

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA**

*[Coram: Egonda-Ntende, Mulyagonja & Luswata, JJA]*

**ELECTION PETITION APPEAL NO. 02 of 2023**

*(Arising from High Court Election Petition No.11 of 2022 at Soroti)*

**BETWEEN**

Attan Moses Okia=====Appellant

**AND**

Ariko Herbert Edmund Okworo=====Respondent No.1

The Electoral Commission =====Respondent No. 2

The Returning Officer=====Respondent No 3

Soroti City District=====Respondent No. 4

**JUDGMENT OF FREDRICK EGONDA-NTENDE, JA**

**Introduction**

- [1] The appellant and the respondent no.1 were candidates for the seat of Member of Parliament for Soroti City East Constituency in Soroti District in the by-elections held on 29<sup>th</sup> July 2022. The respondent no.2, Electoral Commission returned the respondent no. 1 as the validly elected Member of Parliament for the constituency and gazetted the result in the Uganda Gazette on 1<sup>st</sup> August 2022. The petitioner challenged the outcome of the election in the High Court of Uganda, Soroti. On 20<sup>th</sup> January, 2023, Ssekaana J., found no merit in the petition and dismissed it.
- [2] Dissatisfied with the decision, the appellant has appealed to this court on grounds set out below:

1. The learned trial judge erred in law and fact when he disregarded the appellant's complaint that the 1<sup>st</sup> respondent's lawyers had

violated rule 19 of the Advocates Professional Conduct Regulations in soliciting for affidavits from the appellant's witnesses.

2. The learned trial judge erred in law and fact when he struck out the affidavits of Emacu Rodrick Denis, Acibo Phois Mary, Egaru Moses, Akello Mary Goretti, Igimu Immaculate, Emesu Francis, Akello Grace, Ogwang Emmanuel, Ocen Nicholas, Okurutu Nathan, Ongodia Stephen and Ariokot Demita in support of the Appellant's petition.
3. The learned trial judge erred in law and fact when he applied a standard of proof in respect of the allegations in the petition contrary to that provided for in the Parliamentary Elections Act 2005.
4. The learned trial judge erred in law and fact when he held that the appellant had no appointed agents during the election.
5. The trial judge erred in law and fact when he upheld the result of the election at Akisim PAG compound polling station despite the illegalities and irregularities.
6. The learned trial judge erred in law and fact when he upheld the results contained in a fraudulently prepared declaration of results form for Akisim PAG compound polling station.
7. The learned trial judge erred in law and fact in concluding that noncompliance had not been proved at Otatai Primary School Polling Station.
8. The learned trial judge erred in law and fact in carrying out an omnibus evaluation of evidence at Owolo C.O.U. compound Polling Station, Opuyo Primary Polling Station and Aminit Primary Polling Stations and thereby reached a wrong conclusion that non-compliance had not been proved at these polling stations.
9. The learned trial judge erred in law and fact in holding that the disputed entries on the certified declaration of results forms for Akisim PAG compound Otatai Primary School, Owolo COU Compound, Aloet Akum Catholic Church, Opuyo and Aminit polling stations were immaterial and had no bearing on the final outcome of the election.

10. The trial judge erred in law and fact in holding that the irregularities had to be attributed to the successful candidate whose election is challenged.
11. The trial judge erred in law and fact when he held that the entire petition was an afterthought to appease the appellant's supporters.
12. The trial judge erred and law when he faulted the appellant and his agents for failure to report complaints to the Electoral Commission.
13. The learned trial judge erred in law and fact in holding that the petitioner had not proved noncompliance on both qualitative and quantitative fronts.
14. The learned trial judge erred in law when he wrongfully exercised his discretion to award costs to the respondents.

[3] The respondents opposed the appeal.

### **Submissions of Counsel**

- [4] Mr. Jude Byamukama appeared for the appellant, while Mr. Esau Isingoma, Mr. Moses Muziki and Mr. Stanley Kangye represented the Respondent no.1 and Mr. Patrick Wetaka and Ms. Gilda Katuutu represented the respondents no.2 and no.3. All Counsel filed written submissions.
- [5] Counsel for the appellant submitted that the trial judge did not study the affidavits of Emacu Rodick Denis, Acibo Ohois Mary, Egaru Moses, Akello Grace, Ogwang Emmanuel, Ocen Nicholas, Okurut Nathan, Ongodia Stephen and Ariokot Demita who gave evidence in respect of Akisim PAG, Aloet Akum, Otati Primary, Owolo COU Compound and Opuyo Primary Polling Stations. Counsel for the appellant further submitted that the trial judge ought to have preserved the affidavits in support of the petition and struck out the one in support of the respondent's answer to the petition.
- [6] Counsel for the appellant contended that the respondent no.1's lawyers made the appellant's witnesses to depone affidavits in support of the answer to the petition through trickery, coercion, and bribery. He contended that the conduct of counsel for the respondent no.1 violates the tenets of a fair trial and is contrary to rule 19 of the Advocates (Professional conduct) Regulations SI

267-2. They referred to Kintu Alex Brandon v EC & Anor [2017] UGCA 134, Nabukeera Hussein Hanifah v Kusasira Peace K. Mubiru & Anor [2017] UGCA 52 and Mbaju Jackson v Thembo Gideon Mujungu & Anor [2022] UGCA 309.

- [7] Counsel for the appellant submitted that it was wrong for the trial judge to conclude that there was no evidence of coercion and bribery of the appellant's witnesses. He contended that there was unchallenged evidence of Emacu Rodrick Denis, Ogwang Emmanuel, Ocen Nicholas, and Emesu Francis. He further submitted that the trial judge wrongly struck out the first set of affidavits in support of the appellant's petition which points to the illegalities that occurred on the polling day that led to the respondent no.1's victory.
- [8] Counsel for appellant submitted that the respondent no.1's advocates were guilty of misconduct contrary to Rule 19 of the Advocates (Professional Conduct) Regulations. He contended that it was wrong for the trial judge to fault the witnesses for recanting their earlier testimonies. Counsel for the appellant argued that the second set of affidavits cannot recant the first set of affidavits where there is unchallenged evidence on record of Ocen Nicholas, Emacu Rodrick Denis and Emesu Francis who confirmed that the second set of affidavits were obtained through intimidation, coercion or bribery by witnesses. He relied on Kintu Brandon v Electoral Commission, Nabukeera Hussein Hanifah v Kusasira Peace K. Mubiru & Anor and Mbaju Jackson v Thembo Gideon Mujungu & Anor (supra) in support of his argument. Counsel for the appellant further argued that the trial judge ignored the principles applied in evaluating evidence of refractory witnesses in election matters which were laid out in Kintu Brandon v Electoral Commission (supra).
- [9] He referred to Mbaju Jackson v Thembo Gideon Mujungu & Anor (supra), where this court struck out the affidavits that were obtained illegally in support of the respondent no.1's case and preserved the first set of affidavits in support of the petitioner's case. He submitted that there was no justification for the trial judge to expunge the 12 affidavits in support of appellant's case from the record of court.
- [10] Counsel for the appellant contended that the results contained in the DR forms for Akisim PAG, Owolo COU Compound, Otatai primary, Aloet Akum Catholic Church and Opuyo Primary polling stations are fraudulent owing to the discrepancies on the certified DR forms relating to the number of voters



registered, the voters who cast votes and those who did not vote on the polling day. Counsel for the appellant contended that the entries made on the DR forms of Akisim PAG polling station indicating 743 as the total number of votes cast against 758 registered voters was false. He stated that the total number of the registered voters who did not vote at the said polling station were 21, as opposed to 15, as indicated in the DR forms.

- [11] Counsel for the appellant stated that the 12 affidavits in support of the petition point to the illegalities that occurred on the polling day at Akisim PAG Church Compound polling station, Owolo COU Compound polling station, Otatai Primary School polling station, Aloet Akum Catholic Church and Opuyo Primary School polling station to qualify his victory. He further stated that the respondents no.1 and no.2 altered the results and information contained in the certified DR forms to prove that the respondent no.1 genuinely won the election whereas not.
- [12] Counsel for the appellants contended that the trial judge erred in concluding that the polling agents needed to be appointed by the candidate to be recognised as such. He argued that the trial judge's reasoning was erroneous and had no legal backing. He cited Section 1 of the Parliamentary Election Act, which defines an agent as a candidate's representative and polling agent of that candidate. Counsel for the appellant contended that the appellant assigned Ariu Washington, who appointed agents on his behalf before the election and he ratified the actions upon his return from Mbale Hospital, where he was receiving treatment.
- [13] Counsel or the appellants submitted that it was wrong for the trial judge to uphold the results contained in DR forms of Akisim PAG Church Compound polling station when election at the said polling station was marred with illegalities to wit disruption of the polling exercises by unjustified firing of live ammunition to scare away registered voters, unlawful arrest of the respondent no.1's opponents and their agents, ballot stuffing that influenced the respondent no.1's victory and major alteration of the certified DR forms to conceal the day's illegalities.
- [14] He contended that the trial judge wrongly concluded that the scuffle which occurred outside the polling station had no effect on the election. Counsel for the appellant contended that the scuffle ensued within the polling station between the appellant's agents and police officers because the appellant's

agents protested the act of transferring 6 ballot booklets to Otatai Primary School polling station. Counsel contended that the video recording attached to the affidavit of Okori Emmanuel provided corroborative evidence. Counsel for the appellant contended that the scuffle brought about ballot stuffing, which influenced the victory of the respondent no.1. He submitted that appellant's polling agents Okori and Oyoyo were arrested and the firing of live bullets scared away voters.

- [15] He contended that the authenticity of the video recording was not in question since it was sanctioned by unchallenged evidence of Emuye Richard, the forensic expert. He further contended that the video recording show that the arrest was done within the boundaries of the polling station, the scuffle was started by a one Erouku Stanely and Kalangwa and not the agents of the petitioner. There was firing of live bullets and the respondents no.2 and no.3 were not in charge.
- [16] Counsel for the appellant submitted that the election was marred with various forms of noncompliance, namely arbitrary arrest of the appellant's agents and UPC candidate Amuriat Pascal, pre-ticking of ballots and ballot stuffing, tampering with containers of ballot papers and DR forms to conceal the illegalities. He contended that the trial judge ignored the evidence adduced by the appellant relating to noncompliance at the polling station, ballot stuffing, tampering with the ballot boxes, forging signatures and false entries on the ballot forms thereby arriving at a wrong decision that the appellant had not proved noncompliance.
- [17] He contended that the trial judge did an omnibus evaluation of the evidence adduced by the appellant's witnesses relating to what transpired at Owolo COU compound, Opuyo primary Aloet Akum Catholic Church and Aminit polling stations and concluded that the allegations were not supported by cogent evidence. Counsel for the appellant submitted that the trial judge applied the wrong standard of proof when he concluded that the appellant was supposed to produce a voter's register to prove the allegation that some voters did not vote. Counsel for the appellant argued that the trial judge attempted to create a new law when he concluded that elections are set aside in the rarest circumstances.
- [18] Counsel for the appellant submitted that the trial judge was wrong to conclude that no complaints were made by the appellants to the Electoral Commission.



He relied on Mbaju Jackson v Thembo Gideon Mujungu & Anor (supra) where this court held that if the evidence on record is that the police and Electoral Commission being principal actors in committing the illegalities at the polling station, it is unrealistic to expect an aggrieved candidate to make any reports about them to the same officers. Counsel for the appellant contended that the complaints were raised with the respondents no.2 and no.3 by the appellant and his agents in vain. He further contended that complaints were raised with the returning officer before transmitting the results of the of the polling station complained of, but the contested results were added to the tally sheet.

- [19] He contended that the trial judge was wrong to conclude that the appellant manufactured figures to challenge the respondent no.1's victory when the figures being challenged were in the certified DR forms. He further contended that the trial judge was wrong to hold that the discrepancies in the figures of the certified DR forms were not fatal. Relying on Betty Muzanira Bamukwatsa v Matsiko Winfred Komuhangi & Ors EPA No. 065 of 2016, (unreported); Bantalib Issa Taligola v EC [20222] UGCA 164 and Mbaju Jackson v Thembo Gideon Mujungu & Anor (supra) he submitted that the suspicious results in the DR forms are offensive and have the effect of overturning its outcome either qualitatively or quantitatively.
- [20] Counsel for the appellant submitted that the trial judge's conclusion that nullification of elections should be imposed in very rare situations is a standard of proof that is alien to the Parliamentary Election Act. He contended that the standard of proof of setting aside an election is proof to the satisfaction of court and the non-compliance, which affects results in a substantial manner. He cited Section 61 of the Parliamentary Elections Act and Mbaju Jackson v Thembo Gideon Mujungu & Anor (supra).
- [21] Counsel for the appellant contended that the trial judge wrongly concluded that the irregularities or unlawful actions had to be attributed to the respondent no.1 for his or her victory to be overturned. He contended that the law is not lenient to candidates who are beneficiaries of fraudulent elections once an illegality leads to political reward. He argued that the law requires satisfaction of noncompliance which affected the election in a substantial manner. Counsel for the appellant contended that the trial judge ignored the principles of law established in binding precedents of Mbaju Jackson v Thembo Gideon Mujungu & Anor (supra) where this court rejected the reasoning that illegalities had to be attributed to a winning candidate in order for his election to be overturned.

- [22] Counsel for the appellant contended that the trial judge erroneously subjected the appellant to costs. Counsel for the appellant was of the view that the trial judge ought to have exercised his discretion judicially in awarding costs with good cause. He contended that the petition was instituted in the spirit of democracy and good governance for the electorate of Soroti East Constituency.
- [23] In reply, counsel for the respondent no.1 referred to Chebrot Stephen Chemoiko v Soyekwo Kenneth & Anor [2017] UGCA14 on the duty of the first appellate court.
- [24] Counsel for the respondent no.1 submitted that the affidavits sworn by Emacu Rodrick Denis, Acibo Phois Mary, Egaru Moses, Akello Mary Goretti, Igimu Immaculate, Emesu Francis, Akello Grace, Ogwang Emmanuel, Ocen Nicholas, Okurut Nathan, Ongodia Stephen and Ariokot Demita in support of the petition, in Rejoinder and the respondent no.1's Answer to the Petition were rightly expunged off the record and disregarded by the trial judge.
- [25] Counsel for the respondent no.1 submitted that the witnesses were not credible as rightly found by court and their evidence could not be relied on. They contended that the trial Judge disregarded 12 affidavits out of 120 filed by the appellant and the reminder of the affidavits did not satisfy court that there was election malpractice. They contended that the trial Judge relied on Kintu Alex Brandon v Electoral Commission and Anor EPA No. 16 of 2016, Nabukeera Hussein Hanifah v Kusasira Peace K. Mubiru EPA No. 72 of 2016 and Mbaju Jackson v Thembo Gideon Mujungu & Anor EPA No. 0046 of 2021 which relate to the law of recanting affidavits. They further contended that the trial Judge correctly concluded that such conflicting affidavits require assessment of the credibility of the witnesses in light of the principles applicable to the assessment and burden of proof in adducing evidence.
- [26] Counsel for the respondent no.1 submitted that the appellant did not demonstrate how the 12 deponents were approached and tricked by the 1<sup>st</sup> Respondent's legal team to obtain further evidence. They contended that they did not point out any advocate from the firms of Ms K&K Advocates, Ms Byenkya, Kihika & Co. Advocates, and Ms. Kirunda & Wasige Advocates, who tricked the deponents into swearing affidavits in support of the answer to



the petition. They contended that the witnesses were not subjected to any form of coercion, trickery and or bribery.

- [27] Counsel for the respondent no.1 submitted that it was proper for the trial Judge not to rely on the evidence of recanting witnesses. They contended that the witnesses proved to be liars, lacked credibility and were not honest members of the society. They invited this court to uphold the finding of the learned trial judge of striking out the recanting affidavits of Emacu Rodrick Denis, Acibo Phoio Mary, Egaru Moses, Akello Mary Goretti, Igimu Immaculate, Emesu Francis, Akello Grace, Ogwang Emmanuel, Ocen Nicholas, Okurut Nathan, Ongodia Stephen and Ariokot Demita.
- [28] Counsel for the respondent no.1 submitted that the learned trial judge applied the right standard under Section 61 of the Parliamentary Elections Act No. 17 of 2005 on the evidence adduced by the appellant and found it to be insufficient to overturn the results of an election. They further submitted that the trial judge rightly found that the appellant did not adduce corroborative evidence to prove the allegation of the people who did not cast votes. They relied on Odo Tayebwa v Bassajjabalaba Nasser & Electoral Commission Election Petition Appeal No. 013 Of 2011, Kwoba Herbert v. Ssebugwawo Tadeo Election Petition Appeal No. 40 of 2016 and Col. (RID) Dr. Besigye Kizza v Museveni Yoweri Kaguta and the Electoral Commission Election Petition No.1 of 2006 (unreported) for the submission that burden of proof in election petitions is upon the appellant to prove allegations to the required standard to satisfy court in order for the Court to interfere with the result of the election as declared by the Respondent no.2 and no.3.
- [29] Counsel for the respondent no.1 submitted that it was incumbent upon the appellant to adduce corroborative evidence in form of a voters' register to prove that the alleged number of votes cast were higher than the total number of the people who voted on the polling day. They argued that it is not proper for courts of law to base findings on the mere assertion of a registered voter who did not vote without any corroborative evidence. They contended that since elections are of critical importance to the people of Uganda, whoever wishes to challenge the voice of the people has to adduce concrete evidence to the satisfaction of the court and it's not enough to state the grounds for the nullification of an election.

- [30] Counsel for the respondent no.1 contends that the trial judge rightly found that the appellant had no legally appointed agents. They cited Section 32 (1) and (2) of the Parliamentary Elections Act for the submission that the appointment of agents cannot be exercised by any other person other than the candidate. They contended that the appointment letters of the appellant's polling agents were signed by Ariu Washington, who was not a candidate at the time. They submitted that the appellant had no legally appointed agents. They contended that the affidavits of Oyoyo Samuel, Okori Emmanuel, Ehuru Moses, Arienyo Florence, Erimu Moses, Omara John, Egonyu Benjamin, Ewou Raymond, Ekamu John Robert, Wanale Sowedi, Etoru Francis and Egwalu Simon Peter contained falsehoods regarding their appointment as the appellant's agents.
- [31] Counsel for the respondent no.1 contended that the appellant's allegation that there was ballot stuffing, arbitrary arrests of agents, disruption of the polling exercise by unjustified firing of live bullets and alteration of the declaration of results forms at Akisim PAG Church Compound Polling Station was not backed up by any corroborative evidence. They contended that the evidence adduced by the appellant was not sufficient to lead to cancellation of the results of the entire polling station.
- [32] Counsel for the respondent no.1 further contended that the trial Judge was right in concluding that the alleged scuffle had no effect on the outcome of the process. They submitted that the appellant stated that a scuffle happened between his appointed agents and Kalangwa, Eroku Stanley and the Police. They asserted that Eroku Stanley, in his evidence, stated that he did not go to Akisim PAG polling station and never knew the two agents of the appellants. The appellant's agents stated in their affidavits that they did not know the people that came to the polling station.
- [33] Counsel for respondent no.1 submitted that the appellant's agents, Okori Emmanuel and Oyoyo Samuel, gave contradicting evidence regarding what happened at the polling station. They submitted that while considering the credibility of witnesses, the court ought to always test the veracity of the witnesses by reference to the objective facts proved independently of their testimony. They relied on Bantalib Issa Taligola v Electoral Commission & Anor (supra) in their submission. They further submitted that Court must act cautiously and ought to thoroughly interrogate and scrutinize the evidence in the case. They relied on Hon Nakate Lillian Segujja & EC v Nabukenya Brenda Election Petition Appeals 17 & 21 of 2016 (unreported).



- [34] Counsel for the respondent no.1 further submitted that the veracity and authenticity of the video evidence adduced could be ascertained by the Court. They contended that the recording made by Okori Emmanuel was inadmissible in evidence as provided in Section 8 of the Electronic Transactions Act, 2011. They contended that the digital evidence does not conform with the established standard of authenticity for electronic records. They further contended that the expert report does not indicate whether the experts verified if the devices were functioning properly. They stated that the evidence was recorded by witnesses who were acting in the appellant's interests and they were not stored in the course of their ordinary business. They relied on Kakonge Umar v Uganda [2002] UGCA 2042 for their submission that the video in question is suspect and the Respondent no. 1 ought to receive the benefit of the doubt.
- [35] Counsel for the respondent no.1 submitted that there was a break in the chain of evidence. They contended that the witness stated in cross-examination that his phones were confiscated by the police and he had no idea of the whereabouts of his phone for about 12 hours. They further contend that there was need to prove that the phone was stored in such a way that no one tampered with it. They further submitted that for Court to rely on electronic evidence, it must be ascertained that the electronic record was recorded by a party to the proceedings who is adverse in interest to the party seeking to introduce it. Relying on DPP v Kilbourne [1973] 1 ALL ER 440, they submitted that the evidence is irrelevant and does not prove any of the allegations of the appellant. They contended that the evidence is not corroborated by any other independent evidence and cannot be verified.
- [36] Counsel for the respondent no.1 contended that the evidence as adduced by the Respondents' witnesses was coherent, corroborated, and un rebutted. Opolot Simon and Okello Gilbert, the polling officials, stated that the voting exercise went on smoothly and they did not record any incidents or receive complaints from either Petitioner's agents or other candidates' agents.
- [37] Counsel for the respondent no.1 further contended that the appellant relied on uncertified DR Forms; documents marked Annexure A, Bi, B2, B3, B4, BS, B6, B7, C, D, and E attached to the affidavit of Aguti Barbara Agnes and Annexure A attached to the affidavit of Salamu Musumba are uncertified public documents. They submitted that the uncertified copies of Declaration of Results forms have no evidential value and Court could not place any reliance on them. They relied on Mashate Magomu v. EC & Sizomu

Wambedde [2017] UGCA 10 and Kakooza John Baptist v Electoral Commission and Anor Election [2008] UGSC 8.

- [38] Counsel for the respondent no.1 stated that the appellant sought to rely on the evidence of a handwriting expert to show that the DR forms had forged signatures. He argued that court could not rely on the alleged handwriting expert's report because no witness named in the report appeared before the handwriting expert. They contended that the expert was handed papers with the signatures of the people complained of and requested to compare with the ones on the DR Forms but she could not attach the signatures to individual witnesses. They argued that the handwriting expert did not state the criteria used to select a particular signature. They submitted that the handwriting expert was partisan since she was invited by the appellant.
- [39] Counsel for the respondent no.1 argued that matters concerning the validity of elections are matters of great public concern with far-reaching implications that require diligent inquiry so that a party that emerged victorious in a contested election is not denied the fruits of his victory on flimsy grounds. They further argued that the inquiry must therefore involve cogent evidence that applies directly to the facts in issue. They submitted that the appellant failed to produce cogent evidence in support of the alleged arrests and the effect they had on the outcome of the elections. They further submitted that the learned trial judge cannot be faulted for holding that the scuffle had any effect on the outcome of the election process.
- [40] Counsel for the respondent no.1 submitted that the trial judge was right to find that the appellant had no duly appointed agents at the polling station. They contended that the appellant stated his evidence that he had polling agents and informed court in cross-examination that he did not sign any letter appointing agents. They contended that the appellant deliberately lied to court about the appointment of agents and prayed that the falsehood should be treated seriously.
- [41] Counsel for the respondent no.1 contended that the appellant did not adduce any proof of the alleged ballot stuffing. They argued that the appellant's evidence is insufficient to arrive at a conclusion that there was ballot stuffing or multiple voting. They stated that the certified DR forms show that Akisim PAG Church Compound polling was issued with a total of 800 ballots, out of which 743 were valid and 17 were spoilt making a total of 760 used ballots and a remainder of 40 ballot papers.



- [42] Counsel for the respondent no.1 submitted that the learned trial Judge correctly found that the appellant had not proved non-compliance at Otatai Primary School polling station. They contended that the appellant did not adduce any cogent evidence to show that there was non-compliance with election laws at that particular polling station. They further contended that the appellant did not adduce cogent evidence to prove the arbitrary arrests as alleged by his witnesses.
- [43] Counsel for the respondent no.1 contended that the allegations that there was 100% voter turn up at Owolo C.O.U. compound polling station, ballot stuffing and fraudulent entries on the certified DR forms were not supported by any cogent evidence. They stated that the appellant's witnesses, Arienyo Florence and Egonyu John, did not state who participated in the alleged ballot stuffing or which serial numbers of ballot papers were stuffed. They submitted that there was strict compliance with the electoral laws at Opuyo primary school polling station. They contended that the allegations of intimidation as put forward by Wanale Sowedi and Ekamu John Robert are baseless since no witness reported a matter of intimidation to the Respondent no.2 or to police. They argued that the presence of security personnel at a polling station is lawful. They asserted that the appellant's allegation that that his agents and supporters were chased away is false and not substantiated by cogent evidence or with sufficient probative value.
- [44] Counsel for the respondent no.1 submitted that the nature of the evidence brought forward by the Appellant in respect to Abet Akum Catholic Church polling station was opposed in various affidavits of the respondent no.1's witnesses Ingitu Agnes and Emwogu Michael, Edopu James, Igimu Immaculate, Akello Mary Goretti. They stated that the witnesses narrated that voting went on peacefully and smoothly in the presence of the appellant's agents Benjamin Egonyu and Raymond Ewou. They contended that the witnesses denied allegations of arbitrary arrests.
- [45] Counsel for the respondent no.1 contended that the appellant relied on the affidavit evidence of Akori Filbert, Egwalu Simon, Olupot James Peter, Etoru Francis, Etengu Paul, Areu Simon, Elungat Emmanuel, Asunge Godfrey, Acupu Francis, Otim Solomon, Ewangu Peter, Ateru Samuel and Omadi Emmanuel in support of his case of non-compliance with electoral law at Aminit Primary School polling station. They submitted that the affidavit of Akori Filbert, which the appellant relied on was fabricated evidence that was

never given by the deponent. They contended that the affidavit of the witness shows a clear disparity between the signatures of the witness contained on the deponent's page and the signature on their national identity cards attached as Annexure A to the affidavit.

- [46] Counsel for the respondent no.1 submitted that the appellant failed to prove non-compliance and as such, the election was not affected in a substantial manner. They contended that the appellant did not adduce evidence to demonstrate or prove that the respondent no.1 participated or had knowledge of any electoral irregularities or non-compliance. They stated that the appellant testified in cross-examination that he did not see the respondent no.1 participate in any alleged irregularity or illegality. They argued that the authority of Mbaju Jackson V Thembo Gideon Mujungu and Anor (supra) is irrelevant to the circumstances of this case because there was glaring evidence of irregularities and illegalities for court to overturn the election. The losing party did not confirm that the winner never participated in any election malpractice.
- [47] Counsel for the respondent no.1 submitted that neither the appellant nor his witnesses reported incidents to the Electoral Commission or the Police. They contended that whereas one may complain of irregularities after the elections have been held, courts encourage complainants to utilize the administrative procedures that allow the Commission to resolve matters without necessarily waiting to go to courts of law. They asserted that it would be unfair for the petitioner as a candidate who never made any formal or written complaint to Electoral Commission to turn up in Court later after the elections and claim that the Electoral Commission failed in its duty to prevent or stop something that was never brought to its attention. They submitted that, save for the complaint at Omalera Mango Tree, the appellant failed to show Court that he or his agents had made any complaints of the alleged irregularities on polling day to the respondent no.2.
- [48] Counsel for the respondent no.1 contended that it is not true that the appellant furnished his complaint to the respondent no.3 before polling came to an end. The said complaint was received by the respondent no.3 on 28/7/2022 at 16:4 (4:04 pm), which was after closure of polling. They further contended that Hon. Salaamu Musumba did not adduce any evidence of a complaint raised to the respondent no.3 in her affidavit. They asserted that she never attached any complaint in a manner provided for under Section 48 of the PEA. They further asserted that tallying of results is a preserve of the Electoral



Commission and not parties' supporters and sympathizers. They contended that the Petitioner's agents counter signed the declaration of results forms, which shows that they confirmed the results.

- [49] Counsel for the respondent no.1 submitted that the appellant failed to prove any of the allegations before the trial court, and the trial judge dismissed the petition with costs to the respondents. Relying on Freda Nanziri Kase Mubanda v Mary Barbirye Kabanda & Electoral Commission Election Petition Appeal No.38 of 2016, they submitted that the award of costs in an election petition is a discretionary act of the court that an appellate Court can only interfere with when it has been shown that such discretion was exercised in an injudicious manner. They contended that the appellant failed to prove that the trial judge exercised his discretion arbitrarily and contended that there was no omnibus evaluation of evidence as alleged.
- [50] Counsel for the respondents no. 2 and no. 3 supported the decision of the trial court and argued that this appeal had no merit on all the 14 grounds raised. The appellant failed to adduce sufficient evidence to show that there was any wrong doing or irregularities that could cause the annulling of the election in question. The evidence proffered was not worthy of belief for different reasons. He prayed that this appeal should be rejected.

### **Analysis**

- [51] As a first appellate court, it is our duty to re-evaluate the evidence on record as a whole and arrive at our own conclusions of law and fact bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses (that may have testified in court), which opportunity, we do not have. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S I 13-10, Banco Arabe Espanol v Bank of Uganda I [999] UGSC I, Rwakashaija Azarious and others v Uganda Revenue Authority [2010] UGSC 8 and Omunyokol v Attorney General [2012] UGSC 4.

### **Ground 1 and 2:**

- (1) The learned trial judge erred in law and fact when he disregarded the appellant's complaint that the 1<sup>st</sup> respondent's lawyers had violated rule 19 of the Advocates Professional Conduct Regulations in soliciting for affidavits from the appellant's witnesses.**
- (2) The learned trial judge erred in law and fact when he struck out the affidavits of Emacu Rodrick Denis, Acibo Phois Mary, Egaru Moses, Akello**

**Mary Goretti, Igitu Immaculate, Emesu Francis, Akello Grace, Ogwang Emmanuel, Ocen Nicholas, Okurutu Nathan, Ongodia Stephen and Ariokot Demita in support of the Appellant's petition.**

[52] Ground 1 and 2 are really two sides of the same coin and shall be considered together.

[53] Under this head the appellant complains that the learned trial judge failed to consider the breach of rule 19 of the Advocates Professional Conduct Regulations in soliciting affidavits from the appellant's witnesses. The learned trial judge opted to consider the credibility of the 12 witnesses of the appellant that recanted their affidavits and swore affidavits in support for the respondent no.1.

[54] This court in Mbaju Jackson v Thembo Gideon Mujungu & Anor [2022] UGCA 309 stated in part as follows,

[45] There are two possible approaches to dealing with affidavits of witnesses who switch sides and recant their earlier affidavits, firstly, it is wrong and unprofessional for the opposite party to approach a witness of the other party seeking to turn the person into the witness for his side. Once that party is aware that such a person is a witness for the other party the only option available to him or her is to meet in court and subject the witness to cross-examination. Any other course undermines the concept of a fair trial where one party's witnesses are not safe from the machinations of the opposite party. Affidavits obtained this way should be struck out for infringing the right to a fair trial.

[47] The other approach is to view the witnesses who swear such affidavits for both contending sides in proceeding with zero credibility.

[55] This court in Kintu Alex Brandon v Electoral Commission & Anor [2017]UGCA 134 stated in part as follows,



‘We wish to point out that actions of the 2<sup>nd</sup> respondent’s counsel and his team in approaching the witnesses of the of the petitioner and obtaining further affidavits from them were contrary rule 19 of the advocates (professional conduct) regulations SI 267/2 which render counsel involved not only to disciplinary proceedings for misconduct, but ought to have sufficient ground for rejecting or striking out those affidavits for violating the tenets of a fair trial’

[56] The trial judge approached this matter as hereunder,

‘This court shall not rely on any of the affidavits deposed by the persons who switched sides or made contradictory affidavits since such evidence is not credible in the circumstances of this matter. Therefore, the affidavits of the following persons: Emacu Rodrick Denis, Acibo Phois Mary, Egaru Moses, Akello Mary Goretti, Igimu Immaculate, Emesu Francis, Akello Grace, Ogwang Emmanuel, Ocen Nicholas, Okurut Nathan, Ongodia Stephen and Ariokot Demita are accordingly rejected.’

[57] In Mbaju Jackson v Thembo Gideon Mujungu & Anor (supra) there were 2 possible approaches provided when faced with the situation that the learned trial judge faced. He appears to have opted for option 2 to consider the recanting witnesses with zero credibility.

[58] I would think it is not a question of either, or, about the possible options. Both actions needed to be taken simultaneously. Action needed to be taken against the offending affidavits. In our view it is imperative that actions taken in complete disregard of the law must be sanctioned. It is therefore important those affidavits that were made in complete disregard of the law ought to be struck out.

[59] The learned trial judge ought to have struck out the second set of 12 affidavits sworn by the persons who had already sworn affidavits in support of the petition. These persons were approached by the respondent’s counsel and made to swear affidavits recanting their earlier sworn affidavits in favour of the petitioner. The respondent was barred by law from approaching or talking to these witnesses, other than by way of cross examination in a court of law.

That second set of affidavits is, so to speak, 'forbidden fruit' which I cannot countenance the respondent having benefit of in the proceedings in the court below.

[60] After striking out the second set of affidavits on account of the same being forbidden fruit the learned trial judge would then be under a duty to subject the remaining affidavits on the record to scrutiny in order to determine their credibility and reliability.

[61] I would allow grounds 1 and 2 of the appeal. I would strike out the offending 12 affidavits sworn for the respondent no.1. And I will consider the 12 affidavits sworn in support of the petition which were ignored by the learned trial judge but subject, of course, to determining the credibility of the same in addition to all other evidence on record.

[62] We would also refer the impugned conduct of the 3 firms of advocates for the respondent no.1 to the Law Council for it to investigate the matter of professional misconduct and take appropriate action.

[63] Grounds 1 and 2 accordingly are upheld.

**Ground 3: The learned trial judge erred in law and fact when he applied a standard of proof in respect of the allegations in the petition contrary to that provided for in the Parliamentary Elections Act 2005.**

[64] The learned trial judge set out in his judgment both the provisions of the relevant legislation and the decisions of superior courts on the standard and burden of proof in election matters. The learned trial judge dealt both with standard of proof and burden of proof. He then concluded thus:

'The sum effect of the above analysis is that the success of a candidate who has won at the election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of law. However, equally well established is the proposition that though election of a successful candidate is not to be lightly interfered with one of the essential requirements of the election law is to safeguard the purity of the election process and also see that people do not get elected by flagrant breach of electoral laws or the Constitution.

Purity of election must be maintained at all costs. Any attempt to procure success by unfair and foul means should be ruthlessly suppressed. Crooked and illegal methods employed by a candidate, his workers or agents, must be suitably dealt with and sternly put down by enforcing the law of elections. But at the same time, allegations must be proved to the satisfaction of the court.'

- [65] The provisions that set out the standard of proof are section 61 of the Parliamentary Elections Act. I shall set out the provisions thereof in full.

**'(1) The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court—**

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

(b) that a person other than the one elected won the election; or

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

(d) that the candidate was at the time of his or her election not qualified or was disqualified for election as a member of Parliament.

(2) Where an election is set aside, then, subject to section 63, a fresh election shall be held as if it were a by-election in accordance with section 3.

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

- [66] The standard of proof to be discharged is double barrelled. Firstly, it is on a balance of probabilities and I would think this needs no further explanation. It is the general standard in civil matters. The fact that had to be proved on a balance of probability must be more likely to have occurred than not to have occurred. The balance must tilt in favour of occurrence of the event or fact in question having occurred or taken place than not to have occurred or taken place. Secondly, the ground or grounds to annul an election must be proved 'to the satisfaction of the court.' This is not a subjective element. Though the standard of proof is the civil standard of proof upon a balance of probability



Parliament has further ordained that the court must be satisfied that such ground as presented has been satisfactorily proved.

[67] The burden of proof is governed by section 101 and 102 of the Evidence Act. I shall set them out in full.

**‘101. Burden of proof**

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

**102. On whom burden of proof lies**

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.’

[68] Following the foregoing provisions, it is clear that the burden of proof lies upon a petitioner to prove any of the grounds put forth in his or her petition. Such grounds must be proved to the satisfaction of the court on a balance of probability. I am satisfied that this is what the learned trial judge understood to be the law and it is what he applied to the case before him.

[69] I am unable to fault the learned trial judge.

[70] Ground 3 is without merit.

**Ground 4: The learned trial judge erred in law and fact when he held that the appellant had no appointed agents during the election.**

[71] The complaint under this head is that the learned trial judge held that the appellant had not appointed agents during the election when he had done so through his political assistant, Ariu Washington.

[72] The relevant provisions of the law in relation to this point are section 63 of the Parliamentary Elections Act. It provides,

**‘32. Polling agents of candidates**



(1) A candidate may be present in person or through his or her representative or polling agent at each polling station for the purposes of safeguarding the interests of the candidate with regard to the polling process.

(2) Not more than two representatives or polling agents shall be appointed by a candidate under subsection (1) **and the appointment shall be in writing addressed to the presiding officer of the polling station.**

(3) A representative or polling agent appointed under subsection (2) shall report to the presiding officer of the polling station on polling day and shall sit at a table provided under section 31(5)(a) or be positioned in such a way that he or she is able to crosscheck the names of the voters on the voters' roll against the voter's card or any other identification given. *[subsection (3) amended by section 6 of Act 12 of 2010]*

(4) A representative or polling agent appointed under this section shall be paid an allowance determined by the Commission.'

- [73] The appointment of polling agents by a candidate was to be in writing addressed to the presiding officer of each polling station.
- [74] In his testimony during cross examination the petitioner stated that he had not been able to appoint polling agents as he was sick in hospital and had authorised his political assistant to do so. And that the polling assistant had done so.
- [75] Mr Ariu Washington swore an affidavit in support of the petition. He did not depone that he was the political assistant of the petitioner. Neither did he state that he had been instructed by the petitioner to appoint polling agents and that he had in fact done so. His short 4 paragraph affidavit on page 1033 of the record related to what he relayed to the petitioner as happening at one polling station.
- [76] Most of the polling agents of the petitioner that swore affidavits in support of the petition indicated that they had appointment letters addressed to the Presiding Officers of the various polling stations at which they represented the petitioner. And even if one or two polling agents presented such letters these letters were disowned by the appellant who stated in cross examination that he had not personally appointed any agent as he was in hospital at the time.

[77] The learned trial judge dealt with matter of appointing agents thus,

‘None of the witnesses stated that the election exercise or voting ended during the chaos or scuffle. The election continued without the two persons who had been arrested. The Petitioner stated these were his agents at the polling station, but this court is not sure of this fact since the petitioner stated in his evidence in cross examination that he never personally appointed the said agents since he was admitted at hospital on the election eve.’

[78] I am unable to fault the learned trial judge for suggesting that the appellant had failed to prove that he had appointed polling agents. The appointment had to be in writing to the Presiding Officer. No such evidence was made available. In fact the appellant in his testimony conceded that he had not made any such appointments.

[79] Ground 4 is without merit.

**Grounds 5 and 6:**

**(5) The trial judge erred in law and fact when he upheld the result of the election at Akisim PAG compound polling station despite the illegalities and irregularities.**

**(6) The learned trial judge erred in law and fact when he upheld the results contained in a fraudulently prepared declaration of results form for Akisim PAG compound polling station.**

[80] Grounds 5 & 6 shall be handled together because not only do they relate to Akisim PAG Church Compound polling station but raise basically the same complaint that the electoral law was not complied with during the voting; counting, and declaration of results. Counsel for the appellant contended that the election at Akisim PAG Church Compound polling station was marred with irregularities, to wit: disruption of the polling exercise by unjustified firing of live ammunition to scare away voters, unlawful arrest of the respondent no.1's opponents and agents, ballot stuffing and major alterations of the certified DR forms to conceal illegalities.

[81] I shall set out below how the learned trial judge dealt with Akisim PAG Church Compound Polling Station.

'This court notes that there was a scuffle that happened outside the confines of the demarcated voting area, the same had no effect on the process of polling and it was quickly handled by the relevant authorities and the police constables who restored peace. The arrest of the two agents if at all was related to the election chaos or confusion at the polling station (which) had to be dealt with in order to facilitate the election process (voting). None of the witnesses stated that the election exercise or voting ended during the chaos or scuffle. The election continued without the two persons who had been arrested. The Petitioner stated these were his agents at the polling station, but this court is not sure of this fact since the petitioner stated in his evidence in cross examination that he never personally appointed the said agents since he was admitted at hospital on the election eve.

Justice Yorokamu Bamwine (as he then was) in the case of Bantalib Issa Taligola vs Electoral Commission & Wasugirya Bob Fred equally noted that:

*"Court is acutely aware that in election contests of this nature, witnesses, most of them motivated by the desire to score victory against their opponents, deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain."*

Therefore, the evidence of polling agents and persons working for a candidate should not be ordinarily relied upon and if it is to be relied upon the court should be extremely cautious on its credibility. Testimony of political witnesses is to be accepted with care. The evidence of the election petitioner and his/her election agent is partisan. This has to be assessed with great caution. Interest or partisanship is a strong element that weans one away unconsciously from the truth.

The Petitioner wants to take advantage of the chaos in order to deny the inclusion of the results at this polling station. The petitioner's evidence at this polling station is that elections continued after the scuffle and indeed results were returned on the Declaration of results forms. The contention is on the invalid votes at the polling station and why all the voters turned up on the voting day. The petitioner has lined several persons or voters who claim that they did not vote on that day at the said polling



station. It is always hard to believe that a person did not without strong collaborative evidence on court record. The petitioner should have produced the voting register used at the polling station on that day instead of merely attaching a fresh voter's register which did not assist this court in establishing whether they voted or not.

This court has a duty to examine the evidence having regard to the fact that where the electorate has chosen their candidate at an election, their choice ought not to be lightly upset. The declaration of results forms clearly show that the votes obtained by the candidates are the same and there is no ballot stuffing of excessive votes cast. The petitioner's witness (Aguti) clearly signed the same Declaration of Results Forms and never stated any problem which would have stopped her from signing as an agent of one of the contestants. (Amuriat Pascal obtained 01 votes, while Ariko Herbert Obtained 567 votes and Attan Moses got 175 votes. The only identifiable difference is on the 17 votes indicated as invalid votes on Aguti's DR form while on the certified copy of Electoral Commission indicates that the 17 were spoilt ballot papers and ballots issued at the polling station. This would mean that the 17 ballot papers would not affect the number of voters since the spoilt ballot papers are never indicated as votes cast since they never get into the ballot box. It could be an acceptable error to record the same as invalid votes instead of spoilt ballot papers. In an election contest it is the public interest, not the parties claims, which is the paramount concern. The voters expressed their will at this polling station and cast their votes which are not in dispute, the claims of the petitioner on spoilt and invalid votes will not be entertained to lead to a cancellation of the results of the entire polling station in order to obtain victory for the petitioner.'

- [82] The learned trial judge sets out his reasons for not accepting the version of events put forward by the petitioner. I am unable to fault him.
- [83] The petitioner in his petition stated in paragraph 11 and 12 that he would move court at the appropriate stage to order the respondent no.2 and no.3 to bring forth the ballot boxes of the contested polling stations for examination and to substantiate his claims. I have examined the proceedings before the court below and no attempt was made to this effect. The crucial electoral records

were thus not availed to the court to substantiate the claims of the petitioner, including the actual voter registers used during the elections.

[84] I have examined the forms and observed that there is no great discrepancy between the two documents. The certified DR Form of Akisim PAG church compound polling stations show that the appellant obtained 175, respondent no.1, 567 and Amuriat Pascal scored 01. The total number of votes cast was 743: invalid votes 0, spoilt votes 17, the total number of votes issued was 800, with 743 used and 40 unused. In the original copy of DR Form, the appellant scored 175 votes, the 1<sup>st</sup> respondent 567, Amuriat Pascal 0, the total number of votes cast was 743, the number of ballot papers counted was 760, the number of invalid votes was 17, the number of ballots spoilt was 0, and the ballot papers used were 860 and 100 unused. There was no difference in the total number of votes scored by the appellant, 1<sup>st</sup> respondent, or Amuriat Pascal at the polling station. The difference of 17 invalids or spoilt ballots did not affect the results.

[85] I would accordingly reject grounds 5 and 6.

**Ground 7: The learned trial judge erred in law and fact in concluding that noncompliance had not been proved at Otatai Primary School Polling Station.**

[86] Counsel for the appellant submitted that the election at Otatai polling station was marred by arbitrary arrests of the appellant's agents and agents of UPC candidate, Amuriat Pascal, pre-ticking of ballot papers, ballot stuffing, tampering with the contents of the ballot box, and DR Forms to conceal illegalities.

[87] Eseru Peter, Engwedu Samuel, Iwiru Martha, Eporu John Akello Sarah, Audo Esther Norah, Ocen Nicholas, Omadi Martin, Ogwang Emanuel, Asango Jesca, Ebwongu Emmanuel stated that they are registered voters of Otatai polling station but they did not cast their votes.

[88] Ediau Moses stated that he found soldiers chasing away voters at Otatai polling station and did not cast his vote.

[89] The appellant did not produce the voter's register indicating the registered voters who cast their votes and those who did not. The extracts of the voter's register attached on the affidavit of the witnesses only show that the witnesses were registered voters of Otatai polling station and court cannot rely on it to

ascertain the exact number of people that exercised their right to vote and those who did not.

- [90] Eriebu Simon Peter stated that three vehicles arrived at the Otatai Primary School Polling Station and Acwio Judith, the polling agent of the respondent no.1, entered one of them. She came out and went towards the pit latrine; the presiding officer followed her and they returned to the polling station together. Two men came out of the car and approached the agents of the petitioner and Amuria Pascal, namely Aliecho Beatrice, Ayebo Debla, Erimu Moses, and Omara John and they were arrested.
- [91] He then saw the man go to the presiding officer, get ballot papers, tick them, and stuff them in the ballot box. While still at the polling station, he saw a salon car arrive and the man who came out kicked the ballot box. Thereafter, the man who ticked the ballot papers brought police and army officers who chased away people from the polling station. He then saw officials of the respondent no.2 arrive at the polling station with a new ballot box, pick up the ballot papers that had spread and put them in the ballot box. He stated that most of the ballot papers picked were not for the Otatai primary school polling station. The voting exercise resumed for about 30 minutes. Thereafter, voting stopped, and votes were counted. He stated that he did not vote and doubts the declared results.
- [92] Erimu Moses, the appellant's agent at Otatai primary school polling station, stated that when a police patrol car arrived at Otatai primary school polling station, two civilians and 10 policemen emerged from the car. The two civilians asked for the petitioner's agents and agents of the UPC candidate; they threatened to injure him, Omara John, Ayebo Debla, and Aliecho Beatrice and forced them to append their signatures to the DR Forms before the voting exercise closed. They were arrested and detained at the polling station. They eventually took them to East Kyoto Police Station and released them on bond. He stated that he and the agents of the UPC candidate did not sign DR forms.
- [93] Omara John, the appellant's polling agent at Otatai primary school polling station, stated that the RDC arrived at the polling station with 10 policemen and forced the petitioner's agents, agents of the UPC candidate, Erimu Moses, Ayebo Debla, and Aliecho Beatrice, to sign the DR forms before the election ended. He consequently ordered their arrest along with the agents of the UPC candidate.



- [94] Orieki Edmond stated that two vehicles with a group of men on board arrived at the Otatai primary school polling station. One of them went to the agents of the petitioner and UPC candidate and asked them to move aside. He then saw Omara John, Erimu Moses, Ayebo Debla, and Aliecho Beatrice move aside, and the police arrested them. The group of men arrived at the polling station in a small car, got ballot papers from the presiding officer, ticked them, and stuffed them in the ballot box. Thereafter, a group of people arrived at the polling station and moved towards the ballot box. The police officer tried to stop them, but he was overpowered, and the ballot papers poured out. They tore ballot papers and carried some with them.
- [95] Ayebo Debla and Ediatu David, in their affidavits, they confirmed the evidence of Eriebu Simon Peter, Erimu Moses, Orieki Edmond and Omara John.
- [96] Elasu Edmond stated that the army officer and three policemen apprehended him and snatched his phone. He was forced into the car parked at the field which, had Emuko Carl Peters, Arioengt Esther. They were taken East Kyoga Regional Police Station, where he met Oyoyo Samuel and Okori Emmanuel. On 29<sup>th</sup> July 2022 they were released on police bond. He attached a copy of the Police Form 18 to his affidavit in support of the petition.
- [97] Oyuru Anthony stated that he went to Otatai polling station with Emukon Carl Peters and Ecaat Robert. They found men in police uniforms and numberless vehicles on the compound. They were arrested, taken to East Kyoga Regional Police Station and released on police bond. He attached a copy of the police Form 18 to his affidavit in support of the petition. Emukon Carl Peters and Ecaat Robert confirmed the evidence of Ayuru Anthony.
- [98] Amuriat Pascal, a candidate in the bye-election for member of parliament Soroti District, stated that he was informed by Ajiko Faith that Ayeblo and Ariecho Beatrice his agents at Otatai polling station were arrested. His agents, Ecaa Robert, Oyuru Anthony and Emukon Karl Peters were also arrested which deprived him of representation at the polling station. The DR forms were not signed by his agents. He stated that the election was not free and fair. It was marred with intimidation, rigging, ballot stuffing and unlawful arrests. The outcome of the election did not reflect the will of voters of Soroti City East Constituency polling station.

[99] Ojok John Stephen, presiding officer of Otatai polling station, stated that the polling exercise started at 8:00 a.m. and went on smoothly. There was no ballot stuffing, multiple voting, use of pre-ticked ballot papers, or arrests of agents, and no ineligible voter was allowed beyond the verification table to cast votes in favour of any candidate. The results garnered by the candidates in the DR forms, which were signed by Wansukina Michael and Omara John, agents of the petitioner. There was no ballot box that was kicked or tampered with. The polling agents of the petitioner executed their duties without any interference.

[100] Section 35 of the Parliamentary Elections Act provides for the procedure for handling ballot papers it states:

(1) A voter wishing to obtain a ballot paper, for the purpose of voting, shall produce his or her voters' card to the presiding officer or polling assistant at the table under paragraph (a) of subsection (5) of section 30.

(2) If the presiding officer or polling assistant is satisfied that the voter's name and number indicated in the voter's card correspond to the voter's name and number in the voter's register for the polling station, he or she shall issue a ballot paper to the voter.

(3) Where a person does not have a voter's card but is able to prove to the presiding officer or polling assistant that his or her name or photograph or both is or are on the voter's register, the presiding officer or polling assistant shall issue him or her with a ballot paper.

(4) The presiding officer or polling assistant shall place a tick against the voter's name in the voters' roll for the polling station.

(5) Subject to section 39, a person shall not be permitted to vote at a polling station unless the person's name appears in the voter's roll for that polling station.

[101] Orieki Edmond stated that a group of men arrived at the polling station in a small car, got ballot papers from the presiding officer, ticked them, and stuffed them in the ballot box. Eriebu Simon Peter confirmed the evidence of Orieki Edmond.

[102] The affidavits in support of the petition told one tale. 16 deponents stated that they did not vote for different reasons at this polling station. Other witnesses deposed to a variety of acts committed against the agents of the petitioner, including arrest and being removed from position; throwing away of the ballot



box and scattering of votes; a new ballot box being brought and votes stuffed by some unknown and known people, with the electoral officers, impotent to stem the illegal activities.

[103] On the other hand, the witnesses for the respondent no.1, told another tale, not unexpectedly. However, those witnesses included the following who had already sworn affidavits for the petitioner: Ocen Nicholas, Ongodia Stephen, Ogwang Emmanuel, and Nathan Okurut. The affidavits of the said witnesses are struck out as having been illegally obtained. I will therefore consider only the affidavits of Isabu Josephine, Eyatu Wilson, Enomu Vincent, and Kumakech Salim. These witnesses denied the version put forth by the petitioner's witnesses. The respondent no.1's witnesses stated that the voting had occurred normally without any interruption or incident. At the end of the same the votes were counted peacefully and all candidate agents signed the DR forms including the agents for the petitioners.

[104] For the respondents no. 2 and no.3, Ojok John Stephen, the Presiding officer at that polling station, denied the allegations and stated that there was no ballot stuffing, multiple voting, and or use of pre-ticked ballot papers. He deponed that no ineligible voter was allowed beyond the verification table to cast votes in favour of any candidate.

[105] The situation here is simply that of oath against oath. One version on oath against another version on oath too. How do we determine which version is more probable than the other to the satisfaction of the fact?

[106] The allegation of arbitrary arrest of the agents of the petitioner is undermined by the finding that the petitioner did not adduce sufficient evidence of the appointment of any agents in accordance with the law.

[107] The petitioner in paragraph 11 of his petition, undertook,

‘at the hearing of this petition, your petitioner shall move court to order the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to avail the securely sealed, if at all, ballot boxes for Owolo COU Compound polling station, Otatai primary school polling station, Aminiit Primary School polling station, Aloet Akum Catholic Church polling station, Opuyo Primary School polling station and Akisim PAG Church Compound polling station for further examination to substantiate his claims.’



[108] The petitioner did not pursue this undertaking which would have been able to throw light on what happened at Otatai Primary School polling station. In the absence of an examination of the ballot box and the records that were preserved for this polling station I am unable to find that the petitioner had succeeded in discharging the burden upon him to prove the facts he set out to prove to the satisfaction of the fact.

[109] I would accordingly reject this ground.

#### **Ground 8**

**‘8. The learned trial judge erred in law and fact in carrying out an omnibus evaluation of evidence of Owolo C.O.U. compound polling station, Opuyo primary polling station and Aमित primary school polling Station and thereby made wrong conclusion that non-compliance had not been proved at these polling stations.’**

[110] If I understand the complaint of the appellant, it is that the learned trial judge did not set out and consider separately the evidence of each witness for each of the polling stations referred to in the course of evaluating the evidence adduced on each issue in his judgement. Rather the learned trial judge considered the grounds for nullification of the results at Owolo C O U Compound polling station, Opuyo Primary School polling station and Aमित polling station, and concluded that there was insufficient evidence to support such grounds at those stations.

[111] The contents of a judgment are provided for in Order 21 rules 4 and 5 of the Civil Procedure Rules. Rules 4 and 5 provide,

#### **‘4. Contents of judgment.**

Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision on the case and the reasons for the decision.

#### **5. Court to state its decision on each issue.**

In suits in which issues have been framed, the court shall state its finding or decision, with the reasons for the finding or decision, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.’

[112] The learned judge in his judgment, inter alia, set out the points for determination; the decision on those points or issues raised by the pleadings,

and the reasons for reaching such decisions. In this regard the learned trial judge complied with law.

[113] On each of the issues arising from the appellant's petition and the answers thereto which were framed at the beginning of the hearing of this petition, and during the scheduling conference, the trial court made its findings and provided reasons for doing so.

[114] The appellant in his petition sets out the facts which he sets out to prove to succeed. The affidavits in support seek to prove those facts. The affidavits are the evidence in support thereof. For reasons that the learned trial judge gave he found that those facts were not proven.

[115] I am unable to find fault with the learned trial judge under this head. I would reject ground 8.

## **Ground 9**

**9.The learned trial judge erred in law and fact in holding that the disputed entries on the certified declaration of results forms for Akisim PAG church compound, Otatai Primary School, Owolo COU compound, Aloet Akum catholic church, Opuyo and Aमित polling stations were immaterial and had no bearing on the final outcome of the election.**

[116] I have already dealt with complaints about the learned trial judge's holdings in respect of Akisim PAG church compound polling station and Otatai Primanry School Compound polling station. I need not return to them under this ground. I will restrict myself to **Owolo C O U Compound polling station, Aloet Akum Catholic Church polling station, Opuyo Primanry School polling station and Aमित Primary School polling station.**

## **Owolo C.O.U. Compound Polling Station**

[117] Acuro Rose Lozira stated in her affidavit that on 28 July, 2022, during the polling, she was blocked by army officers from accessing the Owolo C.O.U. compound polling station to cast her vote; Adiyo Hellen stated that she went to Owolo C.O.U. compound polling station with Idwoku Esther and Ayenyo Esther to cast votes, but army officers chased them; and Idwoku Esther stated that she went with Adiyo Hellen and Ayenyo Esther to Owolo C.O.U. compound polling station to cast votes. They arrived at midday and the

officers chased them, claiming that voting had come to an end. Opolo Regine stated that he was informed by Arieny Florence that people were being blocked from voting, but he did not reach the polling station.

- [118] Engulu Phillip, Elilu Stephen William reached at the polling station, but they did not cast votes because the ballot papers were finished.
- [119] Ejuru Moses, polling agent of the petitioner at Owolo C.O.U. compound polling station, stated that the presiding officer allowed Aim Grace, Alwayo Tabisa and five men to vote despite the fact that they were not registered voters at Owolo C.O.U. compound polling station. He further stated that two police officers arrested him on the instructions of one of the unregistered voters. They kicked him, took his phone and confined him in a vehicle parked at the polling station.
- [120] Egungu John Michael stated that Enomu Vincent wanted to bribe him with 500,000/= (five hundred shillings) to leave the polling station but he rejected the money. He saw Enomu Vincent with police and army officer chase people from the polling station. Enomu Vincent and his team picked ballot papers, ticked them and stuffed them into the ballot box.
- [121] Arieny Florence stated that she saw the RDC Soroti pick up ballot papers from the presiding officer and tick them. She stated that Oraria Emmanuel forged her signatures on the DR forms for Owolo C.O.U. compound polling station.
- [122] Ocola Tom stated that while at the polling station, he saw a man go to the table of the presiding officer and pick up ballot papers. The man went to the church, ticked the ballot papers and stuffed them in the ballot box. He stated that he was able to see whatever was transpiring while in the home of Mzee Ere since police had chased them from the polling station. He returned to the polling station and the security personnel informed him that voting was done.
- [123] Epiu David, polling supervisor of the respondent no.1, stated that he was at Owolo C.O.U. compound polling station with Egungu John Michael and Elilu Stephen, the petitioner's agents, but he did not witness ballot pre-ticking and stuffing. He saw Acuro Rose Lozira, Adiyo Hellen, Ayeny Esther, Ocola Tom, Apolot Regine and Alunyo Grace vote. He stated that Aim Grace and Alwayo Tabitha did not vote at Owolo C.O.U. compound polling station.



- [124] The affidavits of Alwayo Tabisa, Aimo Grace, Alachu Richard James Ogira and Egaru Moses for the respondent no.1 present a version of what occurred at Owolo COU Compound polling station that is as different from the version of the petitioner's witnesses as night is from day. Both versions cannot of course be correct.
- [125] Abeku Francis, the presiding officer at Owolo C.O.U. compound polling station, stated in his affidavit that the polling exercise commenced with verifying voters using the BVVK and manual voters register. The agents of the candidates, too, had registers issued to them by the respondent no.2 to ensure transparency. He stated that he personally knows Engulu Phllip, Egaru Moses, Ayenyo Esther, Acuro Lozira Rose, Adiyio Hellen, Idwoku Esther, Alunyo Grace and Elilo Stephen William and confirmed that they cast their votes on the polling day. He further stated that there was no interference with the polling exercise, ballot stuffing, multiple voting, use of pre-ticked ballot papers, voting of ineligible voters, or arrests of agents. He further stated that he was not aware of any bribery that took place at the polling station by Enomu Vincent and no ineligible voter was allowed beyond the verification table to cast votes in favour of any candidate. He confirmed that the DR forms were dully signed by the Arinyo Florence and Ejuru Moses agents of the petitioner and no complaints or objections were raised by the agents or voter. The results reflected on the DR forms are the true results obtained by each candidate. He attached a copy of the DR form on his affidavit marked B.
- [126] He stated during cross- examination that the registered voters were 424 and the turn up was 100 %. He did not allow fraud at the polling station and no one was arrested. He confirmed that he saw Ejuru Moses sign the DR forms.
- [127] Once again at this polling station the evidence in support of the petition is opposed by the evidence in support of the answer to the petition. Generally, it is a question of oath against oath. The petitioner's witnesses who claim not to have voted are stated to have been seen by the respondent's witnesses voting.
- [128] As I have noted earlier on in this judgment, had the petitioner gone through with his undertaking in paragraph 11 of the petition to apply for the opening of the ballot boxes and the related documents at the trial this would have helped to piece out what exactly happened at this polling station. He did not do so.
- [129] Section 42(1) of the Parliamentary Election Act

‘A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy-two currency points or imprisonment not exceeding three years or both.’

[130] In the instant case Eggunyu John Michael stated that Enomu Vincent wanted to bribe him with 500,000/= (five hundred thousand shillings) to leave the polling station but he rejected the money. Enomu Vincent, who allegedly offered a bribe, was not a candidate nor an agent of the respondents. The witness stated that the bribe was purposely offered to make him leave the polling station and not to induce him to vote a particular candidate.

[131] To prove bribery or offering of illegal gifts by a candidate it must be proved that a gift was offered to a voter; by the candidate or his agent; to induce that voter to vote a particular candidate. See Bantalib Taligola v Electoral commission & Anor [2022] UGCA 164 and Kizza Besigye v Kaguta Museveni [2000] UGSC 3. There was no evidence adduced linking the alleged attempted bribery of the witness to any candidate or candidates’ agents or that they did so for the purpose of persuading the witness to vote for the respondent no.1. The charge of bribery is unproven.

[132] I am satisfied that with the state of evidence at this station the petitioner failed to prove the allegations he had to prove to succeed.

### **Aminit Primary School Polling Station**

[133] Egwalu Simon peter stated while at Aminit primary school polling station, six people arrived carrying caps and masks, and two of them had pistols. He stated that the man impersonating his relative Ateru Samuel, a registered voter at Aminit primary school polling station, told them he wanted to vote. The witness approached the presiding officer and asked him not to allow people who are not registered voters of Aminit Primary school polling station to vote. He then saw unknown people pick two ballot paper booklets, entered the classroom and ticked them all in front of the presiding officer. When he protested the impersonator, Ateru Samuel, threatened him with a pistol. They stuffed the votes into the ballot box which agitated the people who had turned up for voting exercise and they kicked the ballot box. The police officer



attached to Aminit primary School polling station shoot in the air to disperse the crowd. He then saw more police officer arriving at the polling station and sprayed tear gas on the people.

- [134] Etoru Francis stated that while at Aminit primary school polling station, six people arrived carrying caps and masks, and two of them had pistols. He stated that the man impersonating his relative, Ateru Samuel, a registered voter at Aminit primary school polling station, told them he wanted to vote. Egwalu Simon Peter approached the presiding officer and asked him not to allow people who are not registered voters of Aminit Primary school polling station to vote. He then saw Etoru Simon Peter Ekuu, LC5 Chairperson, Soroti City, and another person get more than two booklets, enter the classroom and ticked them all. When Egwalu Simon Peter protested the impersonator, Ateru Samuel threatened him.
- [135] Olupot James Peter stated in is affidavit that three vehicles arrived at Aminit polling station. He was able to recognise Etoru Simon Peter and Eriaku Peter among other occupants. He was arrested and driven to Arerego Cell. The vehicle stopped and he was pushed out. He jumped on a motor cycle and headed to the polling station, but he was re-arrested and taken to the home of captain Mike Mukula in senior quarters. He was released at 9:00 p.m.
- [136] The respondent no.1 denied the above allegations in his affidavit in support of the answer to the petition. He adduced evidence of his campaign agents.
- [137] Ewangu John Robert stated that the voting exercise at Aminit primary School polling station went on well up to 3:00 p.m. when the petitioner's agents started demonstrating and kicked the ballot box, pouring down its contents. The police officer attached to the polling station fired bullets in the air to disperse the crowd. There was reinforcement and tear gas was sprayed. The crowd dispersed and the officials of the respondent no.2 picked the ballot papers and put them back in ballot box in presence of the Egwalu Simon Peter and Etoru Francis agents of the petitioner who never objected. The voting exercise continued and votes were counted when voting ended. The witness, Egwalu Ben and the agent of Amuriat signed on the DR forms after declaration of results. He attached a copy of the DR form on his affidavit marked "B".
- [138] Egwalu Ben, polling agent of the respondent no.1 at Aminit primary School polling station stated that the voting exercise went on well until 3:40p.m. when



a group of people from the FDC camp arrived to the polling cheering that their candidate had won. They cut the boundary rope which prompted the police officer to shoot on the ground to scare them away. However, they kicked the box and ballot papers poured out. Police officers arrived and shot in the air which scared away the mob. The officials of the respondent no.2 put back the ballot papers in presence of the campaign agents of the candidates and voting continued. She stated that after the voting exercise, the votes were counted, the respondent no.1 scored 170 votes, appellant scored 70 and Amuriat Pascal scored 01. He stated that there was no pre-ticking of votes, ballot stuffing, intimidation and election malpractice by the respondent no.2's officials and or agents of the respondent no.1.

- [139] Etoru Simon Peter Ekuu, LC 5 Chairperson Soroti City stated that he passed by Amini Primary School polling station, lowered his car mirror and inquired from the people how the voting exercise was going on. They informed him that it was moving on smoothly and left for a meeting in Gweri County. He denied the allegations of ticking of ballot papers, ballot stuffing and going to Madera polling station. He denied the allegations of entering in classroom to pre-tick ballot papers.
- [140] The respondents no.2 and no.3 denied the allegations and officials of the respondent no.2 gave an account of what transpired on the polling day. Their account omits the scuffle that led to the kicking of the ballot box and the falling out of the ballot papers that had been cast. This incident must have occurred given that the witnesses for both the petitioner and the respondent no.1 discuss it in their affidavits.
- [141] However, it appears that order was subsequently restored and voting resumed.
- [142] The other complaint of the petitioner with regard to this polling station is the fact that gender classification of the voters on the DR form does not tally with the particulars in the voter's register for this particular polling station. The DR forms give the male voters at that station as 198 while the register gives the number of male voters as 176. And that therefore an additional 22 male voters who voted at that station were not registered at that station.
- [143] The petitioner's contention is one possible interpretation of this scenario. It is also possible that this was simply an error. The voters, who voted at this polling station, were less than the registered voters. To resolve this scenario, it would have been necessary to obtain the register used at the polling station,

which indicated the actual voters that turned up to vote, cross checking it with their sex or gender.

[144] The petitioner had undertaken to seek, at the trial, the opening of ballot boxes at these stations in question, which he chose not to do. As a result this is a matter that can hardly be resolved in his favour. The burden was upon him to establish the correct facts to the satisfaction of the court. I am satisfied that he failed to do so.

[145] There are 2 contending versions as to what really occurred at this polling station. It is a matter of oath against oath. I am satisfied that the appellant came up short in proving to the satisfaction of the court that the alleged malpractices and irregularities at this polling station, in fact occurred.

#### **Aloet Akum Catholic Church Compound Polling Station**

[146] The complaints at this polling station are mainly 2. It is contended that the appellant's 2 agents at this polling station were arrested by security officials during polling to allow for malpractices, such as ballot stuffing, prevention of voters from voting, giving way to fraudulent entries being made in DR forms.

[147] 2 polling agents for the appellant swore affidavits to the effect that there were arrested from the polling station.

[148] There are 12 affidavits of voters who claim they did not vote but DR forms shows that only 9 registered voters did not vote. The form indicates that the total number of votes (valid and invalid) cast were 399 while the tally of male and female voters gives the total as 365. If it is only 365 voters who voted there is then an additional 34 votes that cannot be accounted for. It is contended that the only logical explanation is that there was vote stuffing at this polling station.

[149] The respondent no.1's agents, and other witnesses, painted a different version of what occurred. In their affidavits they point to disruption occurring twice on polling day caused by the rowdy supporters of the appellant which was quelled by the security officers. Otherwise there polling proceeded and at the end votes were counted and declarations made as to what each candidate had received. Returns were then made to that effect.

- [150] For the respondents no.2 and no.3, 2 affidavits were sworn by the Presiding Officer and a polling assistant that did the verification of voters before a voter would be authorised to vote and given the ballot papers. These officers painted a version of tranquillity and peaceful nature of voting at this polling station, at variance, not only with appellant's evidence but at variance with the evidence of the respondent no.1.
- [151] It appears that the approach of the respondents no.2 and no.3 was simply to deny that there was any disruption, whether temporary or otherwise, whatever the source of disruption. Very little score can be placed in their version, which is the same in relation to all complaints at all polling stations where complaints were raised. It is simply denial of any incidents whatsoever and that everything went on peacefully at each of these polling stations.
- [152] Disregarding the version put forth by the respondent no.1 I find that both the appellant and the respondent no.1 have differing versions of what occurred at this polling station. Generally, it is oath against oath. The respondents no.1's agent, Emwogu Michael, claims to have identified 3 of the persons that had sworn affidavits to the effect that they had not voted, (Igimu Immaculate, Akello Mary Goretti, and Omongole Joseph), voting at this polling station.
- [153] To determine which version of the events at this polling station occurred and which did not, between the 2 contending versions, it would have been helpful, if the actual register to identify the voters, used during the voting, was adduced into evidence. This was not done. In addition had the undertaking by the appellant that he would seek, at the trial, the opening of the ballot box and examination of contents, including official register, and other information / documents contained therein, would have been able to throw more light as to what happened.
- [154] I note the discrepancy between total votes cast, (399) and the total of male and female voters (365). Whereas as this may be suspicious, to get at the bottom of it, we have to look at the voters' register used in the identification of voters, and know how many voters were identified, by what means, and were issued with a ballot. This would have been possible had the appellant, sought, as he had undertaken, to do, to apply for the open up of the ballot box for this station and examine the same and its relate records.



[155] The duty was upon the appellant to prove to the satisfaction of the court, on a balance of probability that the alleged irregularities had occurred. I am satisfied that he failed to meet the threshold.

### **Opuyo Primary School Polling Station**

[156] The major complaint here, according to Ekamu John Robert and Wanali Sowedi, agents of the petitioner at this polling station, is that in the afternoon of the polling day, this polling station was substantially taken over by Police and other unknown persons who chased away voters and the agents of the petitioner; allowed non-voters at this polling station to vote, with individuals obtaining booklets of votes and ticking them and stuffing them in the ballot box. And that at the counting of votes, the appellant's votes would be miscounted with 5 votes being declared 1 vote.

[157] The other complaint is that many voters did not vote because of the chaos that was unleashed in the afternoon with many affidavits sworn to that effect by the affected voters, including some who reached the polling station but were turned away; those who did not even reach the polling station but gave up on the way. See the affidavits of Egau Julius, Otai Joel, Akelo Grace, Akello Sharon, Elweru Charles; Akot Eunice, Emesu Francis, Aloko Norah, Abulo Patricia and Awio Grace.

[158] The petitioner complains that the respondent no.2 and no.3's officials attempted to explain the lack of signatures by the polling agents of the petitioner by claiming on the DR form that the agents had been picked by their party bosses which was not true.

[159] Lastly that analysis of the data on the voter register and polling data on the DR form would show that although there are 451 registered voters for this polling station, 439 voters voted on polling day, implying that 12 voters did not vote. However, the appellant's evidence shows that 16 voters did not vote and so there was an excess 4 ballots not accounted for.

[160] The only witnesses for the respondent no.1 at this polling station, turn out to have been earlier witnesses for the petitioner, who swore fresh affidavits, recanting their earlier affidavits. These are Akello Grace and Emesu Patrick. These affidavits are struck for offending the rules for a fair trial. The respondent no.1 and his advocates should not have approached witnesses for the adverse side other than cross examining them in court.

[161] For the respondent no.2 and no.3 there were 2 affidavits sworn by Mr Elapu George Wilfred, who was a Polling Assistant, and Etapu David, the Presiding Officer at this polling station. These witnesses state that voting was peaceful without any incident and exercise was concluded with vote counting and declaration of results in the presence of agents of all the candidates.

[162] Other than the affidavits of the presiding officer and polling assistant no other evidence is available from the respondents to show what went on at this polling station. It might have helped if the security officers assigned to the polling station had sworn affidavits to explain what went on. Nevertheless, we are now left with 2 versions that are as different as night is from day. It might have helped to tip the balance to one or the other side, if the appellant had, as he had undertaken in the petition, to apply for the unsealing of the ballot box and examination of the documents therein, to gain a full understanding of what happened at the polling station. An examination of voters' register used for identifying candidates, including the machine for identifying voter's fingerprints, may have conclusively determined if there as abuse of the process or not.

[163] It was asserted for the petitioner that his votes were down counted with 5 votes being called out as 1 vote. Recounting of those votes, at the trial, will have established the truth in relation to this allegation. The obligation was on the appellant to prove these allegations, on a balance of probabilities, to the satisfaction of the court. In my view he failed to do so.

**Ground 10: The Trial Judge erred in law and fact in holding that irregularities had to be attributed to the successful candidate whose election is challenged.**

[164] The complaint is premised on the following remarks of the learned trial Judge,

‘....irregularities at an election which is neither the act of a candidate nor linked to him cannot affect his election. The Petitioner through adducing evidence must prove two things which are that whether the irregularities particularly allotment of votes have been established, and whether the allotment of votes can be attributed to the respondent.....’

[165] There is merit in this complaint. It is possible irregularities may be committed by the successful candidate or his agents. However, it is possible the irregularities may be committed by other persons, particularly the electoral



officials, or any other person that may be given leeway to do so in the process. The grounds for setting aside an election are set out in section 61 of the Parliamentary Elections Act. I need not set out its provisions. There is no requirement that the acts complained of must specifically be attributed to the successful candidate. See Mbaju Jackson v Thembo Gideon Mujungu and Anor [2022]UGCA 309.

[166] I would allow this ground.

**Ground 11: The learned trial judge erred in law and fact when he held that the entire petition was an afterthought to appease the appellant's supporters.**

[167] The appellant contends that there is no evidence to back up this conclusion by the learned trial judge. I have examined the record of the trial court and find no basis for this conclusion. It was unwarranted.

[168] I would allow this ground.

**Ground 12: The learned trial Judge erred in law and fact when he faulted the appellant and his agents for failure to report complaints to the Electoral Commission.**

[169] The gravamen of the complaint under this ground are the following remarks by the learned trial judge in his judgment.

‘.....No single witness reported the matter of intimidation to either the 2<sup>nd</sup> respondent or to police. It would be wrong for the court to take evidence of intimidation of voters when the alleged voters were intimidated at the different polling stations never reported to the police or the Electoral Commission. All the petitioner's witnesses state that they abandoned voting and this would mean that it was their own volition and should not be attributed to deployment of security personnel.....’

[170] Counsel for the appellant attacked the learned trial judge for finding that the witnesses claimed that they were intimidated not to vote but did not report to the police or Electoral Commission. To the learned trial judge's remarks in context he was evaluating whether or not to believe the evidence on intimidation. Counsel for the appellant submitted that this was wrong in so far there were some reports to the authorities by the appellant in person and



Salaamu Musumba who was at the tally centre but that the returning officer ignored the same.

[171] Secondly that even if there were no complaints by voters given the evidence that the intimidation was perpetrated partly by security forces it was unrealistic to expect reports to be made to the authorities.

[172] It is correct to note that the appellant's witnesses who claimed not to have voted because of intimidation did not report to the authorities. But as we noted in Mbaju Jackson v Thembo Gideon Mujungu and Anor (supra),

'... it is true that no evidence of reports of these infractions to the police were produced. However, given the evidence available that the police officers chose not to restrain or take action against those perpetuating the same in their presence it was unrealistic to expect that a report would be made to the police or to the respondent no.2's officers that were principal actors and a record would be made of the same...'

[173] It is not essential for proof of intimidation in particular that a report must be made to the authorities though it is preferable that this is done and a record made of it, at that point in time. The circumstances obtaining will be considered in determining what exactly occurred. However, the failure to report was not the only reason for the trial judge concluding that intimidation had not been proven to the satisfaction of the court.

[174] The appellant's version of events alleges intimidation while all the 3 respondents' witnesses deny that such intimidation took place at the said polling stations. It is oath against oath. There must be other evidence to tilt the balance in favour of the petitioner, who had the burden to prove his case on a balance of probability to the satisfaction of the court. We must assume that it was the absence of such other evidence to tilt the burden that led the learned trial judge to opine that the absence of any reports to the authorities, which would have augmented the witness' version of events rendered the petitioner's witnesses' evidence somewhat insufficient to prove intimidation.

[175] On the facts of this case, I am unable to fault the trial judge.

**Ground 13: The learned trial judge erred in law and fact in holding that the petitioner had not proved non-compliance on both qualitative and quantitative fronts.**

[176] This is general and repetitive as the specific complaints with regard to the qualitative and quantitative basis have specifically been dealt with in the earlier grounds. It is struck out accordingly.

**Ground 14: The learned trial judge erred in law when he wrongfully exercised his discretion to award costs to the respondents.**

[177] Having found that the petition failed it was up to the learned trial judge to decide on whether to award costs to the successful party. He decided to do so as the rule is that costs normally follow the event. I find nothing wrong with his order to award costs. Nevertheless, given the other facts that have shown that the respondent no.1's advocates infringed professional ethics by approaching witnesses they ought not to have approached and made them recant their earlier evidence for the petitioner, I would find this sufficient reason to deny them costs, despite the fact the respondent no.1 was one of the successful parties in the court.


[178] I would not disturb the award of costs to the respondent no.2 and no.3.

### **Decision**

[179] As Mulyagonja and Luswata, JJA, agree this appeal succeeds in part but not sufficiently as to overturn the results of the election. The decision of the trial court dismissing the appellant's petition is affirmed. The respondent no.1 is denied costs both here and, in the court below, for their flagrant flouting of professional ethics. Respondent no.2 and no.3 will have costs in the court below and on appeal. The appellant will have one third of his costs on appeal as against the respondent no.1.

[180] The Registrar of this court is directed to avail the Secretary, Law Council with a copy of this judgment and the record of this appeal.

Signed, dated, and delivered at Kampala this 19<sup>th</sup> day of March. 2024



Fredrick Egonda-Ntende  
**Justice of Appeal**



**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA**

*[Coram: Egonda-Ntende, Mulyagonja & Luswata, JJA]*

**ELECTION PETITION APPEAL NO. 02 of 2023**

*(Arising from High Court Election Petition No.11 of 2022 at Soroti)*

**BETWEEN**

Attan Moses Okia=====Appellant

**AND**

Ariko Herbert Edmund Okworo=====Respondent No.1

The Electoral Commission =====Respondent No. 2

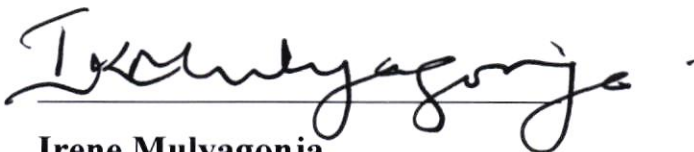
The Returning Officer=====Respondent No 3

Soroti City District=====Respondent No. 4

**JUDGMENT OF IRENE MULYAGONJA, JA**

I have had the benefit of reading in draft the judgment of my brother, Egonda-Ntende, JA. I agree with the reasoning and the final decision that the appeal succeeds only in part. I also agree with the orders that he has proposed with regard to the Advocates' costs.

Dated at Kampala this 19<sup>th</sup> day of March, 2024.



**Irene Mulyagonja**

**JUSTICE OF APPEAL**

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA**

*[Coram: Egonda-Ntende, Mulyagonja & Luswata, JJA]*

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**AND**

**Ariko Herbert Edmund Okworo=====Respondent No.1**

**The Electoral Commission =====Respondent No. 2**

**The Returning Officer=====Respondent No 3**

**Soroti City District=====Respondent No. 4**

**JUDGMENT OF EVA K. LUSWATA, JA**

I have had the opportunity to read in draft the judgment of my learned brother Hon. Justice Frederick Egonda Ntende, JA.

I agree with him and have nothing useful to add.

Dated, signed and delivered at Kampala this ..... day of .....  
2024.

.....  
**EVA K. LUSWATA**  
**JUSTICE OF APPEAL**