THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

ELECTION PETITION NO. 005 OF 2011

MUGULA FRANCIS XAVIER::::::::::::::::::::::::::::::::PETITIONER

VERSUS

1. **THE ELECTORAL COMMISSION**
2. **NAMAYANJA FLORENCE::::::::::::::::::::::::::::RESPONDENTS**

BEFORE: HON. LADYJUSTICE ELIZABETH MUSOKE

JUDGMENT

National elections were held on the 18th day of February 2011. The 2nd respondent, and Mr. Alintuma C. Nsambu were among the contestants for Member of Parliament for the above constituency. The 1st respondent declared the 2nd respondent validly elected Member of Parliament having been stated to have polled the highest number of votes. The 2nd respondent subsequently assumed the Parliamentary seat of Bukoto East Constituency.

The Petitioner, a registered voter in the above constituency, was aggrieved by the results of the above election and he petitioned this court under Section 60 (2) of the Parliamentary Elections Act, 2005 (PEA) having fulfilled the requirement of being supported by the signatures of not less than five hundred voters registered in the constituency. The Petitioner was accompanied by an affidavit sworn by him on the same date. He later filed an affidavit in rejoinder dated 6/5/2011, and another one dated 10/6/2011. The Petitioner also filed 31 supplementary affidavits in support of his case.

Broadly, the grounds of his petition are:

i) That the electoral process in Bukoto East Constituency was not conducted in compliance with the provisions and principles of the Parliamentary Elections Act 2005 (PEA).

ii) That the failure to conduct the election in compliance with the provisions and principles in the electoral law benefited the 2nd respondent and affected the final result in a substantial manner.

iii) That the 2nd respondent personally or through her agents, with her knowledge, consent or approval, committed several election offences and illegal practices.

The Petitioner prayed for the following orders:

a) That the 2nd respondent was not validly elected.

b) That the election of the 2nd respondent as a Member of Parliament be nullified.

c) That elections for Bukoto East Constituency be annulled and fresh ones be conducted.

d) That the 1st and 2nd respondents pay the costs of the petition.

The 1st respondent in its answer denied the allegations, contending that the election of the Member of Parliament for Bukoto East Constituency was conducted in accordance with the provisions of the law.

In her answer to the Petition, 1st and 2nd respondents denied that the election was conducted in contravention of the provisions and principles of the electoral law, and that if any contravention of the provisions of the above had occurred, then it did not affect the result of the election in a substantial manner. The 2nd respondent specifically denied there were any offences or illegal practices committed by herself personally or by other people with her consent, knowledge or approval.

At the Scheduling Conference, the following issues were agreed upon:

i) Whether the electoral offences or illegal practices were committed by the 2nd respondent either by herself or by other persons with her knowledge, consent or approval within the meaning of the PEA.

ii) Whether the parliamentary elections for Bukoto East Constituency were not conducted by the 1st respondent in accordance and in compliance with electoral laws; and if so whether the non-compliance affected the results in a substantial manner.

iii) Remedies are available to the parties.

It is a cardinal rule of the law of evidence that he who alleges, must prove. (Section 100 -103, of the Evidence Act, Cap. 6). Under Section 61 (1) and (3) the standard of proof is to the satisfaction of court, on the basis of a balance of probabilities.

Section 61 (1) of the PEA lays down the grounds upon which the election of a Member of Parliament may be set aside as follows:

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) …….

In Supreme Court of Uganda ***Presidential Election Petition No. 1 of 2001: Col. (Rtd) Dr. Kizza Besigye Vs Museveni Yoweri Kaguta and the Electoral Commission,*** the Learned Chief Justice Odoki, cited with approval the case of ***Borough of Hackney Gill Vs Reed [1874] XXXI L.J. 69,*** where Grove, J emphasized that an election should not be annulled for minor errors or trivialities thus:

> ***"An election is not to be upset for an informality or for a triviality. It is not to be upset because the clock at one of the polling booths was five minutes too late or because some of the voting papers were not delivered in a proper way. The objection must be something substantial, something calculated to affect the result of the election. …… so far as it appears to me the***

rational and fair meaning of the section appears to be to prevent an election from becoming void by trifling objections on the ground of informality, but the Judge is to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect."

If the Petitioner is to succeed, therefore, he has to prove the grounds, or any one of them, of the petition to the satisfaction of court, on a balance of probabilities.

"Proof to the satisfaction of Court" has been held by the Supreme Court of Uganda to imply that, the matter has been proved without leaving room for the Court to harbor any reasonable doubt about the occurrence or existence of the matter; See Supreme ***Court Presidential Election Petition No. 1 of 2001; Col. (Rtd) Dr. Kizza Besigye Vs Museveni Yoweri Kaguta and another (Supra):*** (Judgment of Mulenga, JSC).

This court will apply the above stated principles as to the burden and standard of proof in the determination of this petition.

At the beginning of his submissions, Counsel for the 2nd respondent raised two preliminary matters, namely:

i) Certification of affidavits by the illiterates; and

ii) Propriety of the pleadings.

I will deal with them first.

Certification of affidavits by illiterates:

It was submitted that during the proceedings the Petitioner, PW1, in cross-examination admitted that he could not understand the affidavit unless the same was translated to him wherein he admitted that he needed translation and that the affidavit was translated to him before the Magistrate. In further cross examination, he confirmed that he could not even read an English Newspaper. He was specifically given a New Vision News paper which he said he could not read. The statement that the affidavit was translated was itself a lie in so far as the witness stated that the affidavit was translated by a person who is not disclosed yet this is a requirement of the Oaths Act. (See Form B in the schedule to the Act). This

position is further emphasized under Section 7 of the Commissioner for Oaths (Advocates) Act Cap. 5, which emphasizes the fact that the witness needs translation of the affidavit in order to understand it. Mugula's (PW1) affidavit in support of the petition deponed on the 22nd day of March 2011 lacked the mandatory translation which was required for all illiterates within the provisions of Section 1 of the illiterates Protection Act Cap 78. Counsel relied on ***Election Petition Appeal No. 11 of 2002 Ngoma Ngime Vs Hon. Winnie Byanyima and the Electoral Commission***, per Byamugisha J.A. with the concurrence of the other members of the bench; and ***Election Petition No. NP 01 of 1996 Odeta Henry John Vs Omeda O'Max*** per Ntabgoba P.J as he then was, for the proposition that a person must understand what he is saying if he or she is to give evidence. He also relied on O19 rule 3 of the Civil Procedure Rules.

The above fatalities equally affected PW1's affidavits deponed on the 6th day of May 2011 and another one deponed on the 10th day of June 2011; the affidavits of Sebwaana Joseph; deponed on 18/03/2011 Nabukenya Fatuma deponed on the 18th day of March 2011; Jumba Claver's affidavit deponed on 2011; Nakabugo Gelaid's affidavit deponed on the 18th day of March 2011; and Namyaalo Margaret's affidavit deponed on 18th March 2011.

Counsel for the Petitioner did not agree. He contended that the 2nd respondent had to prove that all the deponents of the impugned affidavits were illiterate in terms of the illiterates Protection Act Cap. 78. It was necessary that the 2nd respondent tested the level of illiteracy by proving to court, that the deponents were unable to read their respective affidavits and understand the same or the language in which the affidavits were written or printed. The law envisaged a trial within a trial dedicated to establishing the factum of illiteracy so as to fall within the ambit of the law. Counsel distinguished Ngoma Ngime's case (supra) and Odeta's case (supra) and said in the said cases the deponents were proved to be illiterate. He concluded that all the impugned affidavits were not defective.

I have considered the submissions of learned Counsel on both sides, the law and authorities relied on. The term "illiterate" is defined under Section 1 (b) of the Protection of Illiterates Act, Cap. 78, as follows: -

> ***"(b). "illiterate" means in relation to any document, a person who is unable to read and understand the script or language in which the document is written or printed".***
>
> Section 3 of the Act states:

> ***"Any person who shall write any document for or at the request on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her."***

The Petitioner has not cited any authority for the proposition that to prove illiteracy there must be a trial within a trial. In my view what was put to the petitioner in cross-examination (supra) and his answers were enough to enable court to determine that the petitioner was illiterate within the ambits of the Law. If the petitioner could not read the New vision Newspaper, then how could he read and understand a petition couched, as it is, in legal language? In Ngoma Ngime (supra) it was held that the requirement to include a jurat at the end of the affidavit or affirmation stating that the contents of the same were read over to the deponent and he appeared to understand the same, was not a matter of form but of substance. Without a certification to prove that a named person interpreted the contents of the affidavits to the petition and that he appeared to understand the same, the affidavits fail the requirements of the law. The affidavits of the petitioner dated 22/3/2011, 6/5/2011 and 6/6/2011 are therefore, fatally defective and must be rejected. So must the affidavits of Sebwana Joseph, Nabukenya Fatuma, Jumba Claver, Nakabugo Garaid, and Namyaalo Margaret's affidavits all be rejected since they all admitted under cross-examination that they could not read the English language.

What is the effect of rejection of the petitioner's affidavit in support of the Petition? Rule 4 (8) of the Parliamentary Elections (Election Petitions) Rules states thus:

> ***"The petition shall be accompanied by an affidavit setting out the facts on which the Petition is based together with a list of any documents on which the Petitioner intends to rely."***

The above refers to the Petitioner's affidavit accompanying the Petition. Since the statutory affidavit has been rejected, the petition would, in my view, be incompetent. I would dismiss it with costs.

However, this being an election petition which by its nature is a matter of great importance both to the nation and the constituency concerned, I will consider the merits of the case after disposing of the next preliminary point.

The second preliminary point raised was with regard to pleadings.

The petitioner averred in paragraph 6 of the Petition that the 2nd respondent committed illegal practices personally and these were particularized. He however sought to prove these cases against "agents". This is not permissible under the Rules of Pleadings. Parties are bound by their pleadings (Order 6 rule 7 of Civil Procedure Rules and ***Dirisa Vs Sietco [1993] IV KALR 63)***. No party is allowed to depart without leave to amend. A party cannot prove what was not pleaded. The particulars against the 2nd respondent personally are found in paragraph 6 (a), (b), (c), (d), (e), (g), (h), and (i). The allegations against the 2nd respondent's agents are contained in paragraph 6 (f) where it is alleged that the 2nd respondent's agents filled DR Forms at Lakes High and in (q), that the agents mixed themselves with voters in the lines causing intimidation and bribery to thrive, (r) that they transported unsealed boxes from polling stations and (s) that they bribed voters and made sure that the votes for the persons bribed were cast in favour of the 2nd respondent.

The rest were against the 2nd respondent personally, and had to be proved against the 2nd respondent personally. Counsel asked court to analyze the evidence with the above submissions in mind.

The petitioner was of a different view. His case was that the 2nd respondent knew the case she had to answer and did not suffer any prejudice in the manner which the current pleadings were concluded. The Petitioner relied on ***Bakaluba Peter Mukasa Vs Nambooze Betty Bakireke S.C.EP No. 4 of 2009*** (Katureebe JSC) for the proposition that rules of procedure are very important but not an end in themselves; they are the handmaids of justice but not justice themselves.

I have examined the pleadings and the submissions on this point. I find that at the Scheduling Conference an issue was framed "***whether the electoral offences were committed by the 2nd respondent either by herself or by other persons with her knowledge, consent or approval within the meaning of the Parliamentary Elections Act 2005".*** This issue clearly envisages that the offences to be canvassed were either committed by the 2nd respondent herself or through her agents. That issue could only have been framed after the 2nd respondent understood the case against her. Up until now, the 2nd respondent did not raise any issue with the pleadings. In my view it is too late in the day to raise this when the 2nd respondent had acquiesced in it, and even agreed to issues encompassing what she is now objecting to.

In ***Railways Corporation Vs EA Road Services Ltd [1975] EA 128,*** it was held that an unpleaded issue but made an issue at the trial without objection may be decided by court and relied on.

I agree with the petitioner that substantive justice must be administered without undue regard to technicalities (Article 126 (2) (e) of the Constitution. In the present case it would not be a departure from the pleadings when the petitioner seeks to prove that the agents of the 2nd respondent committed acts, which in the petition were stated as committed by the 1st respondent; and that they committed these with the knowledge consent and approval of the 2nd respondent. I see no prejudice or injustice occasioned to the 2nd respondent, or embarrassment in her defence. The preliminary objection is overruled.

The 1st issue is whether electoral offences or illegal practices were committed by the 2nd respondent either by herself or by other persons with her knowledge and consent or approval within the meaning of the Parliamentary Elections Act.

The allegation of bribery is made in paragraph 4 (b) that there were numerous illegal practices and electoral offences committed by the 2nd respondent personally and by her agents with her knowledge, consent and or approval. I however do not find "bribery" listed among the illegal practices or electoral offences. However in paragraph 17 of the Petitioner's affidavit in support, he depones that "the 2nd respondent and her agents massively distributed gifts to voters on polling day and the electoral officials were notified about it by the just remained passive hence bribery thrived in the said polls".

Section 61 (c) of the Parliamentary Elections Act provides that an election will be set aside if it is proved to the satisfaction of court that an illegal practice or any other offence was committed by the candidate or with his knowledge and consent or approval. Sections 68 lists down the bribery as an illegal practice.

It states:

> "***Any person who, with intent either before or during an election, either directly or indirectly influences another person to vote or to refrain from voting for any candidate, or gives, provides or causes to be given or provided any money, gift or other consideration to another person, to influence that person's voting commits an illegal practice of the offence of bribery……"***

Meanwhile Section 61 (c) states:

> ***"61; Grounds for setting aside election.***

The election of a candidate as a Member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of court:

a) ……..

b) …….

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."

Oder JSC (RIP) in Col***. (Rtd) Dr. Besigye Vs Yoweri Kaguta Museveni – SCEPI of 2001, at page 475*** set out the ingredients of bribery as follows:

1) That a gift was given to a voter.
2) The gift was given by a candidate or his agent.
3) It was given with the intention of inducing the person to vote.

The gift or money must be given to a voter. The PEA defines a "registered voter" in Section 1, as a person whose name is entered on the voters register. Needless to say the person bribed must be a registered voter. In a Parliamentary election I must add that the person allegedly bribed must be a registered voter in the Constituency in issue. Proof to that effect ought to be adduced to prove bribery of a voter.

In determining where the offence of bribery has been committed, the court bears in mind that this is a very serious petition issue on which alone the petition can succeed.

The offence must have been committed by the 2nd respondent or by her agents with her knowledge, consent or approval. In ***Col. (Rtd) Dr. Besigye Kizza Vs Museveni Y.K. & Anor EP. No. 1 of 2001,*** it was held that an agent is a person employed by another to act for him or her and on his or her behalf either generally or in some particular transaction. The authority may be actual or implied from circumstances. It is not necessary to prove agency to show that a person was actually appointed by the candidate, if a person not appointed were to assume to act in any department of service as election agent and the candidate accepted his service as such; that the test is whether there has been employment or

authorization of the agent by the candidate to do some election work or the adoption of this work when done. The candidate is, however, not only liable for the acts of the agents when he has himself or have to some extent put himself in the agents' hands or to have made common cause with him for the purpose of promoting of the candidate's election. The candidate must have entrusted the alleged agent with some material part of the business of election. It was further held that the offence of bribery in election is not complete unless the bribe or gift is given to a registered voter, otherwise there is no act of bribery committed. The above case was applied in ***Amama Mbabazi & Electoral Commission Vs Musinguzi Garuga James Election Petition Appeal No. 12 of 2002,*** and ***Fred Badda & Anor Vs Prof. Muyanda Mutebi Court of Appeal No. 25 of 2006***.

It was the 2nd respondent's case that neither Mugula's Petition or affidavit names the polling stations, registered voters bribed, the gifts given or the voter ID number. It was cardinal for the pleadings to name the person bribed as it was not a matter of evidence but pleadings. Further, that the petition in this respect should be drafted nearly like a charge. It was therefore contended that the omission to give the particulars of the bribery in the petition occasions a fatality to the petition.

In response the Petitioner's Counsel contended that there is no requirement in the electoral law as regards the offence of bribery pleadings should be drafted in the form of a charge sheet.

The court finds the proposition by the 2nd respondent that the allegations of bribery should be set out more like a charge sheet in the petition, a bit strange. The allegations, which are termed as election offences, are offences for purposes of setting aside an election of a candidate under the PEA. They are not equivalent to criminal charges. It is clear from Section 63 (8) of the PEA that proof of the commission of an illegal practice does not amount to proof of the commission of a criminal act. Rule 4 (2) of the Parliament Elections (Election Petitions) Rules SI 141-2, requires that the petition shall be divided in paragraphs numbered consecutively, each of which shall be confined, as nearly as may be, to a distinct irregularity.

I already stated that the problem I had with the petition, was that this particular irregularity of bribery was not stated as a specific illegal practice or election offence. It is only mentioned in the affidavit. The affidavit is only meant to support the petition and should not introduce matters that were not in the petition. Even then, the court's interest is to get to the facts/truths of the matter without nipping the petition in the bud, and to take the pleadings as a whole and deal with all the complaints canvassed.

Having said the above, on the issue of whether bribery allegations should be set out as charges, the court is not persuaded that the bribery charges ought to have been set out like in a charge sheet.

As long as bribery is mentioned in the pleadings, the court will look at the supporting evidence to see if the offence of bribery has been proved to the satisfaction of court, on a balance of probabilities.

I will proceed to examine the supporting evidence in respect to the offence of bribery.

Mr. Mugula's affidavit is the statutory affidavit accompanying the petition envisaged under Rule 4 (8) of the (PEEP) Rules. It is basically meant to set out the facts on which the petition is based. This being the case, it is the only affidavit which may depone to matters based on information and belief. This will stand only as long as other supporting and cogent evidence is adduced to prove the allegations in the statutory affidavit, to the required standard of proof.

During cross-examination, Mugula mentioned names of Kimbowa John Bosco, Takiya Namu as people who were allegedly bribed with Shs. 5,000= and Shs. 2,000= respectively, and that the money was given by Damulira, a voter, who had in turn got it from one Mwebe.

It is not stated where this offence was committed. Mwebe swore an affidavit for the Petitioner and was also cross-examined. He did not mention giving money to Damulira on polling day. Further still apart from Mugula mentioning in court that he saw Kimbowa and Namu Takiya being bribed, he does not mention whether these were registered voters. He only mentioned Damulira, the giver of the bribe as the voter. The requirement is for the receiver to be a voter, and proof that must be provided he is a voter.

I find Mugula's above allegations of bribery of the above persons not proved to the satisfaction of court. Mugula also admitted to having participated in arrangements for donations of sugar and maize flour to schools during campaign period on behalf of Mr. Nsambu, on the pretext that the project had started earlier.

Michael Mwebe

The above witness swore an affidavit and was cross-examined as PW11. He deponed that he was a member of the 2nd respondent's campaign team in the recent elections. During the campaigns he was assigned duties ranging from transporting the 2nd respondent, her youth brigade, "solidas", whose job was to cheer their candidate and protect her during the campaign period. During cross-examination he said he had changed allegiance from supporting the 2nd respondent because she had not completed the

power project abandoned by Mr. Nsambu when he lost elections. Further, as a parent his children had lost out when Mr. Nsambu stopped his donations of maize flour and sugar to schools when he lost election. In his affidavit he deponed that he was assigned by the 2nd respondent to take boxes of soap to Kyassunsu and Dogero, where Kabugo and Kawalya distributed pieces of soap from house to house. The beneficiaries are not named, nor are they stated to be registered voters in the 2nd respondent's area of jurisdiction. It is not stated whether Kyassunsu and Dogero are located within the 2nd respondent's constituency. Bribery is proved only when the person alleged to have been bribed was a registered voter. Absence of evidence that the person bribed is a voter is a serious flaw; because unless one is a voter, he cannot be influenced to vote for a candidate. (See ***Rt. Col. Dr. Kizza Besigye Vs Y.K. Museveni Presidential Election Petition No. 1 of 2006).***

I find that Mwebe's allegation is not proved to the satisfaction of court.

Mwebe further deponed that on polling day Kabugo, Kawalya and himself were given bundles of Ug. Shs. 5,000=, 2,000= and 1,000= to give to voters as they proceeded to the polling station, and that he saw two persons distributing money at Mazinga and elsewhere telling them to vote for Florence Namayanja.

Mwebe did not name even a single person who was given the bribe money in Mazinga or elsewhere. There is no evidence that the money was given to voters. I find this evidence wanting. Further, the court also had issue with Mwebe's credibility as a witness. He is an accomplice witness, a self confessed criminal, whose evidence is to be taken with a pinch of salt. He stated in court that he would wish to see Mr. Nsambu back so as to continue getting sugar and maize flour from Mr.

Nsambu. His demeanor in court was very disturbing. He refused to face the public or anyone for that matter, even when Counsel Segona asked him to face him. He preferred to face a blank wall, and used his hand to hide his side of face from the members of the public in court. I was not at all impressed by his demeanor at all.

With such a suspicious demeanor, the court finds it very unsafe to rely on Mwebe's evidence, which had even failed to satisfy the requirements of the PEA. Even so, the 2nd respondent denied ever employing Mwebe as a campaign agent or for anything else, during her cross-examination. On the whole the court finds that Mwebe's evidence does not satisfy the requirements of the PEA, and falls short of satisfying court to the balance of probabilities.

Najjemba Ida

In her affidavit dated 10th June 2011, the above witness said she was a registered voter at Mazinga polling station who was accosted by one Damulira, a known campaigner for the 2nd respondent on 3rd January 2011, he gave her Shs. 1,000= to vote for the 2nd respondent. She however told Damulira and his friend that he would vote for NRM throughout from the President to L.C. I. On polling day, Damulira gave her Shs. 2,000= saying that even if she was not going to vote for Namayanja, Namayanja cared for all voters in Bukoto East Constituency. The witness deponed further that sodas were bought for many residents on 5th January 2011.

I find that although this witness stated she was a registered voter she did set out to prove this by attaching her voter ID card, or the polling day register to show she was a voter at Mazinga polling station. Secondly, she made it clear as she was allegedly being given money that she would not change from NRM, but that Damulira all the same gave her the money saying Namayanja was for all. The residents who were the beneficiaries of soda are not known, let alone, there being any evidence that they were registered voters. The evidence of Najemba did not fulfill the requirements of the PEA, and did not satisfy court. More importantly, it is neither alleged nor proved that the 2nd respondent knew of the alleged acts if at all they took place, or that she consented or approved of them.

Nakabugo Gelaid

She swore an affidavit on 18/3/2011 deponing that on polling day she saw "Tigo" delivering her mother Nzerina Nakintu and helping her to cast her vote. She asked her mother why Tigo voted for her and she said that Tigo had waylaid her and transported her to the station and asked to vote for her which she accepted because she had given her Shs. 5,000=. The witness then followed Tigo and found him about 500 meters from the polling station where he was confronting voters and bribing them with money and then putting them on the motorcycle up to the polling station. "Tigo" alias George Kagimu, had been appointed the 2nd respondent's campaign agent at a meeting she had attended on 26th January 2011. Further still, Nakandi Tabula, Nakintu Nzera and Sereve were brought by Tigo from Butende and voted for.

I find that the evidence about this witness's mother being bribed is all hearsay, which is not permitted in election petitions (Order 19 rule 3 of the Civil Procedure Rules). She saw Tigo bribe voters 500 meters away and bring them to vote. Then she saw Tigo get people from Butende to vote. This was evidence in

cross-examination. She seemed to have seen so many things happening at the same time, even as he was meant to be at the polling station as an agent protecting her candidate's vote. None of the few she named swore affidavits, at least to corroborate her evidence. If her mother is alive as she claims, then she should have sworn an affidavit to corroborate the witness's claims. As it stands Shakyaddone, the above evidence of bribery by this witness is not cogent enough to satisfy court that bribery of voters took place, and with the knowledge consent and approval of the 2nd respondent. George Kagimu alias Tigo, swore an affidavit on 1/4/2011 and denied all the allegations. It should be noted that Nakabugo's affidavit is among those defective for non-certification.

Nakabugo further deponed that Nabuuma told her that the Gomesi she was donning was given to her by the 2nd respondent. This evidence is also hearsay as the witness did not witness the Gomesi being given to Nabuuma, or indeed that it was given as a bribe. Moreover the witness also admitted getting a T-shirt from NRM, but in her case she said it was normal. Nabuuma in her affidavit and during cross-examination denied ever getting a gomesi from the 2nd respondent, or even being her agent.

The witness's entire evidence on bribery is not cogent enough to satisfy court to the required standard.

Naluwembe Max

The above witness swore an affidavit on 10/6/2011 stating that on polling day he was offered Shs. 5,000= to vote for Namayanja which she rejected. That at Mazinga Nakachwa Tackiya told her she had received Shs. 5,000= from Lukyamuzi Dick, the 2nd respondent's campaign manager.

Although the witness stated she was a voter at Serinya Mazinga polling station, Bulango parish, she never attached proof that she was a registered voter by way of voter ID card and polling day register. Further, the law requires the money to be received in order to constitute a bribe. If she did not take the money it cannot be a bribe. Further still, the evidence relating to Nakachwa Tackiya was hearsay.

It should also be noted that her affidavit is defective for non-certification (Jurat).

Nakate Fatiya

She swore an affidavit on 10/6/2011 stating that on 17/2/2011 one Sempango an agent of Namayanja gave money to Luzigilla to buy votes for the 2nd respondent. The two men showed him bundle of Shs.

5,000= and asked her how much she wanted to vote for Namayanja. She saw them giving Nalongo Shs. 5,000= of this money. Further, that on the polling day Matovu and Mulalo provided a car and boda bodas to ferry voters to the polling station. On arrival such ferried people would declare they needed help and ask the drivers who brought them to cast votes for them.

The witness did not attach her voter ID to prove she is a registered voter; not even a polling day register, and yet she was a polling agent. In any case she refused the offer of the "bribe". On the provision of the saloon car and boda bodas, it is not indicated where this happened and whether the witness perceived this herself. Further, who were Matovu, Mulalo and Mutema Nte, acting on behalf of? This is not stated.

And if the unnamed self confessed helpless voters made their choice of who should help them to vote, was the 2nd respondent to blame. It is court's view that the evidence of the witness fell short of that required under the PEA, and did not satisfy court that an offence of bribery was committed.

I conclude by quoting from the judgment of Odoki CJ, in Kizza Besigye's case [2006] (supra) that:

> ***"Mere distribution of money to agents or their supporters did not amount to bribery unless corrupt motive and the status of the receiver of the money as a voter were established. In order to bring home the charges of bribery against the 2nd respondent, it must be proved that the bribe was given out by his agent with his knowledge, consent and or approval. Many people found to be distributing money were deemed to be agents of the 2nd respondent without necessary proof. Some of the people could have been agents for Parliamentary candidates."***

I find that what is stated above applies to our case. People were deemed to be agents of the 2nd respondent without proof of the fact. The persons alleged to be bribed did not have proof that they were registered voters. Further, 18/2/2011 was a date for many categories of polling; Presidential; Parliamentary candidates for constituencies; and candidates for Woman District Member of Parliament. These were many representing numerous political parties. It would not be easy to know with certainty who was acting on whose behalf without proof.

Letters of appointment of the so called agents would, if attached, have gone along way to prove the fact of appointment to act for the 2nd respondent; or the scope of authority granted to the agents.

In conclusion, I find that the allegations of bribery have not been proved to the satisfaction of court.

Uttering false statements/Defamation

The Petitioner alleged in paragraph 6 of his Petition and paragraph 20 of his affidavit that:

> ***"The 2nd respondent's agents at Kitengesa used defamatory language during campaigns in the presence of the 2nd respondent labeling Hon. Alintuma John Nsambu as a betrayer, elopist, stinking dog, owner of a shrine and other derogatory remarks with the 2nd respondent's sanction or consent."***

Paragraph 21of the affidavit states:

> ***"That the 2nd respondent and her agents made all sorts of inflammatory remarks during campaigns that Hon. Alintuma Nsambu had personally closed Central Broadcasting Service because of his hatred for Kabaka of Buganda which was not true."***

The evidence to corroborate the above statements came from Sebwana Joseph, Michael Mwebe, Ssali Sula, Nakabugo Gelaid, Nakatte Fatiya, Najemba Aida, Mugula's affidavit in rejoinder; whose sum total is that Ponsiano Senyonga, Joseph Gabula, Fatuma Kakyi were agents and known supporters of the 2nd respondent, and they together with the 2nd respondent uttered the above words.

The above are stated to be further corroborated by the Returning officer RW1, Tugume Ephraim when he stated in court during cross-examination that Mr. Nsambu raised a complaint on defamatory matters in the mid-campaign meetings.

I have examined the allegations of defamation and evidence in support and also considered the submissions by Counsel for either side on the issue.

It is trite that defamation is with respect to personal character. The words stated to be defamatory must also be proved to be untrue. It is very unfortunate that the person whose character was alleged to have been lowered in the eyes of voters by the said allegations chose not to swear any affidavit as to whether what was attributed to him true or false; or that those who uttered them had no reasonable grounds to utter them.

There is no evidence that Nsambu's character was injured by the said words or utterances.

The case of ***Wasike Steven Mugeni Vs Aggrey Awori*** is distinguishable in that case it was the person defamed that sued, and he was able to prove damage to his character, and the effect on the electorate.

Lastly, even if the words were proved defamatory there had to be further proof that they were uttered by proved agents of 2nd respondent with her knowledge and consent or approval. This was not proved. The 2nd respondent denied being party to any of the alleged false utterances or defamatory statements.

The allegation that Mr. Nsambu was referred to as a "stinking dog" was admittedly an analogy. (See paragraph 7 of PW11, Mwebe Michael's affidavit).

It should further be emphasized that the right to free speech, especially in election campaigns should not be stifled. Section 21 (2) of the PEA provides:

> ***"Subject to any other law, every candidate shall enjoy complete and unhindered freedom of expression and access to information in the exercise of the right to campaign under this Act".***

The provision is couched in similar words as S. 23 (2) of the Presidential Elections Act, and in ***Rtd. Col. Dr. Kizza Besigye Vs E.C. and Another SC.EP No. 1 of 2006*** the Supreme Court had occasion to consider the effect of that provision in the Presidential Elections Act, which is in pari material with S. 21 (2) of the PEA.

Odoki C.J. said:

> ***"Section 23 of the Presidential Elections Act is intended to further the objectives of the above Articles sic 41 and 43, of the Constitution by promoting free and unhindered freedom of expression by candidates in an election. Therefore a liberal interpretation must be placed on Section 23 while a narrow or restrictive interpretation is placed on Section 24 which places some restrictions on freedom of expression by criminalizing certain statements made by candidates while campaigning."***

In that case, the petitioner had complained that the 2nd respondent made statements during the presidential campaigns, which violated the above provisions. The impugned statements included reference to the petitioner as:

> ***"a prophet of doom", 'a non-starter', 'a liar and mentally sick' 'a rebel working with terrorists', 'a traitor, rebel and opportunist', 'one who massacred hundreds of innocent civilians at Barlongo', 'a failure and unpatriotic', and 'that FDC was scattered millet'".***

The court dismissed all the above as not constituting an offence under the Act. Kanyeihamba JSC, held that:

> ***"The statements complained of were nothing more than boasts, exaggerations and vulgarities typical insults intended to enhance the speakers' chances of success and dampen those of his or her opponents in turn. For a political rival to call another a failure or an opportunist or a weakling does not, in my opinion amount to anything capable of interpreted as an offence against the law, sections 23 and 24 of the Presidential Elections Act notwithstanding."***

See also ***Justice Rugadya Atwoki in Paddy Kabagambe and Anor Vs Bwambale Buhondo Yokasi & Anor EP 11/2006*** (Fort Portal).

I would not agree more. I find the statements complained of in the present petition i.e. that Nsambu was a stinking dog, not amounting to anything capable of being interpreted as an offence against the law. It was used as an analogy, and the person referred to did not complain.

The court finds that the allegation of defamation of Nsambu Alintuma and uttering false statements have not been proved to the satisfaction of court.

Undue influence contrary to Section 80 PEA

Paragraph 6 (a) of the Petition alleges that the 2nd respondent used abusive defamatory, intimidating, frightening; threatening and belittling language against Hon. Alintuma Nsambu and his supporters which led some voters to shun voting for him, while other voters and agents feared for their lives and failed to vote or safeguard the votes of their preferred candidate contrary to Section 80 of the PEA.

Paragraph 6 (1) alleges that among the electoral offences committed by the 2nd respondent were:

> ***"Physically assaulting of Hon. Alintuma Nsambu's supporters during campaigning and on the voting day calculated to instill fear in the said supporters thereby stopping them from voting."***

The petitioner in paragraph 18 of his affidavit of 22/3/2011 stated that the 2nd respondent and her agents exhibited a lot of intimidation, physical assaults and all sorts of threatening language and gestures which scared Hon. Alintuma Nsambu's supporters who preferred to save their lives and leave the elections to be rigged in favour of the 2nd respondent.

Counsel for the Petitioner contended that the above evidence of the petitioner was not assailed in cross-examination. However I would not call the facts and allegations laid down in the statutory affidavit as evidence. This is because it is not evidence and; it cannot stand on its own unless some supporting affidavits are sworn to prove the allegations in the affidavit.

In cross-examination, the petitioner stated that the 2nd respondent never assaulted any supporter of Hon. Nsambu. He said it was her supporters that did, at Kidda when supporters of both candidates clashed.

Senabulya Abdallah swore an affidavit and was cross-examined. He said he had gone to Kidda Youth mobilize for Hon. Nsambu to inform people of his coming for a rally. He found boda bodas were blocking the road to stop Nsambu from coming to Kidda. He was hit and injured in a scuffle between the supporters of the rival candidates that followed. He saw youths hitting him. He did not see the 2nd respondent at the scene, although Hon. Nsambu was there. It should be noted that Abdallah's affidavit is one of the defective ones for non-certification.

Namwanje Prossy deponed that she was an agent of Mr. Nsambu at Kyanjovu polling station. She was intimidated and left at 1.00 p.m., and that rowdy youth came and shouted. In cross-examination she said she was at the polling station (Kyanjovu) until 10.00 p.m. after counting of votes. The identity of Gyavira who brought the rowdy youth is not given. The youth stated that "Namayanja is a power and Hon. Nsambu is going to fill (sic) her power". The court finds nothing in her evidence to connect the youth to the 2nd respondent. Commenting on Namayanja's power did not imply that the youth were her agents, doing what they did with her knowledge, consent or approval. The second agent of Alintuma Nsambu, at the same station who the witness said was pushed out of the ring by Namayanja's supporter never swore any affidavit. Even then, there is no evidence that the one who pushed the agent was doing so with knowledge, consent or approval of the 2nd respondent.

In the affidavit in rejoinder of the petitioner dated of 6/5/201, the petitioner deponed that at Kidda, Nsambu was surrounded by the 2nd respondent's supporters and his body guard fired in the air to disperse the crowds. At Nkuke the 2nd respondent's agents assaulted Hon. Alintuma Nsambu's supporters and a case was reported to police. The Kidda incident was also reported to Police. The rest of his averments in this affidavit are from information, which is not permitted in law, since this was not the statutory affidavit in support of the petition.

In paragraph 6 (d) of the affidavit in rejoinder, the petitioner deponed that he deponed that the 2nd respondent's agents assaulted Alintuma Nsambu's supporters into fight which causes them to shun from voting fearing reprisals. None of the voters so affected, however, swore any affidavit to the effect that they did not vote because they feared reprisals.

Namyalo Margaret deponed that at Matanga polling station a group came chanting Namayanja's slogans and one Sebuwufu came with rowdy youths who disrupted voting by joining the voting lines. The chanting caused a lot of fear in Hon. Alintuma Nsambu's group and some of these supporters quietly left the voting lines and ran back to their homes.

No evidence was adduced to prove that Sebuwufu was an agent of the 2nd respondent, acting with her knowledge, consent and approval. There was no evidence to connect the rowdy youths with the 2nd respondent. Meanwhile, none of Mr. Nsambu's supporters who are alleged to have quietly left the lines to go home were named; neither did any of them swear an affidavit to the effect. The Namayanja slogans the youths were chanting were also not disclosed. The witness in cross-examination said she could neither read nor understand English, yet there was no certification (jurat) at the end of her affidavit. In cross-examination she denied the contents of her affidavit relating to people wanting to beat them at the polling station, that she did not know who had put them there.

Mr. Lukyamuzi Dick, the campaign manager of the 2nd respondent was named by Senabulya as one of those who beat him up and caused the confusion/chaos at Kidda. In his affidavit and testimony he denied being part of the fighting and ensuing chaos. He said he arrived at Kidda with his candidate at around 7.00 p.m. and met the convoy of Alintuma Nsambu. According to him, Nsambu's brother Senteza started fighting a lady and caused all the ensuing chaos. Amidst the chaos Mr. Nsambu's body guard fired in the air and Lukyamuzi had to find an escape route for his candidate. The 2nd respondent in her affidavit and during cross-examination denied being the cause of the chaos at Kidda or Nkuke, or any of his agents causing chaos with her knowledge and consent or approval. Both the 2nd respondent and Dick Lukyamuzi stated during cross-examination that they were returning from Lambu after their final rally, to Kidda which was the 2nd respondent's home and campaign headquarters. They had not gone there to disrupt Mr. Nsambu's rally as the petitioner put it.

The petitioner submitted that their evidence on the violent incidents at Kidde, Nkuke and Kitengesa was corroborated by the Returning officer in his cross-examination. The Returning officer, Mr. Tugume, was however not testifying from his own knowledge but from information he had received. The only

evidence allowed in election petitions is from one's own knowledge. In any case, the returning officer never implicated the 2nd respondent at all. If anything he said he was informed that Mr. Nsambu wanted to hold a rally after 7.00 p.m. and he was stopped by the public. Further that Nsambu did not complain at all because it was past campaign time.

The court has not found evidence connecting the 2nd respondent to any violence. The 2nd respondent on her part blamed the violence and chaos at both Kidda and Nkuke on Mr. Nsambu's supporters, who she says attacked her supporters. Both Dick Lukyamuzi and the 2nd respondent said during cross-examination that Mr. Nsambu used to don UPDF fatigues, to intimidate her supporters.

Fights among supporters of rival candidates are expected among the supporters. It is not every time the supporters fight that they have been instructed by their candidates. And where the petitioner makes allegations which are completely denied by the 2nd respondent who even goes further to put the blame on the petitioner's side, without independent evidence to tilt the balance on either side, it becomes ones word against the other, and very difficult to put the blame on one party. This is more so when there are many other loopholes in the petitioner's evidence as pointed out above.

I find that the allegations of undue influence against the 2nd respondent or his agents with her consent, knowledge or approval have not proved to the satisfaction of court.

Canvassing for votes

Section 81 of the PEA prohibits canvassing for votes within 100 metres of any polling station, or the use of slogans on polling day.

Under this heading, Counsel for the petitioner relied on paragraph 6 (L), of his affidavit in support where he alleged that photographs of Hon. Nsambu's known supporters were taken to scare them away from voting for their candidate promising to punish them if they dared vote for him. One Kalema Mary deponed that at Kitengesa one Matovu, son of Muwonge, took her picture and of other people without asking them. Then the rowdy youth told her the pictures taken were of the supporters of Nsambu to identify them when time for punishment came. She further deponed that Dick Lukyamuzi had said Matovu was his man but he had not asked him to take pictures. Dick Lukyamuzi in cross-examination said he knew both Matovu and Kalema Mary who had made allegations in his presence that one Matovu had taken their pictures. He said Matovu was not his person and police was at the scene to take action, in case of any violation by Matovu.

I find no connection of Matovu with the 2nd respondent. Kalema herself does not claim that Matovu acted on the instructions of the 2nd respondent. She even exonerates Lukyamuzi in her affidavit whom she says denied instructing Matovu. Matovu himself did not swear any affidavit. Even the youth have not been connected to Namayanja, or proved to be her agents. I find the allegation of the illegal practice in this respect not proved against the 2nd respondent.

Under this head, there was also Namwanje Prossy's affidavit of 18th March where she deponed in paragraph 3 that a group led by one Gyavira, a known supporter of 2nd respondent, told voters that "Namayanja was a power and Hon. Nsambu was going to fill her power." This was at Kyanjovu polling station on 18th February 2011. In Nabukenya Fatuma's affidavit of 18th March 2011 she stated that at Lakes High School polling station, Namayanja agents after voting would join the line of voters and start campaigning for her; a one Namayanja Molly was even chased from the line where she was found canvassing votes for Namayanja Florence. The petitioner invited court to believe the petitioner's version as far as proof of the offence of canvassing for votes or uttering any slogan, vouching for any particular candidate, within the prohibited area on voting day was concerned.

It was however the 2nd respondent's case that there was no canvassing within the meaning of the PEA, proved. The court also finds that the actions of Gyavira and Molly Namayanja which are complained of were not connected to the 2nd respondent at all. These persons were neither stated nor proved to be the 2nd respondent's agents. It was alleged Gyavira was a known supporter of the 2nd respondent. A supporter and an agent are two different categories. The law mentions agents. Neither was it proved that the 2nd respondent knew or approved of these peoples' action. Canvassing has not been proved to the satisfaction of court.

Unauthorized voting

In paragraph 8 (a) and (b) of Mugula's affidavit in rejoinder of 6/5/2011, he deponed on information from Mutyaba Ronald that the latter did not cast his vote having found his name ticked; and on enquiry he was told that one Mutyaba Henry had voted in his place yet Mutyaba Henry's name had also been ticked. The above are facts not from Mugula's knowledge but information from Mutyaba Ronald. I have already pointed out that affidavits in election petitions have to be deponed from one's knowledge only. It is true Mugula is the petitioner but this was not the statutory affidavit, but the affidavit in rejoinder. An affidavit from Mutyaba Ronald would have been more appropriate. In any case how did the 2nd respondent benefit from the non-voting of Mutyaba Ronald. The 2nd respondent was not in any

way connected to the incident. Maria Kalule in her affidavit of 21/3/2011 in support of the petition alleged that she was Nsambu's polling agent at Gulama Primary School polling station; when Mutyaba Ronald came his name had been ticked; and it was discovered that Mutyaba Henry had signed in his place. Ronald was sent away without voting.

In opposition to the above, Iga Francis and Nakitto Jane, both polling agents for the 2nd respondent at Gulama Primary School polling station swore affidavits stating that they saw both Mutyaba Ronald and Mutyaba Henry at the polling station. When it was discovered that Mutyaba Henry had voted in Mutyaba Ronald's name, by consensus of all agents, Mutyaba Ronald was allowed to vote in Mutyaba Henry's space. The mistake was rectified.

I intend to believe the Iga Francis and Nakitto's evidence. If Mutyaba Ronald was aggrieved as stated by Mugula and Maria Kalule, he would have sworn an affidavit that he did not vote.

As I stated, all this mix up was not connected to the 2nd respondent, and neither was she said to have benefited from the alleged mix up.

Unauthorized voting allegations have not been proved to the satisfaction of court. Further, this allegation belonged to issue number 2, which deals with allegations against the 1st respondent.

In conclusion, I would answer the first issue in the negative.

The second issue was whether the Parliamentary Elections in Bukoto East Constituency were not conducted by the 1st respondent in accordance and in compliance with the Electoral Laws and if so whether this said non-compliance affected the results of the said election in a substantial manner.

The principles of a free and fair election were well stated by the Petitioner's Counsel as:

i) The Election must be free.

ii) The election must be by universal adult suffrage, which underpins the right to register and vote.

iii) The election must be conducted in accordance with the law and procedure laid down by Parliament.

iv) There must be transparency in the conduct of elections.

v) The result of the election must be based on the majority of the votes cast.

vi) The overriding principle is that the election must be free and fair.

See ***Rt. Col. Dr. Besigye Kizza Vs Museveni Yoweri Kaguta [2001].***

The other principles are:

1. Freedom of expressing oneself.
2. Fair play for all candidates.
3. Freedom to choose a candidate of one's choice.
4. One man one vote rule.
5. Elections to be conducted by the electoral officials only.
6. Counting and declaration of results at the polling station.
7. Filing and handing over the declaration form to each candidate's agent.
8. Transport of Electoral materials to be in a transparent manner.
9. Sealing of ballot boxes and envelopes at the polling stations.
10. Generally carrying out the whole exercise in a transparent manner. (See Sections 27 – 59 of the Parliamentary Elections Act).

It was the petitioner's case that the above principles were grossly violated by the 1st respondent and the 2nd respondent took advantage thereof. The violations were spelt out in the pleadings and the court will end to deal with them seriatim.

Paragraph 5 (a) of the Petition; failure by many presiding officers to open ballot boxes for public viewing:

The above was not supported by any evidence, and neither was it canvassed in submissions.

Paragraphs 5 (a) – (d) of the petition;

(b); Failure by the Returning officer to display lists of names of presiding officers 2 days prior to polling.

(c); Returning officer deliberately posting presiding officers who were pronounced agents of the 2nd respondent to preside over polls which allowed rigging and ballot stuffing in favour of the respondents.

(d); Biased polling officials allowed the polling exercise to be taken over by the 2nd respondent's agents and mentioned people who openly ticked ballot papers in favour of the 2nd respondent.

In paragraph 5 of his affidavit in support of the 1st respondent dated 20/5/2011, the Returning officer Mr. Ephraim Tugume (RW1) deponed that he received no complaint against the conduct of presiding officers or any other irregularity with respect to any of the three elections conducted on the 18/2/2011, and he understood the same to have been conducted in compliance with the law. In paragraph 6 he stated that all polling officials were appointed through a process that involved advertising, applications, short listing, interviews and posting and all candidates were informed of all these processes and were advised to send their agents for training. In paragraph 7 he deponed that the lists of all polling officials were displayed at the respective sub-county Headquarter as required by law and no complaints were received in relation to their impartiality or other qualification. And as pointed out by Counsel for the 1st respondent, the petitioner was not known to the Returning officer as an agent of Mr. Nsambu. (Indeed the Returning officer deponed that they knew only one Muyingo as the official agent). The Returning officer, therefore, had no obligation to deal with the petitioner in any election matter. Counsel further submitted that the law did not require the Returning officer to consult anybody in the appointment of presiding officers and polling officials, hence he had no obligation to consult the petitioner.

The court finds that there was no evidence that the candidate, Mr. Nsambu or Muyingo, the official agent, filed any complaints in regard to the above complaint with the Returning officer. The Returning officer deponed that the candidates were informed of all the processes and I find no reason to disagree. I, therefore, find no merit in the above complaints.

On the appointment of Batte David at Lakes High Polling station, the Petitioner complained that on polling day, the late appointment of Batte was irregular. In cross-examination, however, the Returning officer clarified that the presiding officer and polling officials meant to serve at the station did not turn up on polling day, and a replacement had to be looked for. The returning officer appointed a senior

polling assistant who had been trained and participated in earlier election, called David Batte, to take over as presiding officer.

Counsel for the 1st respondent pointed out that the Returning officer was empowered to do so under S. 34 (2) of the Electoral Commission Act. According to the petitioner in cross-examination, at Lakes High polling station, his candidate won. On reviewing the evidence, the court does not find this a valid complaint because the Returning officer did what he was expected by law to do. Decisions had to be taken in a hurry. If there were any irregularities in appointing polling assistants who were untrained at that station as per Batte's affidavit, it was not stated to have affected the polling in anyway.

Paragraphs 5 (e) – (f); Voting by the elderly and others who needed help;

The petition alleged that the polling agents of the 2nd respondent were the only ones to assist the above category, and that polling constables were allowed to vote for more than 6 people. In paragraph 13 of his affidavit in support of the Petition, the Petitioner avers that many of Nsambu's elderly supporters were refused a chance to choose people of their choice to assist them, but were ordered to be assisted by the 2nd respondent's agents or biased polling constables, who ticked the 2nd respondent's name.

The petitioner did not however give the details of the elderly or others in that category, who were so affected, nor the polling constables or 2nd respondent's agents who assisted illegally. Nabukenya Fatuma who swore a supplementary affidavit to the petition deponed that at Lakes High polling station, the polling constable voted for over 20 people pretending to be helpful. The court finds that the details of the voters "assisted" were not given. The elderly people Fatuma Nabukenya claimed were brought on a boda boda by Sentongo are not also disclosed. Neither did the Petitioner adduce evidence to prove his statement in paragraph 15 of his affidavit in support that Mr. Nsambu's supporters were sent away by presiding officers on the excuse that their names were not on the voters register. No name of those sent away is mentioned. Neither did any swear an affidavit to that effect.

Buwunga Sub-county:

Paragraph 5 (d) of the petition states that the Returning officer/District Registrar was openly biased against Hon. Alintuma Nsambu to the extent of arresting Nsambu's agent for Buwunga Sub-county whom he dumped in prison without charges just to get him out of the way to rig for the 2nd respondent. In paragraph 16 of his affidavit in support, the petitioner further deponed that the District Registrar together with the 2nd respondent came to pick results from Buwunga Sub-county at 4.00 p.m., arrested

the Sub-county supervisor and picked tally sheets from the 2nd respondent's agents and travelled back in the 2nd respondent's vehicle; which displayed a lot of bias against Hon. Nsambu, putting the entire Sub-county's results in issue. During cross-examination, the District Registrar, RW1, and the 2nd respondent, RRW1, vehemently denied the above allegations. RW1 stated both in his affidavit and cross-examination that he went to Buwunga Sub-county with the District Police Commander in the latter's car, accompanied by several policemen. This was after getting information that the polling officials were surrounded, hence the delay in submitting the results. He found the 2nd respondent and the petitioner at the Sub-county. He took the results and left the same way he came. He further denied dumping any supporter or agent of Hon. Nsambu Alintuma in prison. The 2nd respondent also stated in cross-examination that she came to the sub-county with his driver, and went away the same way. She denied coming or leaving with RW1. With such allegations denied as they were, there was need for independent evidence, say from the District Police Commander whom the Returning officer traveled with to give his side of the facts. Without such independent evidence, the allegations remain unproved to the balance of probabilities.

Paragraph 5 (h) – (q) of the Petition:

h) ***The 1st respondent allowed the 2nd respondent's agents at some polling stations to fill the declaration forms contrary to Section 50 of the Act and by so doing they filled doctored figures which gave the 2nd respondent some advantage.***

i) ***The 1st respondent's presiding officers at some polling stations declared results that were contrary and far higher than the number of people who had cast the votes that day on the said polling station.***

j) ***The 1st respondent's presiding officers posted wrong results without first ascertaining them which led to pronouncing of faulty results and in some instance posted the same results more than once.***

k) ***The 1st respondent's returning officer based his declaration of results on the wrong data deliberately and fraudulently entered by the presiding officers and or the 2nd respondent's agents to declare the 2nd respondent duly elected.***

l) ***Failure, by the 1st respondent's polling officials to seal the envelopes containing results and ballot boxes which gave a free way to the 2nd respondent's agents to alter the declaration forms and to stuff the ballot boxes contrary to S. 51 (2) of the Act.***

m) ***The 1st respondent's agents exhibited great bias when they allowed the 2nd respondent's agents to chase away Hon. Alintuma John Nsambu's agents thus denying them chance to safeguard their candidate's results contrary to S. 47 (3) of the Act.***

n) ***Polling officials and agents of the 2nd respondent chased away registered voters suspected to be supporters of Hon. Alintuma John Nsambu and hence disenfranchising Ugandans from exercising their rights to vote which contravened the constitution.***

o) ***The agents of the 1st respondent exhibited great incompetencies in the conduct of the polls like failure to take charge of the polling stations and allowing the 2nd respondent's agents to take charge which gave them advantage to rig to vote.***

p) ***That there was ballot stuffing and multiple voting at some polling station in favour of the 2nd respondent which caused some fraudulent advantage for the 2nd respondent contrary to S. 31 (1) of the Act.***

q) ***That the agents of 1st respondent allowed a free mixing of the 2nd respondent's agents with voters lines which caused intimidation and bribery to thrive.***

I find no evidence at all either by affidavit, or in cross-examination or submissions to support the above complaints. The court takes it that these allegations were abandoned.

Unsealed Ballot Boxes:

The Petitioner alleges in paragraph 5 (f) of the petition and paragraph 25 of the affidavit in support of the petition that in many polling stations ballot boxes were left unsealed by the biased polling officials. Further evidence on this aspect is to be found in paragraph 11 of Namwanje Prossy's affidavit where she deponed that ballot boxes at her polling station, Kyanjovu, were not sealed.

The petitioner did not give details of the "many polling stations" where ballot boxes were left unsealed. Prossy Namwanje also did not claim that the results entered on the Declaration of Results Form were not the correct ones. The court finds no complaint or evidence at all that because ballot boxes were

unsealed, the results were tampered with or altered along the way. Further still, the Returning officer, Mr. Tugume refutes the allegations that ballot boxes were delivered while open. (Paragraph 11 of his affidavit). He never received any open ballot box from any polling station as all were sealed.

On the available evidence I find that the petitioner has not satisfied court that in many polling stations ballot boxes were unsealed; and even if Kyanjovu's case was to be true, failure to seal the ballot box did not affect the results in any way.

Transportation of Election Materials:

The Petitioner alleges in paragraph 7 of the petition and paragraph 26 of the affidavit in support of the Petitioner, that ballot boxes were collected and transported by the 2nd respondent's agents, Baker Nsubuga and Gyavira.

Jumba Claver, in paragraph 6 of his affidavit, also states that all the ballot boxes from Bugabula parish were collected by Mr. Bukenya, the DP Chairperson for the parish, who transported them to the Tally centre.

Mr. Bukenya Joseph swore an affidavit admitting that he was requested by the parish supervisor, and he accepted to transport election materials at a fee, for the entire parish of Bugabula. He moved with agents of different candidates who wished to more with him to the Sub-county, on his vehicle. He, however, denied being a DP Chairperson and states that he stopped voting in 1980. On polling day, voting had ended when he transported the ballot boxes.

The Returning officer, RW1, clarified during cross-examination that the Electoral Commission used to hire private vehicles to transport election materials as the Electoral Commission does not have enough vehicles of their own, and that this did not offend any law.

The Petitioner did not adduce evidence of details of the transportation by Gyavira and Baker Nsubuga of Election materials; where they transported them from and to where. On his part, Baker Nsubuga swore an affidavit denying ever touching election materials as stated by Mugula or at all. Even Gyavira in his affidavit stated he had nothing to do with the election exercise.

Finally, the court found no evidence relating to any tampering with the results of elections as declared at the polling stations and as indicated on the DR Forms. On the evidence available, I find that the complaint that biased officials of the 2nd respondent were left to transport ballot boxes is not proved to the satisfaction of court.

Whether non-compliance, if any, affected the results in any substantial way:

The Returning officer swore an affidavit and also stated during cross-examination that the elections were free and fair, and he received no complaints of non-compliance with electoral laws in all the three election categories of the day. He appeared a truthful witness who was very consistent and firm in his testimony. I tend to believe his testimony/evidence. I also find that the complaints raised against the 1st respondent were not proved to the satisfaction of court, especially when the allegations were totally denied by the 1st respondent, and there was no credible evidence to prove the allegations. There was no non-compliance which was capable of affecting the results at all, which has been proved to the satisfaction of court.

The court believes that there is no election that can be free of any irregularities as long as it is conducted by human beings who are bound to err. In most cases the candidates are not even aware, and neither do they acquiesce in the irregularities or chaos. For such incidents to be used by court to unseat a Member of Parliament requires cogent evidence to the satisfaction of court, that the irregularities were such as to affect the results of the election in a substantial manner.

The petitioner had the duty to satisfy court on the balance of probabilities that non-compliance with the law and principles affected the results of the elections in a substantial manner.

In ***Ibrahim Vs Shegani & Others [1985] LRC (Cons) 1***, quoted with approval in ***Rt. Kizza Besigye Vs Y.K. Museveni [2006]*** (supra), the Supreme Court of Nigeria considered a law similar to our electoral laws which stated that "***an election shall not be invalidated by reason of the non-compliance with part II of the Act if it appears to the court …… that the election was conducted substantially in accordance with the provisions of the said part II and that non-compliance did not affect the results of the election."***

The court observed;

"The court is the sole judge and if it is satisfied that the election has been conducted substantially in accordance with Part II of the Act, it will not invalidate it. The wording of Section 123 is such that it presumes that there will be some minor breaches of regulations but the election will only be voided if the non-compliance so resulting and established in court by credible evidence is substantial. Further the court will take into account the effect if any which such non-compliance with the provisions of Part II of the Electoral Act 1982 has had in the results of the election".

In his judgment in EP No. 1 of 2001, Mulenga J. explained the meaning of the phrase, "affected the results in a substantial manner" as follows:

"Issue No. 3 in this petition relates to the application of paragraph (a) of that sub-section {58(6)}. It is centred on the meaning of the phrase "affected the result of the election in a substantial manner". The result of an election may be perceived in two senses. On one hand, it may be perceived in the sense that one candidate has won, and the other contesting candidates have lost the election. In that sense, if it is said that a stated factor affected the result, it implies that the declared winner would not have won but for that stated factor; and vice versa. On the other hand, the result of an election may be perceived in the sense of what votes each candidate obtained. In that sense to say that a given factor affected the result implies that the votes obtained by each candidate would have been different if that factor had not occurred or existed.

In the latter perception unlike in the former, degrees of effect, such as insignificant or substantial, have practical effect. To my understanding therefore, the expression non-compliance affected the result of the election in a substantial manner as used in S. 58 (6) (a) can only mean that the votes candidates obtained would have been different in substantial manner, if it were not for the non-compliance substantially. That means that to succeed the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that the winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt."

I find that there was no credible evidence adduced to prove that there was non-compliance with electoral laws, so as to substantially affect the results whether qualitatively or quantitatively. No complaints were raised on the counting and tallying of votes. The DR Forms were duly signed by the agents of the

candidates. Even if there was non-compliance resulting from the complaints raised by the petitioner if proved it would not in court's view have affected the results in a substantial manner.

The court finds that this ground has not been proved. The issue is answered in the negative.

Last issue – Remedies:

All in all I find that the Petitioner failed to prove all the grounds of his petition to the satisfaction of court on the balance of probabilities. He is not entitled to any remedy. The petition is hereby dismissed with costs to both respondents, with a certificate of two Counsel for the 2nd respondent approved.

It is so ordered.

Elizabeth Musoke

JUDGE

9/08/2011