445 DR Form was tendered before the trial court by the respondent.

In the absence of admissible evidence of the DR Form, the evidence submitted to court by the respondent to prove the number of persons disenfranchised was the Results Tally Sheet for Bunamwera Polling Station indicating that the Polling Station had 840 registered voters. A

450 copy of the said Tally Sheet was attached to the Respondent's Affidavit in Support of the Petition. During the Scheduling Conference, the said Results Tally Sheet was admitted in evidence by court and marked Exhibit "P2" **subject to certification by the Electoral Commission**. The respondent's Counsel did not subsequently obtain the certification as required by court. Instead, he proceeded to file Written Submissions in support of the

455 Petition. It is our finding that the failure to fulfill the condition given by the trial Court for the admission of the photocopy of the Results Tally Form in evidence rendered the uncertified copy on the court record inadmissible.

The other evidence to prove the actual number of voters who were disenfranchised would have been the Voters Roll which was used at the impugned Polling Station. However, no

460 such Voters Roll was part of the respondent's evidence. Under Section 136(3)(f) of the Local

Government Act, the Voters Roll which is used at the Polling Station is one of the documents which the Presiding Officer is required to seal in the ballot box and forward to the Returning Officer at the end of the polling exercise. The Returning Officer, in turn, has a legal obligation imposed by Section 52 of the Parliamentary Election Act No. 17 of 2005 to keep the sealed  
465 ballot box and all the other election documents in safe custody until the Electoral Commission gives directions as to their destruction after the settlement of any disputes arising from the election. Section 52 of the Parliamentary Election Act is applicable to the elections of Local Councils with the necessary modifications by virtue of Section 172 of the Local Government Act.

470 It is our finding that in the absence of admissible evidence as to the number of people who expressed interest to vote by turning up and casting their votes at the impugned Polling Station, there was no basis for the trial court to conclude that the omission of the results of the impugned Polling Station from the final tally affected the final results in a substantial manner. Grounds 1, 2, 3, 4 and 6 accordingly succeed.

475 **GROUND 5**

Ground 5 was couched as below:

*The learned trial Judge erred in law and fact when she failed to expunge all the Respondent's affidavits in rejoinder for contravening statutory provisions.*

**APPELLANT'S SUBMISSIONS ON GROUND 5**

480 Counsel for the appellant faulted the trial judge for overruling the preliminary point of law which he raised during the trial seeking to expunge the Affidavits in Rejoinder of the PW1 Mwosuko Jacob, Kasolo Tom Juma and Mpyangu Alex dated 17<sup>th</sup> June 2021 from the Court Record. The reasons advanced in support of the point of law was that the said Affidavits introduced new facts/issues touching the professional integrity of the Appellant's officials



485 which contravened Rule 17 of the Parliamentary Elections (Interim Provisions) Rules S.1 141  
-2 and Order 8 Rule 18 of the Civil Procedure Rules, S.1 71-1.

The second reason advanced by the appellant's Counsel was that Kasolo Tom Juma and  
Mpyangu Alex were complete strangers to the Petition and their evidence was inadmissible  
in so far as they were neither mentioned in the Affidavits of the Respondent or Appellant in  
490 Support nor did the contents of the two Affidavits refer to any specific paragraphs of the  
appellant's Affidavit evidence which they sought to rebut.

Counsel concluded this ground by inviting this court to find that the said affidavits in rejoinder  
offended the statutory provisions of the law and the learned Judge ought to have struck them  
off the record.

495 **RESPONDENT'S REPLY TO GROUND 5**

Counsel for the respondent supported the decision of the trial judge. Counsel submitted that  
the trial judge had opportunity to examine the Appellant's affidavit in support of the petition  
and the subsequent affidavits in rejoinder and found that the same did not introduce any new  
elements of evidence beyond the allegations of connivance and collusion which had already  
500 been alluded to in the supporting affidavits to the petition. Accordingly, the trial judge cannot  
be faulted for overruling the preliminary objection.

Counsel concluded by inviting Court to answer all grounds in the negative and dismiss  
Election Petition Appeal No. 66 of 2021 with costs to the Respondent.

**Resolution of Ground 5**

505 We have considered the submissions of both counsel in respect of ground 5. This court  
having answered grounds 1, 2, 3, 4 and 6 in the affirmative, ground 5 was rendered  
academic. This court is not prepared to go onto an academic voyage. Accordingly ground 5  
is struck out.

time  
WCL 22

united

### Decision of Court:

- 510 1. The appeal is allowed.
2. The orders of the trial court are hereby set aside.
3. The election results for the LC3 Chairperson of Mugiti Sub-county in Budaka District as declared by the appellant are hereby upheld.
- 515 4. Each party shall bear its costs in this court and in the court below. The reason for this is that the winning margin in this election was very narrow and it is important that the aggrieved parties should always be encouraged to access the court for civil resolution of the allegations of election malpractice without fearing to be penalized by way of costs. Our decision is fortified by the decision of this court in Aisha Kabanda Nalule v Lydia Daphine Mirembe & 2 Others, Election Petition Appeal No. 90 of 2016, where this Court considered it inappropriate
- 520 to condemn either party by way of costs given the narrow winning margin of 67 votes.

We so order.

Signed, dated and delivered at Kampala this <sup>1st</sup> day of <sup>Aug</sup> 2022.

  
ELIZABETH MUSOKE

**Justice of Appeal**

  
MUZAMIRU MUTANGULA KIBEEDI

**Justice of Appeal**

  
MONICA K. MUGENYI

**Justice of Appeal**