THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO.38 OF 2011

HON. OBOTH MARKSONS JACOB ::::::::::::::::::APPELLANT

5 VERSUS

DR. OTIAM OTAALA EMMANUEL ::::::::::::::::::RESPONDENT

CORAM: HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, DCJ;

HON. JUSTICE C.K. BYAMUGISHA, JA

10 HON. JUSTICE REMMY KASULE, JA.

JUDGEMENT OF REMMY. K. KASULE, JA.

This is an election petition appeal against the judgement of the High Court of Uganda at Tororo, (Rugadya Atwooki, J.) delivered on 23.09.2011 in Election Petition No.007 of 2011.

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The petition arose out of the Parliamentary election held on 18.02.2011 in west Budama County, South Constituency, Tororo District. The appellant, the respondent and three others were candidates in the election that was conducted by the Electoral Commission.

The appellant, was declared and gazetted to be the duly elected Member of Parliament for the said constituency having garnered 17,200 votes. The respondent, was the runner up with 16,034 votes.

5 Dissatisfied with the election results, the respondent petitioned the High Court at Tororo complaining of non compliance by the Electoral Commission and the appellant with the Parliamentary Elections Act provisions in conducting the election and that the non-compliance had affected the election results in a substantial manner.

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The High Court was prayed to declare that the appellant was not validly elected a member of Parliament of West Budama County South Constituency, that his election be annulled and a bye –election ordered.

15 The learned trial judge allowed the petition, set aside the election of the appellant as a Member of Parliament of West Budama South Constituency, declared the seat vacant and ordered that a bye-election be held.

Disagreeing with the judgement and orders of the trial court, the appellant
20 appealed to this court on three grounds, namely:-

1. ***The learned trial judge erred in law and fact when he failed to evaluate the evidence on record and came to wrong conclusions that there was non-compliance with the electoral laws.***
2. ***The learned trial judge erred in law and fact when he found that there was voter disenfranchisement of 2913 voters.***
3. ***The learned trial judge erred in law and fact when he found that the non-compliance substantially affected the results.***

The appellant prayed this court to allow the appeal, set aside the judgemnent and order of the High Court and declare the appellant duly elected as Member of Parliament for West Budama County South Constituency.

At the hearing of the appeal, the appellant was represented by learned counsel Musa Sekaana, while Counsel Aggrey Wabwire assisted by Ambrose Tebyasa and Geoffrey Ojok Ojulu were for the respondent.

It is noted that both the Notice of Appeal and the Memorandum of Appeal have only Dr. Otiam Otaala Emmanuel as the respondent, leaving out the Electoral Commission, who was the 2nd respondent to the original petition out of which this appeal arose. This was by choice of the appellant. There was also no attempt on the part of the respondent to this appeal to have the Electoral Commission added to the appeal.

At the scheduling three issues were framed for determination by this court:

1. ***Whether or not the trial judge failed to evaluate the evidence on record before coming to the conclusion that there was non-compliance with the electoral laws and the principles laid thereunder.***

5 2. ***Whether the trial judge erred in law and fact in holding that such non-compliance affected the results in a substantial manner.***

3. ***Whether the appellant is entitled to the remedies sought in the appeal.***

Musa Sekaana counsel for the appellant, submitted in respect of the first
10 ground, that the trial court abdicated its duty when it failed to ascertain the election results out of returns from all polling stations. Instead, the Returning Officer excluded from the tally sheet of all votes cast, the results from six(6) polling stations of Rugot Church, Bendo Nursery School, Mawele Primary School, Siwa Primary School, Panyagasi Primary School
15 and Rubongi Primary School. The purported reason for the exclusion being that the presiding officers concerned did not include the results of the polling stations in the envelopes forwarded to the Returning Officer.

Had the trial judge properly evaluated the evidence as regards the voting at
20 the said six polling stations, counsel contended, he would have come to the conclusion that the inclusion or exclusion of any of the results from any of the six polling stations would still have left the appellant the overall winner of the election. The trial judge would then not have allowed the petition and no bye-election would have been ordered.

This is because evidence of Declaration of Results forms availed to the trial court by both the appellant and Respondent, clearly established that the appellant had overwhelmingly won in each of the stated six polling stations and the respondent had miserably lost. It followed therefore that the exclusion of the votes of each of the six polling stations from the tally sheet of all the votes cast in the constituency reduced the total number of the votes of the appellant and not those of the respondent, and, in spite of this reduction of votes, the appellant still remained with the majority votes, thus winner of the election.

Further, the learned trial judge erred to conclude that the voters in these six polling stations had been disenfranchised. Proper voting had gone on at each of these six polling stations and the registered voters who decided to vote had all voted for a candidate of their own choice.

Counsel thus urged this court to subject the evidence to a fresh re-evaluation and arrive at the conclusion that the six(6) polling stations could not be a ground for allowing the petition.

On the second ground, appellant's counsel criticized the trial judge for finding that the election had been substantially affected by non-compliance with the electoral laws. The learned judge ought to have ascertained the number of those who voted and those who did not from the Declaration of Results Forms of the six (6) polling stations, which forms were before the

trial judge as evidence. Had the learned trial judge properly evaluated the evidence on record, he would have come to the conclusion that the voters at the said six (6) polling stations had actually voted and as such had not been disenfranchised. Accordingly the results of the election had not been affected in a substantial way by any non compliance with the electoral laws.

With regard to the third and last ground, appellant's counsel contended that a trial court must be satisfied that the effect of the non compliance with the election law or the irregularities in the election produced a substantial effect such as, for example, if there are no votes cast in a given situation, the court would be left in such a situation that there is no clear way of establishing the winner.

Relying on ***Kiiza Besigye Vs Yoweri Kaguta Museveni: Election Petition No.1 of 2001,*** as to what **"substantial effect"** means in an election, counsel submitted that in fact, it was the appellant, and not the respondent who lost votes by exclusion of the votes of the six polling stations, and by reason of any other non-compliance with the election law. As such the respondent could not complain of having lost the election by reason of exclusion of the votes of the six (6) polling stations, let alone any other proved non compliance with the election law. Counsel accordingly prayed to have the appeal allowed.

For the respondent, Counsel Aggrey Wabwire, submitted in opposition to the appeal, that the trial judge properly evaluated all the evidence on record

before rightly concluding that there was non-compliance with the electoral laws and principles of a free and fair election.

He further submitted that the trial judge rightly refused to consider the
5 requisite Declaration of Results forms because for Rugot church, Bendo Nursery school, and Mawele polling stations, these had inherent irregularities of failure to account for the use of ballot papers. They therefore did not show accurate results of what each candidate got at each of the polling stations.

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Further, respondent's counsel submitted that specially with regard to the results of Bendo Nursery and Panyangasi Primary school polling stations, the evidence of the Returning Officer, was to the effect that the results of these two polling stations had been cancelled due to the fact that at the
15 time of tallying votes, it was found that the number of ballot papers cast at each of the stated stations exceeded the number of registered voters. The learned trial judge could thus not rely on such evidence in an attempt to ascertain the results of voting at those two polling stations.

20 As to the other four (4) polling stations, counsel reasoned that it is only those Declaration of Results forms specified in section 53 of the Parliamentary Elections Act that the Returning Officer is under obligation to use in ascertaining the results of a particular polling station; and not those

Declaration of Results forms which the candidate's agents kept and which had not been certified by the Electoral Commission.

Counsel referred court to ***Supreme Court Presidential Election Petition No.1/2006 Kiiza Besigye Vs Y.K, Museveni and also Supreme Court Election Petition Appeal No.11/2007: Kakooza John Baptist Vs Electoral Commission and Iga Anthony,*** and invited court to find that the learned trial judge was right when he refused to use the Declaration Result Forms for the four (4) polling stations since the same were not original documentary evidence and did not also satisfy the requirement for being admitted as secondary evidence of public documents.

As to the second ground of appeal, respondent's counsel argued that the trial judge was justified in his finding that there was none compliance with the electoral laws and that the non compliance affected the results in a substantial manner. The fact that the number of registered voters at the six(6) polling stations who were disenfranchised exceeded the difference in votes between the appellant and the Respondent, the failure to control the use of ballot papers resulting in cancellation of results at Bendo Nursery and Panyangasi primary school polling stations, voter intimidation, harassment and violence during voting, voting by ineligible and/or dead persons, such as at Muwafa primary school polling station, all justified the trial judge's stated finding.

As to ground three (3) of the appeal, respondent's counsel contended that the trial judge properly considered and applied the doctrine of substantial effect in affecting the result of an election. The respondent, as petitioner at the trial, did not have to show that he should have won; or that the appellant should have lost, but rather that the non-compliance with the electoral laws put in doubt the election result of the successful candidate.

On the basis of the Court of Appeal decisions of ***Election Petition Appeal No.12 of 2002: Amama Mbabazi vs Musinguzi Garuga*** and ***Election Petition Appeal No.24 of 2006: Kirunda Kivejinja Ali vs Abdu Katuntu,*** respondent's counsel invited this court to uphold the trial judge on this issue.

With regard to ground 4 of remedies, Respondent's counsel prayed that the appellant's appeal be dismissed with costs.

Having carefully considered the submissions of counsel for the appellant and those of the respondent, the law and the evidence that was adduced at trial, I will now proceed to deal with resolving the issues in the order they were framed.

The essence of the first issue is to determine whether or not the learned trial judge failed to properly evaluate the evidence on record before coming

to the conclusion that there was non-compliance with the electoral laws and the principles underlying those laws.

The Constitution (1995) and the Parliamentary Elections Act 17 of 2005 and the rules made thereunder are the electoral laws relevant to this appeal.

As to the principles underlying the above laws, Article 1 (4) of the Uganda Constitution incorporates the universal principles as relate to elections propounded in article 21 of the Universal Declaration of Human Rights 1948, and article 25 of the UN Covenant on Civil and Political Rights, 1966. Article 21 of The Universal Declaration of Human Rights provides:

> ***"The will of the people shall be the basis of the authority of government: this will, shall be expressed in periodic and genuine elections which shall be held by secret vote or by equivalent free voting procedures".***

Article 25 of the UN Covenant on Civil and Political Rights is in similar terms as above. Both the Declaration and the Covenant recognize the paramount rights of every one to take part in the government of one's country directly or through freely elected representatives.

Article 1 (4) of the Uganda Constitution embodies the above principles by providing that:

> ***"The people shall express their will and consent on who shall govern them and how they should be governed through regular free and fair elections of their representatives or through referenda".***

Through periodic elections, the citizens make their choices as to how they are to be governed. It follows therefore that if the choices are to be genuine and credible, the exercise of carrying out those choices must be through ways and means whereby the rights of the individual voters are protected and there is assurance that each vote cast is counted and reported properly. Thus the Uganda Supreme Court has propounded that:

"An electoral process which fails to ensure the fundamental rights of citizens before and after the election is flawed". See ***Presidential Election Petition No.1 of 2001: Besigye Kizza Vs Museveni Yoweri Kaguta & Another: Judgement of Odoki, C.J; at page 60.***

Accordingly, a free and fair election process must have sufficient time given for all stages of the election, candidates' right to stand for election must be ensured and so too the right of a citizen to register and vote for a candidate of that voter's choice. No one should have an unfair advantage over others. There must be no intimidation, bribery, violence, coercion or

anything to take away the will of the people. The ballot must be secret, the counting accurate and the results announced in a timely manner. The electorate must be made knowledgeable and sensitized about the electoral laws and guidelines in sufficient time. Fairness and transparency must be maintained. Those committing electoral wrongs must be punished and election disputes resolved fairly and speedily.

It is the duty of this court, as the first appellate court, to subject the evidence adduced at the trial to a fresh and exhaustive scrutiny and then decide whether or not the learned trial judge came to the correct conclusions, and if not then this court is entitled to reach its own conclusion(s). In doing so this court must be conscious of the fact that it had no opportunity to observe the demeanour of witnesses at the trial stage. See: ***Supreme Court of Uganda Civil Appeal No.17 of 2002: FATHER NASENSIO BEGUMISA & 3 OTHERS VS ERIC TIBEBAGA: [2004] KALR 236 AT P.240-242.***

It is a proved fact that in the election, the subject of this appeal, the election results of six (6) polling stations were not taken into account in the overall election results.

These stations were:

- Bendo Nursery school polling station with 330 registered voters;
- Panyangasi primary school polling station with 509 registered voters;

- Rubongi secondary school polling station with 404 registered voters;
- Rugot church polling station with 808 registered voters;
- Mawele primary school polling station with 563 registered voters;

and

5 - Siwa primary school polling station with 299 registered voters.

The evidence of the Returning Officer of this election, one ERIKWEINE NGOBI, was to the effect that he cancelled the results at Bendo Nursery School and Panyangasi primary school polling stations because he found from the returns of each of these polling stations that the total number of
10 votes cast exceeded the total number of registered voters.

As for Rubongi secondary school, Rugot church, Mawele primary school and Siwa primary school polling stations, according to the Returning Officer, the results from these polling stations were missing from envelopes
15 sent to him by the stations' presiding officers. The results had to reach him within 48 hours of close of polling. When the time expired without having received these results, he discarded them and declared the final results without their being included.

The learned trial judge dealt with this aspect of the election in his
20 judgement under the sub-heading of "DISENFRANCHISEMENT". He found that polling had been carried out to completion by the Electoral Commission at each of the six (6) polling stations on Election Day and that

the Returning Officer had not included in the final election results, the results of these polling stations.

5 As regards Bendo Nursery school and Panyangasi primary school polling stations, the results had been cancelled by the Returning Officer because the total number of votes cast exceeded the total number of registered voters at each of these two stations. The results of Rubongi secondary school, Rugot church, Mawele primary school and Siwa primary school polling stations were discarded because the presiding officers had not
10 enclosed the results of each station in the envelopes forwarded to the Returning Officer.

The learned trial judge then proceeded to hold that:-

"For the four polling stations where the DR forms were not
15 ***available, the Returning Officer decided that he could not and did not use the forms which were in the report of the Presiding Officer or from the ballot boxes. The law availed him such an option but decided not to utilize it. One of his reasons was that there was no time to wait the arrival of the ballot boxes. The elections were held***
20 ***and concluded on 18th February. The Returning Officer announced the results on 20th February. It surely could not have taken two days for the ballot boxes to arrive. Whatever his reasons, the Returning Officer impugned the results from the four polling stations. So the Declaration of results forms which the 1st respondent annexed to his***

affidavit, being Declaration of Results forms which were allegedly given to his agents at the respective polling stations were of no relevance.

5 ***The same argument goes for the two polling stations whose results were cancelled. The cancellation was because of irregularities. There were more votes cast than the number of registered voters. That was evidence that either persons voted more than once, or that there was ballot stuffing, both of which hallmarks of an unfair election, and are***
10 ***contrary to the law. Once cancelled, those results could not be of any value to anyone and any purpose, may be save to show that people cast their ballots at those polling stations.***

Engwau JA, in *<u>Bakaluba Mukasa V. Namboze</u>* ***held that the Electoral***
15 ***Commission has the constitutional duty to organize a free and fair election. Where an election is not free and fair, and where there has been non compliance with the law, the EC will be held to account.***

For the above reasons I found that the people in the six polling
20 ***stations who totaled 2,913 voters were disenfranchised contrary to Article 59 of the Constitution".***

In holding as he did, the learned trial judge, found the Declaration of Results Forms of the four polling stations of Rubongi secondary school,

Rugot church, Mawele primary school and Siwa primary school, that the appellant had annexed to his affidavit in reply dated 04.04.2011 and filed in court in opposition to the petition, as having no relevance.

The appellant asserted in his reply to the petition and in his affidavit in
5 support of the reply that the voters from the said four polling stations were not disenfranchised because they voted and also that even if the results of the said stations were to be included in the final tally sheet, he, appellant, would still be winner of the election with majority votes.

10 The Declaration of Result forms in question are signed by the respective station presiding officers as well as a set of two agents for the appellant and also for the respondent. It follows therefore that if any of those Declaration of Results Forms was a forgery, then a party to the petition would straightaway point out the forgery. None did so.

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In his affidavit in rejoinder, respondent attached annexures “A”, and “I”, being the Declaration of Results Forms for Rugot church and Mawele primary school polling stations. Each one of these forms was certified as an authentic true copy by the Electoral Commission. The two Declaration
20 of Results forms are identical in their contents and signatories to appellant’s annextures “C” and “E” of his affidavit in reply to the petition.

It can therefore safely be concluded that, as at the time of the trial of the petition, the appellant, the respondent and the Electoral Commission were in possession of the Declaration of Results Forms for the polling stations of Rugot church and Mawele primary school and that evidence of this was placed before the trial judge.

As to the polling stations of Rubongi secondary school and Siwa primary school, the evidence is that at conferencing at the trial stage on 13.07.2011, there was no objection to the tendering in evidence of the Declaration of Results forms for the said two polling stations. Indeed in his affidavit in rejoinder, the respondent did not dispute the authenticity or show any opposition to the tendering in evidence of the Declaration of Results forms for the two polling stations.

It was submitted on appeal by counsel for the respondent that the Declaration of results forms for the four (4) polling stations produced in evidence by the appellant could not be relied upon because they were never properly admitted as evidence at the trial of the petition. The appellant had not served upon the Electoral Commission any notice to produce the same to court.

I am unable to accept the above submission. As already pointed out, the Declaration of results forms for Rugot church and Mawele primary school polling stations produced at trial by the respondent were certified by the

Electoral Commission. The two are identical in their contents and signatories to those adduced in evidence by the appellant. The requirement for appellant to produce certified copies of the forms is thus dispensed with in respect of these two stations.

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As to the Declaration of Results forms for Rubongi and Siwa primary school polling stations, though not certified by the Electoral Commission, the same were, like the others, admitted in evidence by consent of the parties at conferencing.

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Further, section 64 of the Evidence Act, that provides for Notice to produce, is broad in its scope. The notice to produce may be one prescribed by law, but where there is no specific prescription, then it is such notice as a court considers reasonable in the circumstances of the case. The same section

15 also provides an exception to the general rule that:

> ***"except that such notice shall not be required in order to render secondary evidence admissible, in any of the following cases, or in any other case in which the court thinks fit to dispense with it ………(b) when, from the nature of the case the adverse party***
>
> 20 ***must know that he or she will be required to produce it".***

In my judgement the petition having been an election petition to resolve an election dispute, to which both the respondent and Electoral Commission

were parties, and where section 52(1) of the Parliamentary Elections Act, mandatorily required the Electoral Commission to keep in safe custody all the election materials until the settlement of the disputes arising from the said election, makes the case fall under the exception to section 64 of the
5 Evidence Act. I find that this is such a case that from the nature of the case the adverse parties to the petition ought to have known that each one individually would be required to produce the stated Declaration of Results forms including those of Rubongi and Siwa primary school polling stations. As such the stated Declaration of Results forms were properly before court
10 as evidence and the learned trial judge was not justified to discard them as being of no value.

Two other polling stations of Bendo Nursery school and Panyangasi primary school had their results cancelled by the Returning Officer, on the
15 grounds that on counting the votes the number of votes cast exceeded the number of registered voters at each of the two polling stations.

Bendo Nursery school polling station, according to the Results tally sheet had 330 registered voters. 350 ballot papers were issued. At the end of
20 voting 336 votes had been cast, while 14 remained unused. This, on the face of it showed the votes cast to be more than the registered voters. This being the state of affairs the returning Officer cancelled the results. Counsel for the appellant conceded that the Returning Officer was right in what he did. The trial judge upheld the decision of the Returning Officer.

On an overall review of all the evidence, this court finds that the trial judge was right in upholding the cancellation of the results of this polling station.

The results of Panyangasi primary school “B” of Panyangasi parish were also cancelled by the returning Officer. Proof of cancelling of these results is the Results tally sheet of 20.02.2011. I have subjected the evidence on this issue to a fresh scrutiny. It has already been held that the Declaration of Results Form provided by the appellant was and is valid evidence as to the determination of the results of the election at this polling station. At trial, the petitioner and the Electoral Commission did not validly dispute the accuracy of its contents. These contents are to the effect that 550 ballot papers were issued before polling. At end of polling, 406 votes had been cast, 2 votes had been rejected, 2 had been spoilt and 140 had been unused. Thus the total number of cast, spoilt, rejected and unused votes, i.e. (406+02+02+140) added up to the number of ballot papers issued of 550. The Tally Sheet however shows that the number of registered voters at this station was 509. The Declaration of Results Forms shows that the total number of ballot papers used at the station were 406 cast votes, 2 invalid votes and 2 spoilt votes, thus a total of 410 votes, which is less than the 509 registered voters at the station.

The Returning Officer was therefore in error to cancel the results of this polling station on the false premise that the number of votes cast exceeded the number of registered voters at the station. The error must have come

about due to the failure of the Returning Officer from appreciating the fact that the number of ballot papers issue for polling i.e. 550 was immaterial in determining whether or not the number of registered voters of 509 had been exceeded. It is the numbers of the cast, rejected and spoilt ballot papers that were material. The total of these numbers clearly showed that there had been no excess number of those who voted over the number of registered voters. I therefore hold that the votes cast for each candidate at this polling station ought to have been regarded as valid and counted in the final tally of votes of each candidate.

From the above appreciation of the evidence as regards the six (6) polling stations, whose polling results were excluded from the final tally of the results of the West Budama County South Constituency, it can be safely concluded that, at the trial of the petition, the learned trial judge, had before him legitimate evidence of the Declaration of Results Forms from which, in addition to the evidence before him, he could determine the validity of the election at each of the said polling stations except the one of Bendo Nursery school. Further, had the learned trial judge properly analysed the said evidence that was before him, like this court has done on appeal, then he would have come to the same conclusion.

With respect, the learned trial judge, erred when he failed to approach and appreciate the evidence as indicated above. This error led the Honourable judge to arrive at wrong conclusions as regards the five(5) polling stations.

Section 47 of the Parliamentary Elections Act required the Presiding Officer of each of these polling stations to count the votes after the closure of polling, in the presence of and in full view of those present, including the candidates' agents is. The Presiding Officer is thereafter required to sign
5 the Declaration of Results form. That all Declarations of results Forms were signed by the agents of the appellant and respondent and that there was no complaint forwarded to the Returning officer before an election or during and immediately after counting votes at any of these five (5) polling stations is proof that the requirements of this section were complied with at
10 each of the said stations.

There was also no evidence that the provisions of section 50 of the parliamentary Elections Act, requiring the filling of Declaration of results forms and the Presiding Officer to display a copy at the station, forward a
15 copy to the Returning Officer, a copy to the candidate's agent and a copy deposited in the ballot box, was not substantially complied with, except with regard to forwarding a copy to the Returning Officer, which requirement the Returning Officer asserted was not complied with.

20 Section 53 of the same Act empowered the Returning Officer, in the absence of the results of the poll from any of these five (5) polling stations to use the Declaration of Results Form in the Presiding Officer's report book, or in the absence of the report book, to open the ballot box and use the Declaration of results form in the box from each polling station for

adding up the results of the poll. The agents of the candidates are required to be present.

The Returning Officer, in his evidence at trial, offered no valid explanation as to why he did not resort to any of the options that were available to him under section 53, apart from asserting that since the appellant had won at all these polling stations and the respondent had lost, then it made no difference whether or not he used any of the options as the appellant would still be the winner of the election.

Having had a fresh re-evaluation of the evidence on the point, I find that there is sense in the reasoning of the Returning Officer. The evidence that was adduced before the trial court, and which has been re-evaluated on appeal, shows that successful polling went on at each of the five (5) polling stations. At the closure of polling the votes were counted and announced at each polling station. The Presiding Officer and the agents of each of the appellant and respondent signed the respective Declaration of Results forms at each station, each agent keeping a copy of the form. There were no complaints raised to the Returning Officer, and/or the Presiding Officer before the announcement of the election. I conclude from all this that a proper election as is reflected in the Declaration of Results form for each of these polling stations did take place and that the results were valid.

It was therefore incumbent upon the learned trial judge, to evaluate the evidence of the results of polling at each of the five polling stations and arrive at specific conclusions based on that evidence. The learned trial judge instead, just disregarded the Declaration of Results forms of each of these polling stations as irrelevant, simply because the Returning Officer had excluded them, from the final tally of election results on the ground that the results from the Presiding Officers of the respective polling stations had not been included in the envelopes forwarded to him. With respect, the learned trial judge was wrong in adopting such an approach.

On analyzing the results of the five (5) polling stations, the inevitable conclusion one reaches is that the appellant obtained majority votes at each of the five polling stations: 258 votes as opposed to respondent's 138 at Panyangasi Primary school B, 390 as opposed to respondent's 89 at Rugot church, 522 as opposed to respondent's 34 at Mawele primary school, 172 as opposed to Respondent's 48 at Siwa primary school and 160 as opposed to 89 for the Respondent at Rubongi polling station.

It follows therefore, given the above election results from the five (5) polling stations that the appellant, inspite of having the said results excluded from his total number of votes that were cast for him in the election, still won over the respondent and the rest of the other candidates, by an overall majority of 1,176. Therefore the inclusion of the results from any of the five

(5) polling stations would result in increasing the overall majority of votes by the number of the included votes.

Accordingly whether the results of the five (5) polling stations are included or excluded in the overall results of the election in the constituency, still the appellant would remain the winning candidate of the election.

In conclusion, as regards the six (6) polling stations I find that, apart from Bendo Nursery school polling station whose election results were rightly cancelled and excluded, the rest of the election results from the five (5) polling stations were held in accordance with the electoral laws and ought to have been included in the final tally of the results of the election. The learned trial judge erred in excluding these election results from the final results of the election.

As to the election results of the polling station of Kagwara Church of Uganda, Nabuyonga Sub-County headquarters and Salvation Army Primary School, where it was alleged that the Electoral Commission failed to control the case of ballot papers, the trial judge dealt with the matter by finding that, though the figures of the votes obtained by each of the appellant and respondent, or any other candidate, were not queried, it was an absolute necessity that the figures on the Declaration of Results Form be correct because numbers are vital in an election.

With the greatest respect to the learned trial judge, while every effort must be taken to ensure that what is filled in the Declaration of Results Form is correct, it is not the law that any irregularity in filling the form as regards the figures of an election result must be fatal and inexcusable to the standard set by the learned judge that:-

> ***"Numbers are vital in an election. The correctness of the same is therefore an absolute necessity".***

Odoki, C.J, in Supreme Court Presidential Election Petition No.01 of 2006: Col. Dr. Kizza Besigye Vs Electoral Commission & Yoweri Kaguta Museveni, held with the concurrence of the other members of the court that: ***"…………………….some non-compliance or irregularities of the law or principles may occur during the election, but an election should not be annulled unless they have affected it in a substantial manner. The doctrine of substantial justice is now part of our constitutional jurisprudence. Article 126(2)(e) of the constitution provides that in adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the principle, among others, that substantial justice shall be administered without undue regard to technicalities. Courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice".***

The principle as propounded above by Odoki C.J. is, as far as parliamentary Elections are concerned, embedded in section 61(1)(a) of the Parliamentary Elections Act.

It is significant that at the elections at each of Kagwara Church of Uganda, Nabuyonga Sub-County Headquarters and Salvation Army primary school, the Declaration of Results Forms were signed by the respective Presiding Officers as well as the agents of the appellant and those of the respondent. There were no complaints raised as regards the election before and during the counting of votes. There was no credible evidence adduced of multiple voting or a group of eligible voters being prevented or otherwise disabled from freely exercising their right to vote. There was no evidence that those who voted were more than the registered voters at any one of these polling stations. No candidate or agent of any candidate complained that the votes counted, announced and recorded on the Declaration of results form as those of his/her candidate were wrongly recorded on the form.

The above being the state of affairs, it is safe to infer that the writing of misstatements on these forms relating to total valid votes cast, or rejected, or ballot papers counted, or spoilt, or issued or unused as mere irregularities not affecting the results of the election in a substantial manner.

With respect to the learned trial judge, he was in error to hold as he did on this point.

The learned trial judge found as established to the satisfaction of the court that five registered voters at Muwafu Christian Centre polling station were

dead, and yet they were indicated as having voted since the station had 596 votes while the petitioner received only 2 votes.

Suffice to state that even if the 599 registered voters are taken away from
5 the winning majority that the appellant had of 1,176 votes, he would still be the winner of the election.

The winning majority of the appellant would now be even much higher, given the fact that it has been found in this judgement that the appellant's
10 winning majority should be appropriately increased by the number of votes cast for him in the five (5) polling stations whose results were, contrary to the law, excluded from the final tally of the results of the election for the whole constituency.

15 The above notwithstanding, the allegation of alleged dead voters having voted at Muwafu Christian Centre polling station was contained in the affidavit of one Oyeri Neggrey, who was presidential polling agent at Muwafu primary school and also oversaw the interests of his candidate at Muwafu Christian Centre on election day. They are contained in his
20 affidavit dated 31.03.2011.

The learned trial judge held this allegation to have been proved to the satisfaction of the court because the results of the station showed that only

one person had not voted of all the registered voters in the station, thus implying that even those registered voters who were dead voted. Further, no one, including the appellant and the Returning Officer, came out in their evidence to specifically deny the allegation.

5 Section 103 of the Evidence Act placed the burden of proof that the alleged registered voters were dead; and that actually someone else voted in their names at the stated polling station upon the respondent, since it is the respondent (petitioner) who wished court to believe in the existence of this fact.

10

It is to be noted that Oyeri Neggrey who made this allegation also made the same allegation in respect of Muwata primary school polling station in paragraph 13 of his affidavit. The learned trial judge, in his judgement, did not make any specific finding as to whether or not there was truth in this 15 allegation. So too was the allegation by the same Oyeri Neggrey in paragraph 15 of his affidavit that two voters Mwibi Perez and Achieng Zakia had each registered double as voters at Muwafu primary school and Muwafu Christian Centre polling stations. The two allegations in paragraphs 13 and 14 thus remained unproved.

20 In the same affidavit Oyeri Neggrey, the maker of the allegations stated on oath in paragraph 13(IV) that one Obbo Abuneri of voter code – 04126438 of Muwafu primary school polling station, though dead, had actually voted at the election. The same witness, however, contradicted himself, again on oath, when he asserted in paragraph 14 of the same affidavit that the said

Obbo Abuneri of the same voter code, was actually, at the time of the election, alive but in prison at Morukatipe prison. The trial judge did not address himself to this contradiction.

It is a fact, which has to be judicially taken note of, that, as at the time of elections, and even as of now, Uganda does not have a national registration law requiring every death of a person in Uganda to be registered. Records regarding the death of someone are thus usually supplied by family members of the deceased and local leaders, usually of the place where the deceased lived or was buried. None of this evidence was adduced before the trial judge as proof of the death of those alleged "dead" registered voters, alleged to have voted. No death certificate of any sort was produced before the trial court in respect of any of these persons Mr. Oyeri Neggrey did not claim to have personally known each one of these alleged dead voters. He did not give the time when each one died or the actual place of residence and/or burial, apart from asserting the general statement that they were registered voters at the stated polling station.

With respect, I find that there was no credible evidence to satisfy the court that those registered voters alleged to have been dead were actually dead. The learned trial judge was accordingly in error to have taken this fact as proved to the satisfaction of the court.

As to the contravention of the electoral laws through voter intimidation, harassment and violence, the learned trial judge, held, rightly in my view, that it was not shown to the satisfaction of court that the acts of violence, voter intimidation and harassment were caused by the appellant or his agents with his knowledge, consent or approval. I hasten to add also, which the learned trial judge did not do, that on the overall evaluation of evidence, it was not established at the required level of burden of proof in an election petition, that voters at this election in this constituency were prevented from voting for a candidate of their choice by reason of acts of voter intimidation, harassment and violence. The petitioner, in my judgement, cannot be said to have satisfied court that the entire election in this constituency was conducted in an atmosphere of intimidation, bribery, and violence that subverted the will of the people.

For the reasons given, I find that the learned trial judge failed to properly evaluate the evidence on record and because of this failure he wrongly held that there was non-compliance with the electoral laws and the principles laid thereunder.

The second issue is whether non-compliance with the electoral laws and principles therein in the conduct of the Parliamentary elections in West Budama County South Constituency affected the results of the election in a substantial manner.

Section 61(1)(a) of the Parliamentary elections Act, provides that an election of a candidate as a member of parliament shall be set aside on the ground, if proved to the satisfaction of the court, that non-compliance with the provisions of the Parliamentary Elections Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the non compliance and the failure affected the result of the election in a substantial manner.

In Supreme Court of Uganda, ***Election Petition Appeal No.18 of 2007: MUKASA ANTHONY HARRIS V DR. BAYIGA MICHAEL PHILIP LULUME*** their Lordships held that the phrase **"proved to the satisfaction of the court"** on a balance of probabilities means that the petitioner must prove the occurrence of a fact to have been more probable than not.

Sections 100, 101 and 102 of the evidence Act Cap.43 set out parameters to determine as to whom the law places the responsibility to prove facts that need to be proved. Thus the petitioner had the burden of proof to prove to the satisfaction of the court and balance of probabilities the matters he asserted in the petition. Sections 101 and 102 make room for the shifting of the burden of proof in the process of proving and disproving the alleged facts in a case. The overriding principle to apply in determining the shift of the burden is that there must be sufficient evidence prima facie adduced by the one bearing the burden to establish the fact, before the

onus is shifted to the opposite party. In other words, the party on whom the onus lies must prove his/her case sufficiently so as to justify a judgement in his/her favour if there is no other evidence given. It would be wrong to allow the burden of proof to be shifted by a redundant averment in the
5 pleading of an issue framed upon that averment: See:***SARKAR'S LAW OF EVIDENCE, 14TH ed at page 1339.*** See also: ***STONEY VS EASTBOURNE RURAL COUNCIL [1962] 1 Ch.367.***

The rule that the burden of proof lies on the one who affirms a fact and not
10 the one who denies it, is an ancient rule founded on considerations of good sense and can only be departed from only on strong reasons: See: ***Supreme Court of Uganda Civil appeal No.4 of 1991: J.K. PATEL VS SPEAR MOTORS LTD.***

It is in the proper discharging of the burden of proof by the parties
15 concerned, that court can be in a position to determine whether or not the contravention of the electoral laws in an election have had a substantial effect upon that election.

The term ***"affected the result"*** of an election was considered in 1966 by
20 the High Court of Tanzania in MBOWE VS. ELiufoo [1967]EA 240: at page 242 when George, C.J. stated, that:

In my view in the phrase "affected the result" the word "result" means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if

after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules".

The ***Uganda Supreme Court in Presidential Election Petition No.1 of 2001: Dr. Kiiza Besigye Vs Yoweri Museveni,*** Mulenga, JSC, applying ***the above principles of the Mbowe case*** (supra) held, with the concurrence of the rest of the justices, that:-

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

The supreme Court of Zambia in ***ANDERSON KAMBELA MAZOKA & 3 OTHERS Vs LEVY PATRICK MWANAWASA & 3 OTHERS: Presidential Petition No. SCZ/01/02/03/2002*** dealt with the issue of determining

whether defects in the conduct of the Presidential election in Zambia had substantially affected the result of the election. The court referred to its earlier case of ***LEWANIKA & OTHERS VS CHILUBA***, where it had stated:-

"……….it can be said that the proven defects were such that the
5 ***majority of the voters were prevented from electing the candidate whom they preferred or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true will of the majority of the voters".*** The court then went on to hold in the Mwanawasa case that:

10 ***"The few partially proved allegations are not indicative that the majority of the voters were prevented from electing the candidate whom they preferred or that the election was so flawed that the dereliction of duty (by Electoral Commission) seriously affected the result which could no longer reasonably be said to reflect the free***
15 ***choice and free will of the majority of the voters".***

The same principles enumerated above were followed by the Uganda Supreme Court in another ***Presidential Election No.1 of 2006: Rtd Col. Dr. Kiiza Besigye Vs Y.K. Museveni.***

20

The test to be applied in determining the effects of the irregularities on the result of the election depends on the particular facts of the case. It may be the quantitative or the qualitative approach, or both of them. The quantitative approach concerns numbers while the qualitative looks at the

quality of the whole electoral process of the particular election. It is the nature of the evidence before the court that is used as a yardstick in deciding which test to use, or whether to use both of them: See: ***Court of Appeal Election Appeal No.9 of 2002: MASIKO WINIFRED KOMUHANGI VS BABIHUGA J. WINNIE.***

In this case, the trial judge used both tests. I am also of the considered view that the evidence adduced in the case called for an application of both tests.

From the approach of the quantitative side, it has been already held in this judgement that the learned trial judge was in error when he discarded the inclusion in the final tally of the results, the election results of Panyangasi Primary school, Rubongi Secondary school, Rugot Church, Mawele Primary School and Siwa Primary School polling stations.

The only polling station where the learned trial judge has been found right to have excluded the results is Bendo Nursery school polling station.

I have also found that the learned trial judge erred in holding that it had been proved to the satisfaction of the court that a number of registered voters had died and that voting had gone on using the names of the dead voters to vote.

It follows therefore that since the appellant had been declared and gazetted with a winning majority after the election, the exclusion of the results of the five (5) polling stations notwithstanding, and given the fact that the appellant won at all the said five (5) polling stations, the majority of the winning votes of the appellant is now higher than that of the respondent or any other candidate who participated in this election. Hence from the quantitative test, it cannot be said, that whatever non compliance with the electoral laws and the principles therein that has been proved, can be said to have affected the winning majority of the appellant in any substantive way.

From the view of the application of the qualitative test, no electoral offence was proved to have been committed by the appellant in the course of the election. The trial judge found it as a fact that the appellant or his agents were not responsible for the voter intimidation, harassment and violence. I have held, on re-evaluating the evidence, that it was not established that voters in the constituency at this election were prevented from voting for a candidate of their own choice by reason of acts of voter intimidation, harassment and violence.

The answer to the second issue therefore is that whatever non-compliance with the electoral laws and the principles therein in the conduct of the parliamentary elections in west Budama County south Constituency was proved, the same did not affect the results of the election in a substantial manner.

In conclusion, this appeal is allowed. The judgement of the High Court dated 23.09.2011, whereby the election of the appellant as Member of Parliament for West Budama County South Constituency was set aside, is hereby vacated. It is declared that the appellant, OBOTH MARKSONS JACOB, is the elected Member of Parliament for West Budama County South Constituency, having had the majority votes of the electorate in the election held on 18.02.2011.

On the issue of costs, this court has already noted earlier on in this judgement, that the appellant, of his own choice, did not add the Electoral commission as a co-respondent to the appeal. According to the evidence on record, the trial in the court below brought out the fact that the Electoral Commission was responsible in a rather significant way for much of what went wrong at this election. By excluding the Electoral Commission from the appeal, the appellant gives up his right to recover costs of the appeal from the said Electoral Commission. To order otherwise would be to condemn the Electoral Commission in its absence during the prosecution of the appeal.

Accordingly it is ordered that the appellant is to recover ⅓ of the costs of the appeal from the respondent, and he is to recover full costs of the High Court jointly and/or severally from both respondents to the petition.

It is so ordered.

Dated at Kampala this ……**05th** ….day of **March, 2012**.

……………………………………….

REMMY.K. KASULE

5 **JUSTICE OF APPEAL**

JUDGMENT OF A.E.N.MPAGI-BAHIEGEINE, DCJ

I have read in draft the judgment prepared by R.Kasule, JA.

10 I agree with his appraisal of the evidence and conclusion arrived at.

I need not add anything.

Since C.K.Byamugisha, JA is also of the same view the appeal succeeds with orders as stated in the lead judgment.

15 **A.E.N.MPAGI-BAHIEGEINE,**

DEPUTY CHIEF JUSTICE

20 **JUDGMENT OF BYAMUGISHA, JA**

I had the benefit of reading in draft form the judgment of kasule ja which has hust been delivered.

I agree with his evaluation of evidence and conclusions he has reached allowing the appeal.

I have nothing useful to add.

Dated at Kampala this …**5th** …day of **March, 2012**

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C.K.BYAMUGISHA
JUSTICE OF APPEAL