

IN THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
PARLIAMENTARY ELECTION PETITION No.0001 OF 2006
IN THE MATTER OF PARLIAMENTARY ELECTIONS ACT, ACT
17 OF 2005

AND

(IN THE MATTER OF THE PARLIAMENTARY ELECTIONS)
(ELECTION PETITIONS) RULES

AND

IN THE MATTER OF PARLIAMENTARY ELECTION OF FEBRUARY
23RD 2006

KABATSI JOY KAFURA ::::::::::::::::::::::::::::::::::: PETITIONER

VERSUS

- 1. BANGIRANA KAWOOYA ANIFA**
- 2. ELECTORAL COMMISSION::::::::::::::::::::::::: RESPONDENTS**

JUDGMENT

KABATSI JOY KAFURA, the petitioner, on the 23rd day of February, 2006 contested, as an independent candidate, the Parliamentary elections for a woman member of Parliament for Sembabule District, together with three other candidates. The others were:

1. BANGIRANA ANIFA KAWOOYA, the first respondent, belonging to the NRM party;
2. NAKIGANDA IRENE JOSEPHINE, belonging to the Democratic Party (DP); and
3. NAMUKASA JUSTINE MUKIIBI, an FDC party candidate.

This election was part of the general elections held on that day.

The Electoral Commission, the second respondent, which organized the election, declared the 1st respondent the winner. It is not in dispute that the declared results were as follows: -

- | | | | |
|-------|----------------------------|---|--------------|
| i). | 1 st respondent | - | 29,398 votes |
| ii). | Petitioner | - | 28,199 votes |
| iii). | Nakiganda Irene Josephine | - | 787 votes |
| iv). | Namukasa Justine Mukiibi | - | 1,649 votes |

The petitioner was dissatisfied with the election result. On 26th April, 2006 she petitioned this court and set out many complaints as the basis for her dissatisfaction. The petitioner asked the court to declare: -

- (a) That the election of the 1st respondent is null and void; that it be set aside, and new elections held;
- (b) That the costs of the petition be provided for.

The petition was accompanied by an affidavit sworn by the petitioner dated 24th April, 2006. In her petition the petitioner sets out three main grounds of complaint, namely: -

- (a) That there was non-compliance with the provisions of the constitution, the Parliamentary Elections Act, 17 of 2005 (PEA), and the Electoral Commission Act (ECA) relating to the conduct of the said elections and principles laid down in the said Acts, and that the non-compliance and failure affected the result of the election in a substantial manner.
- (b) That the 1st respondent was, at the time of her election, not qualified for election as a member of Parliament contrary to S.4(1) (c) of the Parliamentary Elections Act.
- (c) That the 1st respondent committed illegal practices contrary to sections 68 and 72 of the Parliamentary Elections Act in connection with the said election personally, or by her agents with her knowledge and consent, or approval.

The case put up by the 1st respondent in answer to the petition can be summarized as follows: -

- (a) that the 1st respondent is qualified to be elected a member of Parliament under S.4(1) (c) of the Parliamentary Elections Act as she possesses the prescribed academic qualifications.
- (b) That the 1st respondent did not commit the offence of bribery in connection with the said election personally, or by her agents with her knowledge and consent or approval.
- (c) That the election was conducted in accordance with the principles set out in the Constitution, the Parliamentary Elections Act and the Electoral Commission Act, and that if there was any failure or non-compliance it did not affect the result of the election in a substantial manner.

The 2nd respondent also filed an answer to the petitioner and put up the following case: -

- (a) That it conducted the general elections held on 23rd February, 2006 in accordance with all the electoral laws and principles laid therein, upon which the 1st respondent

was declared the winner of the woman Member of Parliament seat for Sembabule District.

- (b) That if there was any non compliance with the electoral laws, which is denied, it did not affect the results of the election in a substantial manner.
- (c) That the 1st respondent was duly qualified for election as a member of Parliament at the time of the election.
- (d) That it is not aware of the alleged offence of bribery allegedly committed by the 1st respondent or by her agents.

The petitioner was represented by learned Counsels Mr. Byamugisha Nester and Mr. Wandera Ogallo. The 1st respondent was represented by learned Counsel Mr. Kakuru Kenneth. The 2nd respondent was represented by learned Counsel Mr. Kandeembe Ntambirweki.

The parties, through their Counsel, agreed on some facts which included the following: -

- (i) That the presidential and regular Parliamentary elections were also held on 23rd February, 2006.
- (ii) That the 2nd respondent was responsible for, and did organize, the said elections.

- (iii) That the elections were held under a multiparty system.
- (iv) That the number of registered voters for Sembabule District was 85,016.
- (v) That the number of valid votes cast were 60,033.
- (vi) The number of invalid votes were 1,171.
- (vii) The total votes cast were 61,204.

At the scheduling conference, the court in consultation with learned Counsel who appeared for the parties, framed the following five issues for determination.

1. Whether the election of the 1st respondent as a woman Member of Parliament for Sembabule District was conducted in compliance with the provisions of the Constitution, the Parliamentary Elections Act, 17 of 2005, and the Electoral Commission Act, and in accordance with the principles laid down in the said laws.
2. If the answer to issue No.1 above is in the negative, whether the non compliance affected the result of the election in a substantial manner.

3. Whether the 1st respondent committed illegal practices c/ss 68 and 72 of the Parliamentary Elections Act in connection with the election.
4. Whether the 1st respondent at the time of the election possessed the prescribed minimum academic qualification for election as a member of parliament.
5. Whether the parties are entitled to the remedies sought

According to rule 15 of the Parliamentary Elections (Election Petitions) Rules (S.I.141-2) all evidence at the trial of the petition is required to be adduced by affidavits. Cross-examination of the deponents may be permitted only with leave of the court. Accordingly the parties filed many affidavits to support their respective cases. The petitioner filed 54 affidavits both in support of the petition and in reply to the affidavits of the 1st and 2nd respondents. The 1st respondents filed 42 affidavits in support of her answer to the petition, and also in reply to the petitioner's affidavits. The 2nd respondent filed three (3) affidavits in support of its answer to the petition, and also in reply to the petitioner's affidavits.

Leave was granted to the 1st and 2nd respondents to cross-examine: -

- (i) The petitioner (PW1)
- (ii) Ssekikubo Theodore (PW2)
- (iii) Ssentongo Herman (PW3)

Leave was equally granted to the petitioner to cross examine the 1st respondent.

Counsel for all the parties read the affidavits deponed in support of their cases while making their submissions to this court. Several authorities were cited and, in some instances, copies were provided to the court. Upon completion of the hearing I have carefully perused and evaluated the evidence adduced by the parties. I have also studied the various authorities cited to court.

The burden of proof:

S.61(1) of the Parliamentary Elections Act provides:

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

It is generally agreed that the burden of proof lies on the petitioner to prove the allegations made against the respondent

to the satisfaction of the court. The petitioner has to prove her case to the satisfaction of the court. Controversy used to surround the standard of proof required to satisfy the court.

In Election Petition No.1/2001 Col (Rtd) Dr. Besigye Kizza vs Museveni Yoweri Kaguta and Electoral Commission, in his judgment ODOKI, CJ at page 20, said:

“The standard of proof required in this petition is proof to the satisfaction of the court. It is true that a court may not be satisfied if it entertains a reasonable doubt, but the degree of proof will depend on the gravity of the matter to be proved.”

Then he went on to say:

“Since the legislative chose to use the words “proved to the satisfaction of the court” it is my view that that is the standard of proof required in an election petition of this kind. It is a standard of proof that is very high because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance.”

ODER,JSC (RIP) at page 214 said:

In the instant case the learned counsel for both the 1st and 2nd respondents have suggested a standard of proof which is higher than proof on a preponderance of probabilities but short of proof beyond reasonable doubt. I agree with them.

.....Parliament has ordained that a court must be satisfied. Only Parliament can prescribe a lesser or more requirement. Parliament would have said in the Act that election offences should be proved on the balance of probability or beyond reasonable doubt if it wanted to do so. It did not, and left it to the discretion of the courts or judges what is meant by being “satisfied”.

All that is required, in my view, is that the court must be satisfied that alleged grounds for annulment of an election have been proved. If it has reasonable doubt then the court is not ‘satisfied’ ”.

Parliament has since expressed itself clearly on the question of standard of proof. Subsection (3) of S.61 of the Parliamentary Elections Act [17 of 2995] provides:

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

So, despite the interpretation given by the Supreme Court above, the position now appears to be that

“proof to the satisfaction of the Court” is proof “on the basis of a balance of probabilities”.

To use the words of ODER, JSC (RIP) only Parliament can prescribe a lesser standard of proof. Parliament has said in the Act that the standard of proof required is a balance of probabilities. I think this has settled this matter.

I shall not consider the issues in the order in which they have been framed. I wish to start with issue No.4.

Whether the 1st respondent at the time of the election possessed the prescribed minimum academic qualifications for election as a member of Parliament.

Under S.61 (1) (d) of the Parliamentary Elections Act the election of a candidate as a member of Parliament can be set aside if it is proved that the candidate was at the time of her election not qualified or was disqualified for election as such. Section 4 of the Act sets out the requisite qualifications. With regard to academic qualifications S.4 (1) (c) provides:

**“(1) A person is qualified to be a member of parliament if that person -
(c) has completed a minimum formal education of Advanced Level Standard or its equivalent.”**

In the petition it was alleged in para.7 as follows:

“7. FURTHER your petitioner states that the 1st respondent was at the time of her election not qualified for election as a member of Parliament contrary to section 4 (1) (c) of the Parliamentary Elections Act.

In the petitioner’s affidavit in support of the petition para.9 states:

“9. That the 1st respondent does not possess the required minimum academic qualifications to be elected member of Parliament and Parliamentary evidence of this shall be presented at the trial.”

In her answer to the petition in para.5 (p). the 1st respondent averred thus:

“p). Paragraph 7 is denied.”

The 1st respondent swore an affidavit in support of her answer to the petition, and in reply to the petitioner’s affidavit. In para.23 she stated:

“23. I do possess the required minimum academic qualification to be elected member of Parliament and as such paragraph 9 is false, a copy of my degree certificate is annexed hereto. (Annexure y)”.

Annexure y is a photocopy of a degree of Bachelor of Arts in Development Studies (Second Class with Honours - Upper Division) awarded at a congregation held at Nkumba University on 23rd April 2005.

The petitioner swore an affidavit in reply dated 14th September 2006 and filed in court on 19.9.2006. In this affidavit the petitioner challenged the 1st respondent's degree by paras 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26. I will quote some of those paragraphs.

Para 14 states:

“14. That the 1st respondent presented a degree of Bachelor of Arts - Development Studies of Nkumba university for her nomination as a Woman District Representative Candidate for Sembabule District. A photocopy of the degree certificate is annexure “y” to the 1st respondent's affidavit in support of the answer to the petition.”

Para.18 states: “18. That my advocates wrote to the Registrar Nkumba University on 21st April 2006 requesting certified copies of all the documents tendered by the first respondent for admission in that University and I delivered the letter in the company of Hon. Sekikubo Theodore and received the documents in para.7 hereof.”

The documents which the petitioner received and which are mentioned in para.7 are:

- (i) A diploma from Kampala Business Institute obtained in 1991 Annexure "AP7".
- (ii) A diploma from Uganda National Chamber of Commerce and Industry Annexure "AP8"
- (iii) A diploma from Management Business Skills - Annexure "AP9.
- (iv) A degree certificate from Knights bridge University - annexure "AP 10".

Para 8 states: - " 8. That the 1st respondent presented the said documents to Nkumba University and was admitted for the Bachelor of Arts, Development Studies Degree based thereon. A photocopy of a letter from Nkumba University to that effect is Annexure "AP 11".

Para 19 states: "19. That on handing to me the said documents the Registrar Mr. Busulwa requested me to inform him if we established in our investigations that the first respondent was admitted and awarded the degree on the basis

of forged documents to enable their senate cancel the said invalid degree certificate.”

Para 15 states: “19. That on handing to me the said documents the Registrar Mr. Busulwa requested me to inform him if we established in our investigations that the first respondent was admitted and awarded the degree on the basis of forged documents to enable their Senate Cancel the said invalid degree certificate.”

“15. That I am advised by my advocates and I verily believe their information to be true that in so far as the said degree certificate was applied for by the 1st respondent on the basis of forged documents and Nkumba University admitted her for the degree on that basis, the resultant graduation and a ward of the degree were null and void as nothing based on fraud or forgery can pass valid title.”

What comes out of the above extracts, in my view, are two positions:

- (i) That the 1st respondent possesses a degree of Bachelor of Arts in Development Studies from Nkumba University; and

- (ii) That she presented the said degree to the 2nd respondent for her nomination as a Woman District Representative Candidate for Sembabule District.

Learned Counsel Mr. Wandera Ogalo argued the fourth issue on behalf of the petitioner.

Counsel cited Article 80 (1) (c) of the constitution. It provides:

“80 (1) A person is qualified to be a member of Parliament if that person -

- (a)
- (b)
- (c) **Has completed a minimum formal education of Advanced Level Standard or its equivalent which shall be established in a manner and at a time prescribed by Parliament by law.”**

Counsel also referred to S.4(1) (c) of the Parliamentary Elections Act.

He submitted on the question of burden of proof. He cited the case of:

HAJI MULUYA MUSTAPHAR VS ALUPAKUSADHI WAIIBI WAMULONGO AND TWO OTHERS,, Election petition No.22 of 1996, by C.K.Byamugishsa, J (as she then was).

He also cited:

RASHID GOVULE YIGA & MANOHA ACHILE MILA VS OLEGA ASHRAF NOAHA AND TWO OTHERS Election petition No.1 and 2 of 2001, by Rubby Aweri Opio,J.

In the Haji Muluya Mustapha case (Supra) C.K.Byamugisha, J (as she was then) at page 13 of her judgment, said;

“As stated earlier, the first respondent offered himself as a candidate, he was duly nominated and eventually elected as a member of Parliament. It can be assumed therefore that he asserts that he has the minimum educational qualifications laid down in the statute. He knows which school and institutions he has attended as a student and generally what he has been doing in his adult life. These are facts which are peculiarly or specially within his knowledge. He therefore has the burden to prove to the satisfaction of the court that he is qualified to be a member of parliament. All he has to do is to adduce evidence of the schools he attended with the certificates obtained and the evidential burden will shift to the petitioner to dispute the qualifications by adducing evidence

which will cast a reasonable doubt on their authenticity”.

In the Rashid Govule Yiga case, Justice Aweri Opio, at page 8 of his judgment, said:

“It is trite law that the burden of proof in election petitions is on the petitioner. This burden of proof ordinarily does not shift. When it shifts at all, it prescribes that the petitioner should have prima facie established a case against the respondent that would have entitled him to a judgment.”

The learned judge quoted a passage in Sarkar’s law of Evidence vol.2, 14th Edn. from page 1338 - 1340. He also referred to Election petition No.1 of 2001. Col.(Rtd) Besigye Kizza vs Y.Museveni Kaguta & Anor (Supra).

However, despite reference to those authorities the learned judge went on to say: “In the instant case, the qualification of Hon. Olega is within his knowledge and therefore the burden is on him to show that the certificate which he presented was his and not that of Betty Omoda. In order to discharge the said burden of proof the first respondent should have done the following.....”.

Learned Counsel Mr. Wandera Ogalo, while submitting on the several affidavits filed on behalf of the petitioner to challenge the

first respondent's academic documents, said that on the authorities cited above it is sufficient if the petitioner casts doubt on the academic documents; that the petitioner does not have to prove forgery.

Learned Counsel Mr. Kakuru submitted that S.61(1) of the Parliamentary Elections Act places the burden of proof on the petitioner. He submitted that the burden of proving necessary grounds to have an election set aside rests on the petitioner. He submitted that the standard of proof was settled by S.61(3) of the Parliamentary Elections Act as being a balance of probabilities.

Counsel submitted that for purposes of S.61(1) (d) of the Act the petitioner has to establish a prima facie case. He submitted that once that is established the evidential burden shifts to the 1st respondent who has a duty to rebut it.

Counsel posed the question:

How weighty is the evidence necessary to shift the burden?

Counsel cited:

Col. (Rtd) Besigye Kizza vs Yoweri Museveni Kaguta & Anor (Supra). In his judgment at page 176, ODOKI, CJ said:

“As far as the shifting of the burden of adducing evidence is concerned it is stated in Sarkar’s Law of

Evidence Vol.2 14th Edn. 1993 Reprint, 1997 pages 1338 - 1340 as follows:

“It appears to me that there can be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient Prima facie to establish the case of the party on whom the onus lies..... what is meant is that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence.”

KAROKORA, JSC at page 262 agreed with the above position. He said:

“.....it appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient prima facie to establish the case of the party on whom the onus lies.”

The learned justices of the Supreme Court were agreed generally that in the first instance the party on whom the onus lies must prove his case sufficiently of justify a judgment in his favour if there is no other evidence given to contradict it.

Relying on that authority learned counsel Mr. Kakuru submitted that before the burden shifts the evidence before the court must be such that the petitioner would be able to get judgment if there was no evidence from the 1st respondent.

Dr. John Jean Barya swore an affidavit dated 23rd August, 2006, and I quote here below some extracts from it:

“2. That on 19th August, 2006, my firm wrote a letter ref:BB/GEN/689 to the Executive Director of National Council for High Education (NCHE) requesting it to invoke the provisions of the Universities and other Tertiary Institutions Act and regulations made there under to declare that the degree obtained by the respondent from Nkumba University, cannot, being based on forged entry admission requirements be valid.”

“3. That in the said letter the forged certificates and various affidavits proving them to be forged were provided to NCHE for its guidance..... The affidavits relating to the forged certificates are contained in volume II of the petitioner’s affidavits in support at pages 1, 10, 13, 17 and in the affidavit of Lubanga the Permanent Secretary, Ministry of Education that is also on record.”

“4. That on 23rd August, 2006 NCHE replied to our letter under reference vide theirs ref.NCHE/OA/025.....”. The said letter from NCHE dated 23rd August, 2006 was annexed to the said affidavit. The letter was addressed to Messrs Barya, Byamugisha & Co. Advocates. The subject matter was:

“Validity of degree of Bachelor of Arts in Development Studies of Nkumba University issued to Kawooya Anifa Bangirana.”

I quote para.2 of that letter:

“We have brought the contents of your letter to the attention of the Academic Registrar of Nkumba University and he has informed us that you should take up the case with the University so that should it be proved that forged documents were used by the above lady, the University would follow its laid down procedure to withdraw the degree.”

I also quote para.3 of that letter:

“In the last paragraph of your letter you asked us to declare the said degree invalid. All that we can state

as a general rule is that if it is proved that a degree is based on forged University entry certificates, that degree cannot be valid.”

The NCHE was given the following documents:

- (i) A letter dated 24th January, 2006 written by the Academic Registrar of Nkumba University, addressed to the Director of CID.
In that letter the Academic Registrar listed the documents which the 1st respondent used to obtain admission to that University to study for a Bachelor of Arts - Development Studies.
- (ii) A diploma in Business Administration awarded by Kampala Business Institute.
- (iii) A diploma in project planning and Management and a diploma in Business Management awarded by Uganda National Chamber of Commerce and Industry.
- (iv) A letter of verification of results by UNEB.
- (v) A degree - B.A Public Administration awarded by Knightsbridge University.

- (vi) A copy of an affidavit sworn by James Mwandha dated 5th May, 2006.
- (vii) A copy of an affidavit sworn by Katutumba Boney.M dated 2nd May 2006, together with a sheet of signatures as an annexure.
- (viii) A copy of a letter dated 19th May, 2001 addressed to the Registrar, Management and Business Skills Institute written by Dan.N.Odongo, Ag. Secretary, UNEB.
- (ix) A letter dated 8th May 2006, addressed to M/s Barya, Byamugisha & Co. written by Dan.N.Odongo, for Executive Secretary, UNEB.
- (x) A copy of an affidavit sworn by Dan.N.Odongo dated 17th May, 2006.
- (xi) A copy of an affidavit sworn by Francis Lubanga dated 30th June, 2006.
- (xii) A copy of an affidavit sworn by Sarah Barton, Deputy Director British council, dated 16th May 2006.

- (xiii) A photocopy of a degree of Bachelor of Arts in Development Studies of Nkumba University.

In para.5 of his affidavit Dr. John Jean Barya stated his firm belief that the 1st respondent acquired the above mentioned degree on the basis of forged diplomas and certificates, and that the said degree is invalid.

The advocates for the petitioner wanted the NCHE to study all the foregoing documents, and, thereafter, declare the said degree to be invalid.

I have noted the response of the NCHE. They referred the matter to the Academic Registrar of Nkumba University. The NCHE seem to be aware that the University has its own procedure for dealing with the matter, and that it is the University which may decide to withdraw the degree. So, NCHE never made any finding that the 1st respondent's academic documents presented to it were forged documents. Nor did NCHE declare the 1st respondent's degree to be invalid.

In the petitioner's affidavit in reply dated 14th September 2006, filed in Court on 19.9.2006, she stated in para. 20 as follows;

“20. That my said advocates further wrote to the said Registrar and provided all the evidence of the forged documents and requested the University to take

appropriate action as previously promised by the said Registrar.”

She further stated in parags. 21 and 22 as follows:

“21. That I delivered the letter in the company again of Hon. Ssekikubo and Mr. Herman Ssentongo to the Registrar who received the letter but declined to sign or stamp my advocates copy but the Registrar promised to lay the matter on the Agenda of the next Senate meeting.....”

“22. That my advocates have written a reminder to the said Registrar Nkumba University and still await a response. I delivered the letter to the Registrar.”

Attached to the said petitioner’s affidavit as AP 22 is the advocates’ letter of reminder dated 6th June, 2006. It was addressed to the Academic Registrar, Nkumba University. It was headed: “Forgery and uttering false documents by Bangirana Anifa Kawooya”.

Para.1 read:

“On 18th May, 2006 we wrote to you and providence (sic) evidence that Bangirana Anifa Kawooya presented forged certificates for admission in your University for the award of Bachelor of Arts - Development Studies which she subsequently obtained.”

Para.4 read:

“You promised to bring the matter to the attention of the Senate latest by 28th May 2006 for appropriate action and inform us of the outcome but you have not.”

Para.5 read:

“We would have thought that the University has taken great interest in this matter to redeem its reputation and image but you seem not to bother.”

Para.6. stated:

“We do inform you that we have instructions to take legal action to obtain appropriate remedy.”

I have not seen on the record any other evidence to suggest that Nkumba University has set in motion its own procedure for dealing with the matter. For certain there is no evidence on record that the said University has decided to withdraw the degree. The Advocates for the petitioner provided to the Registrar all the alleged evidence of the forged documents. Like they did with the NCHE it is likely that the advocates for the petitioner provided to the said Registrar the alleged forged certificates and the various affidavits which they claim prove the certificates to be forged. I have already listed the said documents in this judgment. It is not yet known what Nkumba University did with that evidence.

So until the hearing of this petition was concluded no authority had declared the 1st respondent's certificates to be forged. Similarly, no authority had declared the degree obtained by the 1st respondent from Nkumba University to be invalid. Nor is it known what legal action the Advocates of the petitioner have taken, or against whom, to obtain what they call appropriate remedy.

By a letter dated 24th January, 2006 written by the Academic Registrar Nkumba University addressed to the Director of CID he stated as follows:

“1. We based our admission of Kawooya Anifa Bangirana to BA - Development Studies on the following documents she presented to us.

- (i) **Diploma in Business Administration awarded by Kampala Business Institute.**
- (ii) **Diploma in Project Planning and Management and Diploma in Business Management by National Chamber of Commerce and Industry.**
- (iii) **A letter of verification of results by UNEB**
- (iv) **B.A Public Administration awarded by Knightsbridge University.**

“2. She was admitted to study for a Bachelor of Arts - Development Studies.”

Let me now consider the evidence concerning these certificates/documents.

1. Diploma in Business Administration.

I have carefully perused the affidavit sworn by James Mwandha dated 5th May, 2006.

In para.5 he stated that he was the Chairman of the Institute and used to sign all diploma certificates. In para.6 he stated that the chairman's signature on the certificate is not his. He stated that the signatories on the certificate are unknown to him. I have perused the photocopy of the said diploma certificate. It bears the signatures of a Principal and Chairman, Academic Board. In my view a proper identification of the signatories required recourse to the records of the Institute. This would have assisted Mr. James Mwandha to recall the Principal of the school, and to get a sample of his/her signature.

Identification of the chairman, Academic Board also required examination of the Institute's records. This was not done. In my view it was necessary to get an affidavit sworn by a person who was involved in the day to day operations of the institute. Such a person would have been able to state that the signatories on the Diploma certificate did not belong to that Institute.

The 1st respondent filed an affidavit sworn by MUSINGUZI APOLLO, who was a lecturer at the institute between 1990 - 1992. He identified the Principal of the Institute, a signatory to the diploma certificate, as Bigirwa Samuel. He stated that he checked the Institute's records in 1991 which showed that Annie.S. Bangirana attended the Institute from 1979 - 1981.

He further stated that he prepared the diploma certificate in 1991 on the instructions of the Principal. He stated that the diploma certificate is genuine.

With regard to the entry requirements for the Institute it is my view that Mr. James Mwandha should have produced a prospectus, or a brochure, or other evidence of the minimum entry requirements in 1979, the time when the 1st respondent allegedly joined that Institute. I prefer the evidence of Musinguzi Apollo to that of James Mwandha. The petitioner failed to produce evidence from a person who was involved in the day to day management of the Institute. James Mwandha's evidence is insufficient, and I cannot rely on it to find that the diploma certificate from Kampala Business Institute was forged.

2. Diploma in Project Planning and Management, and a Diploma in Business Management.

In paras 2 and 3 of his affidavit Katatumba Boney.M. stated in effect that on 12th June, 1998 he was the President of Uganda National Chamber of Commerce and Industry, and that he used to sign diplomas awarded by the Chamber. He stated that the signature of President appearing on the Diploma of Bangirana Anifa Kawooya was not his. He provided specimen signatures and writings to show how he

sings and writes his names. Unfortunately, this court has not been provided with evidence of a handwriting expert on the matter. I have examined annexure "X" to Katatumba's affidavit. I have noted the aspects pointed out by learned Counsel Mr. Kakuru. I agree with Counsel's observation that Mr. Katatumba signs differently each time he does so. The petitioner did not produce any diplomas properly signed by B.M.Katatumba for comparison. Katatumba did not comment on the second signature, allegedly that of the Secretary General, on the Diploma.

Katatumba did not clarify whether or not the 1st respondent attended any courses of study arranged by the Chamber. Nor did he comment on the academic transcript attached to his affidavit.

The 1st respondent filed an affidavit sworn by Charles Binwe dated 11th July, 2006. In that affidavit Charles Binwe narrated how the 1st respondent received her training leading to the award of a diploma certificate for Project Planning and Management. He disputed Katatumba's denial of the signature on the certificate.

In para.3 Charles Binwe claimed to have been the Chairman of the training committee. To her affidavit in reply dated 15th September, 2006 the 1st respondent attached, as Annexure "D", a booklet for the first graduation ceremony of

UNCCI held on June, 12, 1998. The booklet shows the pictures of Binwe Charles, the Chairman of the Training committee, and Boney Katatumba, the President of the Chamber. The booklet contains a list of graduands of a diploma in Project Planning and Management. The 1st respondent was listed as graduand No.27.

In light of this evidence, which I believe to be truthful, I am unable to rely on the evidence of Katatumba Boney.M. to say that the diploma certificate in question was forged.

It would appear that what the Academic Registrar of Nkumba University, in his letter of 24th January 2006 to the Director of CID, referred to as a diploma in Business Management was actually a diploma in Business Administration dated 15th July, 2000. It must have been wrongly listed together with the diploma in Project Planning and Management as having been awarded by the Uganda National Chamber of Commerce and Industry. This diploma in Business Administration was awarded by M/s Management and Business Skills Institute.

The petitioner filed an affidavit sworn by Francis Lubanga, the Permanent Secretary, Ministry of Education. From investigations carried out by his instruction Francis Lubanga concluded that Management & Business Skills institute must be operating in some premises other than the place where it

was licensed to operate, and that if this be the case then it is operating illegally, and would not be lawfully permitted to award recognizable valid certificates. He stated that he considered the said Institute to be a ghost institution. He stated that he was not aware of certificates, if any, that were awarded by the said Institute.

Charles Binwe, in his affidavit dated 11th July, 2006, from para.15 narrated how the said institute was established and licensed by the Ministry of Education. Francis Lubanga also stated that the said Institute was granted a license by his Ministry on 24th September 1999, as a Post Secondary Commercial Institution. Charles Binwe narrated how the 1st respondent joined the institute and undertook a diploma course in Business Administration. He stated that the 1st respondent completed her course in April, 2000, and that on 15th July, 2000 she was awarded a diploma. The petitioner has not adduced any evidence to show that the 1st respondent did not study at the said institute. Nor has the petitioner adduced evidence to show that the diploma certificate was not issued by the said institute. How the Ministry of Education carries out inspection of new institutions to ensure compliance with their regulations is their own business. In my view it has nothing to do with unsuspecting students who flock to such institutions for training. The concern of this court is to determine whether

the 1st respondent obtained the diploma certificate. On the evidence on record I find as a fact that she did. I have not come across any evidence from the petitioner to prove that this diploma certificate was forged.

3. A letter of verification of results by UNEB.

A copy of the letter of verification of results dated 25th August, 1993 issued by the Secretary of UNEB, addressed to the Area Manager, Zambia Airways was admitted in evidence as exhibit P.I. I have carefully perused this document, and compared it with a letter dated 23rd January, 2006 written by Dan.N.Odongo addressed to the Assistant Inspector General of Police CID, and annexed to his affidavit dated 17th May, 2006, filed by the petitioner. In para.4 of the affidavit Dan.N.Odongo stated:

“4. That I can confirm writing the other 2 letters dated 23rd January, 2006 - 1st February, 2006.”

I have observed that the 1st respondent's results stated in the letter of verification of results in 1993 are the same results which were given to CID Police on 23rd January, 2006.

I have also perused a letter dated 8th May 2006 written by Dan.N.Odongo, addressed to M/s Barya, Byamugisha & Co. Advocates. The said letter was also annexed to Dan.N.Odongo's

affidavit. In the said letter at the second page under item No.2 Dan.N.Odongo wrote:

“.....The contents (of the letter dated 23rd January 2006) reflect the records of results which are held by UNEB in the names of Bangirana Annie J.S. The differences in the in index numbers are insignificant - U019/4EACE 1973 and U019/004 EACE refer to the same person who was fourth on the list of candidates for the EACE 1973 examination at centre U019.”

The 1st respondent attached to her affidavit in reply dated 15th September 2006 annexure “Y” which is a certificate of completion of formal education of Advanced Level Standard or of its equivalent dated December,8, 2005 issued by the Executive Director, NCHE. By the said certificate the NCHE recognized that the 1st respondent holds the East African Certificate of Education, EAEC, 1973.

The 1st respondent stated during cross-examination that from 1970 - 73 she was in Kigezi High School where she sat for O-level examinations. She stated that she had a certificate together with the results slip. She said that these documents were misplaced during the war of 1979. She told court that she possesses a verification letter from UNEB of her O-level examinations results. She explained that it is a certificate that she sat for the

examinations in the names of Annie Bangirana J.S. She further explained that she was named Jovia Sarieta Annie Bangirana upon her birth. The petitioner has not adduced any evidence to show that those were not the names of the 1st respondent. I, therefore, find as a fact that the letter of verification of results issued by UNEB is genuine, and it reflects the records of results which are kept by UNEB in the names of Bangirana Annie J.S. I also find that the said letter is sufficient proof that the 1st respondent completed formal education of Ordinary Level Standard.

4. B.A. Public Administration awarded by Knightsbridge University.

The original degree certificate was admitted in evidence as exhibit P.3. Learned Counsel for the petitioner, Mr. Wandera Ogalo, submitted that the said degree was submitted to the NCHE for verification. Counsel pointed out that Annexure "B" to the 1st respondent's further affidavit filed on 15.9.06 showed that NCHE made enquiries from the Academic Registrar, Knightsbridge University. On Wednesday, October 26, 2005 NCHE wrote as follows:

"The purpose of this mail, therefore is to request you to inform us of the accreditation status of the University and to confirm to this Council the qualifications awarded to Anifa Bangirana Kawooya."

On 28th October 2005 one Henrik Fyrst Kristensen sent an email to the NCHE in which he stated:

“I can confirm that Anifa B.Kawooya was awarded the degree of Bachelor of Public Administration on 8th January 2001.

Knightsbridge University is a private, Danish higher education provider. Denmark has free higher education market with no overlap between the public and private provider. There is no form of external approval available to private providers, nor is any such required.....”

Learned Counsel Mr. Wandera Ogalo submitted that the 1st respondent's degree from Knightsbridge University was not included in the certificate issued by the NCHE dated December 8, 2005. He submitted that this cast doubt on the recognition of the said degree. Learned Counsel then attacked the features on the original degree (exhibit P.3). Counsel pointed out that the degree has two distinct and different logos; that it has signatures but no names of the signatories; that it is written in English which does not make much sense. Counsel submitted that the degree certificate has no evidential value because it was not notarised.

Counsel submitted that the degree certificate is not a genuine document and could not form the basis for entry into, or an award from, Nkumba University. Counsel submitted that the degree from Knightsbridge University tells lies about itself.

The Petitioner filed an affidavit sworn by Sarah Barton, the Deputy Director British Council, dated 16th May, 2006.

In para.3 she stated:

“3. That in response to that request I made inquiries from the United Kingdom authorities through the department for Education and confirmed that Knightsbridge University is not a U.K. recognized body and does not have U.K degree awarding powers and I wrote back to M/s Barya, Byamugisha & Co. Advocates in those terms as per annexure”B” hereto.”

Learned Counsel for the 1st respondent Mr. Kakuru submitted that the case of the petitioner was that the University did not exist. Counsel submitted that this was the import of Sarah Barton’s affidavit. Counsel submitted that the University does not exist in the U.K. He submitted that the evidence of Sarah Barton fell far below the standard of evidence required to prove any fact, let alone fraud. Learned Counsel referred to a letter dated 30th

August, 2006 written by the Academic Registrar, Nkumba University addressed to the Executive Director, NCHE. The Academic Registrar wrote as follows:

“1. Kawooya Anifa Bangirana on 18th August 2001 applied for a Postgraduate (sic) in Public Administration and Management.

2. At the sitting of the Higher Degrees Committee of 10th October, 2001, we looked at the applicant’s first degree obtained from Knightsbridge University, Denmark studied under Distance Learning Programme, other qualification and a wide range of her working experience in related field.

3. The Committee advised that she registers for an undergraduate course prior to undertaking a postgraduate.”

The Academic Registrar enclosed the minutes of the Higher Degrees Committee. The said minutes were attached to the 1st respondent’s affidavit in reply filed on 15th September 2006 as annexure “H”. I have carefully perused the said minutes, especially the membership of the said committee. The committee comprised Academic Professors and other holders of PHD

qualifications. It advised that candidate 0281 Kawooya Anifa Bangirana register for undergraduate studies.

In my view, the petitioner and any other person interested to know the accreditation status of Knightsbridge University should have extended the inquiries to the Danish Embassy. This was not done.

It is also my view that the Higher Degrees Committee of Nkumba University considered the 1st respondent's degree from Knightsbridge University, and after their assessment they advised her to register for undergraduate studies. It is my view that the petitioner has not adduced any evidence to prove that the degree from Knightsbridge University was forged. In the circumstances I find nothing new raised by the petitioner which would affect the assessment by Nkumba University of the said degree.

Learned Counsel Mr. Wandera Ogalo submitted that the 1st respondent holds several diploma certificates and a degree certificate from Knightsbridge University which all tell lies about themselves. He submitted that all those qualifications have been shown to be doubtful. He submitted that they could not be a basis for admission into Nkumba University. He submitted that the degree from Nkumba University is a Nullity; that it could not be a basis for nomination of the 1st respondent. He submitted

that the 2nd respondent was wrong to have accepted the nomination of the 1st respondent. Counsel cited:-

H.C. Election Petition No.0012 of 2006 GOLE NICHOLAS DAVIS VS ELECTORAL COMMISSION AND LOI KAGENI KIRYAPAWO (Kasule, Ag. Judge). Counsel contended that the facts in the above case are similar to the facts in the instant case. Counsel invited court to hold that the degree from Nkumba University is a nullity because the underlying certificates were null themselves.

I have carefully perused the judgment of my brother Kasule, Ag. Judge in the Kiryapawo case. In that case the court summoned one Moses Mubiru an acting academic Registrar at Bukalasa Agricultural College. He produced the records of the Veterinary Training Institute, Entebbe. The records included a register showing the names and place of origin of graduates of the institute, year of graduation, course and the award, a certificate or a diploma. The register covered the period from 1963 to 1992. The witness was given a copy of a diploma in Animal Husbandry (Uganda) allegedly issued by Veterinary Training Institute, Entebbe in the names of Loi Kageni, with serial No.74/155. He compared it with the records in the register. He found the names Loi Kageni not in the register as a person who was awarded a diploma in 1974 or at any other time before or after at that Institute. The serial number 74/155 was found to exist in the register, but the register stated the person who was awarded the

diploma of that serial number to be Nabalembeka Martha (Miss) of Kyotera. The witness concluded that the diploma in Animal Husbandry (Uganda) in the names of Loi Kageni was a forgery. The court accepted that evidence, and held Loi Kageni's diploma to be a forgery. At page 18 of the judgment the court said:

“It is the considered of (sic) view of this court that reliance by the second respondent on a diploma that she knew was a forgery to get admittance to a university and to get further qualifications, deprived her admission and the academic qualifications, subsequently obtained of any legitimacy”

In the instant case the petitioner was contented with merely casting some doubt on the authenticity of the diploma and degree certificates held by the 1st respondent. The petitioner did not consider it her duty to adduce cogent evidence to prove forgery. Yet she prayed court to declare the 1st respondent's diploma and degree certificates forgeries. In my view the facts in the Loi Kageni Kiryapawo case can be distinguished from the facts in the instant case. In the instant case I have found the petitioner's evidence largely wanting, and no basis for declaring any diploma certificate, or the Knightsbridge University Degree certificate, a forgery. I have not seen in the instant case any substantiated challenge to any of the documents mentioned by the Academic Registrar, Nkumba University, which the 1st respondent submitted

to them, and which the said Registrar stated were used as a basis of admission of the 1st respondent to a B.A. Development Studies undergraduate course. In my view the admission of the 1st respondent into Nkumba University remains valid. In his letter dated 30th August, 2006 the Academic Registrar wrote in the last paragraph as follows:

“Kawooya Anifa Bangirana was therefore duly admitted and registered for a Bachelor of Arts in Development Studies which she successfully studied and completed with an award of BA in Development Studies (Second Class with Honours - Upper Division) of 23rd April 2005.” An Academic Transcript issued by Nkumba University to the 1st respondent was attached to her Affidavit in reply filed on 15th September 2006 as annexure “T”. In conclusion of this matter I hold that the petitioner has failed to adduced evidence which can make this court say anything affecting the validity of the 1st respondent’s degree obtained from Nkumba University. I further hold that the petitioner has failed to prove on the basis of a balance of probabilities the ground provided for in S.61(1) (d) of the Parliamentary Elections Act.

I therefore answer issue No.4 in the affirmative that the 1st respondent at the time of the election

possessed a degree from Nkumba University, a qualification which is higher than the prescribed minimum academic qualifications for election as a member of parliament.

Next I wish to consider issue No.3 which is: whether the 1st respondent committed illegal practices c/ss 68 and 72 of the Parliamentary Elections Act in connection with the election.

Under S.61(1) (c) of the Parliamentary Elections Act the election of a candidate as a member of Parliament can be set aside if it is proved to the satisfaction of court that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.

In the petition it was alleged in para.6 as follows:

“6. Your petitioner further states that illegal practices of bribery contrary to section 69 of the Parliamentary Elections Act were committed by the first respondent personally and/or by her agents with her consent and/or approval.”

In the petitioner's affidavit in support of the petition para.8 states:

“8. That while campaigning, the first respondent bribed voters with cash, tarpaulins and saucepans with the intention that they voted her and refrained from voting for your petitioner.”

In her answer to the petition in para.5 (o) the 1st respondent averred thus: -

“(o) paragraph 6 is denied in toto. As the respondent did not bribe anybody, and no such illegal practice was reported to police or 2nd respondent. The petition does not state where, when and to who the bribe was given nor does it state the kind, nature or description of the bribe.”

In her affidavit in support of her answer to the petition, and in reply to the petitioner's affidavit the 1st respondent stated in para.22 thus:

**“22. I did not bribe any voters at all as alleged in
paragraph 8 of the affidavit. Paragraph 8 is
false.”**

The petitioner filed on 19.9.2006 an affidavit in reply. In para.2 (iii) she stated as follows:

“2.....

- (iii) **That my campaign agents and coordinators and polling agents reported to me that numerous electoral malpractices, illegal practices and offences were committed by the 1st respondent, her agents and supporters, the resident District Commissioner, Sembabule, Mr. Serwano Kabogorwa, Government Officials together with the polling officials and other agents of the second respondent in respect of which the several people have sworn affidavits as evidence in support of my petition.”**

The offence of bribery is provided for by S.68 of the Parliamentary Elections Act. It provides:

“68 Bribery.

(1) A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the

offence of bribery and is liable on conviction to a fine not exceeding seventy two currency points or imprisonment not exceeding three years or both.”

“(4) An offence under subsection (1) shall be an illegal practice.”

In H.C. Mbarara Election Petition No.3 of 2001: Musinguzi Garuga James Vs Amama Mbabazi and EC, Egonda-Ntende, J. at page 84 of his judgment para.307 gave the ingredients of the offence of bribery as the following:

“(1) Any person before or during an election

(2) With intent either directly or indirectly to influence another person to vote or refrain from voting for any candidate;

(3) gives or provides or causes to be given or provided any money or gift or other consideration to that other person.”

I consider the above a fair breakdown of the provision creating the offence of bribery.

In election Petition No.1 of 2001 Col.(Rtd) Dr. Besigye Kizza vs Museveni Yoweri Kaguta and EC, ODOKI, CJ in his judgment at pages 164 and 165, while commenting on illegal practices or offences, made two observations:

- (i) That there is no requirement to prove that the illegal practice affected the result in a substantial manner.
- (ii) The provision requires that the candidate be liable for the actions of his agents only when they are committed with his knowledge and consent or approval. To this extent the general principles of the law of agency have been modified.

Concerning specifically the illegal practice of offering gifts ODOKI, CJ in his judgment at page 180 said:

“I accept the submission of Mr. Bitangaro that the petitioner must prove the following ingredients to establish the illegal practice of offering gifts: -

- (i) **that a gift was given to a voter**
- (ii) **that the gift was given by a candidate or his agent**
- (iii) **that the gift was given to induce the person to vote for the candidate.**

It is trite law that the burden of proof lies on the petitioner to prove all the ingredients of the illegal practice under section 68 (i) of the Act.

On the question of the agency relationship between a candidate and his representatives or agents the law is that the candidate is liable only on proof that the agent acted on the candidate's express or implied authority or that the candidate ratified the act after it was done or appointed the agent to do all acts legal or illegal which he might think proper to support the candidate's interest.

See the judgment of TSEKOOKO, JSC at P.152 in Election Petition No.1 of 2001. At P.153 TSEKOOKO, JSC said:

"I do not think that prior knowledge and express consent or express permission or approval of a candidate is a necessary prerequisite to the Commission of an illegal practice or any other offences by a representative or an agent before a candidate's election is rendered liable to annulment.

In the nature of things, no candidate would openly and in public give consent or approval to his agents to commit illegal practices or other electoral offences.....

I think that once there is evidence of agency, gathered from the surrounding facts, the candidate should be held liable for the wrongful conduct of his agent/representative.”

Commenting on the statutory provision in S.58 (6) (c) of the Presidential Election Act (similar to S.61 (1) (c) of the Parliamentary Elections Act) MULENGA, JSC, said:

“Under that section, it is clear that an illegal practice or other offence which was not committed by the candidate, can be sustained as a ground for annulment of his election, only if it is proved to the satisfaction of the court that it was committed with the candidate’s “knowledge and consent”, or with his or her knowledge and approval.”

“To my understanding the legislature chose to use those words in order to limit the application of the sanction to only such an illegal practice or offence as the candidate assumed personal responsibility for, either through consent where he or she had prior knowledge, or through approval upon subsequent knowledge, of its being committed.”

In the Court of Appeal Election Petition Appeal No.12 of 2002: Amama Mbabazi and EC versus Musinguzi G.James, OKELLO, JA, in his judgment at page 42 observed that an allegation of bribery by a candidate in an election process is a serious matter and that it requires cogent evidence to prove it.

Para.8 of the petitioner's affidavit in support of the petition contains an allegation that while campaigning the 1st respondent bribed voters with cash, tarpaulins and saucepans. The petitioner did not state the places where this happened and the particulars of the voters involved.

Hon. Ssekikubo Theodore M.P. Lwemiyaga swore an affidavit, filed on 12.6.2006. In paragraphs 11, 12, and 13 of his affidavit Hon. Ssekikubo stated that on Sunday 19th February, 2006 he held a joint campaign rally with the 1st respondent and Hon. Sam Kuteesa at Kakoma Primary School. He said that he witnessed the 1st respondent offering 2 big saucepans and a tarpaulin to the voters of each LCI in Kakoma Parish, Lwemiyaga sub-county.

Hon. Ssekikubo stated that on the same day at about 4:00 p.m he witnessed the 1st respondent offering the same items to voters at a rally at Kakoma-Kasambya to all the LCIs in Lwensakala Parish of Lwemiyaga sub-country.

He stated that on the same day at about 8:30p.m at Kampala Primary School, Lwemiyaga sub-county the 1st respondent again made a similar offer to voters of 2 big saucepans and a tarpaulin

in every LCI in Kampala Parish, Lwemiyaga sub-county. On each occasion the 1st respondent requested the people to vote for her. Several questions arise from the above statement:

- (i) How many LCI villages are in Kakoma Parish?
- (ii) How many voters from each LCI attended this rally?
- (iii) How were the voters identified?
- (iv) How many LCI villages are found in Lwensakala Parish?
- (v) How many voters from each LCI attended the rally at Kakoma - Kasambya?
- (vi) How were these voters identified?
- (vii) How many LCI villages are found in Kampala Parish?
- (viii) How many voters from each LCI attended the rally at Kampala Primary School?
- (ix) How were these voters identified at 8:30 p.m?

- (x) To whom were these items handed in respect of each LCI?
- (xi) By what means were these items being conveyed from place to place?
- (xii) If Hon. Ssekikubo found the activities of the 1st respondent illegal and objectionable where did he report soon after those incidents?

In my view the affidavit of Hon. Ssekikubo missed out a lot of vital information. It is not sufficient to prove the essential ingredients of the illegal practice of bribery by offering gifts. No single recipient of the gifts was mentioned.

No single voter was identified. The people intended to be induced to vote for the 1st respondent remained unknown and incapable of being ascertained.

Lukabya Peter swore an affidavit which was filed on 12.06.2006. In para.9 of his affidavit he stated:

“9. That during the evening of 21st and 22nd February, 2006 the same persons I have mentioned in paragraph 8, went around the village showing the residents a big saucepan that had been given to the village by the respondent, telling them that anybody

who voted the petitioner should not expect to use it if they got any social function or problem.”

Lukabya Peter claims to be of Lwebitakuli Trading Centre. Is this the village he is referring to in Para.9 above ?

In my view any reference to a big saucepan as the one which was given to the village by the respondent is hearsay. Lukabya Peter did not state his source of information. I find para.9 of Lukabya's affidavit devoid of any probative value.

Kasozi Bagalaalina Muhamood swore an affidavit which was filed on 12.06.2006.

In para.6 he stated:

“6. That prior but close to the polling day in February, 2006, I witnessed a bribery act whereby Jolly Kyomugisha a key campaign agent of the 1st respondent gave ushs.50,000/= to Godfrey Kapinga the Movement Chairperson of our village and instructed him to use it to hire supporters of the petitioner to support the first respondent.”

In para.7 he stated:

“7. That on that same occasion the said Kyomugisha told Kapinga that he should also take advantage of the big saucepan and tarpaulin given by the 1st respondent to convince supporters of the petitioner to support the 1st respondent.....”

Jolly Kyomugisha swore an affidavit in rebuttal filed on 15.9.2006. In para.6 she stated that she never gave any money to Godfrey Kapinga as alleged in paras. 6 and 7 of the affidavit of Muhamood Kasozi Bagalaaliwo (sic). She stated that she did not even see Kapinga the whole of February 2006 at all.

Godfrey Twebaze, also known as Kapinga swore an affidavit, filed on 15.9.2006. In para.4 he stated that para.6 of the affidavit of Kasozi Bagalaaliwo is false; that he never received any money from Jolly Kemigisha; that he did not see her during the days preceding the last general elections.

In my view no proof has been produced to satisfy this court that Jolly Kyomugisha gave Ushs.50,000/= to Godfrey Kapinga with the 1st respondent's knowledge and consent. No evidence has been adduced to show that the 1st respondent subsequently came to know what Jolly Kyomugisha had done, and she approved or ratified it. I have found nothing in the affidavit of Kasozi Bagalaalina to suggest that the 1st respondent assumed personal responsibility for the acts of Jolly Kyomugisha.

In para.7 of his affidavit Kasozi Bagalaalina did not show that he possessed personal knowledge about any big saucepan and tarpaulin, or where they came from. The deponent stated what he overheard Kyomugisha tell Kapinga. So in my view any information that the 1st respondent gave any saucepan and tarpaulin is hearsay. In conclusion, what Kasozi Bagalaalina stated in parag.7 of his affidavit is not anywhere near proof of the ingredients of bribery.

Walukagga Abaasi of Kirebe village, Kabale Parish swore an affidavit, filed on 12.06.2006. In para.6 he stated:

“6. That prior to the voting day I saw Godfrey Kapinga the Kirebe village Movement Chairperson move around the village with a huge saucepan and tarpaulin while telling people that the 1st respondent had given them in order that people vote for her.....”

It is my view that any reference to the 1st respondent as a person who gave a saucepan and tarpaulin is hearsay. Godfrey Twebaze alias Kapinga stated in para.3 of his affidavit that he never received any saucepan or tarpaulin from the 1st respondent at all; that no such things were ever donated by the 1st respondent .

In para.5 he denied being an agent or a campaigner of the 1st respondent.

In my view para.6 of Walukagga's affidavit has no probative value. It does not assist the petitioner to prove the illegal practice of bribery against the 1st respondent.

Learned Counsel referred to the affidavits of Hon. Ssekikubo Theodore, Lukabya Peter, Kasozi Bagalaalina and Walukagga Abaasi, and submitted that the 3rd issue had been proved, and that it should be resolved in the affirmative. Counsel did not refer to the affidavit of Nyesigye Benjamin filed on 12.06.2006. However, learned counsel Mr. Kakuru referred to it and made submissions on it.

In para.6 of his affidavit Nyesigye Benjamin said:

“6. That I attended the rally convened and addressed by the 1st respondent herself on 21.2.2006 at Lwembogo Trading Centre at which she handed over a huge saucepan and tarpaulin and some money to James Kaihura and announced that she was giving them to the people so that they can vote for her and those who did not support her should not be allowed to partake of them even when they lose their loved ones.”

In her affidavit in reply filed on 15.9.2006 the 1st respondent answered in para.16. She stated:

“16. The affidavit of Nyesigye Benjamin is false as I did not at any one time during the last general elections or any time during the campaign period donate saucepans (sic), tarpaulins (sic) or any other gift to any person”.

Learned Counsel, Mr. Kakuru submitted that the petitioner had to prove that the saucepan and tarpaulin and money were given to a voter to induce him to vote.

James Kaihura, the alleged recipient of the items has not been identified as a voter, or an agent of the 1st respondent. It was not mentioned in what capacity James Kaihura represented the people. It was not stated which particular people were intended to be benefited. None of the voters who attended the said rally was identified, who could perhaps lay claim to those items. Learned Counsel Mr. Kakuru submitted that para.6 of Nyesigye's affidavit was general and could not prove anything. I do agree. I find no evidence that the people who were offered the alleged items were voters. In my view the people who were given the items were unknown and uncertain. I wonder how an anonymous group of persons could have been induced to vote for the 1st respondent. Nyesigye's evidence does not show that the 1st

respondent targeted any particular group of persons. In my view the 1st respondent could not seriously be taken to have intended to influence everybody in attendance to vote for her because of the alleged gifts. It would appear to me that a gift given to everybody is a gift to nobody. No particular person is certain about deriving benefit from such a gift. I do not see how such a state of affairs would induce any person to vote for the 1st respondent, or to refrain from voting for the petitioner. Because of the anonymity of the people intended to be influenced by the alleged gifts I find Nyesigye's evidence not useful in proving the petitioner's allegations against the 1st respondent.

Kanyonyi Umar, the LC.I Chairperson of Kirebe Village, Kabale Parish, Lwebitakuli sub-county, stated in his affidavit that on polling eve Godfrey Tumwebaze A.K.A Kapinga together with Benon, Movement Chairperson of Kabale Parish, Njuki, PWD Councilor of Kabale at Lwebitakuli sub-county, showed residents at different places in the village a huge saucepan and tarpaulin which were given to them by the 1st respondent while campaigning at Lwendezi. The deponent stated that those three people were saying that the items had been offered to the village by the 1st respondent so that people know that she feels for them and vote for her. From Kanyonyi Umar's affidavit any information connecting the 1st respondent to the donation of any items is obviously hearsay. Kanyonyi Umar has not stated that he

attended the rally at Lwendezi and saw the 1st respondent donate those items.

Kasozi Bagalaalina, the petitioner's campaign coordinator in Kabale Parish Lwebitakuli sub-county did not state that he saw the 1st respondent offer a big saucepan and tarpaulin to any group of people in Kabale Parish.

Walukagga Abaasi of Kirebe village, Kabale Parish, Lwebitakuli sub-county did not personally witness the 1st respondent giving any items to Godfrey Kapinga, or to any group of people in Kabale Parish.

Each of these deponents claims to have overheard another person allege that a big saucepan and tarpaulin had been given to the people by the 1st respondent. Learned Counsel Mr.Kakuru submitted that no link had been proved to exist between the people mentioned by these deponents and the 1st respondent. Counsel submitted that evidence of the illegal practice of bribery on record does not show that anything was done by the 1st respondent's agents with her prior knowledge and consent, or that she subsequently got knowledge of what her agents had done and she ratified or approved of it. I respectfully agree with and follow the words of MULENGA, JSC that the legislature used words in the provision of the law in order to limit the application of the sanction to only such an illegal practice or offence as the

candidate assumed personal responsibility for thorough knowledge and consent, or knowledge and approval.

In conclusion of issue No.3 I hold that it has not been proved to the satisfaction of this court on a balance of probabilities that the 1st respondent committed the illegal practices of bribery contrary to section 68 (1) of the Parliamentary Elections Act, either personally, or by any other person with her knowledge and consent or approval.

Let me now deal with issue No.1 which is:

Whether the election of the 1st respondent as a woman member of Parliament for Sembabule District was conducted in compliance with the provisions of the Constitution, the Parliamentary Elections Act, 17 of 2005, and the Electoral Commission Act, and in accordance with the principles laid down in the said laws.

Under S.61(1) (a) of the Parliamentary Elections Act the election of a candidate as a member of Parliament can be set aside if it is proved to the satisfaction of the court that there was non-compliance with the provisions of this Act relating to elections. The court must be satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and the non compliance and the failure affected the result of the election in a substantial manner.

Section 1(2) of the Parliamentary Elections Act provides:

“(2). The Commission Act shall be construed as one with this Act.”

Commission Act means the Electoral Commission Act [cap.140].

The Parliamentary Elections Act and the Electoral Commission Act must be read together and every provision of each of the Acts must be interpreted as if it has been incorporated in one Act, unless there is a clear inconsistency or ambiguity which must be resolved by holding that the later Act modified the earlier Act.

See also the judgment of ODOKI, CJ at Pg.31 in Election Petition No.1 of 2001 (supra).

The grounds for annulling an election of a candidate as a member of Parliament must be those contained only in the Parliamentary Elections Act.

S.61 (1) (a) provides for “noncompliance with the provisions of this Act relating to elections”.

The court is supposed to find out whether there was failure to conduct the election in accordance with the principles laid down in the provisions of the Act. However, when considering the latter it is necessary to have in focus the provisions of the Electoral Commission Act which contains the principles relating to a free

and fair election. Non-compliance with the provisions of the Commission Act is not per se a ground for annulling a Parliamentary election. Such non-compliance can be a ground if it affects the principles behind the provisions of the Parliamentary Elections Act which, in section 61(1) governs the annulment of an election of a Parliamentary candidate.

See the judgment of ODOKI, CJ at pg.32 in Election Petition No.1 of 2001 (Supra). Though the Chief Justice was considering the annulment of a Presidential Election the views he expressed would in my view apply equally to a Parliamentary Election. By section 1 (2) of the Parliamentary Elections Act the principles laid down in the Commission Act were incorporated into the former Act. The same principles were also laid down in the Constitution.

It was pleaded in para.4 of the petition that the 2nd respondent conducted the entire Parliamentary Election for the woman Member of Parliament in Sembabule District in contravention of and contrary to the provisions and the principles laid down in the Parliamentary Elections Act and the Constitution. Para.4 has subparagraphs from (a) to (y) . However, several of them are alleged violations of the provisions of the Commission Act. Under S.61(1) (a) of the Parliamentary Elections Act the Court is supposed to consider:

- (i) Non compliance with the provisions of that Act relating to elections;

- (ii) Whether there was failure to conduct the election in accordance with the principles laid down in the provisions of the Act.
- (iii) It is my view that the court is supposed to concentrate on alleged noncompliance with the provisions, and the principles laid down in those provisions, of the Parliamentary Elections Act. Non-compliance with the provisions of the Commission Act will be considered where it is alleged to affect any principles laid down in the provisions of the Parliamentary Elections Act.

Subparagraphs (a), (b), (c), (d), (e), (h), (i), (j), (k), and (u) of para.4 of the petition made no reference to the Parliamentary Elections Act.

Learned Counsel Mr. Byamugisha summarized the above grounds when he submitted that the 2nd respondent failed to conduct the elections in issue independently, fairly, freely and impartially. He submitted that the duty of the 2nd respondent to perform its functions independently and impartially is constitutional and mandatory. Counsel referred to Article 62 of the Constitution and section 13 of the Commission Act.

Article 62 provides:

“62. Independence of the Commission.

Subject to the provisions of this constitution, the Commission shall be independent and shall, in the performance of its functions, not be subject to the direction or control of any person or authority.”

The same provisions are reproduced in section 13 of the Commission Act. Counsel submitted that the 2nd respondent is a body corporate.(see section 2 of the Commission Act). Counsel submitted that the functions of the 2nd respondent can only be carried out through human persons. He submitted that these persons, whether they are members of the 2nd respondent, or its staff, or authorized persons, must carry out the functions with independence and impartiality. Counsel referred to section 30 of the Commission Act . It provides in subsection (1) as follows:

“30. Appointment of returning officers.

(1) The Commission shall, by notice in the Gazette, appoint a returning officer for each electoral district; and the person appointed shall be a person of high moral character and proven integrity.”

Counsel also referred to subsection (3) of S.30 which provides for removal of a returning officer from office.

Counsel submitted that a returning officer is a very crucial factor in the holding of an election. He submitted that any removal of a returning officer contrary to section 30 (2) and (3) of the Commission Act is illegal, null and void. Counsel submitted that the office of a returning officer is extremely important in fortifying the independence and impartiality of the 2nd respondent.

However, Counsel conceded that the petitioner had no complaint against the moral character or competence of one Ibrahim Kakembo who was the returning officer for Sembabule District during the Presidential and Parliamentary Elections held on 23rd February, 2006. Counsel submitted that the petitioner was attacking the actions of the Electoral Commission which she alleged unlawfully appointed Ibrahim Kakembo.

Counsel submitted on the powers of a returning officer to appoint presiding officers and polling assistants under S.34 of the Commission Act. He submitted that the powers to appoint presiding officers and polling assistants vest only in the returning officer. He submitted that the power under S.34 cannot be exercised by the Electoral Commission.

Counsel compared the provisions of section 34 with those in section 31. Section 31 provides for appointment and duties of assistant returning officers.

S.31 (1) provides:

“Every returning officer shall, upon his or her appointment, appoint in writing with the approval of the Commission, an assistant returning officer, who shall be a competent person who is qualified as a voter, and resident in the electoral district.....”

Counsel submitted that the powers given under S.34(1) can only be exercised by the Returning Officer and he cannot be subjected to any direction. He submitted that any appointment of Presiding Officers or Polling Assistants by anybody else or upon nomination by anyone else is null and void.

Counsel submitted that the nature of the office of Presiding Officers and Polling Assistants requires them to be independently and impartially appointed. Counsel submitted quite strongly that the freeness and fairness of any elections organized by the 2nd respondent depends largely on the calibre, quality, competence and integrity of the Presiding Officers and Polling Assistants. Counsel submitted that a Returning Officer is best placed, using existing network in the District, and his/her proven integrity and competence to identify the persons with the requisite qualities to be appointed.

Counsel referred to section 18 (3) of the Parliamentary Elections Act.

It provides:

“(3). At least seven days before polling day, each returning officer shall -

- (a) fix at his or her office within the district and in each constituency, a list of the names of all presiding officers and polling assistants appointed under the Commission Act for each polling station in the electoral district, with the names and numbers of their respective polling stations to enable persons to raise any objections they feel necessary; and**
- (b) permit free access to and afford full opportunity for the inspection of the list by the candidates or their agents and any other interested persons during normal working hours.”**

Counsel submitted that breach of the provisions for appointment and removal of election officers is not a mere procedural irregularity; it goes to the heart and very existence of the Electoral Commission, and the purposes for which it was set up. He submitted that such a breach should be followed by nullification of the elections. Counsel submitted that the election in question was conducted under the control and supervision of a

returning officer who was unlawfully appointed, and presiding officers and polling assistants who were appointed in contravention of the law. He submitted that the election was therefore illegal, null and void, and of no effect.

In her affidavit in support of the petition filed on 26.4.2006 the petitioner stated as follows:

"7.....

(c) The 2nd respondent compromised or failed to exercise its independence, impartiality and fairness in conducting the said elections when:

(i) Three days before the said elections were held, it removed Returning Officer Muwaya Tibakuno and unlawfully replaced him with one Ibrahim Kakembo.

(ii) On the 17th day of February 2006 at Sembabule Council Hall it allowed Hon. Sam Kutesa a candidate in the Parliamentary Elections for Mawogola Constituency in Sembabule District and a well known campaigner and supporter of the first respondent, to impose the said Ibrahim Kakembo as the new Returning Officer of the district in the place of the lawful Returning Officer, Mr. Muwaya Tibakuno and

further allowed the said Kutesa to order the Returning Officer to handover his officer (sic) to the imposed man.....”

The petitioner stated that a stalemate followed, and that Hon. Sam Kutesa rang the 2nd respondent and informed it of the stalemate. She further stated that Hon. Sam Kutesa informed all the candidates that the 2nd respondent required them to attend a meeting at its head office in Kampala on the 20th day of February, 2006 to discuss the stalemate.

The petitioner stated that on 20.2.2006 during the said meeting the Deputy Chairperson of the Electoral Commission confirmed, in the presence of the entire Commission, the appointment of Ibrahim Kakembo as the new Returning Officer.

She stated that she protested because she knew that Ibrahim Kakembo had been appointed with the influence of Hon. Kutesa.

Herman Ssentongo, who was a candidate for the Local Government Council 5 Chairman of Sembabule District, swore an affidavit in support of the petition, filed on 12.6.2006. He stated as follows:

Para 5:

“That I remember receiving a telephone call from Fred Muwaya, the then returning officer calling candidates for a meeting on 17th February, 2006 at Sembabule District Council Hall in the morning to

discuss the official list of polling day officials for the general elections in Sembabule district which had been published . A photocopy of the list is annexure HSI hereto.”

Para.6: “That when the candidates arrived for the meeting in the morning it was postponed to the afternoon at the instance of Hon. Kutesa purportedly to afford an official from the second respondent’s Head office in Kampala to attend.”

Para 7: “That in the afternoon Mr. Fred Muwaya convened the meeting and no sooner had he began chairing the meeting than Hon. Kutesa Sam, the then incumbent MP and candidate for Mawogola County Constituency declared that Fred Muwaya was no longer Returning Officer for Sembabule and amidst protests from the majority of the candidates, Hon. Sam Kutesa introduced one Kakembo as the new Returning Officer and ordered Muwaya to vacate the official chair for impostor Kakembo.”

Para.8: “That the said Hon. Kutesa flanked and supported by the first respondent also declared that they categorically rejected Annexure HSI because it contained many names of people who did not have and would, therefore, not serve their interest at heart and they presented to us an alternative list compiled by them.”

Para.9: “That apart from the first respondent, Hon. Kutesa and Dr.Elly Muhumuza, all the other candidates objected to their acts of usurping the powers and role of the second respondent with impunity and rejected their alternative list causing an impasse as the new Returning Officer merely looked on powerlessly.”

Para.11: “That Hon. Kutesa then telephoned the second respondent in our presence and hearing where after he informed us that the chairman of the second respondent wanted us to attend a meeting at its head office on 20th February, 2006 at 10:00a.m without fail to try to settle the impasse.”

Hon. Ssekikubo Theodore, in his affidavit, gave his version of the events as follows:

Para.2: “That on Friday 17th February 2006, I together with other Parliamentary and Local Council V candidates were invited by the Ssembabule District Returning Officer MR. Muwaya Tibakuno to go to Sembabule District Hall for a brief meeting about the latest update from the Electoral Commission regarding the polling officials.

Para 3: “That as Members were settling down in their seats, Mr. Mumbya in the chair as Returning Officer and in the presence of one person who was introduced as Ibrahim Kakembo from Electoral Commission, Hon. Sam Kuteesa the Member of

Parliament for Mawogola and Minister of Foreign Affairs and an NRM Candidate for Mawogola Constituency declared that he rejected all Electoral Commission officials in the district claiming that they were not his supporters.”

Para.4: “That Hon. Sam Kutesa himself then passed over a file containing the list of names he wanted as polling officials for Sembabule to Ibrahim Kakembo and ordered the Returning Officer Mr. Muwaya to handover office to Mr. Kakembo whom he declared the new Returning Officer and further declared that all the district presiding officers and polling assistants who ha been appointed by the Returning Officer were henceforth dismissed.”

Para.6: “That having hit a stalemate Hon. Kutesa rang the Electoral Commission in Kampala in our presence and hearing and informed us that we were to go to the Electoral Commission Headquarters on Monday 20th February 2006 at 10:00a.m for efforts to settle the stalemate.”

The 1st respondent, in her answer to the petition, stated:

In para.5.....

- (a) The election was free and fair and was conducted in accordance with article 61 of the Constitution.

- (b) At all times the 2nd respondent maintained strict impartiality and independence.
- (c) The 2nd respondent appointed and removed returning officers strictly in accordance with the law.
- (d) That all Presiding Officers and other election officials were appointed in accordance with the law at time in consultation with candidates including the petitioner.

In her affidavit in support of the answer to the petition the 1st respondent stated: -

In para:7: “paragraph 7 is denied in toto as the election was conducted in accordance with provisions and principles laid down in the Constitution and the law.”

In para.10: “That paragraph 7 (c) is denied. The returning officer was removed and replaced in accordance with the law and in consultation with and in agreement with all the candidates.

In para.11: “That paragraph 7(c) (i), (ii), (iii) are denied. As a result of misunderstanding between candidates the 2nd respondent received complaints, resolved the complaints in accordance with section 15 of the Electoral Commission Act, by

calling a meeting of all candidates whereby all candidates agreed to adhere to the law and to ensure free and fair elections are held by co-operating with 2nd respondent in accordance with an agreement signed by all parties annexed hereto as annexure "X".

By her affidavit in reply, filed on 19.9.2006, the petitioner answered the above pleadings. She used the opportunity to supply supplementary information to her affidavit in support of the petition on the events which occurred on 17.2.2006 at Sembabule District Hall.

One Turyatamba Fred Bashabe, who was an independent candidate for the Mawogola Constituency, swore an affidavit in support of the petition, filed on 10.8.2006. He stated the events of 17.2.2006 as follows: -

Para.2: "That on 17.2.2006 I received a message on my telephone No.078-099284 from the then Returning Officer Mr. Fred Muwaya inviting me for an urgent meeting at the District council Hall to discuss matters relating to elections."

Para.3: "That when together with other candidates including the petitioner, the first respondent, Herman Sentongo and others were assembled to be briefed by Mr. Muwaya, instead Hon. Kutesa declared that Mr. Muwaya was no longer the Returning Officer and

ordered him to handover to one Ibrahim Kakembo who had shortly before arrived at the District from Kampala.”

Para.4: “That Hon. Kutesa also presented a list of names of presiding and other Election Officials which he said had been prepared by himself and the Resident District Commissioner and insisted this list should not be questioned.”

Para.5: “That except Hon. Kutesa, the first respondent and Dr. Elly Muhumuza and their group we all others refused to accept the unofficial list and a very serious exchange of hot words ensued between the two sides leading to a deadlock.”

Benon Buroora, a registered voter at Kagango Polling Station, swore an affidavit in support of the answer to the petition. It was filed on 19.9.2006. He stated as follows: -

Para.3: “That I have read the affidavits of the petitioner, Herman Ssentongo and Turyatamba Fred Bashabe in support of the petition and understood them.”

Para.3: “That the said affidavits are false in as far as they relate to the origin of the complaint that led to the 2nd respondent removing the returning officer from office.”

Para.4: “That I had observed a lot of irregularities in the manner in which the returning officer, Fred Muwaya was conducting his duties for example he was appointing unqualified persons who were clearly partisan. The said returning officer received several complaints from myself and other voters but refused to act on them.”

Para.5: “That on the 17th of February 2006 I made a formal complaint against the returning officer to the Electoral commission in accordance with the law (annexed).

Para.6: “That the Electoral commission promised to resolve the issue and it is the result of my complaint that the decision to remove the returning officer and replace him with a neutral person and also get the parties to agree on election officials was made.”

Sam A.Rwakoojo, the Secretary of the Electoral Commission, swore an affidavit in support of the 2nd respondent’s answer to the petition which was filed on 8.5.2006. He stated as follows:

Para.4: “That I know that the election was conducted in compliance with the constitution, the Electoral Commission Act Cap.140 and the Parliamentary Elections Act, 2005.”

Para.6: “That the 2nd respondent ensured that the entire electoral process was free, fair and transparent.”

Dr. Jenny.B.Okello a Commissioner in the 2nd respondent, swore an affidavit in support of the 2nd respondent’s answer to the petition, which was filed on 22.9.2006. She stated as follows: -

Para.7: “That it is not true that one Ibrahim Kakembo was imposed on Sembabule District as a returning officer by one Sam Kutesa, but he was lawfully appointed as Returning Officer for Sembabule after the removal of Mr. Tibakuno by the Commission in accordance with the law.”

Para.8: “That the Electoral Commission received complaints regarding the incompetence of Mr. Tibakuno as the Returning Officer among others, that he had failed to publish a list of presiding officers and their Assistants in accordance with the time table and deadline given by the Commission.”

Para.9: “That the said Mr. Tibakuno did not give any sufficient reason to the Commission as to why he failed to publish the list of the Polling Officials as directed by the Commission and accordingly he was lawfully removed and replaced with Mr. Ibrahim Kakembo, who is a Senior Election Officer.”

Para.16: “That there could not have been a stalemate as to who the Returning Officer should be because the appointment of Ibrahim Kakembo had already been done before the meeting of candidates and members of the Electoral Commission.”

Para.19: “That there was no list of Presiding Officers by the former Returning Officer as no list had been published by him as required by the Commission.”

Para.22: “That the Returning Officer who was appointed by the Commission was impartial and competent as he has conducted elections before as a Returning Officer of the Commission in Kabale District.”

Para.23: “That I am aware that Mr. Tibakuno is the District Registrar, Sembabule District and if at all he was in any meeting with Mr. Ibrahim Kakembo, he attended the meeting by virtue of his office as District Registrar as at that time, Mr. Kakembo was already appointed Returning Officer.”

Ibrahim Kakembo swore an affidavit in support of the 2nd respondent’s answer to the petition. It was filed on 22.9.2006. He stated as follows: -

Para.5 (d): “That I am not aware that Hon. Sam Kutesa rang the 2nd respondent.”

Para. 5(e): “By 17th February 2006, I was already appointed the Returning Officer Sembabule District and I am the one who requested the District Registrar, Mr. Tibakuno to invite candidates for a meeting on 17th February 2006 so that I could consult with them.”

Para.5 (f): “That at this time Mr. Tibakuno was merely performing his duties as an employee of the Commission, i.e. District Registrar having ceased to act as Returning Officer for reasons given to him by the Electoral Commission.”

Para.5(h): “It is not true that it is Hon. Sam Kutesa who ordered Mr. Tibakuno to hand over office as his removal had already been communicated to him and I personally had talked to him in my capacity as Returning Officer while requesting him to invite candidates for that meeting.”

Para.5 (i): “That I only went to Sembabule District after appointment as Returning Officer as I had no other duties in that area.”

Para.5 (j): “.....but it is not true that my appointment was made under the influence of Hon. Kutesa.”

Para.5 (e): “Due to the failure to publish a list of Polling Officials in time by the former Returning Officer as directed and required by the Electoral Commission, the Commission invited the candidates and myself for a meeting over the matter, which took place on 20th February 2006.”

Learned Counsel Mr. Byamugisha submitted that the 2nd respondent, influenced by external forces or on its own, illegally removed Mr. Muwaya Tibakuno as Returning Officer and illegally replaced him by Mr.Ibrahim Kakembo contrary to section 30 (i), (2), (3) and (4) of the Commission Act.

Counsel submitted that the affidavits in support of the petition showed that prior to 17.2.2006 Mr. Tibakuno had published a proposed list of presiding officers and polling Assistants for possible appointment under section 34 of the Commission Act. Counsel contended that the publication was in accordance with section 18 (3) of the Parliamentary Elections Act. Counsel referred to Annexure API to the petitioner’s affidavit in reply filed on 19.9.2006 which was a list of polling day officials for general Elections for the sub-counties of Sembabule District. Counsel submitted that the said list was supplied to the petitioner by the 2nd respondent following a request for it made by M/s Barya, Byamugisha & Co. Advocates by letter dated 4th May, 2006 (annexture AP4).

Indeed the said list was a copy certified by the 2nd respondent, endorsed with its official stamp, signed and dated 30.5.2006. Counsel then attacked the denial of that list contained in para.19 of Dr. Jenny B.Okello's affidavit. Counsel submitted that the publication of the list is a legal requirement. He submitted that the affidavits in support of the petition showed that Mr. Muwaya Tibakuno invited all candidates for a briefing. He submitted that the affidavits showed that Mr. Muwaya Tibakuno did not have the opportunity to address the candidates because he was ordered to get off the chair and hand it over to Mr. Kakembo. Counsel submitted that it was Hon. Kutesa who introduced Mr. Kakembo as the new Returning Officer, and that there was no other official from the 2nd respondent. Counsel submitted that Hon. Kutesa was in charge of the removal of the Returning Officer and the installation of a new one.

Counsel referred to S.105 of the Evidence Act. He submitted that the fact of appointment of Mr. Kakembo as Returning Officer was a matter within the special knowledge of the 2nd respondent which bore the burden of proving the appointment. Counsel submitted that the burden on the petitioner was discharged when she averred that there was no such appointment. He submitted that the 2nd respondent should have produced evidence of that appointment. Counsel pointed out that the 2nd respondent's evidence did not state how Kakembo came to Sembabule on 17.2.2006.

Counsel submitted that the affidavits in support of the petition showed that Mr. Kakembo took over the chair under protest. Counsel submitted that the protests were in respect of two matters:

- (i) the removal and replacement of the Returning Officer;
- (ii) The rejection of the proposed official list of Presiding Officers and Polling Assistants.

Counsel submitted that as a result of these protests there was a stalemate. Counsel pointed out contradictions in the affidavits of Benon Buroora, Dr. Jenny Okello and Ibrahim Kakembo. He submitted that the contradictions showed that Mr. Kakembo was not appointed a Returning Officer of Sembabule District in accordance with S.30 of the Commission Act, or at all. Counsel pointed out that in spite of serious challenge to the said appointment no copy of the appointment letter of Mr. Kakembo was attached to the affidavits of Dr. Jenny Okello or Mr. Ibrahim Kakembo. Counsel submitted that Dr. Jenny Okello told lies on oath in paragraphs 8 and 9 of her affidavit. He submitted that even Ibrahim Kakembo told lies. Counsel submitted that these lies were told to suppress the fact that the Electoral commission was influenced by Hon. Sam Kuteesa.

Learned Counsel for the 2nd respondent Mr.Kandeebe objected to the affidavit of Benon Burora. He submitted that the said affidavit

attached a complaint dated 17.2.2006, well after the 2nd respondent had taken a decision. He contended that there was no evidence that the complaint had been received by the 2nd respondent. He submitted that the decision of the 2nd respondent was not based on Ben Burora's complaint.

Counsel submitted on the position of the 2nd respondent on the events of 17.2.2006. He submitted that the 2nd respondent had received reports that no list of polling officials had been prepared, and/or displayed on the notice board. He submitted that the absence of the list was the reason for the removal of the returning officer. He submitted that the Returning Officer was asked for explanation but he failed to give any, and so he was removed.

From the narration of the events of 17.2.2006 by several deponents of affidavits in support of the petition, which I believe to be correct, it appears that before 17.2.2006 the 2nd respondent was in contact with Hon. Sam Kuteesa. The latter knew what was going on. That is why he caused the adjournment of the meeting on 17.2.2006 from morning to the afternoon. Apparently the 2nd respondent permitted Hon.Kuteesa to act on 17.2.2006 when he received and announced the appointment of a new Returning Officer.

The evidence shows that the 2nd respondent was in contact with Hon. Sam Kuteesa behind the back of Muwaya Tibakuno, its own

election officer. This was demonstrated by Muwaya Tibakuno trying to chair a meeting which he had convened before he was humiliated by Hon. Kuteesa's announcement.

The 2nd respondent allowed itself to communicate with Hon. Sam Kuteesa, a mere county candidate, in fixing a meeting for 20.2.2006, and in trusting that he would cause all candidates to attend that meeting. The evidence shows that the 2nd respondent did not communicate through the Returning Officer.

The evidence showed that Hon. Sam Kuteesa produced a list of names of people he wanted to work as Polling Officials of Sembabule District. In my view, this was evidence to prove that Hon. Sam Kuteesa's concern went beyond his constituency. He appears to have assumed more powers than what the Parliamentary Elections Act gives to a county candidate.

On the evidence before court I find that:

- (i) What Dr. Jenny.B.Okello stated in para.7 of her affidavit that Ibrahim Kakembo was lawfully appointed a Returning Officer after the removal of Mr. Tibakuno by the Commission cannot be true. I think that if Mr. Tibakuno had previously been contacted by the 2nd respondent about his removal he would not have attempted to chair the meeting of 17.2.2006.

- (ii) What Dr. Jenny.B.Okello stated in para.8 of her affidavit that Mr. Tibakuno had failed to publish a list of presiding officers and their assistants cannot be true.

- (iii) What Dr. Jenny B.Okello stated in para.9 of her affidavit that Mr. Tibakuno was asked for an explanation but he failed to give sufficient reason prior to his removal cannot be true.

- (iv) What Dr. Jenny.B.Okello stated in para.19 of her affidavit that there was no list of presiding officers published by Mr. Tibakuno cannot be true. The 2nd respondent has in its possession the list which had been published by Mr.Tibakuno.

- (v) What Dr. Jenny.B.Okello stated in para.23 of her affidavit that Mr. Tibakuno attended the meeting of 17.2.2006 as a District Registrar cannot be true. According to abundant evidence Mr. Tibakuno summoned the candidates to the meeting, and when they assembled he proceeded to chair it. He was removed from the chair as candidates looked on in amazement.

- (vi) What Dr. Jenny.B.Okello stated in para.8 of her affidavit that Mr. Tibakuno was removed following complaints of incompetence from Sembabule District cannot be true. In my view if that had been the case it is most unlikely that he would have been allowed to be a District Registrar, a more permanent posting, in the same district. I think the 2nd respondent left Mr. Tibakuno to work as a top election officer in Sembabule District because it believed he was not at fault.
- (vii) What Ibrahim Kakembo stated in para.5 (d) of his affidavit cannot be truthful. He was present in Sembabule District Hall, as the new Returning Officer, when Hon. Sam Kuteesa rang the 2nd respondent. The 2nd respondent invited the candidates for a meeting on 20.2.2006 through Hon. Sam Kuteesa.
- (viii) What Ibrahim Kakembo stated in para.5 (e) of his affidavit is not entirely correct. If he requested Mr. Tibakuno to invite candidates for a meeting on 17.2.2006 Tibakuno would have informed the candidates of the changes. Tibakuno would not have attempted to chair the meeting.
- (ix) What Ibrahim Kakembo stated in para 5 (l) of his affidavit cannot be true. The evidence is clear that it

was not because of Mr. Tibakuno's failure to publish a list of polling officials in time that the 2nd respondent invited candidates for a meeting on 20.2.2006.

There is no evidence that the 2nd respondent issued a notice of appointment of Ibrahim Kakembo for publication in the Gazette. This contravened section 30 (1) of the Commission Act. Despite a request for it by the petitioner the 2nd respondent failed to produce a copy of the appointment letter issued to Ibrahim Kakembo. This court finds it reasonable to draw an adverse inference that the said letter did not exist.

The 2nd respondent did not produce a copy of the notice of removal of Muwaya Tibakuno for publication in the Gazette. Despite a request for it by the petitioner the 2nd respondent failed to produce a copy of the letter. This court finds it reasonable to draw an adverse inference that the said letter did not exist. In the circumstances I agree with the submission of Mr. Byamugisha that the 2nd respondent., acting on influence from external forces, illegally removed Mr. Muwaya Tibakuno as Returning Officer of Sembabule Electoral District, and unlawfully appointed Mr. Ibrahim Kakembo to replace him, and that the 2nd respondent thereby contravened the provisions of section 30(1), (2), (3) and (4) of the Commission Act.

It is provided in S.14 (3) of the Commission Act that the Commission may, where necessary, assume the performance of any function of an election officer under any law. However, I agree with the submission of learned counsel Mr. Byamugisha that a returning officer is best placed, using existing network in the District, his/her experience, proven integrity and competence to identify the persons to be appointed presiding officers and polling assistants. The 2nd respondent did not adduce any evidence that it had received complaints against Mr. Muwaya Tibakuno for being:

- (i) Partial in the performance of his duties; or
- (ii) Corrupt in relation to his duties as returning officer.

When it transpired that Muwaya Tibakuno had actually prepared a list of polling day officials for general elections, and a copy was available I do not see any justification for the 2nd respondent declining to rely on it. There was no evidence that the 2nd respondent had received complaints that the published list was partial in outlook. It appears to this court that nobody, including Hon. Sam Kuteesa, had previously complained to the 2nd respondent about any list of polling officials prepared by Muwaya Tibakuno. So when it transpired that Muwaya Tibakuno had actually prepared a list there was no reason for the 2nd respondent not adopting it.

Under section 18 (3) of the Parliamentary Elections Act a returning officer publishes a list of names of all the presiding officers and polling assistants appointed under the Commission Act for each polling station in the electoral district. The list transcends individual Parliamentary constituencies (which are normally counties) and covers an entire district. It is a comprehensive and an elaborate exercise. It is difficult to imagine how a candidate for a county constituency could reject a list for an entire electoral district. Any candidate who did that displayed a bigger power and interest than that of a Parliamentary candidate. May be such a candidate could attempt to influence the removal of a returning officer. However, if the 2nd respondent complied it would have compromised its freedom, independence and impartiality in performing its duties.

The petitioner complained in para. 4 (j) of petition that the 2nd respondent failed to appoint presiding officers and other election officials in accordance with section 34 of the Commission Act.

In her affidavit in support of the petition filed on 26.4.2006 the petitioner stated:

In para.7 (c) (v): “During the same meeting, the said Hon. Sam Kuteesa objected to all the presiding officers and other polling officials that had been appointed by the returning officer, Mr.

Muwaya Tibakuno and the 2nd respondent instead decided that all the candidates sign a memorandum empowering them each to appoint their own presiding officers and polling assistants in contravention of the law.....”

In her answer to the petition the 1st respondent averred:

In para.5 (f): “That all presiding officers and other election officials were appointed in accordance with the law at time (sic) in consultation with candidates including the petitioner.”

The 1st respondent further answered the allegations concerning polling officials in para.11 of her affidavit in support of her answer to the petition, filed on 19.5.2006. The 1st respondent introduced an agreement signed by all parties annexed to her affidavit as annexure “X”. This was a memorandum of understanding among Sembabule District candidates made on 20th February 2006.

In her affidavit in reply filed on 19.9.2006 the petitioner stated:

In para 3 (ii): “By the said memorandum the 2nd respondent deselected its duty and gravely compromised its powers to independently, freely and impartially maintain an appointed Returning Officer who in turn would independently freely and impartially appoint presiding and other polling officials in so far as it surrendered such powers to the contesting candidates in the Parliamentary Elections.”

In para 3 (iii): “The said memorandum under clause 1 and 2 provided for nomination by each side of a person to be appointed a presiding officer and other election official by which provision the returning officer compromised his impartiality to appoint competent presiding officers and other polling officials and this also had the effect of compromising the impartiality of the presiding officers and all other polling officials so appointed. The memorandum is common ground for all the parties to this petition.”

The petitioner and Hon. Theodore Ssekikubo swore a joint affidavit which was undated but filed on 20.2.2006, in which they stated:

“2. That following the signing of the memorandum of understanding at the compulsion of the 2nd respondent on 20th February 2003 (sic) in the 2 (two) days we were left with to the election day, we had to frantically traverse our respective constituencies looking for persons who would be our possible presiding officers and polling assistants.”

“3. That we submitted to the Returning Officer Mr. Kakembo the first partial list on the 21st February, 2006 and the last list on 22nd February, 2006, the eve of the elections.”

“4. That during this short period we were not able to individually determine who was qualified and competent to handle the exercise as presiding officer and polling assistant for appointment and we picked joint officials whom we appointed.”

“5. That we know that none of these officials on the lists we submitted or indeed any other presiding officer or polling assistant who conducted the elections on 23rd February, 2006 took the prescribed oath or at all.”

Turyatamba Fred Bashabe stated in his affidavit as follows:

In para.6: “That a meeting was called of all the candidates of Sembabule District at the head office of the 2nd respondent which I attended in the process of which a stalemate was reached when we rejected Hon. Kutesa’s un official list and the chairman of the second respondent forced us to form group “A” and “B” and ordered (sic) to submit the names of presiding officers and polling assistant of their choice within 30 (thirty) minutes failure to do which the elections would be postponed at the cost and peril of the candidates.”

In para.7: “That group “B” to which Hon. Kuteesa belonged as expected opted to use the names on the list prepared by him and Kabogorwa, the RDC.”

In para.9: “That amidst protests from members of group “A” about the unfair and unreasonable directive to appoint their polling officials within 30 minutes and thereby giving undue advantage to Hon. Kuteesa and his group to use the rejected list, the chairman and vice chairperson of the Electoral Commission caused a memorandum of understanding in the terms of the directive of form groups and to appoint own polling officials to be prepared and signed but I refused to affix my signature to it because I thought it was against the law for candidates to appoint their polling officials and also for there to be more than one presiding officer and of more than two polling assistants at each polling station.”

In para. 11: “That it was clear throughout the said meeting that the second respondent was not impartial, fair and free of influence because Hon. Kuteesa was given undue regard and allowed to influence the Commission to surrender its powers over elections in Sembabule district to the candidates well knowing the political influence Hon. Kuteesa had in the District and on the first respondent.”

In a further affidavit in support of her answer to the petition, filed on 15.9.2006, the first respondent stated as follows:

In para.3: “That the affidavit styled “joint affidavit” dated 19th June 2006 and sworn jointly by the petitioner and one Sekikubo is defective, offends the law and ought to be struck out.”

In para.4: “That without prejudice to the above am not aware of paragraph 2 and 3 thereof.”

In para.5: “That what is deponed in 4, 5, 6, and 7 is false and has no basis as the 2nd respondent complied with the law in appointing the election officials in the district.”

In para.6: “That the complaints raised in this affidavit ought to have been forwarded to the 2nd respondent but that was not done.”

In her affidavit in support of the 2nd respondent’s answer to the petition Dr. Jenny.B.Okello stated:

In para.10: “That on discovery of the anomaly by the former Returning Officer, a meeting of all stakeholders in the Sembabule District Elections was called at the Commission upon which views of the candidates were sought before a decision was taken by the Commission on whether to postpone the elections or to go ahead with the elections as scheduled.”

In para.11: “That all the candidates including the petitioner were opposed to the postponement of the election upon which they proposed to the Commission that although there were

some disagreements among the candidates as to who the polling officials should be, they could come to an agreement and propose names from which the Returning Officer could appoint Polling Officials to conduct the election as scheduled.”

In para.12: “The Commission allowed the candidates to meet among themselves and agree upon which they came up with a memorandum of understanding among Sembabule District candidates dated 20th February, 2006.”

In para.13: “That the said candidates divided among themselves into two groups and agreed that each group would propose names from whom to be appointed presiding officers and their Assistants by the Returning Officer.”

In para.15: “That it is not true that the Commission forced the candidates including the petitioner to sign the agreement which the commission was not a party to, nor to divide them into groups or to determine which group a particular candidate should belong nor was the Commission bound by the said agreement of candidates.”

In para.21: “That in reply to the affidavit of 14th September 2006, it is not true that the Commission was compromised or failed to exercise its independence, impartiality and fairness in conducting the elections of 23rd February 2006 as it did not

force any candidate to enter a memorandum of understanding or to belong to any particular side.”

In his affidavit Ibrahim Kakembo stated as follows:

In para.5(c): “In respect of paragraph 7 (c), it is not true that the 2nd respondent was compromised or failed to exercise independence, impartiality and fairness in conducting elections.”

In para.5 (j): “It is true there was a meeting at Electoral Commission on 20th February 2006 between the Commission, Returning Officer and candidates from Sembabule District, but it is not true that my appointment was done under the influence of Hon. Kuteesa.”

In para.5 (k): “It is also true that there was a disagreement between candidates as to who the Polling Officials should be but the Commission did not decide that each candidate should appoint their own officials.”

In para.5 (m): “The commission was of the view that the elections in Sembabule District be postponed but all the Parliamentary candidates present were opposed to postponement.”

In para 5 (n): “After deliberations among the candidates themselves, they suggested to the Commission that they could come to an agreement among themselves, then identify

suitable persons and propose the same to me (Returning Officer) from whom Polling Officials could be appointed, so that the election could go ahead as scheduled.”

In para.5 (o): “That after sometime, the candidates produced an agreement, which neither myself nor the Commission was a party or bound.”

In para.5 (p): “That the Commission directed me to receive the lists of proposed names and to determine those who were suitable for appointment as Polling Officials which I did.”

In para.8: “That in response to paragraph 3 of the petitioner’s affidavit dated 14th September 2006, it is not true that the 2nd respondent was compromised or failed to perform its duties in accordance with the law as it was not party to or bound by the memorandum between candidates nor was it responsible for determining which side of the agreement a particular candidate belonged.”

Learned Counsel Mr. Byamugisha submitted that the matter in dispute before the 2nd respondent and the candidates should by law have been settled by a Returning Officer. The law does not require that a Returning Officer consults the Electoral Commission. Counsel submitted that according to the petitioner’s evidence Hon. Kuteesa, Dr. Elly Muhumuza and the 1st respondent rejected the entire list prepared by the Returning Officer, thereby undermining his authority. Counsel submitted

that the 2nd respondent should have acted in accordance with the law.

Counsel submitted that at the meeting side “A” comprised those who protested against the list brought by Hon. Kuteesa and favoured the official list.

Counsel submitted that the memorandum of understanding was contrary to the law, and had no legal effect. He submitted that under S.34 of the Commission Act the power to appoint presiding officers and polling assistants lies with the Returning Officer. Counsel submitted that there was no question of appointing such officials from nominees of other people. He referred to S.34 and submitted that it provides for only one presiding officer at each polling station.

Sec.34 (1) provides:

“Each returning officer -

- (a) shall appoint one presiding officer and not more than three polling assistants for each polling station.....”

The memorandum of understanding provided:

In clause I: “That there shall be two presiding officers in respect of the relevant elections relating to the candidates constituting side

A and side B and that each side shall nominate one person to be appointed presiding officer by the returning officer, Sembabule District.”

In clause 2: “Each of the said sides shall nominate a person to be appointed a Polling Assistant for each table at all Polling Stations and, in effect there shall be 8 (eight) Polling Assistants.”

In clause 4: “The two Presiding Officers representing each side per Polling Station shall sign the Declaration of Results form for their respective Polling Stations.”

Learned Counsel Mr. Byamugisha submitted that the memorandum had the effect of interfering with the power of the Returning Officer, thereby undermining his authority and independence. He submitted that by the memorandum the 2nd respondent applied double standards to the prejudice of Sembabule district.

Counsel submitted that the memorandum unleashed on Sembabule District a gang of partisan, partial, biased, incompetent, untrained and unattainable election officers who were incapable of conducting the election in a lawful, competent, free, fair and/or independent manner. Counsel submitted that the election exercise in Sembabule District was carried out illegally, and it was null and void. He submitted that the situation was

compounded by the appointed officers failing to take oath as required by section 7 (4) of the Parliamentary Elections Act.

Section 7 (4) provides:

“A person shall, before assuming the duties of election officer take and subscribe the oath in form EO specified in the second schedule to this Act.”

Learned Counsel Mr. Kakuru submitted that the memorandum of understanding was reached by the parties with intervention of the 2nd respondent which exercised its mandate under article 61 (1) (f) of the Constitution.

Counsel submitted that the parties entered an agreement voluntarily. He submitted that the 2nd respondent urged the parties to consider:

- (i) The need to hold elections on 23.2.2006
- (ii) The need to have free and fair elections.

Counsel submitted that the 2nd respondent was resolving the disagreement, and the parties accepted, and the elections went ahead on the basis of that agreement. Counsel submitted that the parties did not appoint election officials; that they nominated people and it was the Returning Officer who appointed. Counsel

submitted that the memorandum of understanding was not outside the law; that its clauses followed what the law provides. Counsel submitted that the agreement facilitated the conduct of the elections.

Counsel submitted that no evidence was adduced to show that in implementing the agreement the 2nd respondent contravened the law.

On the allegations that the 2nd respondent was toothless; that it was intimidated by one candidate; that they abdicated their functions because of Hon. Sam Kuteesa, Counsel pointed out that it was the same 2nd respondent which had nominated one Presidential Candidate charged with treason against the advise of the Attorney General.

Counsel submitted that there was no evidence whatsoever that the 2nd respondent had been subjected to direction or control by any person, including Hon. Sam Kuteesa. However, Counsel conceded that what transpired in Sembabule could, if proved, only be a fact of non-compliance. Counsel submitted that it did not constitute the election exercise a nullity. Counsel referred to section 61 of the Parliamentary Elections Act. He submitted that the section envisages some non-compliance but not every act of non-compliance becomes a nullity. Its effect on the result has to be considered.

Learned Counsel Mr. Kandeebe submitted that the position of the 2nd respondent was that when the candidates disagreed on Polling Officials they were told that the elections could be postponed. He submitted that the 2nd respondent was not a party to the memorandum of understanding. Counsel submitted that the 2nd respondent found difficulty in appointing election officials because of disagreements amongst the candidates. He submitted that the memorandum of understanding provided for candidates to propose names to the Returning Officer from which he would appoint Presiding Officers. Counsel submitted that the memorandum contained mere proposals. Counsel contended that the increased number of Polling Officials was also necessary. Counsel submitted that the petitioner had failed to prove that the memorandum was implemented. Counsel pointed out that the 2nd respondent provided officials to control the Presidential Elections. Counsel submitted that the 2nd respondent's position was that the memorandum of understanding was never implemented and that the 2nd respondent merely used it to settle a dispute. However, in what appeared to be a turn-about counsel conceded that the Commission adopted some views of the candidates contained in their memorandum. He conceded that the 2nd respondent directed the Returning Officer to receive lists of names proposed by the candidates. Counsel submitted that the 2nd respondent was merely determining a dispute which arose in the course of the election.

Counsel contended that the memorandum did not stop side "A" from presenting the list of Polling Officials prepared by Mr. Muwaya Tibakuno. Counsel submitted that there is no merit in the submission that the Returning Officer did not exercise his powers under section 34 of the Commission Act. He submitted that the memorandum did not force the Returning Officer to pick the nominees proposed; that he could pick those whom he found fit. He prayed court to find that the Presiding Officers and Polling Assistants were duly appointed by the Returning Officer without hindrance.

I agree with the petitioner that in one day (21st February, 2006) the candidates of side "A" could not determine who was qualified and competent to handle the election exercise as Presiding Officers or Polling Assistants. It appears to me that those candidates were in a state which could be equated to blackmail when the 2nd respondent informed them of the imminent danger of postponing the elections which would make them incur more costs.

What was agreed upon in the memorandum of understanding gave undue advantage to Hon. Kuteesa to use the people proposed by him; the evidence has shown that he had a list prepared covering the entire district. In my view the 2nd respondent gave in to what Hon. Kuteesa wanted.

What Dr. Jenny.B.Okello stated in para.11 of her affidavit that there were some disagreements among the candidates as to who the Polling Officials should be cannot, in my view, be true. According to the evidence the list of Polling Officials prepared by Muwaya Tibakuno was not adopted as a working document or discussed. It was Hon. Kuteesa who wanted his list to be adopted. So, in effect, in my view, the memorandum of understanding permitted Hon. Kuteesa to use his list of proposed persons while the candidates of side "A" were also given the opportunity to propose their own people.

I think the 2nd respondent should have foreseen that the suggestion that candidates of side "A" identify suitable persons and propose them to the Returning Officer for him to choose who to appoint would be difficult to implement because of lack of time. It appears to me that as long as Hon. Kuteesa had his way to use his list the 2nd respondent did not mind how the suggestion could be implemented by the candidates on side "A". Ibrahim Kakembo stated in para.5 (p) of his affidavit that the Commission directed him to receive the lists of proposed names (from either side) and to determine those who were suitable for appointment. In my view this means that the Returning Officer was directed by the Commission to receive Hon. Kuteesa's list which was ready and available, and then wait for the list from side "A". It is, in my view, evidence of the 2nd respondent being compromised or failing to perform its duties. I agree with some of the comments of

counsel Byamugisha that the memorandum of understanding unleashed on Sembabule District Polling Officials who were partisan, partial, biased and untrained. It was yet to be seen how they could conduct a lawful, competent free and fair election.

Counsel Kandebe submitted that the petitioner had failed to prove that the memorandum was implemented.

Counsel Kakuru submitted that the elections went ahead on the basis of that agreement.

Counsel Kandebe submitted that the 2nd respondent's position was that the memorandum of understanding was never implemented. Counsel Kakuru submitted that the agreement facilitated the conduct of the elections.

On the evidence before court I find that the Returning Officer had no time to interview the people nominated for appointment for the entire district. It was inevitable that he had to rely on the choices made by the candidates. I also find that the Returning Officer had no time to display the final list, and so it was not possible for the candidates to know, before the election, which of the two sides had won most appointments as Presiding Officers.

It is my view that the 2nd respondent, by directing the Returning Officer to implement the memorandum of understanding,

breached the provisions of S.34 of the Commission Act. I hold that this was non-compliance which affected the principles laid down in the provisions of section 18(3) of the Parliamentary Elections Act.

On the evidence it appears to this Court that in the meeting of 20th February, 2006 the 2nd respondent displayed weakness. It is my view that the 2nd respondent should have stood firmly and informed Hon. Kuteesa that it was not acceptable for a candidate to produce a list of his own proposed Polling Officials. If the 2nd respondent had wanted to entertain Hon. Kuteesa's objection it should have used Mr. Muwaya Tibakuno's list as a basis. This way the 2nd respondent would have acted in accordance with section 18 (3) of the Parliamentary Elections Act. However, on the evidence before court I agree with the petitioner that the 2nd respondent gravely compromised its powers to independently, freely and impartially appoint Presiding Officers and Polling Assistants, and thereby partially placed the conduct of the elections out of its control.

By para.4 (c) of the petition the petitioner complained that the 2nd respondent failed to control the proper use of ballot papers contrary to section 12 (1) (b) of the Commission Act. The petitioner relied on the affidavit of Ssebutinde Edward of Lwebitakuli Trading Centre who was one of the two Presiding Officers at Lwendezi Polling Station. In para.2 of his affidavit

Ssebutinde Edward stated that one Tushabe Kussein, his co-presiding Officer, who had been nominated by the 1st respondent, was placed in charge of the voters' register and he facilitated some voters to vote more than once. Counsel Mr. Byamugisha invited court to look at the Declaration of Results Form for Lwendezi Polling Station. It was annexed as Exhibit AP5 to the petitioner's affidavit in reply filed on 19.9.2006. At this station the 1st respondent polled 320 votes as against the petitioner's 33 votes.

Counsel Byamugisha referred to the report of Arinaitwe Daniel who was a Poll Watcher at Lwendezi Polling Station. It was annexed as part of Annexure 14 (b) in Mawogola vol.I at pg.498. I have noted that Tushabe Kussein was named as Presiding Officer but the Report had no provision for the second Presiding Officer. At page 500 the Poll-watcher reported that the voters who required assistance due to blindness, illiteracy or old age were assisted by party agents.

The petitioner relied on the affidavit of Lule James of Kyaluwanya village, who was her agent at Kyaluwanya Polling Station. In para.2 of the affidavit Lule James stated that he saw one Dan, a polling Assistant who was in charge of issuing ballot papers, pluck out a bundle of ballot papers and give some voters more ballot papers than one.

Counsel Byamugisha referred to the report of Lwanga Richard who was a Poll-Watcher at Kagango Polling Station, Lwentale Parish, Lugusulu sub-county. It was annexed as part of annexure 14 (b) in Mawogola vol.I at pg.72. At pg.74 the Poll-Watcher reported that the Polling Official was not checking the voter's finger for indelible ink before issuing ballot papers. At pg.75 he reported that more than 20 people were permitted to join the queue after 5 p.m. At pg.79 he stated that according to his observation the election results declared at this Polling Station were not accurate. He reported that the agents were campaigning and moved from place to place; that they assisted voters who were unable to tick the ballot.

The Declaration of Results Form for Kagango Polling Station, Lwentale Parish showed that the 1st respondent polled 255 votes as against the petitioner's 242 votes. There is a statement on the DR Form that six votes were unaccounted for. The said DR Form was annexed as exhibit PR 2B to the Petitioner's second affidavit in reply filed on 26th September 2006.

The Petitioner relied on the affidavit of Nanjiibwa John of Kasansa village, Mitama Parish, Lugusulu sub-county, who was the Chief Campaigner of the petitioner in that area. He stated in para.2 that he was at Kasansa Polling Station at 8:00a.m.

He saw one Moses Ninsiima, the Movement Chairperson of Mitima Parish, and one Yosamu Mugona, both of them agents of the 1st respondent, ticking ballot papers and passing them to Batenga

and Matovu, the Election Officials, who stuffed them in the ballot boxes. He stated that Kiwumulo and Sempijja, the other Polling Officials, just looked on. He stated that the voting at the station virtually ended at 9:00a.m because there were no ballots for the majority of voters who came after 9:00a.m. He further stated that he reported the matter to Kansasa Police Post who did not take any action. There were no affidavits in reply from Moses Ninsiima, Yosamu Mugona, Batanga or Matovu.

The petitioner relied on the Affidavit of Mugyimba James, the LC.I Chairperson of Lugusuulu village Polling Station, Mussi Parish, Lugusuulu sub-county. He stated in para.3 that the daughter of Sam Kuteesa came to Mussi Primary School where the Polling exercise had shifted because of rain. She was in the company of one Barigye. He stated that these two ordered the Polling Officials to allow multiple voting, where upon the people who had already voted and were taking shelter in two classrooms rejoined the lines and voted all over again. It was at about 12:00 noon. He stated that he walked away in protest. He stated that Barigye and some Polling Officials pleaded with him to sign the declaration forms prematurely but he refused.

The Declaration of Results Form for Mussi Polling Station, Mussi Parish, Lugusuulu sub-county showed that the 1st respondent polled 219 votes as against the petitioner's 034 votes. The Presiding Officer recorded on the DR Form that Mugimba James

did not sign it. The said DR Form was annexed as Exhibit AP5 to the Petitioner's Affidavit in reply filed on 19.9.2006.

By para 4 (k) of the Petition the Petitioner complained that the 2nd respondent failed to prevent multiple voting and stuffing of ballots contrary to section 12 (i) (b), (e) and (j) of the Commission Act. Section 31 (i) of the Parliamentary Elections Act provides in effect that a person shall not vote or attempt to vote more than once at any election. Sub-section (2) of S.31 requires a Presiding Officer or a Polling Assistant before issuing a ballot paper, to inspect the fingers of any voter in order to ascertain whether or not the voter has been marked with indelible ink.

The Petitioner stated in her affidavit filed on 26.4.2006 in para.7 (c) (viii) and (xi) that several persons were allowed to vote more than once and that the election officials failed to prevent ballot stuffing, un authorized voting and multiple voting.

The petitioner relied on the affidavit of Rwangoga Joy of Kewayya village, Karushomeza Parish, Ntusi sub-county who was a Polling Assistant at Kitahira Polling Station. In parag.2 of her affidavit Rwangoga Joy stated that she witnessed large scale multiple voting, and that by 1:00p.m ballot papers had been used up. She stated that voters who came after 1:00p.m found their names already ticked. She cited Ninsiima Moses, LC.II Chairperson, Mitima Parish, Lwamatarama, Chairman LC.I of Kyabazubi village,

Bushaija LC.I chairperson, Kyanika village, who were known campaign agents of the 1st respondent as the people who facilitated and a betted multiple voting.

The Petitioner also relied on the affidavit of Dr. Muwanga James of Sembeguya Estates, Mitima Parish, Lugusulu sub-county, who was a voter at Kitahira Polling Station. The affidavit was filed on 12.6.2006. Dr. Muwanga James stated:

In para.2 - That at 8:00a.m. at Kasansa Polling Station he found Ninsiima, Mugona Yosamu and Burora Benon, a Councillor of Lwentare Parish at Lugusuulu sub-county all of them prominent campaign agents of the 1st respondent openly ticking ballot papers and stuffing them in the ballot box.

In para.5 - That at 9:00a.m he visited Birimilire P.School Polling Station where he saw Sam, son of Museveni, and Rubagyema ticking ballot papers and stuffing them in ballot boxes.

In paras.7 and 8 - That at 11:00a.m at Kitahira Polling Station he saw people emerging from a grass thatched house with already folded ballot papers which they jut dumped in the ballot box.

In para.11 - That at 2:00p.m he presented himself to vote but he was only given the ballot paper for the Presidential candidate. He stated that at the MP and woman MP tables he found the ballot

papers already finished, and he found his name in the register already ticked.

The petitioner relied on the affidavit of Nsamba Ishal of Kashongi village, Lwentare Parish, Lugusuulu sub-county, who was a Polling agent for Irene Nakiganda at Kagango Polling Station. The affidavit was filed on 12.6.2006. Nsamba Ishal stated:-

In para.2 - That the counting of votes for the Woman MP began at 9:00p.m in one of the rooms at Kagango P.School with the aid of a lantern lamp.

In para.3 - That while the counting was proceeding Burora Benon, the Councillor, entered the room, talked to the Presiding Officer, and blew out the lantern light, causing darkness which lasted about 8 minutes.

In paras. 3 and 5 - That during the darkness the ballot boxes were stuffed and tampered with; that the lantern was lit and the counting resumed amidst protests.

Benon Burora swore an affidavit in support of the answer to the petition, filed on 15.9.2006. He admitted that he arrived at Kagango Polling Station when it was dark and the counting was going on. He stated that he was only interested in the results of the Presidential Election which had already been announced. He denied having blown the lamp. He stated that he left the Polling Station when the counting was still taking place. He stated that he had no interest in the other election results.

In another affidavit filed on 19.9.2006 Benon Burora described himself as a registered voter at Kagango Polling Station. In an annexure to that affidavit he referred to himself as an NRM Member in Sembabule. Dr. Muwanga James in his affidavit referred to Burora Benon as a Councillor of Lwentare Parish at Lugusulu sub-county. I cannot believe that an NRM Member and a Councillor had no interest in other election results apart from the Presidential election results. I would prefer the evidence of Nsamba Ishal on what transpired during the counting of votes for the Woman MP.

By para.4 (o) of the petition the petitioner complained that the 2nd respondent failed to prevent prohibited persons from voting contrary to article 61 (1) (a), (b), S.12 (1) (e) and (j) of the Commission Act and the Parliamentary Elections Act. The Petitioner stated in her affidavit filed on 26.4.2006 in para.7 (c) (viii) that many unregistered voters and underage persons were allowed to vote.

The Petitioner relied on the following affidavits:

- (a) Affidavit of Ssebutinde Edward who stated in para.3 that he saw Tushabe Kussein allow unregistered voters to vote in the names of deceased or absent voters.

(b) Affidavit of Ntumwa Isha, a Councillor of Sembabule Town Council and the Petitioner's Chief Campaign Agent in Sembabule Town council and Lugusulu sub-county, who stated that near Kagango Polling Station at about 12:00 noon he saw many people gathered at the house of Oliver Nakayiwa who was the Presiding Officer nominated by the 1st respondent. He stated that he found an agent of the 1st respondent handling a bundle of voter cards which he was issuing to under age persons and unregistered persons. He stated that he confiscated 71 voter cards and consulted Nakayiwa Oliver who informed him that the cards belonged to voters who were dead, and were being given to unregistered voters. He stated that he rang the District Returning Officer and informed him, and upon the latter's advice the deponent reported the matter to Sembabule Police Station. He stated that he handed the 71 voter cards as exhibits to a detective Woman Police Officer, one Mushemera Rehema, and the case was filed under CRB 256/2006.

(c) Affidavit of Kizza Edward of Lwesankala village, Lwasankala Parish, Lwemiyaga sub-county, who was a Polling Agent of the Petitioner at Lwesankala Polling Station, who stated that he saw Paddy Patrick of Lwesankala and Mugisha of Kasambya, both of them agents of the 1st respondent, actively aiding and

facilitating unregistered voters to vote in the names of absentee or deceased voters. He stated that he saw Mugisha lining up with and ticking the ballot for his own sister KIRABO whose names were not in the voter's register.

- (d) Affidavit of Byarugaba Simon Peter of Lwembogo village, Kasambya Parish, Lwebitakuli sub-county, who was the petitioner's agent at Lwembogo Polling Station, who stated that he saw several persons who were under age being allowed and facilitated by Polling Officials nominated by the 1st respondent to vote in the names of deceased voters. He stated that he saw one Musinguzi Fred, a son of his late neighbour Kabigumira, who was born in 1989 being allowed to vote.
- (e) Affidavit of Beezal Akim of Kenziga village, Lugusuulu Parish, Lwebitakuli sub-county, who was a Chief Campaigner of the Petitioner in Lugusuulu Parish. He stated that on the Polling day at Kenziga Polling Station he saw Kiwanuka Fred, a Councillor of Lugusuulu Parish at Lwebitakuli sub-county and Kyoma Jackson, the LC.I chairperson of Kenziga village, both agents of the 1st respondent, aiding and facilitating unregistered voters to vote in the names of deceased and absent voters.

He stated that Kiwanuka Fred held and read out the list of voters and he and Kyoma accompanied unregistered voters to the voting table and either ticked the ballots for them or directed them where to tick as they watched. He gave some names of deceased or absent voters in whose names unregistered voters voted. He stated that one Sekabito, the LC.III Chairperson of Matete sub-county, a known campaigner of the 1st respondent personally attacked and prevented him from writing down names of persons who were voting illegally.

Kiwanuka Fred, in his affidavit in reply, admitted that he was a registered voter at Kenzige Polling Station and that he voted there. He denied the allegations that he read out names at the Polling Station. He stated that the names of the deceased and absent persons mentioned by Beezal Akim had been removed from the register during the cleaning up exercise of voters' registers. As a challenge to the petitioner he stated that her agents signed declaration of results forms confirming that no irregularity had taken place.

The Declaration of Results Form for Kenziga Polling Station, Lugusuulu Parish, showed that the 1st respondent polled 329 votes as against the petitioner's 100 votes. The DR Form was annexed as exhibit PR 2B to the petitioner's second affidavit in reply filed on 26th

September 2006. I have noted on this DR Form that against the Petitioner's name one Matovu Edward signed as the candidate's agent present. I have also noted that Matovu Edward did not swear any affidavit in support of the petition.

- (f) Affidavit of Gumikiriza Godfrey of Kisaana village, Lwebitakuli sub-county, who was the petitioner's agent at Kiwogo Polling Station, who stated that he saw Herbert Kamugasha and Nanyondo, agents of the 1st respondent, aiding and facilitating unregistered persons to vote in the names of deceased or absent voters.
- (g) Affidavit of Hajjat Fatuma Namugula of Dispensary Zone, Sembabule Town council, the Woman Councillor for Mijwala Sub-county and Sembabule Town Council, who stated that at Kidokolo Parish at 1:00p.m she saw the Presiding Officer calling out names but people of different names were stepping forward and voting in the names of deceased and absent voters. She stated that she particularly heard the names of Kanoti Freedah, an elderly person, being read, but a girl who appeared to be less than 18 years voted in Kanoti's names.
- (h) Affidavit of Mujuzi Vincent of Buyini village Kinyamazzi Parish, Lwebitakuli sub-county, who was a campaign co-

ordinator of the petitioner in Kinywamazzi Parish, who stated that on Polling day he visited Kyezinga Polling Station where he saw Kyoma Jackson and Kiwanuka Fred, both campaign agents of the 1st respondent, facilitating and aiding unregistered voters to vote in the names of deceased and absent voters. He stated that he saw Kyoma and Kiwanuka take turns to read the roster and then take voters to the voting table, tick the ballots for them or watch them tick the ballots. He stated that he blamed them but they roughed him up and also threatened him.

In my view the evidence of Mujuzi Vicent corroborated the evidence of Beezal Akim, and I find this evidence more believable than the denials of Kiwanuka Fred.

- (i) Affidavit of Kanyonyi Umar, the LC.I Chairperson of Kirebe village, Kabale Parish Lwebitakuli sub-county, and a voter at Kirebe Polling Station, who stated that he voted and remained at Kirebe Polling Station for the whole day. He stated that he witnessed lots of malpractices committed by Polling Officials and agents of the 1st respondent. He stated that he looked at the register and found that the names of deceased persons had been ticked as having voted, and these were: - Godfrey Musombelo, Kadigaza, Byekwaso Erika, Kahembwe and his wife, Bagyenda

Mbyemire, Bamwesigye, Katung and Bandwaniza. He also stated that he saw the names of: Bulungo, Tumwine and his wife, Bende, Baruga and Kasamanyu ticked and yet they had long shifted to other areas.

- (j) Affidavit of Godfrey Bigirwa of Katikamu village, Kawanda Parish; Lugusuulu sub-county, a veterinary officer of Sembabule District Local Government and a voter at Katikamu Polling Station, who stated that he saw Hon. Kuteesa authorized many people from Gomba county, who were present, to cast their votes at Katikamu Polling Station, which they did. He stated that one Kanimi, the ranch manager of Hon. Kuteesa and Mugume, an LC.I chairman, both staunch supporters of the 1st respondent; were in charge of the voting exercise, telling voters to vote for candidates with the bus symbol, and they too cast votes for other people who included the dead and the absent.

Hon. Sam Kuteesa did not file any affidavit to deny the allegations made against him. Counsel Byamugisha referred to the affidavit of Benon Kato relating to Katikamu Polling Station. He submitted that a combination of the affidavits of Godfrey Bigirwa and Benon Kato prove the allegations of voting by prohibited persons at Katikamu Polling Station. Counsel submitted that the evidence

contained in the several affidavits relied upon by the petitioner proved the complaints that:

- (i) The 2nd respondent failed to control the proper use of ballot papers;
- (ii) The 2nd respondent failed to prevent multiple voting and stuffing of ballot boxes;
- (iii) The 2nd respondent failed to prevent prohibited persons from voting.

Learned Counsel Mr. Kakuru submitted that Edward Ssebutinde was not a Presiding Officer. I observed that the format for the Poll-watchers report form provided space for only one Presiding Officer. Counsel referred to the Poll-watcher's comments that the election was free and fair. However, the same person (Arinaitwe Daniel) commented that when Polling Officials work at their local Polling Stations they participate in malpractices. If this Poll-watcher was at Lwendezi Polling Station I wonder where else he observed the malpractices.

Counsel Kakuru attacked the affidavit of Mugyimba James that it did not connect the 1st respondent with any malpractices. Mugyimba James stated in para.2 of his affidavit that he saw James Katumba and Sam Namara, both Polling Agents of the 1st

respondent, campaigning to voters in the lines saying “vote only the bus.” It is a fact that the 1st respondent also used the symbol of a bus. James Katumba and Sam Namara did not file any affidavits to deny the allegations.

With respect to the affidavit of Lule James in para.2 two names: Dan and Charles appeared. In the report of the Poll-watcher, Mujuzi Cyprian at page 126 two people: Mujuzi Diane and Muwanguzi Charles were named as Polling Assistants. It is possible that Lule James was referring to one of them but was confused by the names.

Counsel Kakuru attacked the affidavit of Ntumwa Isha for not naming the under age or unregistered people, or stating how the voter cards were used. Ntumwa Isha stated that he found very many people gathered at the house of Oliver Nakayiwa. He stated in para.6 that when he confiscated the voters’ cards very many of the young persons dispersed. I think what was important was that Ntumwa Isha confiscated 71 voters’ cards, talked to Nakayiwa Oliver, one of the Presiding Officers, and later reported to Sembabule Police Station. I find Ntumwa Isha’s evidence credible and I do believe it.

With regard to the affidavit of Nanjiibwa John Counsel Kakuru submitted that Moses Ninsiima and Yosamu Mugona were not election officials. The Poll-watcher, Matovu Grace, in his report,

stated that Mugona Yosam was an election day constable. Nanjiibwa John stated that Moses Ninsiima was the Movement Chairperson of Mitima Parish. He stated that Kiwumulo and Sempijja, who were Polling Officials, merely looked on as the ballots were being stuffed in the boxes. The Poll-watcher named Kihumulo Hope and Sempijja as Presiding Officers. In his report the Poll-watcher stated that no voters were denied the right to vote; that all voters who were in the queue at 5p.m were permitted to vote.

Nanjiibwa John stated that all voters who asked to vote after 9:00a.m including himself were told that there were no ballot papers, and did not vote. He named other people who were denied the right to vote and these were: Joseph Luswata, John Bamuhiga and Kayondo Francis. He stated that he reported the case of vote stuffing to Kasansa Police Post but the Police came after 9:00a.m, after the ticking and stuffing was over. In my view, as a witness for the petitioner, Nanjiibwa John should have stated the Police reference for the case he reported. None of the other people who were denied the right to vote swore affidavits. Nanjiibwa's evidence lacks corroboration. I have examined the Declaration of Results Form for Kasansa Polling Station (annexture marked PR 2B attached to the petitioner's second affidavit in reply, filed on 26.9.2006) and found that there were 17 unused ballot papers, the same number given by the Poll-Watcher in his report. I have also noted that the Petitioner's agent called Akandwanaho Ronald signed the DR form. The said agent did not

swear any affidavit to bring out what Nanjiibwa John stated. In my view the Petitioner's agent confirmed what was stated on the DR Form as accurate. I cannot reconcile Nanjiibwa's statement that the ballot papers were finished at 9:00a.m with the availability of unused ballot papers. So, I think Nanjiibwa John fabricated his story. He stated that Batanga and Matovu who allegedly stuffed the ballot boxes were election officials. The report of the Poll watcher disproved this by naming different people as Polling Officials. I, therefore, reject Nanjiibwa's affidavit.

With regard to the affidavit of Gumikiriza Godfrey Counsel Kakuru referred Court to the Poll-watcher's report, particularly his comments at pg.405. The Poll-watcher at Kiwogo Polling Station was Byaruhanga James. His comments were that three people were denied the right to vote because they reached the Polling Station after 5:00p.m. Gumikiriza Godfrey named Kasozi, Kirizze Erias, Mubangizi and Joy Mugumya, alleged to be campaign agents of the 1st respondent, as people who gave money to voters and instruct them to vote for the 1st respondent. He stated that even the Polling Constable warned them but to no avail. He stated that the same people escorted voters to the Polling table and ticked the ballot papers for them. Erias Kirize swore an affidavit in reply in which he denied having been a campaign agent of the 1st respondent, giving money to anyone, or escorting voters and showing them who to vote for. However, he admitted

being a registered voter at Kiwogo Polling Station and that he cast his vote there. He did not deny having been seen by Gumikiriza Godfrey. Nor did he deny knowledge or the presence of Kasozi, Mubangizi and Joy Mugumya. These three did not swear affidavits to deny the allegations made against them. I have looked at the Declaration of Results form for Kiwogo Polling Station (annexed as exhibit AP5 to the Petitioner's affidavit in reply filed on 19.9.2006) and noted the following:

- (i) The 1st respondent polled 400 votes as against the petitioner's 97 votes.
- (ii) Gumikiriza God signed the DR Form as the petitioner's agent.
- (iii) The Presiding Officer did not sign the DR Form.
- (iv) The number of unused ballot papers was given as 170.

However, the Poll-watcher, in his report, gave the total number of unused ballots as 179. Yet he was supposed to obtain this information from the Presiding Officer. Since the Presiding Officer did not sign the form the court is left to wonder who filled in the form and gave information to the Poll-watcher. Gumikiriza Godfrey stated in his affidavit that he was not given a copy of the DR form. I consider Gumikiriza's affidavit

evidence credible and I do believe it. I, therefore, reject the Poll-Watcher's report.

To challenge the affidavit sworn by Rwangoga Joy counsel Kakuru referred to the Poll-watcher's report and invited this court to compare the said report with the allegations in Rwangoga's affidavit. The Poll-watcher at Kitahira Polling Station was called Lukandwa Ignatius. He stated that by 5:00p.m voting had already ended. He answered question No.14 in his report which was as follows:

"Were all voters who were in the queue at 5:p.m permitted to vote?" His answer was "yes". He answered question No.13 which was this:

"Were any voters denied the right to vote?"

He ticked "yes", then "No", but eventually he put a big tick on "Yes".

In my view the Poll-watcher had a problem with making up his mind to state the truth. Rwangoga Joy, in her affidavit, named the perpetrators of the alleged illegal acts. She mentioned the presence of Hon. Sam Kuteesa, taking Bushaija aside, and the coca cola soda which flowed there after. She stated that even lining voters feasted on the soda. She mentioned people who were shouting to the lining voters to vote the bus for the Woman MP. The Poll-watcher apparently did not see any of these activities. In the circumstances I prefer the evidence of

Rwangoga Joy who stated that by 1:00p.m ballot papers had been used up because of illegal ticking and multiple voting. I reject the Poll-watcher's statement that by the afternoon most of the voters had already cast their votes.

With regard to the affidavit of Nsamba Ishal Counsel Kakuru invited court to look at paras. 7 and 8 thereof and to compare them with the Poll-watcher's comments. The Poll-watcher at Kagango Polling Station was called Lwanga Richard. Nsamba Ishal stated in para.7 that he observed the ticking of ballot papers by the respondent's agents for other voters. He named Kakooza, a boda boda cyclist, who ferried voters and proceeded to tick ballots for them. He also named Nalongo, the 1st respondent's Polling agent who ticked ballots for some voters. The Poll-watcher stated that the agents breached the election laws when they campaigned and moved from place to place. He stated that the agents helped those who were unable to tick. The Poll-watcher reported that there was violence at the Polling Station caused by the party agents. He reported that voters were permitted to join the queue after 5:00p.m. In my view the Poll-watcher's report helped to bring out other illegal acts which were done by agents.

Learned Counsel Mr. Kandebe attacked the affidavit of Hajati Fatuma Namugula that it contains hearsay in para.6. I do

agree. However in Election Petition No.1 of 2001 (supra) Tsekooko, JSC said:

“.....there are decided cases from other jurisdictions, such as England and Kenya, which support the proposition that parts of an affidavit can be severed from the rest of the same affidavit where the severance does not affect the merits, or will not detract from the other paragraphs of the affidavit.” The learned JSC further said: “In my opinion it would be improper in this petition to strike out whole affidavits which are found to contain so called hearsay evidence in some parts where the offending parts of the same affidavits can be severed from the rest of the affidavit without rendering the remaining parts meaningless.”

On the basis of this authority I am of the view that para.6 of Hajati Fatuma Namugula’s affidavit, the offending part, should be severed while the non-offending parts of the affidavit should be relied upon.

Counsel Kandebe attacked the affidavit of Godfrey Bigirwa. He submitted that the deponent never mentioned any names of the dead or the absent who were impersonated. Counsel submitted that the deponent never mentioned any names or the number of people from Gomba who were allowed to vote.

Counsel submitted that the best witnesses for the petitioner concerning the alleged mess at the Polling Stations should have been Presiding Officers, Polling Assistants and the candidate's agents. He submitted that strangers and passersby cannot be used to prove mess at the Polling Stations. Learned Counsel assumed that the Presiding Officers took oath and became impartial. However, the Petitioner and Hon. Theodore Sekikubo stated in their joint affidavit that no Presiding Officer or Polling Assistant who conducted the elections on 23rd February 2006 took the prescribed oath. The main cause of such a situation was insufficiency of time to carry out the exercise. In my view it was very difficult to expect impartiality from people nominated by contesting camps.

Counsel Kandebe associated himself with the analysis of Counsel Kakuru on the alleged prevalence of malpractices.

Counsel Byamugisha argued the alleged non-compliance in paras. 4 (e), (m), (q), (r), (s), and (t) together. He submitted that the sum total of all those grounds is that the elections were carried out under insecure conditions. Counsel referred to S.7 of the Parliamentary Elections Act. It provides:

S.7 (1): "Every candidate, election officer, clerk, candidate's agent or other person in attendance at the Polling Station during the counting of the votes shall maintain and aid in

maintaining the secrecy of the voting, and no candidate, officer, clerk, candidate's agent or other person shall -

- (a) at the Polling Station, interfere with a voter when marking the ballot paper, or otherwise attempt to obtain information with respect to the candidate for whom any voter is about to vote or has voted;
- (e) at a Polling Station, induce or endeavour to induce any voter to vote for a person other than the person of his or her choice;"

The complaint in para.4 (e) was that: The 2nd respondent failed to take steps to ensure that there were secure conditions necessary for the conduct of the election contrary to S.12 (1) (f) of the Commission Act.

The complaint in para.4 (m) was that:

The 2nd respondent failed to ensure that voting was by secret ballot contrary to S.30 (i) of the Parliamentary Elections Act and S.12 (i), (e), (f) and (j) of the Commission Act.

The complaint in para.4 (s) was that:

The 2nd respondent failed to prevent canvassing of votes within one hundred metres of Polling Stations on the polling day contrary to Article 61 (a) of the Constitution and S.12 (i) (e) and (j) of the Commission Act and the Parliamentary Elections Act.

Perhaps added to the above complaints in terms of context should be para 4 (w). The complaint was that:

The 2nd respondent failed to prevent people from seeking influence (sic) of others to vote for the first respondent or to ascertain for which candidate voters intended to vote or had voted for contrary to Article 61 (i) (a) of the Constitution, S.12 (i) (e) and (j) of the Commission Act and S.81 (2) (a) of the Parliamentary Elections Act.

S.30 (i) of the Parliamentary Elections Act provides:

“Voting at every election shall be by secret ballot.....”.

In order to prove the complaint in para.4 (m) the petitioner relied on the affidavits of:

- (i) Mbonigaba John, a voter at Katuntu Polling Station, Lwebitakuli Parish, Lwebitakuli sub-county, particularly pars. 2 and 3;
- (ii) Ntumwa Isha, in para.7.
- (iii) Kasozi Bagalaalina Muhamood of Kirebe village, Kabale Parish, Lwebitakuli sub-county, a campaign co-ordinator of the petitioner in Kabale Parish, particularly, para.2

Counsel Kakuru attacked the affidavit of Mbonigaba John for failing to name the voters referred to. However, the deponent

named the alleged agents of the 1st respondent who actively and openly campaigned to the lining voters. He stated that they followed voters to the voting table urging them to vote the bus. He also named the Presiding Officer who allegedly did nothing to stop the illegal activities. None of the named persons swore an affidavit to deny the allegations against him/her. I have no reason for not believing the evidence of Mbonigaba John.

In order to prove the complaint in para.4 (s) the Petitioner relied on the affidavits of: -

- (i) Ssebutinde Edward, the 2nd Presiding Officer at Lwendezi Polling Station, particularly para.4;
- (ii) Mbonigaba John, in para.2
- (iii) Mugyimba James, in para.2.
- (iv) Walukagga Abaasi of Kirebe village, Kabale Parish, Lwebitakuli sub-county a polling agent of Dr. Kizza Besigye at Lwendezi Polling Station, in para.3.
- (v) Ntumwa Isha, in para.7.
- (vi) Kalanzi Joseph, a Presiding Officer of Nankondo Polling Station, Lwebitakuli sub-county, in para.2.

- (vii) Kizza Edward, a Polling Agent of the Petitioner at Lwesankala Polling Station, in para.2.
- (viii) Bolekwa Adrian of Kinoni village, Lubale Parish, Lwemiyaga sub-county who was a Presiding Officer at Kinoni Polling Station, in paras. 2, 3, 5, and 6.
- (ix) Christine Namugerwa of Katimba “A” village, Mateete Parish, Mateete sub-county who was the Petitioner’s Polling Agent at Katimba “A” Polling Station, in paras. 3 and 4.
- (x) Rwangoga Joy, a Polling Assistant at Kitahira Polling Station in Ntusi sub-county paras. 7 and 9.
- (xi) Kaseeba Edward of Lwembogo village, Kasambya Parish, Lwebitakuli sub-county, who was the Petitioner’s Polling agent at Kigaaga Polling Station;
- (xii) Bunjako Richard of Suzaddembe village, Lwebitakuli Parish, Lwebitakuli sub-county, who was the Petitioner’s Polling agent at Lwebitakuli Trading Centre Polling Station, in Para.2.

- (xiii) Ahabu Mugisha David Stanley, a Polling Agent of the Petitioner at Lutunku “B” Polling Station, Sembabule Town Council, in paras.3 and 4.
- (xiv) Livingstone Nshemereirwe of Katikamu village, Kawanda, Lugusulu sub-county, who was a voter at Kairasya Polling Station in paras. 3 and 4.
- (xv) Hajjat Fatuma Namugula, in paras. 7 and 15.
- (xvi) Hajjat Nabulime Habiba of Katimba village, Matete Parish, Matete sub-county, who was the petitioner’s polling agent at Katimba “B” Polling Station in paras. 2 and 3.
- (xvii) Kityo Apolonari of Kinywamazzi village, Kinywamazzi Parish, Lwebitakuli sub-county, a voter at Kinywamazzi Polling Station, in Paras. 2, 3 and 4; and
- (xviii) Kasiita Ahmed of Nankondo village, Lwebitakuli Parish, Lwebitakuli sub-county, the Petitioner’s Polling agent at Katuntu Polling Station, in Paras. 2, 3 and 4.

Counsel Kakuru attacked the affidavit of Kalanzi Joseph that he talked about what happened after voting and counting of ballots. I have, however, noted that in parag.2 Kalanzi Joseph stated that

he saw Kitayimbwa Kabumbuli, an alleged agent of the 1st respondent openly campaigning to lining voters. Kitayimbwa Kabumbuli did not swear an affidavit to deny this allegation.

Counsel Kakuru did not submit on what Kizza Edward stated in parag.2 of his affidavit. The deponent named Paddy Patrick and Mugisha, alleged agents of the 1st respondent who openly campaigned to the voters in the lines.

Concerning the affidavit of Christine Namugerwa Counsel Kakuru submitted that shouting “vote the bus” had nothing to do with the 1st respondent. However, Christine Namugerwa named Kalanzi Gerald an ex-LDU operative, a known campaign agent of the 1st respondent, as having shouted at the lining voters to “vote the bus”. The deponent stated that at 3:30p.m the RDC Kabogorwa arrived and when he learnt of the complaints against Kalanzi, he warned the deponent to stop complaining or risk being arrested. Kabogorwa Serwano swore an affidavit in support of the answer to the petition but he did not reply to the allegations made by Christine Namugerwa.

Concerning the affidavit of Kaseeba Edward Counsel Kakuru submitted that it had not been established where Kigaaga Polling Station was. However, the deponent in Para.1 stated that he was the Polling agent of the Petitioner at Kigaaga Polling Station,

Kigaaga village, Kasambya Parish, Lwebitakuli sub-county. I think this was easy for the 1st respondent to cross-check.

Counsel Kakuru attacked the affidavit of Bunjako Richard for failing to name any voter who was instructed. The deponent named Mrs. Mary Rubandira, who was a Polling Assistant and an agent of the 1st respondent as having instructed whoever she handed a ballot paper to vote for the 1st respondent. The deponent was the Petitioner's Polling Agent at that Station. Mrs. Mary Rubandira did not swear an affidavit to deny the allegations. I think as a Polling Agent at the station the deponent was in position to see and hear what was going on. He stated that he complained to the Presiding Officer who did nothing.

Counsel Kakuru attacked the affidavit of Livingstone Nshemereirwe and submitted that the bus did not mean the 1st respondent. The deponent stated that he arrived at Kairasya Polling Station before 7:00a.m. He saw Fred Karakure, an alleged staunch supporter of the 1st respondent arrive with the polling materials. He stated that Karakure addressed voters who had assembled at the station urging them to vote for candidates represented by the bus symbol. He stated that Karakure took charge of the voting exercise, showing the voters how to vote and sometimes voting for them. The deponent stated that he left the station in protest, without voting.

The Poll-watcher at Kairasya Polling Station was called Nyabwana Tito. In his report he named the Presiding Officer as Tusimirirwe. However on the DR Form for that station (attached as PR 2 B to the Petitioner's second affidavit in reply) the Presiding Officer was named as Tibekinga Francis. Unfortunately, he did not sign the DR Form. The Poll-watcher did not name Fred Karakure as having been a Polling Official at that Station. It would appear that he simply usurped the powers of the Presiding Officers, who were not agreed as to who was in control. It is needless to repeat here that the 1st respondent was an NRM candidate using the symbol of a bus.

Kityo Apolonari, a voter at Kinywamazzi Polling Station, narrated how Joseph Mukasa, a known campaign agent of the 1st respondent, who had been appointed a Polling Assistant, openly instructed voters in lines to vote the 1st respondent. The deponent stated that Joseph Mukasa bragged to him that the 1st respondent would be declared the winner no matter what the deponent thought. The deponent narrated that the activities of Joseph Mukasa led to commotion and he had to be removed by mobile police personnel. Counsel Kakuru submitted that whenever malpractices occurred they were firmly dealt with.

S.81 (2) of the Parliamentary Elections Act provides:

“During the hours when a Polling Station is open on a polling day, a person shall not, within two hundred meters of any Polling Station -

- (a) Seek to influence, in whatever manner, any person to vote for any candidate or to ascertain for which candidate any voter intends to vote or has voted.”

In order to prove the complaint in para.4 (w) the petitioner relied on the affidavits of: -

- (i) Mbonigaba John, in paras.2 and 3.
- (ii) Walukagga Abaasi, in paras.2, 3 and 4;
- (iii) Kasozi Bagalaalina Muhamood, in para.2;
- (iv) Kaseeba Edward, in paras.2 and 3;
- (v) Kazibwe Abaasi of Kirebe village, Kabale Parish, Lwebitakuli sub-county, who was a polling agent of Dr. Kizza Besigye at Kabale Polling Station, in paras.2, 3, 4 and 5;
- (vi) Gumikiriza Godfrey, in paras.2, 3, 4, 5, and 6;

- (vii) Charles Bakalu of Lugamba village, Kampala Parish, Lwemiyaga sub-county, who was a Polling Assistant at Lugamba Polling Station, in paras. 2, 3, and 4
- (viii) Nsamba Ishal, in para.7;
- (ix) Livingstone Nshemereirwe, in paras.3 and 4;
- (x) Mujuzi Vincent, in paras. 5, 7, 8, 11 and 12.
- (xi) Muwawu Jude of Lwebitakuli Trading Centre, Lwebitakuli sub-county, a Presiding Officer at Lwebitakuli Trading Centre Polling Station, in para.5;
- (xii) Godfrey Bigirwa, in paras.3, 4 and 5. Kazibwe Abaasi stated in his affidavit that he saw Godfrey, LC.I Chairperson of Kabale, Jolly Kyomugisha a Polling Assistant, Bashabe, an SPC, all of them known agents of the NRM party openly instructing voters to vote for Museveni for President and Anifa for Woman MP. He stated that he saw those people taking voters to the voting table and either tick the ballot for them or watch over them as they voted. In para.4 the deponent listed 34 persons for whom ballots were ticked. He stated that he was stopped from recording more names by one Bagumira Sekabiito, the LC.III chairperson of Lwebitakuli sub-county, who was allegedly a supporter

of the 1st respondent. Counsel Kakuru, however, submitted that the deponent did not name the people whose ballot papers were ticked. I think Counsel, with due respect, overlooked para.4 of the deponent's affidavit. The Poll-watcher at Kabale Polling Station was called Muhwezi Simplisio. He commented that the Polling Officials followed the procedure of voting and there was no problem. He stated that the voting and counting was free and fair.

Jolly Kyomugisha swore an affidavit in support of the 1st respondent's answer to the petition. In para.2 she denied having instructed or asked anybody to vote for Museveni or Anifa. She admitted that she was a Polling Assistant seated at desk three, the last one, and could not interact with voters before they voted. She stated that it was Abasi Kazibwe who was seated at desk one where voters were received. She challenged the Petitioner that her Polling Agent called Jjuko Robert had no complaint and he signed the DR Forms.

I think what is significant in the evidence of Kazibwe Abaasi are the names of 34 voters whose ballot papers were allegedly ticked. These were voters at one Polling Station. The deponent implicated the LC.I chairperson of Kabale but he did not swear an affidavit to say that those people do not exist as voters in his area. Nor did any one of the named voters swear an affidavit to

deny and put Kazibwe Abaasi to shame. The Poll-watcher in his report conceded that some voters were denied the right to vote. Yet in his comments he did not refer to this at all. I would prefer the evidence of Kazibwe Abaasi to the comments of the Poll-watcher.

Charles Bakalu, who was a Polling Assistant at Lugamba Polling Station, stated that he saw Bulaimu Batuma, the movement chairperson of Lwemiyaga sub-county and Micheal Kato, an LDU, both of them known campaign agents of the 1st respondent openly giving money to and instructing lining voters to vote for the 1st respondent. The deponent saw those people escorting voters to the polling table. He stated that as an elder he talked to Bulaimu Batuma but the latter ignored him. The deponent named Musisi and Bob as persons who also tried to prevail over Bulaimu Batuma to stop the malpractice.

Counsel Kakuru submitted that what Charles Bakalu stated were mere unsubstantiated allegations. Bulaimu Batuma swore an affidavit in support of the 1st respondent's answer to the petition. In para.15 he denied having bribed voters at Lugamba Polling Station. He also denied knowledge of Micheal Kato, an LDU. He however admitted that he was the NRM chairman of Lwemiyaga sub-county.

Counsel Kakuru submitted that in all the affidavits the people who voted in the names of dead or absent voters, and were named, totalled 87. He contended that the vote margin between the 1st respondent and the petitioner was 1199 votes. He submitted that there were 177 Polling Stations but only a few Polling Stations were mentioned. He submitted that the 1st respondent filed evidence to show that there were observers at 147 Polling Stations. He referred to the affidavit of Francis Semujju in which a summary gives the qualitative picture of what actually happened in Sembabule District. He submitted that the election was free and fair.

In Election Petition No.1 of 2001 (supra) ODOKI, CJ said that the over-riding principle is that the election must be free and fair. The Commission must ensure that the election is conducted under conditions of freedom and fairness. In order to do so the Commission must be independent and impartial in the conduct of elections.

The Chief Justice observed that to ensure that elections are free and fair there should be sufficient time given for all stages of the elections. The election procedures should guarantee the secrecy of the ballot.

The petitioner complained that the 2nd respondent failed to prevent multiple voting and stuffing of ballots. Multiple voting

contravenes S.31 (i) of the Parliamentary Elections Act. The principle behind this provision is equality and fairness.

The petitioner complained that the agents and supporters of the 1st respondent ticked ballot papers for voters. This constitutes an offence under S.76 (j) of the Parliamentary Elections Act. This provision was intended to safeguard the principles of secret ballot and transparency.

This court had to find out whether there was a failure to conduct the election in accordance with the principles laid down in the provisions of the Parliamentary Elections Act. I have carefully considered this matter. I have kept in focus the provisions of the Commission Act which contains the principles relating to a free and fair election. The petitioner has adduced sufficient evidence which on the basis of the balance of probabilities proves that there was non-compliance by the 2nd respondent with the provisions of the Commission Act and the Parliamentary Elections Act relating to elections. I find that the 2nd respondent failed to conduct the election of the woman member of Parliament for Sembabule District in accordance with the principles laid down in the provisions I have already discussed of the Parliamentary Elections Act. I have already observed that the memorandum of understanding unleashed on Sembabule District Polling Officials who were partisan, partial, biased and untrained. On the evidence available before court I can firmly state that those

Polling Officials failed to conduct a lawful, competent free and fair election. I find that the 2nd respondent gravely compromised its powers to independently, freely and impartially appoint presiding Officers and Polling Assistants, and thereby lost grasp of the conduct of the election of the Woman MP for Sembabule District. I therefore answer the 1st issue in the negative.

Now I turn to issue No.2:

Whether the non-compliance affected the result of the election in a substantial manner.

Counsel Kakuru submitted that S.61 of the Parliamentary Elections Act provides that non-compliance may lead to annulling an election if it was such as to affect the result in a substantial manner. Counsel submitted that the petitioner filed 47 affidavits relating to non-compliance. He submitted that in respect of Lwebitakuli 19 affidavits were filed which cover irregularities at 12 Polling Stations. He submitted that Lwebitakuli had a total of 42 Polling Stations.

He submitted that only two affidavits mentioned Ntuusi sub-county, and they concerned two Polling Stations out of 20. Counsel submitted that five affidavits mentioned Mateete sub-county, and they related to incidents at two Polling Stations out of a total of 46 Polling Stations. He submitted that there were seven affidavits which mentioned Lugusulu sub-county, and they related

to eight Polling Stations out of 21. He submitted that there were seven affidavits which mentioned Lwemiyaga sub-county, and they related to five Polling Stations out of a total of 23. Counsel submitted that only one affidavit of Hajjati Fatuma Namugula mentioned Mijwala, and she mentioned four Polling Stations out of a total of 21. He submitted that no affidavit was sworn concerning Sembabule Town Council. He submitted that there are 177 Polling Stations in the District but irregularities were alleged in a total of 40 Polling Stations. He submitted that there was no evidence of complaint against 137 Polling Stations. He submitted that the petitioner asked court to nullify the election using the qualitative test. He invited court look at the general picture and examine the quality. He submitted that the qualitative test looks at the overwhelming majority. He submitted that the quantitative test requires setting out the numbers, and one has to be exact. He submitted that to satisfy the qualitative test of impact overwhelming evidence must be available. Counsel submitted that 40 Polling Stations out of 177 is 22.5%, areas of complaints. Counsel submitted that the qualitative analysis gives a picture of a free and fair election. He contended that to satisfy the quantitative analysis the petitioner used DR forms in order to show figures. He submitted that if the unsigned DR forms were to invalidate the results then there could be a substantial effect on the results. Counsel submitted that in order to determine the effect of the unsigned DR forms it is necessary to examine the DR forms for all 177 Polling Stations.

He submitted that the court cannot be sure whether the DR forms produced in court were the only invalid DR forms. He contended that there may be other invalid forms for Polling Stations where the Petitioner won. He submitted that the evidence before court is not conclusive on invalid DR forms. Counsel referred to S.47 (5) of the Parliamentary Elections At. It provides:

S.47

(5) The Presiding Officer and the candidates or their agents, if any, shall sign and retain a copy of a declaration stating -

- (a) the polling station;
- (b) the number of votes cast in favour of each candidate; and the Presiding Officer shall there and then announce the results of the voting at that Polling Station before communicating them to the returning officer. Counsel Kakuru submitted that the word “shall” in sub-section 95) of S.47 is regulatory but not mandatory. He submitted that the signing of DR forms by a Presiding Officer is not mandatory.

Counsel referred to Article 68 (4) of the Constitution. He submitted that that provision is regulatory not mandatory.

Learned Counsel Mr. Kandebe submitted that there was verification of results under S.53 of the Parliamentary Elections Act. He submitted that it had not been proved that the master DR forms in the ballot boxes were not there or that they were unsigned. He submitted that S.61 (1) (a) of the Parliamentary Elections Act aims at preventing trivial things causing annulment of an election. He submitted that any of the other copies of the DR forms can be used to prove the election results. He wondered where the other copies were. He submitted that a Returning Officer has to open the ballot boxes to verify the results. He submitted that the law on a recount leads to filling new DR forms. He submitted that a petitioning candidate can apply for ballot boxes to be produced for a recount. He submitted that the petitioner must be taken to be satisfied with the contents of the ballot boxes. Counsel submitted that the mentioned incidents of malpractices cannot affect the results in a substantial manner. He submitted that substantial effect must relate to numbers, the winning majority. Counsel submitted that the allegations of invalid DR forms is not enough substantially to affect the result. He submitted that the petitioner failed to prove by numbers how the alleged acts of non-compliance affected the results in a substantial manner. He prayed court to dismiss the petition with costs.

Counsel Byamugisha submitted that a DR form not bearing the signature of a Presiding Officer is invalid. Counsel referred to S.47 (5) and S.50 (1) and (4) of the Parliamentary Elections Act. He submitted that Article 68 (4) of the Constitution used the word “shall” in respect of signing. Counsel submitted that the law does not envisage the absence of a Presiding Officer.

Counsel referred to S.47 (7) (d) and (e) of the Parliamentary Elections Act.

It is provided in S.47 (7) (d) that the refusal or failure of a candidate or agent to sign any DR form shall not by itself invalidate the results - announced under sub-section (5).

S.47 (7) (e) provides that the absence of a candidate or an agent from the signing of a DR form or the announcement of results under sub-section (5) shall not by itself invalidate the results announced.

What is the effect of the absence of a Presiding Officer? Where a DR form is unsigned by a Presiding Officer such questions as the following arise:

- (i) Who opened the ballot box and who counted the votes?
- (ii) Who ascertained the number of votes cast in favour of each candidate?

- (iii) Who announced the results?
- (iv) Who communicated the results of the voting at that Polling Station to the Returning Officer?
- (v) Who recorded the votes cast for each candidate?
- (vi) Who put the copy of the DR form in the ballot box?
- (vii) Who sealed the ballot box after counting the votes?
- (viii) Who ensured proper accountability for the ballot papers delivered at the station?

After considering the above questions, I am of the view that signing of the DR forms by the Presiding Officer is mandatory, and failure of a Presiding Officer to sign a declaration of results form under sub-section (5) of S.47 does by itself invalidate the results of the Polling Station. In my view a candidate would then rely on the results shown on the duly signed DR forms.

I have noted that in this case the unsigned DR forms produced by the Petitioner were duly certified and stamped by officers of the 2nd respondent. I must take that to be the official position; that the 2nd respondent received and keeps unsigned DR forms in respect of the affected Polling Stations.

Counsel Kakuru submitted that if the unsigned DR forms were to invalidate the results then there could be a substantial effect. I hold that unsigned DR forms invalidate the results of the affected Polling Station. In the instant case I do agree with Counsel Kakuru that there was a substantial effect on the result of the election.

The experience in Sembabule District was unique. The election of the Woman MP was conducted by Polling Officials who were nominated by the candidates themselves, their own campaign agents, who were partisan, partial, biased and untrained. It would be difficult to defend the result of an election left in the hands of such people. To compound the problem the returning officer also was not even a week-old in Sembabule District. So who was in control of the election?

So in answer of the 2nd issue I hold that the non-compliance affected the result of the election in a substantial manner.

I hold that the petition has succeeded on the 1st and second issues. Therefore, the election of Anifa Bangirana Kawooya as a woman member of Parliament for Sembabule District is hereby set aside under S.61 (1) (a) of the Parliamentary elections Act. I hereby order that a new election be organized and held under S.63 (4) (c) and S.61 (2) of the Parliamentary Elections Act. Within the meaning of S.63 (6) (c) of the said Act

I hereby declare the seat of the Woman MP for Sembabule District to be vacant. A certification to this effect is hereby made to the clerk of Parliament and the Electoral Commission. The two bodies, the Parliament, acting by its clerk, and the Commission, acting by its Secretary, shall obtain certified copies of this judgment and proceed to give effect thereto forthwith. I find the 2nd respondent to blame for the messed up election of the Woman MP for Sembabule District. Also, the 1st respondent has won the 3rd and 4th issues in this petition.

I, therefore, award costs of the petition to the petitioner but as against the 2nd respondent alone. I so order.

Moses Mukiibi

JUDGE

24.1.2007

24.1.2007 at 4:05p.m.

Mr. Wandera Ogallo for petitioner

Petitioner is in court

Mr. Kakuru for 1st respondent

1st respondent is in court

Mr. Kandeebe for 2nd respondent

Representative of 2nd respondent in court.

Ngobi - Court Clerk

Court: - Judgment is delivered in open court.

Moses Mukiibi

JUDGE

24.1.2007

Mr. Kandebe:- I have instructions to lodge an oral Notice of Appeal against the decision of this Court. The 2nd respondent intends to appeal to the court of Appeal. The Court should direct the Registrar to prepare the record, at least the judgment within the next 10 days. The 2nd respondent needs to formulate grounds of appeal. So I pray.

Court: - The Registrar is hereby directed to ensure that this judgment is typed and made ready for the parties to take within the next 10 days from today.

Moses Mukiibi

JUDGE

24.1.2007