THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

ELECTION PETITION NO. 002 OF 2021

WANYOTO LYDIA MUTENDE ::PETITIONER

VERSUS

ELECTORAL COMMISSION :::::::::::::::::::::::::::::::: 1ST RESPONDENT

NAKAYENZE CONNIE GALIWANGO:::::::::::::::::::::::: 2ND RESPONDENT

BEFORE: HON DR. JUSTICE BASHAIJA K. ANDREW

JUGDEMENT

WANYOTO LYDIA MUTENDE *(hereinafter referred to as the "Petitioner")* brought this petition against the ELECTORAL COMMISSION *(EC) (hereinafter referred to as the "1st Respondent")* and NAKAYENZE CONNIE GALIWANGO*(hereinafter referred to as the "2nd Respondent")* seeking a declaration that the election of the 2nd Respondent, as the Mbale City Woman Representative to Parliament was illegal, null and void ab initio; an order nullifying and /or setting aside the election of the 2nd Respondent; an order directing the 1st Respondent to conduct afresh a free, fair and credible election for Mbale City Woman Representative to Parliamentary; and that the Respondents pay the costs of this petition.

The background is that the Petitioner, the 2nd Respondent, and four others, were candidates in the race for Woman Representative to Parliament for Mbale City in the election held on 14th January 2021. The 1st Respondent declared the 2nd Respondent winner of the election with 40,729 votes and the Petitioner was said to have obtained 25,276 votes. Dissatisfied with the result, the Petitioner filed this petition on grounds that the election was not conducted in a free, fair and transparent manner in accordance with the electoral laws and the Constitution of the Republic of Uganda, that the principles and provisions of the law relating to the conduct of credible elections were never followed as numerous electoral malpractices, illegal practices and offences were committed by the Respondents, their agents and supporters, that the non-compliance and failure to adhere to the laid down principles regulating the conduct of a free and fair election affected the result of the election in a substantial manner. The Petitioner thus sought the orders stated above.

At the hearing, Mr. Swabur Marzuq, Mr. Peter Allan Musoke, Mr. Andrew Wambi, Mr. Silas Mugabi and Mr. Eddie Nangulu represented the Petitioner. Ms. Jackline Natukunda represented the 1st Respondent. Mr. Medard Lubega Segona, Mr. Mutembuli Yusuf, Mr. Nappa Geoffrey, Ms. Agnes Kanyago and Mr. Jonathan Elotu represented the 1st Respondent. Counsel filed written submissions with authorities to argue the petition, and court is grateful for the authorities supplied. Nine issues were initially agreed, but at the scheduling conference, the following issues were framed for determination;

1. ***Whether Election Petition No. 2 of 2021 is valid and competent.***
2. ***Whether Election Petition No. 2 of 2021 discloses a cause of action against the Respondents.***
3. ***Whether the Parties' documents attached to the pleadings and affidavits are admissible.***
4. ***Whether the Parties' affidavits are competent.***
5. ***Whether the Elections for Woman Member of Parliament for Mbale City was not conducted in compliance with the electoral laws, and principles laid down in the laws and if so, whether non-compliance affected the results of the election in a substantial manner.***
6. ***Whether the 2nd Respondent and/or her agents directly or indirectly committed any electoral offences.***
7. ***What remedies are available to the parties.***

At the scheduling conference, counsel for the Respondents put court on notice that they would raise preliminary objections to the validity and competence of the petition, particularly regarding the Petitioner's affidavits and the documents attached thereto. For expediency, court directed that the objections be reserved and framed as issues to be resolved along with the other issues in the judgment. As such, issue 1, 2, 3 and 4 were framed by way of objections, and will determined such.

Issue No. 1: Whether Election Petition No. 2 of 2021 is valid and competent.

The issue of validity and competence of the petition is directly intertwined with issue 2, 3 and 4 pertaining to objections to the Petitioner's affidavits and some of the documents attached to the Petitioner's and other deponents' affidavits. Therefore, Issues Nos. 2,3, and 4 will be resolved together in that order and others after.

Issue No.2: Whether Election Petition No. 2 of 2021 discloses a cause of action against the Respondents.

The objection stems from paragraph 14 of the petition where it was pleaded that the 2nd Respondent and her agents committed illegal practices, and offences, specifically of voter bribery. Counsel for the Petitioner sought to frame the issue as it appears under Issue No.6 above. The Petitioner alleged, under paragraph 14 (i) – (xxiv) of the petition, the illegal practices of voter bribery against the 2nd Respondent allegedly committed by her known agents and supporters. In paragraph 8 (i) – (xxi) of the affidavit accompanying the petition, she expounded on the allegations, that she was informed by various persons whom she named, about the alleged voter bribery allegedly committed by known agents and supporters of the 2nd Respondent at various polling stations in diverse places in the constituency.

Counsel for the 2nd Respondent objected arguing that it was not pleaded that the alleged illegal practice was not committed by the 2nd Respondent personally or by her agents with her knowledge and consent or approval, which are the cardinal requirements under Section 61 (1)(c) of the Parliamentary Elections Act (PEA) if the 2nd Respondent is to be found culpable for the alleged illegal act/offence of bribery. That instead, the alleged illegal practice/offence only appears casually in the affidavits of the Petitioner and other deponents, and affidavits only constitute evidence and not pleadings, and issues cannot be framed from evidence but on pleadings. That an issue such as one sought to be framed by counsel for the Petitioner, was not borne out of pleadings and hence the petition discloses no cause of action against the 2nd Respondent.

In reply, counsel for the Petitioner submitted that Rule 3 (c) Parliamentary Elections (Interim Provisions) (Election Petition) Rules *(hereinafter referred to as the "Rules")* defines a "petition" to include the affidavit accompanying the petition. That the affidavits of the Petitioner and her witnesses attesting to the alleged illegal practice/offence, are pleadings within the meaning of the law. That though not specifically pleaded in the petition, the affidavits in support, by various deponents, attest to the illegal practice and offence of bribery against the 2nd Respondent and her agents. That as such, the 2nd Respondent is bound by the actions and omissions or her agents amounting to illegal practices and offences under the Act, and issues can be framed on the evidence since, in law, evidence is pleadings.

In determining whether or not, the petition discloses a cause of action, regard must be had to the petition itself as a pleading, on the assumption that the assertions therein are true. See: ***Simon Peter Kinyera vs. Electoral Commission and Taban Iddi Amin, EPA No. 03 of 2016.*** In election petitions, the position of the law is that the affidavit accompanying the petition on presentation is regarded as "pleading". Rule 3 (c) of the Rules provides that;

> ***""petition" means an election petition and <u>includes the affidavit required by these Rules to accompany the petition.</u>"*** [emphasis added]

Also, Rule 4(8) provides that;

> ***"The <u>petition shall be accompanied by an affidavit</u> setting out the facts on which the petition is based together with a list of any documents on which <u>the petitioner intends to rely</u>."*** [emphasis added].

The above provisions clearly mean, that other than the affidavit of the Petitioner accompanying the petition at the time the petition is presented, any other affidavit sworn, whether by the Petitioner or anyone else, supporting the petition or supplementary and /or rejoinder, does not constitute a "pleading" within the meaning of Rule 3(c) (supra).

Regarding the alleged offence of voter bribery in the instant case, Section 68 (1) PEA spells out the ingredients and prescribes a punishment as follows;

> *"**A person who either before or during an election with intent either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, 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 to imprisonment not exceeding three years or both."***

Under subsection (4) of Section 68(supra) bribery is categorised as an illegal practice. Therefore, to set aside an election on account of an illegal practice or offence of bribery, Section 61(1) (c)PEA must come into play. It provides as follows;

> ***"The election of a candidate as member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of court –***

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

As this applies to the instant case, for the Petitioner to succeed on ground of bribery, she needed to specifically plead the particulars that the alleged illegal practice/offence of bribery was committed in connection with the election, by the 2nd Respondent personally or by her agents, with her knowledge and consent or approval. Pleading the particulars of knowledge and consent or approval of the 2nd Respondent is crucial if the offence of bribery is to be linked to her as having been committed by herself or with her knowledge and consent or approval by her agents or any person in connection with the election. Failure of the Petitioner to plead facts establishing the specific nexus, as required by Section 61(1) (c)PEA, between the 2nd Respondent and her agents' alleged illegal practices, renders the issue framed to be outside the scope of the pleadings as they appear on the record. It would follow that the petition and the accompanying affidavit, do not disclose a cause of action against the 2nd Respondent in respect of the alleged illegal practice/offence of bribery.

Rule 4 (1) (b) of the Rules, requires that the petition must state the grounds relied upon to sustain a prayer of the petition. In the instant case, the Petitioner failed to plead the ground that the alleged offence of bribery was committed by the 2nd Respondent personally or by her agents with her knowledge and consent or approval. It did not feature in her petition or the affidavit accompanying the petition, when it was presented. To the extent to which it was not pleaded, the petition discloses no cause of action against the 2nd Respondent in that regard.

Equally, the principles pertaining to "principal – agency" applicable in ordinary civil suits, alluded to by counsel for the Petitioner, do not apply in election petitions as between a candidate and his/her agents. By interpretation, under Section 1 (I) PEA, "agent" by reference to a candidate includes a representative and polling agent of a candidate. There is a clear dichotomy between principles that govern principal- agent relationship in ordinary/ common parlance and those that govern a candidate - agent relationship in elections under the Act. It is a requirement, pursuant to Section 61(1) (c) PEA, that grounds linking a candidate personally or by his/her agents with the candidate's knowledge and consent or approval to the illegal practice/offence, be specifically pleaded for it to bind the candidate. By its clear wording, Section 61(1) (c) PEA was never intended

by Parliament to automatically bind a candidate in an election for every act or omission of his/her agents amounting to an illegal practice/offence under the Act. A candidate in an election cannot be deemed to have known of, or to have sanctioned every illegal practice and offence committed by his/her agent, unless the contrary is specifically pleaded and cogently proved. The substance of Section 61(1) (c) PEA does not lie in mere wording and letter of the law, but the mischief that was intended by the Legislature to be cured in the spirit of the provision. Court thus upholds the objection that the instant petition discloses no cause of action against the 2nd Respondent in respect of the alleged offence of voter bribery.

Issue No.3: Whether the parties' documents attached to the pleadings and affidavits are admissible.

Counsel for the 1st Respondent objected to photocopies of the National Voters' Register attached to the affidavit accompanying the petition, Declaration of Results Forms *("DRFs")* the electronic evidence by way of Compact Discs *("CDs")* and *Annextures H* and *I,* to the petition. Regarding photocopies of the said documents attached by the Petitioner and other deponents, counsel submitted that the impugned documents were not certified by the Secretary to EC, and therefore contravene provisions of Sections 75 and 76 of the Evidence Act Cap 6. That when she was cross-examined, the Petitioner conceded that the DRFs attached to her affidavit accompanying the petition and the National Voters' Register, were not certified by the Secretary to EC. That the Petitioner also conceded that she did not attach evidence of any letter requesting the EC for certified copies of National Voter's Register and DRFs or any receipts as proof of payment for the certified copies of the said documents.

Citing the cases of ***Kakooza John Baptist vs. Electoral Commission & A'nor, SC EPA No. 11 of 2007*** and ***Mashate Magomu Peter vs. Electoral Commission & A'nor, EPA No. 47 of 2006,*** counsel submitted that the National Voters' Register and DRFs attached by the Petitioner and her witnesses, are public documents within the meaning of the Section 73 (a) (ii) Evidence Act. That the Petitioner who sought to rely on them ought to have applied to the Secretary to the EC to have them certified pursuant to Section 75 and 76 of the Evidence Act (supra) upon payment of the prescribed fees. Counsel maintained that without the necessary certification, such documents could not be used to prove any fact they sought to prove, and prayed that the documents be expunged from the record on account of being inadmissible.

The 2nd Respondent's counsel, also citing ***John Baptist Kakooza vs. Anthony Yiga and A'nor,*** case (supra) raised similar objection, contending that the said documents are inadmissible. That the impugned DRFs were attached without notice to the EC of an intention to use them, and that all the Petitioner simply did was to rely on what she called "stamping" by the Returning Officer. Counsel argued that certification of such documents under Section 10 of the Electoral Commission Act, is a preserve of the Secretary to the EC. That the impugned documents were not certified as required by law and should all be struck off.

In reply, counsel for the Petitioner submitted that the objections by the Respondents' counsel with regard to impugned public documents should fail. Citing the case of ***Tamale Julius Konde vs. Ssenkubuge Isaac & Electoral Commission, EPA No. 75 of 2016,*** counsel submitted that the Petitioner in this case sought to call the Secretary to EC, as a witness in the matter in which she obtained stamped copies of the documents from the 1st Respondent, but that court denied her that chance. Further, that the 1st Respondent being the custodian of the National Voters' Register by virtue of Section 18 of the Electoral Commission Act, it follows that Sections 65(b) and 106 of the Evidence Act, squarely place the burden of presentation, or proving otherwise the authenticity of the National Voters' Register or its extracts, on the 1st Respondent. That in her affidavit in rejoinder, the Petitioner stated that she applied for the copy of the tally sheet, certified DRFs, hard copies of Voters' Register, names and contacts of the presiding officers, and that a copy of the application was attached to her affidavit in rejoinder in HCMA No. 179 of 2021. That despite the application, the EC refused to avail the said documents, which necessitated her to rely on the uncertified copies.

The starting point for court in resolving this issue, is the position of the law. In ***Mukasa Harris vs. Dr. Bayiga Michael Lulume, SC EPA No. 18 of 2007,*** court held that in election petitions, the burden of proof of particular allegations lies on the petitioner who seeks to have the Respondent's election nullified. This burden does not shift to the Respondents. Under Section 61 (3) PEA, the standard of proof is on balance of probabilities to the satisfaction of court. Whether the uncertified copies of the National Voters' Register and DRFs sought to be relied on by the Petitioner are admissible in evidence, is a question that has been a subject of adjudication. The Supreme Court in ***John Baptist Kakooza vs. Anthony Yiga and A'nor*** (supra) and the Court of Appeal in ***Mashate Magomu Peter*** (supra) held to the effect that a DRF is a public document within the meaning of Section 73 (ii) of the Evidence Act. It requires certification if it is to be presented as an authentic

and valid document in evidence. The same position obtains in respect of the extract of the National Voters' Register and tally sheet. Therefore, the Petitioner in the instant case, as a party wishing to rely on such documents, should have had them certified in accordance with Section 75 and 76 of the Evidence Act.

This court is also acutely alive to the provisions of Section 64 (1) of the Evidence Act, that a party seeking to rely on uncertified documents is required to give notice to the party in possession of the original. However, the Court of Appeal, in ***Mashate Magomu Peter*** case (supra) clarified that the exception only applies where the party seeking to rely on the uncertified DRFs gives notice to the party in possession of the originals requesting for certification and they refused or failed to do as requested. Further, that there should be proof of both the request and payment of the certification fees. As this is applicable to the instant case, it means the argument that the burden of presentation of the certified copies lies on the 1st Respondent by virtue of being custodian of DRFs and the National Voters' Register, lacks basis in law and is neither supported by any precedent.

Besides the above, the Petitioner is on record as having conceded that the impugned documents attached to her affidavit accompanying the petition and in rejoinder, were not certified by the Secretary to the EC. She also conceded that she had no proof of the request to the Secretary to the EC for certified copies or any evidence by way of receipts proving payment of requisite certification fees. Court has also carefully scrutinized the impugned DRFs and the extracts of the National Voters' Register and found that indeed, none of them is certified by the Secretary to EC. There is also no any request to the Secretary to the EC found on the record for certified copies, or any proof of payment for certification fees in any of the Petitioner's annextures. Therefore, the Petitioner is not covered within the exception under Section 64 (1) of the Evidence Act.

Counsel for the Petitioner submitted that they applied to court to summon the Secretary to the EC as a witness in this matter, but the application was declined by court. That as such, the Petitioner was denied a chance to prove the manner in which she obtained stamped copies of the documents from the 1st Respondent. This court pronounced itself on the matter but is, nonetheless, inclined to address the submission of the alleged denial of a chance to the Petitioner to prove her case. The application which counsel for the Petitioner made, during the hearing, was for cross- examination of three of the 1st Respondent's witnesses, including the Secretary to the EC. This application was made pursuant to Rule 15 (2) of the Rules. Counsel for the 1st Respondent objected on ground that

the Secretary to the EC was not a witness in the matter as he had not deponed any affidavit to be cross-examined upon.

Indeed, Rule 15 (supra) only confers upon court the discretion to summon a witness to be cross - examined on the contents of his/her affidavit. It pre-supposes that the witness deponed an affidavit on record. This position was well established in ***Mugema Peter vs. Mudiobole Abed Nasser, EPA No. 30 of 2011,*** where it was held that;

> **"*Rule 15 of the Parliamentary Elections (Election Petitions) Rules provides that evidence at the trial in favour of or against the petition shall be by way of an affidavit read in open court. With leave of court, a person swearing an affidavit which is before the court may be cross-examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn".***

Since in the instant case no affidavit had been sworn by the Secretary to the EC, there was no basis for court to summon him for cross -examination. In addition, the Petitioner cannot seek refuge under Rule 15 (3) of the Rules, as the basis upon which the court could have summoned the said Secretary to the EC. Sub rule (3) can only be invoked by court on its own motion, if it is of the opinion that the evidence of that witness is relevant to assist it to arrive at a just conclusion. Court would not exercise its discretion under the Rule to summon a witness to assist one of the parties to the petition to prove its case against the other. There were no circumstances warranting exercise of such court's discretion. The photocopies of the DRFs and extract of the National Voters' Register sought to be relied on by the Petitioner, offend the mandatory provisions of the law and are inadmissible, and they are expunged from the record.

Regarding the electronic evidence in form of Compact Discs, counsel for the 1st Respondent contended that they were not properly before court, and did not meet the required standard for such electronic evidence and are, therefore, inadmissible. For this proposition counsel relied on ***Amongin Jane Frances Akili vs. Lucy Akello & A'nor HCT-02-CV-EP-0001 of 2014.*** Counsel submitted that Mr. Ayub Kamba, the transcriber who attached the CDs and transcription stated that, at the behest of the Petitioner, he examined 16 video footages of incidents that occurred during the contested election on 14th January 2021, with specific instructions to legally transcribe them. That the said witness did not state that he was present at the alleged scenes during the election, or that he is the one who recorded the video footage, or that he knows the people who were present

at the time of recording the video footages which he transcribed, and he cannot even confirm that it was during the impugned election.

Counsel strongly criticized the CDs evidence, that no gadgets which were allegedly used to record the videos were tendered in court. That the deponent did not state or even insinuate that he knows or has ever met the people who recorded the videos. That he did not state that the persons who recorded the videos were independent and professional persons. That he did not state the person who directed the recordings, or the owners of the phone gadgets alluded to, the gadgets used to transcribe and transfer of the evidence from the phone to the CDs, and the manner of storage of the CDs. That he did not state the language in which utterances in the videos were made, or whether he is conversant and/or fluent in the language in which the utterances were made or who made the utterances. That he did not even explain the relevance and implication of what he did. That what he stated with clarity is that it was the Petitioner who gave him the video footages for transcription. That the Petitioner did not state anywhere that she is the one who recorded the video footages.

In reply, counsel for the Petitioner submitted that whereas they agree with the *ratio decidendi* in the ***Amongin Jane Frances Akili*** case (supra), they disagree with its applicability to the present case. Counsel argued that the affidavits that were presented by the Petitioner in relation to the chain of electronic evidence right from the recording through the transcription to the presentation in court, satisfied the test set out in the ***Amongin Jane Frances Akili*** case (supra). Further, that if any party, let alone the court, had qualms as to the viability/authenticity/accuracy or admissibility of the electronic evidence presented by the Petitioner, such party or court ought to have tested or challenged whether the recordings satisfied the test set out in the ***Amongin Jane Frances Akili*** case (supra). That where this was not done, it would defeat the rules of natural justice to try and impeach the credibility of the evidence through submissions. Court notes that no authority was cited in support of this proposition. Counsel for the Petitioner further referred court to the affidavits of Namajje Salim, at pages 118 and 119 (Vol. 2) and Muzafali Ali at pages 85-87 (Vol. 2) who apparently executed the recordings.

Court has carefully appraised itself with the principles set out in ***Amongin Jane Frances Akili*** case (supra). As rightly submitted by both counsel, the decision set out quite succinctly the parameters and threshold for admissibility of electronic evidence in an election petition. The burden is on the party seeking to have such evidence admitted to prove that the said evidence satisfies the legal threshold test. Admissibility of the CDs necessarily requires court to first

consider and evaluate the evidence of the witnesses that are alluded to in the submissions of counsel for the Petitioner. In his affidavit, at pages 122 of Vol. 2, Mr. Kamba Ayub stated that, at the behest of the Petitioner, he examined 16 video footages of incidents that occurred during the Woman Member of Parliament elections on 14th January 2021, with specific instruction to legally transcribe and translate them. Clearly, he was not the one who recorded the video footage. The Petitioner who instructed him to transcribe it did not state that she recorded the video footage. Counsel for the Petitioner referred court to the affidavits in support of the petition, at page 87 and 119, deponed by Muzafari Ali and Namaje Salimu respectively, where they stated that they recorded incidents on their mobile phones, which they would avail in court at trial. During the trial, no such devices were availed. It meant that counsel for the Petitioner and the deponents, were acutely alive to the procedure for tendering such evidence in court. However, at the scheduling and throughout the trial, the Petitioner did not adduce evidence of the devices. The said witnesses were not called to identify or lay background to the video footage and tender in the recordings. The burden to do so was on the Petitioner. Other than complying with the Petitioner's instructions to transcribe the CDs, Mr. Ayub did not state that he knew or ever met persons who purportedly executed the recordings; not even Muzafari Ali and Namaje Salimu. In the absence of evidence showing how the devices were stored or to prove that the evidence was tamper- proof, who directed the recordings, the gadgets used to transcribe and transfer the evidence from the phone to the CDs and the manner of storage, court would be reluctant to admit such evidence.

In addition, in view of the fact that Mr. Ayub's evidence exhibited severe shortcomings as shown above, court finds that pursuant to Section 6 of the Uganda Electronic Transactions Act, and in line with the decision in ***Amongin Jane Frances Akili*** case (supra), the CDs do not meet the required standard of admissibility as evidence in court. If anything, they contravene the law. It was also not correct to submit that it was the 1st Respondent or court who should have tested or challenged the electronic evidence if they had qualms as to the viability/ authenticity/ accuracy or admissibility of the impugned evidence. The 1st Respondent having specifically raised the objection that the CDs were not properly before court, the onus was on the Petitioner to tender them in as required by law, but she did not do so. To allow in evidence of CDs which were recorded in contravention of the law, would amount to condoning an illegality. For those reasons, court upholds the objection to the evidence of the CDs.

Issue No. 4: Whether the Parties' affidavits are competent.

(i). Affidavits sworn by election officials:

Counsel for the 1st Respondent raised objection to the affidavits deponed by presiding officers, polling assistants and ward supervisors. These include Guya Dennis, Mwasame Kevin Madibo, Wamboya Harunah, Masaba Tom, Nambozo Charity, Mukiibi Hellen, Namakoye Stella, Wanade Rashid, Kawanga Michael, Nambale Ivan, Muzaifa Ali, Kimanya Emanuel, Maduga John Bosco, Waniala Herbert, Wanade Yasin, Mudyadya Douglas, and Karenget Twaha. Counsel submitted that these were election officers employed by the EC, during the election on 14th January 2021. That as such, they could not, without obtaining lawful authority of their employer, the EC swear affidavits and /or reveal to the Petitioner, any matters which came to their knowledge or notice as a result of their appointment, as election officers.

Further, that from reading of their affidavits, the facts deponed to, related to the same election i.e. voting, counting of votes, entering of results prior to handover of tamper-proof envelopes to their supervisors. That all this information came to them in their official capacity as election officers. Relying on the case of ***Oloo Paul vs. Dr. Lokii John Baptist & A'nor***, ***EPA No. 6 of 2021,*** counsel argued that without authority of their employer - the EC, the particular deponents committed illegal acts and their affidavits contravene the provisions of Section 7(4) and (6) PEA and hence are inadmissible and ought to be expunged from the record.

Counsel for the 2nd Respondent also raised similar objections to the affidavits of some of the same deponents. That in their respective affidavits, Guya Dennis stated that he was a presiding officer at North Road Primary (A-L) polling station, Mwasame Kevin Madibo, a presiding officer at North Road B (O-Z) polling station, Wamboya Harunah, a presiding officer at North Road B (N-N) polling station, Wanande Rashid, a presiding officer at Wanambwa Primary School, (N-Z) polling station, Nambale Ivan, a presiding officer at Nkoma High School polling station, Kimanya Emmanuel, a polling assistant at Kisenyi (O-Z) polling station, Madunga John Bosco, a presiding officer at Kisenyi (A-M) polling station, Wanande Yasin , a presiding officer at IUIU primary school (N-Z) polling station, and Mudyadya Douglas, a presiding officer at School of Hygiene (N-Z) polling station. Citing the case of ***Abala David vs. Acayo Juliet Lodou and Electoral Commission, EP No. 04 of 2021***, counsel for the 2nd Respondent argued that the respective deponents' affidavits are illegal for having been sworn without the authority of the 1st Respondent, in contravention of Section 7 (6) PEA.

In reply, counsel for the Petitioner submitted that provisions of Section 7(6) PEA were misconstrued by the Respondents, and that the decision of ***Abala David and Oloo Apul*** (supra) on the interpretation of Section 7(6) PEA were made *per incuriam*, and that this court should depart from, or disregard the decision by applying the correct interpretation of the law. Further, that Section 7(6) PEA bars the election officers from giving information to "a person" and that the definition of "person" under the Interpretation Act, does not in any way include a court of record. That the information contained in the impugned affidavits was given to this court as a temple of justice in order to adjudicate and come to a justiciable conclusion. Further, that Section 64 (1) (a) PEA, provides for witnesses in election petitions and it does not preclude any person or category of persons i.e.; election officers, from testifying in an election petition. That Section 7 (6) PEA cannot be read in isolation of Section 64(1)(a) (supra) since the latter is the primary provision. That Section 7(6) has a clear punishment/sanction for such conduct which does not include expunging the witness' testimonies from the court record.

Counsel further cited Sections 117 and 122 of the Evidence Act, for the proposition that all persons shall be competent to testify. That, since the 1st Respondent in its pleadings and affidavits in support of the answer to the petition, did not object to the said affidavits and did not cross- examine the said deponents to show that the said witnesses did not have authority to appear and testify in court, the Respondents are estopped from purporting to assert that the said testimonies are now inadmissible and should be expunged.

To resolve this issue, there is need to examine provisions of Section 7 PEA, which are titled; "Secrecy required of election officers and others". Section 7(6) (supra) provides as follows;

> **"*an election officer who, without lawful authority reveals to any person any matter that has come to his or her knowledge or notice as a result of his or her appointment, commits an offence and is liable to a fine not exceeding twenty-four currency points or imprisonment not exceeding one year or both."*** [underlined for emphasis].

From the title–head, it is quite instructive that the provisions were intended to safe guard the secrecy in election matters by election officers. In the opinion of this court, Section 7(6) PEA specifically prohibits election officers from revealing any information/matter that came to their knowledge as a result of their appointment to any third party. Court is therefore, persuaded by the decision in ***Abala David and Oloo Apul*** case (supra). It is indeed true that in arriving at the conclusion on the interpretation of Section 7 PEA in that case, the court did not consider provisions

of Sections 64 (1) (a) PEA and Section 117 and 122 of the Evidence Act; that counsel for the Petitioner seeks to rely on. The mere fact that the court in that case did not consider the said provisions does not render the decision *per incurium* to warrant a departure by this court, from the conclusion on the correct scope and interpretation of Section 7(6) PEA regarding the admissibility of the evidence of election officers. Most importantly, Parliamentary election petitions are principally governed by the PEA and the Rules made thereunder. This position was restated in ***Ikiror Kevin vs. Orot Ismael, EPA No. 04 of 2021,*** at p.11, that;

> **"*… election petitions are governed by this Act with rules in a very strict manner. Election Petition law and the regime in general, is a unique one and only intended for elections. It does not admit to other laws and procedures governing other types of disputes, unless it says so itself."***

Therefore, Section 7 (6) PEA is clear enough on the purpose thereof, which is to prevent unauthorized disclosure of information obtained in the course of execution of the duties of election officers to any third party. The elections officers are not barred to testifying in court proceedings per se. The law only imposes upon then a duty to obtain the necessary authorization before divulging information to a third party and testifying on the same in court. Suffice it to note, that Sections of the Evidence Act, cited by counsel for the Petitioner, are provisions of general application that cannot override the specific provisions in Section 7(6) PEA.

Besides the above, the submission that the said deponents disclosed information to court and not to "any other person" and that court is not, and cannot be any other person envisaged in Section 7(6) PEA, is untenable. It is quite apparent, from affidavits of the named deponents, that they disclosed the information to the Petitioner who, together with her lawyers, based on that particular information to prepare and file the impugned affidavits in support of her petition. The said witnesses were not court witnesses as envisaged under Rule 15 (3) of the Rules, as none was summoned by court in the manner provided for under the Rule. They were the Petitioner's witnesses who deponed affidavits in support of her allegations against their employer, the EC. A careful perusal of all the impugned affidavits easily reveals that none of the deponents thereto, attached any authorization from the 1st Respondent or stated that such authority was sought and obtained from the EC. Clearly, all the impugned affidavits were procured and filed in contravention of Section 7(6) PEA, and such an illegality cannot be condoned by court. The particular affidavits are therefore struck off the record.

(ii) Affidavits of alleged registered voters:

Counsel for the 1st Respondent raised an objection to the competence of affidavits deponed by several persons, allegedly as registered voters, but who did not furnish proof showing that they were indeed registered voters. Counsel specifically singled out the affidavits of Namutosi Sarah (at p.108) Namajje Salimu, Mubogi Ronald (at p.182) Masaba Ebele David (at p. 191) Wamono Dison (at p.196) Nagami Kasifa (at p.201) Nakasolo Hope (at p. 209) Waiswa Isaka (at p.13) Gidobo William(at p.217) Kaniala Henry (at p.235) Katalemwa Ali (at p.245) Sajja Denis (at p. 252) Mukisa Fred (at p. 256) Weculi Amuza (at p. 263) Kizito Jamada (at p. 274) Watasa Lonah (at p. 282) Bisiku Herbert (at p. 293) Hanifah Nakitende (at p. 301) Galiwango Muhammed Mukasa (at p. 321), Namarome Grace (at p. 350) Namboozo Afusa (at p. 359) Namatovu Sununa (at p. 364)Mutabali Jonathan Kevin (at p.368) Namakula Rita(at p. 392) Mwambu Saffiyu (at p. 644) Cerotan Sief Ali (at p. 678) Madoyi Mubarak (at p.681) Masaba Mafabi Jawali (at p. 688) Nadunga Harriet (at p. 690) Mwasa Joy (at p.705) and Namwano Madina Wambedde (at p. 702) all in Vol 2 of Petitioner's documents.

Counsel' s contention was that all these affidavits are incompetent because the deponents did not properly identify/prove themselves as registered voters in the respective alleged polling stations or elsewhere. Counsel relied on Section 1 PEA which defines a registered voter to mean a person whose name is entered on the voters' register. Counsel further relied on the cases of ***Wakayima Musoke & Electoral Commission vs. Kasule Robert Sebunya, EPA No. 50 of 2016;*** and ***Nabukeera Hussein Hanifa vs. Kusasira Peace K Mubiru, EPA No. 72 of 2016,*** for the principle that conclusive proof of a registered voter is by evidence of the person's name appearing in the National Voters' Register, and not by possession of or merely attaching a National Identity Card. In counsel's view, the failure to attach any admissible extract of the National Voter's register as proof of the identity of the deponents as registered voters, rendered their affidavits incurably defective, which ought to be struck out /expunged for want of capacity to depone them as registered voters.

Court has had occasion to peruse the submissions in rejoinder filed by counsel for the Petitioner, on 23rd September 2021, but found that no response to this particular objection was made. The import of Rule 15 of the Rules, is that evidence in election petitions is by affidavits. That being the case, the identity and integrity of the deponents of the affidavits, would be a matter of great importance and interest to court, as it and goes to the root of the substance and probative value of

the affidavit, and it cannot be disregarded as a mere technicality. A similar view was expressed in ***Muyanja Simon Lutaaya vs. Kenneth Lubogo & Electoral Commission, EP No. 82 of 2016***. It is also now settled, that that attaching of the copies of National Identity Card by deponents purporting to be registered voters, is not proof that they are registered voters. Proof must be by a proper and validly procured extract of the National Voters' Register. See: ***Wakayima Musoke*** case(supra). In the instant petition, the deponents purported to be registered voters and presented themselves as such, without any proof. Without properly identifying themselves with the required proof of being registered voters, the impugned affidavits are incompetent and are accordingly struck out.

(iii) Affidavits deponed by polling agents:

Counsel for the 1st Respondent objected to the affidavits deponed by polling agents, who did not attach proof of appointment as election agents of the Petitioner. The particular affected deponents are Wanyenze Doreen, Wakwate John Waninga, Magumba Derrick, and Nandudu Aisha. Counsel argued that apart from alleging that they were agents of the Petitioner, none of them attached their appointment letters to the impugned affidavits. Relying on the case of ***Ernest Kiiza vs. Kabakumba Masiko Labwoni, EPA No. 44 of 2016,*** counsel submitted that for one to constitute an agent of a candidate, there must be sufficient nexus between the alleged agent and candidate, and that such is proved by attachment of a letter and acceptance of appointment as an agent.

Once again counsel for the Petitioner did not respond to this particular objection or attempt to controvert the position as stated by counsel for the 1st Respondent. Indeed, the decision in ***Ernest Kiiza*** case (supra) is very instructive, on the principle that for one to constitute an agent of a candidate, there has to be sufficient linkage between the alleged agent and the candidate, and proof of that is by attachment of a letter and acceptance of appointment as the agent. It follows, therefore that, without attaching the required proof, it could not be proved that the particular named deponents were in fact agents as alleged. No sufficient linkage between them and the Petitioner was established, which renders their respective affidavits incurably defective, and are accordingly struck off.

(iv) Irregular affidavits:

Counsel for the 1st Respondent objected to the affidavits of Ofwono John and Mugonzowa Maurice, on ground that the impugned affidavits are irregular and suspicious. That according to the National Identity cards of the deponents attached to their respective affidavits, it is shown that the deponents are unable to sign. That, however, the affidavits bear signatures attributed to the

same deponents. In reply, counsel for the Petitioner submitted that a signature is not an important part of the National Identity Card, and that it is why National IDs are issued to persons who for some reasons are "unable to sign". That if a signature was important and carried weight, those unable to sign would not be issued with National IDs and neither can inability to sign on the ID be inability to sign at all. Counsel cited Section 69(2) of the Registration of Persons Act, to the effect that the National Identity Card is *prima facie* of the particulars contained in it. Further, that Reg. 3(1) and (6) of the Registration of Persons Regulation SI No.67 of 2015, provides for part one of the National Identification Register, and what it contains thereof; a person's signature is not one of the things provided under the law to form part of the National Identification Register in terms of Reg. 3(6). That also, Reg. 15 is to the effect that the entry of the person's details in the National Identification Register is *prima facie* evidence that the person is registered in accordance with the Act.

Court has considered the issue in light of the position of the law regarding apparent inconsistencies between the signature on the National Identify Card and the affidavit and the legal consequence thereof. This was exhaustively discussed by the Court of Appeal in ***George Patrick Kassaja vs. Fredrick Ngobi Gume and Anor, EPA No. 68 of 2016,*** and held that;

> ***"While courts should take a liberal approach to affidavit evidence, they will not condone outright irregularities, especially those that affect the proper identification of the deponent. Affidavit evidence is by its nature very delicate and despite the pressure under which election cases are organized, some mistakes cannot be ignored and held to be inconsequential. The impugned affidavits had been correctly rejected because of their serious irregularities. Some of the affidavits were signed yet the deponents' Identity Cards showed that they were incapable of signing."*** [emphasis added].

In the instant case, counsel for the Petitioner attempted to down play the apparent and rather curious disparity between the signatures on the impugned affidavits and the National Identity Cards attributed to the deponents, which shows that they were incapable of signing. The contention by counsel for the Petitioner that this grave disparity be ignored by court is unacceptable. The issue is not merely one of whether or not a signature on a National ID card is important, but whether the deponents are actually the ones who signed the impugned affidavits, when their identity cards show that they are incapable of signing. In my considered view, this casts serious doubt as to whether they are the actual deponents that appeared before the Commissioner for Oaths, if at all

they did. The irregularity cannot be ignored as a mere technicality, as it goes to the root of the identity and integrity of these deponents. Accordingly, the impugned affidavits are struck out.

(v) Affidavits of deponents who did not appear for cross-examination:

The objection of counsel for the 1st Respondent, was in respect of the affidavits of Wanyenze Doreen, Nambale Ivan and Wamboyo Harunah, on ground that the same are incompetent because when summoned, the deponents declined to appear for cross-examination, apparently on ground that they could not testify against their employer the EC. Counsel submitted that the presumption is that the said affidavits were filed without the consent and knowledge of the deponents. When this objection was raised, this court pronounced itself. The said affidavits could not be relied upon as the deponents were afforded the opportunity to be cross – examined, but they knowingly failed to turn up. Their evidence was thus untested when it should have been. Even if they had turned up, their affidavits would be inadmissible on account of want of lawful authority from their employer, the EC. Court needs not to belabor the issue again.

(vi) Affidavits filed without leave of court:

Counsel for the 2nd Respondent objected to the affidavits filed by the Petitioner on 30th and 31st May 2021, respectively. Counsel submitted that the petition was filed on 2nd March 2021, and that the 2nd Respondent filed the answer to the petition on 15th March 2021. That the Petitioner filed a bunch of other affidavits titled; *"Affidavit in support of petition/ Rejoinder /Rebuttal to the Respondent's additional affidavits"*, on 31st May 2021. Other supplementary affidavits in support of the petition were filed on 30th and 31st May 2021, respectively. Counsel submitted that the filing of the affidavits in support of the petition on 30th and 31st of May 2021, was illegal and irregular, and that they ought to be struck out as incompetent. Further, that the petition is equivalent to a plaint while the answer thereto, is the equivalent of a written statement of defence (WSD). That the plaintiff/petitioner could only file a reply to the WSD only responding to the issues raised in the WSD and not envisaged in the petition. That on the contrary, the Petitioner herein, proceeded to file the impugned affidavits pleading new facts contrary to the laws and norms of pleading. Citing the case of ***Mutembuli Yusuf vs. Musamba Moses Ngwomu and Anor, EPA No 43 of 2016,*** counsel submitted the impugned affidavits could only be filed with leave of court. Counsel prayed that the impugned affidavits be struck off the record.

In reply, counsel for the Petitioner submitted that upon being served with the rejoinder on 1st April 2021, the 2nd Respondent filed additional affidavits in reply, and that on 7th May 2021, the 1st

Respondent also filed its additional affidavits (Vol 1.) which prompted the Petitioner to file supplementary affidavits in support of the petition/rejoinder/rebuttal to the Respondents' additional affidavits, on 31st May 2021. Relying on the cases of ***Akunguzibwe Lawrence vs. Muhumuza David& Anor EPA No.22 0f 2016*** and ***Tamale Julius Konde vs. Ssenkubuge Isaac & Electoral Commission, EPA No.75 of 2016,*** counsel submitted that affidavits filed before scheduling are acceptable as no prejudice would be occasioned to the Respondent, even if no leave of court is obtained.

The law governing the filing and exchange of affidavits in election petitions, has been streamlined by the Court of Appeal. In ***Akunguzibwe Lawrence vs. Muhumuza David***, case (supra) the court considered the issue whether all affidavits in support of the petition must be filed with the 30 days from filing a petition. Court held that the only affidavit that must mandatorily be filed together with the petition within the 30 days, is the petitioner's affidavit accompanying the petition. Further, that Rules 4 (8) and 15 of the Rules, do not stipulate that all affidavits intended to be relied on by the petitioner have to be filed within the stipulated time. However, in the ***Mutembuli Yusuf*** case (supra) the Appellant had contested the striking out of 86 affidavits in support or rejoinder by the trial court on ground that they had been filed without leave of court. The Court of Appeal held that where the petitioner files and serves the petition and supporting affidavits and the Respondents file answers thereto, with their respective affidavits in support of the answer, the petitioner can only file affidavits in rejoinder, save that in the said replies/rejoinders the petitioner is not permitted to introduce fresh issues or change the substance of his claim.

The two decisions did not address other affidavits filed by the petitioner in support of the petition other than a rejoinder, to which the respondents would have no right of reply. The contention of the Petitioner's counsel, that affidavits should be freely filed at any time before scheduling is not a rule of general application. The court must consider whether such filing of affidavits permissible by law within the context of the ***Mutembuli Yusuf*** case (supra) and whether the filing is not prejudicial to the opposite party. This position was re-affirmed in ***Tubo Christine Nakwang vs. Akello Rose Lilly, EPA No.80 of 2016,*** where it was held that every litigant and their counsel were entitled to know the whole case before they could adequately prepare for trial, and that the court ought to have expunged the affidavits which had been filed late without leave of court, especially where the appellant had no opportunity of replying to them, which was prejudicial.

Court has carefully perused the impugned affidavits in the instant case. The Petitioner does not deny that they were filed late, moreover after the answers to the petition had been filed in. It is also not disputed that leave was not sought prior to their filing. The Petitioner also does not deny that the said affidavits introduced fresh issues, and thus in some respects, departed from her earlier assertions. Even at the scheduling, when the objections to the impugned affidavits were raised, the Petitioner being aware of the belated filing of the impugned affidavits, did not seek leave of court to validate the belated filing. In ***Samuel Mayanja vs. Uganda Revenue Authority HCMC No. 17/2005,*** Egonda Ntende J (as he then was) guided as follows;

> ***"Where the applicant wants to file a further affidavit, he ought in my view, to seek the leave of the court, otherwise the proceedings may turn simply into an unregulated game of 'ping pong'. As the affidavit was filed without leave of the court, and it was objected to by the respondent, I shall not have regard to the same".*** [Underlined for emphasis].

Accordingly, the impugned affidavits belatedly filed by the Petitioner without the leave of court were filed in contravention of the law, and shall thus be disregarded. The argument that the said bunch of affidavits were in response to equally belatedly filed affidavits of the 2nd Respondent filed on 31st May 2021, has no merit. The back – to - back illegal filings by both parties, would not render the outcome lawful. To extent that the said affidavits of the 2nd Respondent were also filed belatedly on 31st May 2021, they too would not be permitted for the same reasons.

Issue No. 5: Whether the elections for Woman Member of Parliament for Mbale City was not conducted in compliance with the electoral laws, and principles laid down in the law, and if so, whether non- compliance affected the results of the election in a substantial manner.

The particular allegations featured under paragraphs 5 and 6 of the petition. The Petitioner alleged that there was non- compliance with the electoral laws and that the entire election was not conducted in a free, fair and transparent manner in accordance with the electoral laws, and that numerous electoral malpractices, illegal practices and offences, were committed by the Respondents, their agents and supporters.

In ***Hellen Adoa and Electoral Commission vs. Alice Alaso, EPA Nos. 0057 & 0054 of 2016,*** it was held that the burden of proof lies on the petitioner to prove all her allegations upon which the petition is founded to the satisfaction of court. In ***Akurut Violet Adome vs. Emorut Simon Peter,***

EPA No.40 of 2016, it was further held that the said burden does not shift, and the standard of proof is on the balance of probabilities. To satisfy the standard of proof in respect of all the allegations of non-compliance under this issue, the petitioner is required to adduce cogent evidence to prove her case. As was held in ***Sematimba Peter Simon and NCHE vs. Sekigozi Stephen, EP Nos. 08 & 10 of 2016,*** the evidence has to be of the kind which is free from contradictions, and is truthful so as to convince a reasonable tribunal to give judgement in a party's favour. Cogent means compelling or convincing.

In the instant case, the Petitioner pleaded multiple allegations against the Respondents. They were also listed in the Petitioner's facts in the joint scheduling memorandum, namely; obstruction of election officers and tampering with election materials at polling stations in Northern Division; obstruction of election officers and tampering with electoral materials in Northern Division Collection Centre; undue influence; violence at the Electoral Tally Centre by the 2nd Respondent and her agents and supporters; voter bribery; excess ballot papers at the polling stations; ballot stuffing/multiple voting; disenfranchisement of voters by intentional exclusion of valid votes; unconfirmed electoral results due to unsigned DRFs; falsification and alteration of results; ferrying of voters; permitting unauthorized persons to vote; intimidation and voter violence; and disenfranchisement of voters by early closure of polling stations.

It is in no doubt, that the allegations above are of a serious nature. The position of the law is that the more serious an allegation is or the more serious its consequences if proven, the stronger the evidence has to be, before a court can find that the allegation has been proved on the balance of probabilities. See: ***Mujuni Vincent Kyamadidi vs. Charles Ngabirano & Electoral Commission, EPA No. 84 of 2016.*** The Petitioner must therefore, offer proof cogent enough to secure judgement in her favour.

(i). Obstruction of election officers, tampering with election materials at the polling stations and at Collection Centre in Northern Division, undue influence, violence at the electoral Tally Center by the 2nd Respondent and her agents:

Counsel for the Petitioner submitted on all the above alleged offences and malpractices in paragraph, a, b, c, d, at pages 4-6 of their submissions. They submitted that the 2nd Respondent and her agents, raided North Road Primary School A(A-L); B(M-M), B (O-Z; School of Clinical Officers, Nkoma, Kisenyi (A-M), (N-N), (O-Z); Mutumba Road, Buyonjo Primary School (A-M), (O-Z); Gangama Primary School A(A-MAG); and A(NAM-Z); polling stations, and forcefully

seized election materials from the 1st Respondent's presiding officers before computation, entry of results on the DRFs and sealing of election materials. The Petitioner essentially relied on the affidavits of Guya Denis, Awazi Abdullah, Mwasame Kevin Madibo, Wetaya Dorothy, Wamboya Haruna, Masokoyi Ali Waswaka, Masaba Tom, Wanyenze Doreen, Nambozo Charity, Wagonzowa Maurice, Mukiibi Hellen, Namakoye Stella, Masaba Joseph, Wanande Rashid, Kawanga Michael, Nambale Ivan, Nambuya Mary, Muzaifa Ali, Kimanya Emmanuel, Madunga John Bosco, Woniala Herbert, Wanande Yasin, Namutosi Sarah, Mudyadya Douglas and Wamaniala Geoffrey. It was submitted for the Petitioner, that the 1st Respondent's agents failed, omitted and/or neglected to seal the black boxes, tamper-proof envelopes, and other essential materials from the entire 43 polling stations in Northern Division, to prevent tampering by third parties.

Further, that the 1st Respondent's agents permitted entry / access to the 2nd Respondent, her agents and other third parties, into the restricted Collection Centre where the unsealed black boxes and other material had been assembled. It was further submitted that the 2nd Respondent and her agents forcefully entered into the restricted Collection Centre and tampered with the election materials. That the 2nd Respondent and her agents invoked the aid of the Police force to abuse, harass, and mishandle the 1st Respondent's officials and while doing so, impounded several election materials including black boxes containing ballot papers and DRFs, and took them to unknown locations before their submission by the presiding officers to the Ward and Division supervisors.

In reply, counsel for the 1st Respondent submitted that in cross -examination, the Petitioner testied that she voted at around midday and went back home until 10 minutes to 10:00 pm, when she left to go to the Tally Centre and therefore, she did not witness any of the alleged malpractices. Further, that she only received one phone call about an arrest, at around 2:00 pm, but still did not leave her home. That she also confirmed that the she did not have proof of any complaint either by herself or her agents, that was made to the 1st Respondent about the alleged malpractices, and that no such complaint was attached to the petition or any of affidavits in support of the petition.

Further, that PW2, PW3, and PW5 testified that they were picked from their respective polling stations and dropped at the Collection Centre with their election materials. Counsel argued that it is therefore not true that the election materials were seized and taken away by either Respondents, to an unknown place before the tallying of results. Counsel further submitted that RW1 confirmed in cross- examination, that he received all the tamper-proof envelopes from all the impugned 43

polling stations, including one where there was one open black box, although he had already received the tamper proof envelope, which were transmitted to the Returning Officer for tallying. That in cross- examination PW4 testified that he when he reached the Collection Centre, he saw about 30 presiding officers and that he was able to recognize them because each of them was standing by their respective black boxes. Relying on ***Mashate Magomu Peter*** case (supra) counsel submitted that since affidavits of PW2, PW3, PW4 and PW5 were found to be invalid, the allegations by the Petitioner remained unsupported and merely hearsay and therefore inadmissible. Further, that even if the court was to consider those witnesses' testimonies, they did not prove that there was tampering of results because their only contention was that they were picked from their respective polling stations and driven to the Collection Centre, where they were dumped and left with their respective election materials, and none of them testified to a single act of tampering.

On their part, counsel for the 2nd Respondent submitted that no cogent evidence was led to prove the Petitioner's allegation as regards the safety of the materials. That it ought to be understood that an election where results are to be declared with timelines attached, with Presidential, Parliamentary, and Woman MP elections - all taking place on the same day, perfection can only be a dream. Counsel contended that whereas the EC and all it agents have a duty to perform to their best, the parties to an election equally have a duty to assist by appointing competent and reasonable agents that will help court in the event of any dispute. That by coming to court with virtually no evidence, the Petitioner could not be said to have proved her case. In rejoinder, counsel for the Petitioner submitted that 1st Respondent's counsel conjured testimony and attributed words of PW1 during cross - examination and re-examination, which were never said, and maintained that there was non-compliance.

After carefully evaluating all the evidence together on the issue, it merged that the Petitioner indeed, did not visit any of the polling stations. Therefore, she relied for her information wholly on the evidence of the various deponents. This left her testimony on the said allegation hearsay. It is trite law that no evidence, however strong, can corroborate hearsay evidence because in the eyes of the law, hearsay evidence is inadmissible. It cannot pass the credibility and reliability threshold test in evidence. It is more so that she relied on evidence of deponents whose affidavits were already struck out for having been deponed without the lawful authority. They include Guya Denis, Mwasame Kevin Madibo, Wamboya Haruna, Masaba Tom, Nambozo Charity, Mukiibi Hellen, Namakoye Stella, Wanande Rashid, Kawanga Michael, Nambale Ivan, Muzaifa Ali, Kimanya

Emmanuel, Madunga John Bosco, Wanande Yasin, and Mudyadya Douglas. The Petitioner cannot base on struck out evidence to support the allegations of non-compliance.

Also the affidavit of Namutosi Sarah relied on by the Petitioner was, for reasons advanced earlier in the judgement, struck off for want of proof that she was a registered voter. The affidavits of Wamboya Haruna, Wanyenze Doreen, and Nambale Ivan, were also struck off for refusal to appear in court for cross-examination, when summoned. All these affidavits were disregarded, which rendered the Petitioner's allegations, to that extent, to be based on hearsay evidence and hence inadmissible.

Court has also carefully perused the affidavits of Awazi Abdullah, Wetaya Dorothy, Masokoyi Ali Waswaka, Magonzowa Maurice, Woniala Herbert and Wamaniala Geoffrey. Apart from Wamaniala Geoffrey, all the others were agents appointed by the Petitioner and therefore prone to being partisan. Their evidence required cogent independent corroborative evidence, which was lacking to prove the allegation of obstruction. They did not state that they saw the 2nd Respondent or her agents tampering with the election materials. They also did not state the registration number plate of the alleged truck or that they knew where the truck which was allegedly used to seize the election materials went, other than to the Collection Centre.

PW6, Awazi Abdullah, during cross-examination, stated that he was a polling agent attached to North Road Primary School A(A-L) polling station and that he did not cross over to any other polling station. He stated that the chaos started at around 8:40 pm, and that there was no light. That it was dark and that he neither identified the agents of the 2nd Respondent nor knew how many agents were obstructing the election officers or tampering with the election materials. He also could not identify the number of the people who were on the truck, but he claimed that despite the darkness, he was able to identify what was transpiring at North Road polling station A(A-L) where he was attached, and three other polling stations where he was not attached, of North Road B(N-N), North Road B(O-Z) and North Road (M-M). It is inconceivable that he could be at North Road A(A-L) polling station, where he was attached, and could follow all events at three other different polling stations at the same time.

Regarding Wamaniala Geoffrey's evidence, he stated that he found the 2nd Respondent with over 20 of her supporters inspecting black boxes from different polling stations. However, he could not state how he came to the conclusion that the persons were indeed supporters of the 2nd Respondent and not election officials of the 1st Respondent. He did not state how many black boxes were open

or the number of those which were allegedly loaded and taken away. Following the principle in ***Sematimba Peter Simon and NCHE*** case (supra), the Petitioner in this case was required to adduce cogent evidence to prove her case, the kind that is free from contradictions, truthful, so as to convince a reasonable tribunal to give judgement in her favour. Suffice it to note, that most of the affidavits relied by the Petitioner to prove these serious allegations, were struck off and others found to be from partisan witnesses lacking independent corroboration. Such evidence of diminished evidential value and lacking in cogency could not be the basis to nullify an election.

(ii) Excess ballot papers/ ballot stuffing/multiple voting:

Counsel for the Petitioner submitted that the 1st Respondent neglected and/or failed to regulate the number of ballots at polling stations and intentionally fostered the delivery of unofficial ballot papers. That a total of 4,594 extra/unofficial ballot papers, were discovered/included in the results of 37 polling stations. Counsel premised their submissions on the Petitioner's affidavit accompanying the petition *Annnextures J-TT* and *Annnextures J2-TT3* of her affidavit in rejoinder. Further, counsel submitted that RW1, in cross-examination, stated that he delivered to the Petitioner, DRFs on 16th January 2021, and that those are the same DRFs that were transmitted to the Secretary to the EC. That though RW1 denied knowledge of the alterations, he acknowledged that there were variances in the copies transmitted to the Secretary to the EC and the copies that were eventually certified. That by virtue of the manipulation, a cumulative total of 10,541 votes counted at the 37 polling stations were illegally entered into the final tally of results.

Counsel went on to submit that in connivance with the 2nd Respondent, the 1st Respondent directly orchestrated ballot stuffing and multiple voting at 47 polling stations. That 1035 votes were recoded beyond the actual number of voters that cast their votes at those polling stations. Counsel premised their submissions on *Annextures UU-CCC* of the Petitioner's Vol. 1, and *Annnextures UU2-CCC2* of the Petitioner's rejoinder.

In reply, counsel for the 1st Respondent submitted, based on the Petitioner's testimony in cross-examination, she did not attach a National Voters' Register showing all the voters, and she did not know the number of voters in all the 276 polling stations within Mbale City. Further, that what the Petitioner referred to as excess ballot papers and ballot stuffing, was that according her, there were more ballot papers issued and that more people voted at polling stations than the number of voters. Counsel argued that, however, no Voters' Register was attached to show that more people in the impugned polling stations voted more than those at each polling station. Further, that the Petitioner

did not demonstrate the serial numbers of the ballot papers which allegedly exceeded or were not for the impugned polling station. That the unused ballot papers were accounted for in the DRFs, and had there been excess voting/ballot stuffing, then there would not have been an account for the unused ballot papers. Counsel relied on ***Hon Mujuni Vincent Kyamadidi*** case (supra) that defined ballot stuffing to mean electoral fraud whereby a person who is permitted to vote casts more than one vote or where a person, instead of casting his/her vote in a single booth casts in multiple booths. That it can also take various forms such as casting votes on behalf of people who did not vote or those who are long dead or voting by fictitious characters. Counsel also cited ***Hellen Adoa and Electoral Commission*** case (supra) where court held that for there to be ballot stuffing, the petitioner must prove the exact number of ballot papers and their serial numbers that had been issued to every polling station in order to reach a conclusion on the excess ballot papers and not the DRFs which do not show the serial numbers of ballot papers delivered at a polling station. That in this case, the Petitioner did not adduce any evidence to suggest that at the time when voting stared, there were any ballot papers which were found already in the ballot boxes, or that she saw anyone stuffing ballot papers.

Counsel maintained that the Petitioner did not adduce evidence showing that she knew voters who had cast more than one vote, or cast votes in multiple booths or that she knew people who had voted for deceased persons or fictitious characters. That based on evidence of RW1, ballot stuffing was impossible due to the use of biometric voter registers, a computerized based registration solution where computer fingerprint scanners and digital cameras were used to capture voter's details, and only registered voters were allowed to vote. That this evidence was not rebutted, and that by merely stating that the DRFs indicate more ballot papers than the number of voters at the respective polling stations, without stating the number of voters and by not attaching those particular ballot papers with their serial numbers, the court has nothing to rely on to find that there were excess ballot papers or that there was ballot stuffing. That in any case, the alleged excess ballot papers, if any, were neither cast nor taken into consideration in determining the poll, as they were listed as unused papers. Counsel maintained that the Petitioner failed to discharge the burden of proof to standard required of her to prove this allegation.

After due consideration of the facts on this allegation, it appears that counsel for the Petitioner mixed up issues in respect of unofficial/excess ballot papers and ballot stuffing and doctoring of results. Court will determine each..

(a) Unofficial/excess ballot papers:

In ground E of paragraphs 16 and 17 of the petition, excess delivery of excess ballot papers at 35 polling stations, was alluded to. The Petitioner averred that according to DRFs, 4,231 excess ballot papers were issued to 35 polling stations, which facilitated ballot stuffing and multiple voting. To prove the allegation, the Petitioner relied on *Annextures J-TT* to the affidavit accompanying the petition and *Annextures J2-TT3* to the affidavit in rejoinder. *Annextures J-TT* were earlier struck off the record for want of certification as required under the law. As such, they cannot be relied on as proof of anything. *Annextures J2-TT3* to the affidavit in rejoinder (Vol.1) are the DRFs which were certified by the 1st Respondent's Secretary. There is nothing in them to prove that there were excess ballot papers. The ballot papers do not bear the number of voters in each of the polling stations to ascertain whether the number of ballots were more than the number of voters at the impugned polling stations. The Petitioner testified that she did not know the number of voters in those impugned polling stations. She also did not attach a National Voters' Register as proof of how many voters were in these impugned polling stations. The DRFs merely state the number of valid votes cast for candidates, invalid votes, ballot papers counted, spoilt ballot papers, ballot papers issued to the polling station, and unused ballot papers. There is no provision for excess/unauthorized ballot papers. There is also no indication on which of the DRFs the invalid, counted, spoilt, issued and/or unused ballot papers were the excess. The unused ballots papers were account for on the DRF alluded to by the Petitioner, which meant that either there were excess ballot papers issued, or that not all the registered voters in those polling stations voted and hence, the balance of the ballot papers.

The affidavits of Okello Jackson, Nambozo Aisha, Nyaburu Justine, Masinde Umar, Batataba Francis, Saja Ahmed, which the Petitioner relied on, show that they are of her own appointed polling agents, who are prone to being partisan witnesses. Even then, the DRFs relied on by them were struck off the record and have no evidential value at all. Besides, none of them attached a complaint of the excess ballot papers to the 1st Respondent. Similarly, none of them attached any other DRF which was in their possession or a National Voters' Register to prove their claim. In the absence of this required proof to ascertain the number of voters for each of the impugned polling stations, this court would have nothing to go by, to come to the conclusion that there were indeed excess or unauthorized ballot papers. Court also agrees that accounting for unused ballot

papers meant that the alleged excess ballot papers, if any, were neither cast nor taken into consideration in determining the poll. As such they did not affect the final result in the tally.

(b) Ballot stuffing:

In ground F, at paragraph 18 of the petition, which is repeated in the affidavit accompanying the petition, the Petitioner alluded to ballot stuffing at 38 Polling stations, and averred that the 1st Respondent facilitated delivery of excess ballot papers than the official issued ballot papers, and that the DRFs indicated that 682 votes were recorded than the actual number of votes. As proof, she alluded to *Annextures UU-CCCC* to the affidavit accompanying the petition and *Annextures UU2-CCCC2* to the affidavit in rejoinder, Vol. 1.

The definition of ballot stuffing has already been stated in ***Hon Mujuni Vincent Kyamadidi*** (supra) ***Hellen Adoa & Electoral Commission*** (supra). *Annextures UU-CCCC* having been struck off the record, would not be resorted to by the Petitioner to prove her case. *Annextures UU2-CCCC2,* at pages 213 -298 of the affidavit in rejoinder, Vol. 1, has nothing on the DRFs which proves that there was multiple voting or ballot stuffing. What is common of all the Petitioner's witnesses is that the voting process was peaceful and successful, and obstruction started after closure of voting.

The Petitioner's witnesses, including Kalabuki Edirisa (at page 507) Khayaki Juliet (at page 580) and Watuwa Peter (at page 589) all of Vol 2, relied on DRFs which have already been struck off the record and therefore cannot be relied on to prove the allegation. Interestingly, the DRFs relied on by the said deponents appear to have been signed by them, albeit their inadmissibility. There are no other DRFs attached by the said witnesses to prove ballot stuffing. No cogent evidence to prove the allegations of excess ballots and ballot stuffing, was adduced and the burden of proof under Section 61(3) PEA on the Petitioner was not discharged.

(c) Falsification/alteration/doctoring of results:

This was set out largely against the 1st Respondent. Counsel for the Petitioner submitted that the 1st Respondent doctored electoral results on the DRFs in order to conceal the electoral results on the DRFs, and malpractices at the polling stations. Counsel referred to the same annextures earlier relied on in item (ii) above on *"Excess ballot papers /ballot stuffing"* as proof of the allegations above.

In reply, counsel for the 1st Respondent submitted when a sample of DRFs (*Annextures J, K and L,* at pages 100, 101 and 103 of the petition) and the same DRFs (*Annextures J, K2 and L2* at page

s 177-179 of the affidavit in rejoinder) was analysed to ascertain the alleged alternation, the Petitioner confirmed, in her testimony, that the votes obtained by each candidate in their respective rows were not tampered with or altered. Counsel submitted that the Petitioner's result was not altered to give her less votes or the 2nd Respondent more votes. That she did not have any other DRFs attached to her affidavit, or see any other DRFs which were altered to disadvantage her by giving her less votes than she got and giving the 2nd Respondent more. Counsel submitted that the corrections made on the DRFs, which the Petitioner claims were alterations, did not affect the election at all. That they were mere corrections relating to wrong summations, and that RW1 confirmed that they are human errors caused due to prolonged fatigue in an electoral process, but did not affect the electoral result in any substantial manner. Counsel cited Section 47 PEA, and submitted the most important thing in vote counting is the number of votes cast in favour of each candidate. Citing the case of ***Hellen Adoa & Electoral Commission*** (supra)counsel submitted that if there is no alteration of results on the votes cast for the candidates, as was confirmed by the Petitioner herself, then the court cannot rely on other minor corrections to nullify an election.

It was noted that the Petitioner, in paragraph 24 of her petition, alleged alteration of results by the 1st Respondent's agents. She repeats the same allegation in paragraph 37 of the affidavit accompanying the petition, and paragraph 34 of the affidavit in rejoinder. She averred that the 1st Respondent altered DRFs availed to her by the Secretary to the EC to disguise electoral anomalies in order to defeat the course of justice. However, these allegations cannot be sustained because firstly, the DRFs she relied on, in *Annextures J-TT* to the affidavit accompanying the petition, were struck off the record due to their inadmissibility. Secondly, the DRFs attached as *Annextures J2-TT3* to the affidavit in rejoinder, do not reveal alternations that affected the electoral result. Whereas it is true that the DRFs indicate that some corrections were made to rectify poor additions of the votes cast for each candidate, ballot papers counted, and unused ballot papers, the corrections did not alter or affect the result of the votes each candidate obtained, which is the most important element of the election and the DRFs. No candidate took any benefit from this correction. It would have been different if the alterations were on votes obtained by each of the candidates, or if Petitioner's votes were altered to a lesser figure to her detriment, but that was not the case. Given that finding, the ground of alteration or doctoring of results or that this affected the electoral result, was not proved.

(d) Omission to count every vote cast:

Counsel for the Petitioner submitted that the 1st Respondent intentionally neglected and or failed in its duty to count every vote cast. In ground G, in paragraph 20 of the petition, it was alleged that 606 valid votes in 49 polling stations were intentionally omitted from the tally. The Petitioner relied on *Annextures DDDD-AAAAAA* of the affidavit accompanying the petition and *Annextures DDDD2-AAAAAA2*, of the affidavit in rejoinder, on which counsel for the Petitioner premised their submissions. In reply, counsel for the 1st Respondent submitted that a quick reading of *Annextures DDDD* and *DDDD2*, shows the Petitioner wrongly got the number of issued ballot papers being 400 and subtracted it from the number of the votes counted being 231 to come to the conclusion that 169 votes were not counted. That, however, that notion pre-supposes that the number of voters at those polling stations was equal to the ballot papers issued, which was not the case. That it also presupposed that the number of all the voters at that particular polling station was 400 and that they all voted, but the 1st Respondent excluded 169 votes. That this analogy would be unlikely. Further, that the Petitioner did not attach a National Voters' Register to show the total number of the registered voters at those impugned polling stations, and as such failed to prove that all the registered voters at those polling stations voted, but that some of the votes were not counted. Counsel insisted that it is not possible that at all the 49 polling stations all the registered voters diligently voted, unless the Petitioner adduces cogent evidence to that effect. That even if the Petitioner was to insist that all the voters at the 49 polling stations voted and that some of their votes were excluded, she did not adduce any evidence that all the other votes from those polling stations which were not counted were all hers and not for other candidates.

Court has carefully studied the annextures referred to, as *DDDD to AAAAAA.* These were earlier struck off the record and therefore cannot be used as evidence. *Annextures DDDD2-AAAAAA2*, do not indicate that there were votes which were excluded or intentionally not counted by the 1st Respondent. Still evidence of the National Voters' Register was lacking to prove the number of voters at each of the impugned polling station and therefore, the source of the Petitioner's knowledge and basis of her conclusion on the number of voters, remained unknown. In addition, the DRFs referred to, do not indicate the number of voters in each of the polling station. It is thus not possible to come to the conclusions that the number of votes counted was more than the number of voters in the polling station.

The affidavits of Khaukha Twaha (at page 451 of Vol. 2) and Nazziwa Rehma (at p.492) relied on, are of almost no evidential value. The DRFs relied on by the Petitioner were already struck

out. In addition, whereas these witnesses stated that they received more voters at the polling stations than those who were counted, they attached no other proof, either of the DRFs, to show that what they had was different from that which was supplied by the 1st Respondent. Even then, the DRFs attached were duly signed by them with no comment or complaint recorded thereon. They did not deny having signed or state that they were forced to sign. The allegation of omission or exclusion of valid votes by the 1st Respondent, has not been proved. At the most, the evidence was speculative and ought to be disregarded as neither compelling or convincing.

(e) Arbitrary closing of voting of polling stations before 4:00pm:

In paragraph 41 of her affidavit accompanying the petition, the Petitioner stated that she examined DRFs availed to her, and was informed by her polling agents and voters, that the 1st Respondent closed the polling stations early. She relied on *Annextures BBBBBB, CCCCCC and DDDD* to prove this ground. Counsel for the Petitioner based on the same annextures and submitted that the 1st Respondent arbitrarily ended and closed voting at polling stations before 4:00pm. In reply, the 1st Respondent averred, in its answer to the petition and the affidavit in support at paragraph 13, that some of the omissions and errors in the DRFs, such as the time, were sheer human errors resulting from prolonged fatigue, and that such errors did not affect the actual number of votes obtained by each candidate or confer an electoral advantage to any candidate. Counsel for the 1st Respondent stated that this was not rebutted by the Petitioner. Relying on the evidence of PW1 in cross examination, counsel sought to demonstrate that time for opening the polls which was known to the Petitioner was 8:00am and closure time was 4:00pm. That it is inconceivable that these polling stations could have closed even before opening and yet people voted. Counsel argued that these were normal human errors, which did not affect the electoral result in any substantial manner. In rejoinder, counsel for the Petitioner, submitted that the submissions of counsel for the 1st Respondent were untenable as it amounted to evidence from the Bar. That the DRFs are conclusive and that the results thereon are valid and therefore all entries thereon should be considered.

Court had occasion to carefully peruse the affidavit in support of the answer to the petition Under paragraph 17, RW1 denied the early closure of polling stations. He averred that the polling stations began well in time and that the polling stations remained open until the prescribed time for closure. The Petiitioner's *Annextures BBBBBB-DDDDDD,* which had been relied on to prove the particular allegation, were struck out on account of their inadmissibility. In *Annextures VVVVVV3-XXXXXX3* attached to the affidavit in rejoinder Vol. 1, all the DRFs (at pages 323, 324 and 325)

indicate that they were signed at 19:30pm, 7:20pm and 6:00pm respectively, and not "AM". These DRFs indicate that they were signed by the Petitioner's agents without any complaint whatsoever being recorded on them. None of the agents swore an affidavit proving the allegation that the impugned polling stations closed at 9:00am, 7:20am and 6:00am or that the signatures on the DRFs were forged. It is not logically possible to conclude that the polling stations would have closed before even opening, yet people voted, and that there was no complaint to the 1st Respondent about it either by the Petitioner, her polling agents, her supporters, or even voters themselves. *Annexture VVVVVV3* indicates that 318 votes were cast, *Annexture WWWWWW3*, shows 307 votes were cast, *Annexture XXXXXX3 224* shows votes were cast. The evidence is that voting indeed took place. The allegation of disenfranchisement of voter by early closure has not been proved to the required standard.

(f) Omission to make fundamental entries on or to sign DRFs:

Counsel for the Petitioner submitted that the 1st Respondent's agents intentionally excluded fundamental entries on the DRFs from 21 Polling stations, which affected the proper computation of 2,142 votes cast. That having realized the anomaly, the 1st Respondent's agents doctored the DRFs in order to conceal it. Counsel referred court to the evidence in *Annextures AAAAAA3-UUUUUU3.* Further, counsel submitted that the 1st Respondent's presiding officers intentionally neglected to endorse upon the DRFs for five polling stations thereby invalidating 1,142 votes at the said polling stations. That the 1st Respondent on realizing the anomaly caused the illegal endorsement/signing of the DRFs in *Annextures BBBBBB2-FFFFFF2.*

In reply, counsel for the 1st Respondent submitted that allegations of the omissions and commissions, were not supported by any proof that those important details were excluded from the DRFs or to prove the alleged unsigned DRFs. Further, that in cross examination, PW1 confirmed that she had no other DRFs, apart from those attached to her affidavits. Counsel wondered where she could have got the information that the DRFs did not include the information which she alleged was missing from the DRFs or that there were unsigned DRFs.

Court has not found that *Annextures BBBBBB2 - FFFFFF2,* were unsigned as contended by counsel for the Petitioner. Even if the impugned DRFs were not signed, the omission to sign DRFs cannot be used as a sword, where the agents signed. This was the same holding in the case of ***Mbaghadi Fredrick Nkayi*** (supra). The situation would have been different if the Petitioner had attached copies of the alleged DRFs missing those details or unsigned DRFs on her affidavit

accompanying the Petition to compare with those attached to her affidavit in rejoinder. Otherwise, this court has no other DRFs to compare with in order to conclude that there were anomalies which were later corrected by the 1st Respondent. This ground therefore, also fails.

(g) Ferrying of voters/permitting unauthorized persons to vote:

This ground was alleged but no attempt was made to prove it by the Petitioner. Counsel for the Petitioner also did not to submit on it. No affidavit was filed by any person proving that unauthorized persons voted. There was no proof by way of adducing the National Voter's Register to prove that the alleged persons were not on the National Register and no evidence was adduced that they actually voted. The allegation was clearly not proved. The test in ***Hellen Adoa & Electoral Commission*** (supra) was thus not met.

(h) Intimidation/ voter violence/disenfranchisement of voters:

The Petitioner did not adduce cogent evidence to prove the above alleged malpractices against the Respondents and therefore, failed to discharge the standard of proof under Section 61(3) PEA.

(i) Voter bribery:

This allegation was partly addressed in the objection relating to cause of action. The particular aspect of bribery that requires the remaining attention is in regard to the allegations that the 2nd Respondent committed the illegal practice/offence of bribery in connection with the election, in that she sent money to persons named, using mobile money transfers, using her phone, through her agents for purposes of bribing voters. Counsel for the Petitioner invited court to look at the evidence of alleged mobile money transactions to prove that the 2nd Respondent committed acts of bribery personally. Citing the decision in ***Dr. Mayanja Bernard &Anor vs. Hood Katuramu, EPA No. 42 of 2016*** for the principle that under Section 8 of the Electronic Transactions Act, a mobile money print out is a form of data arising out of an electronic transaction, and once it was obtained by court order, merely because the court order relating to the request was not provided, it was held that the trial court ought to have admitted the mobile money transaction print out as a piece of evidence.

In reply counsel for the 2nd Respondent submitted that the Petitioner did not personally witness any alleged acts of bribery whether by the 2nd Respondent or any of her alleged agents. That she did not state in the petition whether it was the 2nd Respondent personally who committed the alleged acts of bribery or if it was committed by any of her agents, and who of said agents committed the alleged acts of bribery, when and where. That neither the Petitioner nor her

witnesses led any evidence to prove that the persons allegedly bribed were registered voters. That the Petitioner and her witnesses did not adduce the National Voters' Register to show that any and all the persons allegedly bribed were voters.

From the definition, stated earlier in this judgment, an allegation of bribery must be proved by unequivocal evidence, not mere suspicion. It is also a well-known principle in law, that there is no specific number of witnesses required to prove a given fact, even one witness can prove a case if he or she is credible. See: ***Mukasa Anthony Harris vs. Dr. Bayiga Michael Lulume SC EPA No 18 of 2007.*** However, given the partisan nature of an electoral process and the fact that witnesses are not independent of the dispute, it is always important to have independent corroborating evidence. As was observed in ***Kabuusu Moses Wagabo vs. Lwaiga Timothy Mutekanga & Electoral Commission, EP No. 15 of 2011;***

> ***"Owing to the highly partisan and passionate attachment which people have to the candidate they support to the extent that infrequently they go to any length either to seek to establish adverse claim or to rebut it. <u>It is advisable to look for cogent independent evidence in proof.</u> I should add that it would be strange for a candidate to openly and with impunity dish out money or material benefits to voters for the purpose of influencing them. I suppose candidates who indulge in such breaches usually do so with utmost discretion."***

In ***Mukasa Anthony Harris*** (supra) three ingredients of bribery have to be established to wit; that money or gift was given out by the candidate personally or through the candidate's agents with his/her knowledge and consent or approval; the recipient was a registered voter; and the giving was with intention to influence the voter to vote or refrain from voting.

Court has appraised itself of the decision and noted that the evidence of the mobile money print out alleged herein, must come before court through an affidavit attached as an annexture. This is in line with Rule 15 of the Election Petition Rules that all evidence shall be adduced by way of affidavit. See: ***Mugema Peter*** case (supra). In the alternative, the evidence may be *viva-vorce* through a witness called by the petitioner through whom the evidence must be tendered in court. See: ***Kabuusu Moses Wagabo*** (supra). The evidence must properly be adduced before court considers whether to admit it or not.

In the instant case, there is no affidavit introducing or attaching the alleged mobile money print out. There was no application to tender the print out in evidence. No witness was called by the

Petitioner to tender the same in evidence *viva vorce*, and no such application was made to the court. The record indicates that when the 2nd Respondent was cross-examined on whether the telephone number in a print out that counsel had was hers, she denied it. Mere reference to a document by a witness is not one of the ways of tendering and admitting a document into evidence. The ***Dr. Mayanja Bernard & Anor*** case (supra) relied on, did not suggest that the mobile money print out would just be thrown on to the court record, or that the court should admit it in any other way other than in the manner envisaged under the law for admission of such evidence. This court, therefore, declines the invitation to consider the alleged mobile transactions, as the same were not properly exhibited on record. The 2nd Respondent having denied being the holder of the telephone number attributed to her, the burden remained on the Petitioner to prove otherwise. Besides, the alleged recipients of the mobile money had to be proved to registered voters, but no such proof was adduced. Court also finds that other than a blanket statement that the 2nd Respondent and her agents committed acts of bribery, no compelling or convincing evidence was adduced in proof of this allegation. No independent evidence whatsoever to corroborate the allegations of bribery was furnished.

Issue No.7: What remedies are available to the parties?

The 2nd Respondent resoundingly won the election with 40,729 votes as against the Petitioner's 25,276 votes. That is a wide margin given that there even four other candidates in the race. The success of such a winning candidate in an election cannot be lightly interfered with or taken away without any strong justification rooted in the law. Such election win should be upheld. Having found as above, the Petitioner is not entitled to the remedies she sought. The petition is dismissed in its entirety, with costs to the 1st and 2nd Respondent, respectively.

BASHAIJA K. ANDREW

JUDGE

30th September 2021.

Mr. Mugabi Silas Kahima, jointly with Mr. Wambi Andrew and Nangulu Eddie counsel for the Petitioner present.

Ms. Jackline Natukunda counsel for the 1st Respondent present.

Mr. Naapa G counsel for the 2nd Respondent present.

Petitioner and 2nd Respondent present.

Mr.Rebeero Charles Returning Officer of 1st Respondent present.

Ms. Dorothy Kenyange Court Clerk present.

Court: Judgement read in open court.

BASHAIJA K. ANDREW

JUDGE

30th September 2021.