

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA

HCT-03-CV-EP-0007-2011

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT, 2005
AND
IN THE MATTER OF PARLIAMENTARY ELECTIONS
(ELECTIONS PETITION) RULES 1996
AND
IN THE MATTER OF PARLIAMENTARY ELECTIONS HELD ON 18TH DAY OF
FEBRUARY, 2011

MUDIOBOLE ABEDI NASSER :::::::::::::::::::: PETITIONER

VERSUS

- 1. MUGEMA PETER**
- 2. THE ELECTORAL COMMISSION :::::::::::::::::::: RESPONDENT**

REPRESENTATION:

Mr. Dennis Kwizera	}	Counsel for Petitioner
Mr. Ambrose Tebyasa		
Mr. Geoffrey Ojok Odur		
Mr. Kiryowa Kiwanuka	}	Counsel for 1 st Respondent
Mr. Thomas Ocaya		
Mr. Musa Sekana	}	Counsel for the 2 nd Respondent

Court Clerk

Mr. Daniel Mudhumbusi

JUDGMENT: BEFORE THE HON. MR JUSTICE LAMECK N. MUKASA

INTRODUCTION:

The Electoral Commission, the 2nd Respondent, organised the Parliamentary Elections conducted on 18th February, 2011. Mudiobole Abeedi Nasser (Petitioner), Mugema Peter (1st Respondent), Kaudha Grace, Mwiri Med Mohamed and Naigubya Tommy Mukwenda were the candidates and participated in the elections for Iganga Municipality Constituency. The Petitioner was sponsored by the Forum for Democracy Change Party (FDC). The 1st Respondent was sponsored by the National Resistance Movement Organization (NRMO). Mr. Naigubya Tommy Mukwenda by the Conservative Party. Ms Kaudha Grace and Mwiri Med Mohamed were Independents. The Electoral Commission declared and published the first Respondent as validly elected and winner with 7,288 votes while the Petitioner returned second with 6,652 votes and the other candidates with a total of 1,445 votes. **(See. Uganda Gazette dated 21st February, 2011).**

The Petitioner lost the election with a margin of 636 votes and filed this Petition on 21st March, 2011. He contends that the election was conducted in contravention and contrary to the provisions and principles of the Parliamentary Elections Act, the Electoral Commission Act, and the Constitution of the Republic of Uganda which affected the results of the election in a substantial manner rendering it an invalid election. He claims that the entire Constituency electoral process beginning with the campaign period up to the polling day was characterized by acts of violence, lack of freedom, intimidation, lack of transparency, bribery, unfairness, commission of various electoral malpractices and offences, illegal practices and/or acts of contravention of the Parliamentary Elections Act, the Electoral Commission Act and the Constitution of the Republic of Uganda.

The parties filed a joint Scheduling Memorandum which was adopted as part of the Scheduling Conference proceedings. At the Scheduling Conference the following issues were agreed upon for Court's to determination:

1. Whether in the conduct of the election by the 2nd Respondent there was non compliance with the electoral laws and the principles therein.

2. If so, whether the non-compliance affected the results of the elections in a substantial manner.
3. Whether the 1st Respondent personally committed any illegal practices and/or electoral offences as alleged in the Petition.
4. Whether the agents of the 1st Respondent committed any illegal practices or electoral offences alleged in the petition with the knowledge, consent or approval of the 1st Respondent.
5. What remedies are available and to which party.

PROCEDURE AND EVIDENCE

Section 60(2) of the Parliamentary Elections Act (hereinafter referred to as “PEA”) provides:

“(2) An Election petition may be filed by any of the following persons;

(a) a candidate who loses an election; or

(b) a registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the Constituency in a manner prescribed by regulations”

The Petitioner was a registered voter under Registration No. 358 19967 at Iganga Muslim Health Unit – A Polling Station, Iganga Central Division, Iganga Municipality, Iganga District. He was a candidate and participated as such in the Parliamentary Elections of Iganga Municipality, Constituency. It is an agreed fact that the 1st Respondent obtained 7,288 validly cast votes and the Petitioner was the runner up with 6,652 of the validly cast votes. The 2nd Respondent returned the 1st Respondent duly elected Member of Parliament for the constituency. Thus the Petitioner was a candidate who lost the election and filed this petition as such.

Rules 4(8) of the Parliamentary Elections (Election Petitions) Rules, (hereinafter referred as “**the Rules**”) provides:

“ The Petition shall be accompanied by an affidavit setting out the facts on which the petition is based together with a list of any documents on which the petitioner intends to rely”

Rules 8 provides:

“(1) If the respondent wishes to oppose the petition, the respondent shall, within ten days after the petition was served on him or her, file an answer to the petition.

.....

*(3) The answer of the respondent shall be accompanied by -
(a) an affidavit stating the facts upon which the respondent relies in support of his or her answer and*

.....
.....”

And Rule 15 provides:

“(1) Subject to this rule all evidence at the trial, in favour of or against the petition shall be by way of an affidavit read in open Court”

(1) Petitioner’s Affidavits:

In compliance with the above provisions the Petitioner’s Petition was accompanied by an Affidavit/Affirmation affirmed by himself dated 21st March, 2011. By way of evidence the Petitioner filed 49 affidavits. That is a total of 50 affidavits for the Petitioner.

Rule 15(2) provides:

“With the leave of the Court, any person swearing an affidavit which is before the Court may be cross-

examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn”.

Both Respondents were granted leave to cross-examine the Petitioner. In addition the 1st Respondent was granted leave to cross-examine 16 of the Petitioner’s witnesses. The Petitioner failed to produce three of them for cross-examination, namely Mutyabule Abeedi, Namunana Aisha and Amufale Ibra, Mr. Dennis Kwizera, Counsel for the Petitioner, sought their respective affidavits to be expunged from the record. They were accordingly expunged.

In conclusion of his affidavit in support the Petitioner states:

“I certify that what is stated herein above is true and correct to the best of my knowledge”.

Whilst being cross-examined by Mr. Sekaana, Counsel for the 2nd Respondent, the Petitioner admitted that the matters deponed to within his personal knowledge were as stated in paragraph 1 to 8, part of paragraph 9, paragraphs 11, part of paragraph 18, paragraphs 21, 23, 27, 28(a) and 37.

In his submission Mr. Sekaana argued that the Petitioner did not disclose his source of information. That he doesn’t disclose which specific supporter or agent informed him or availed him the information on which he based his averments in the rest of the affidavit. Counsel submitted that such failure was a deliberate falsehood intended to mislead Court. That the effect of lies in an affidavit is that it will be struck out. He cited **Hon. Justice S.G. Engwau** in **Civil Application No. 5 of 2003 Checkunir Sungohor Christopher Vs Electoral Commission and Anor.** where he stated on falsehoods in an affidavit:-

“.....definitely a deliberate falsehood in an affidavit like this one vitiates its value”.

I agree that is the position of the law on falsehoods in an affidavit. However falsehood is distinct from failure to disclose a source of information. Mr.Sekaana doesn't point out the areas of falsehood.

Mr. Sekaana also cited **Uganda Journalist Safety Committee & others Vs Attorney General, Constitutional Petition No. 7 of 1997** where it was stated:

“Court should not act on an affidavit, which does not distinguish between matters stated on information and belief and matters to which the deponent swears from his own knowledge. Where averments are based on information, the source of information should be clearly disclosed and where the statement is a statement of belief, the grounds of belief should be stated with particularity, so that Court can judge whether it is safe to act on the deponents affidavit. Failure to disclose the source of information will normally render the affidavit null and void and an affidavit is not evidence unless it complies with these legal requirements”.

That is the legal requirement however it is not always that failure to disclose the source of information will render the affidavit null and void. The liberal approach which Courts have on several occasions adopted is to shelve the offending parts from the affidavit. In the instant case Counsel doesn't seek the affidavit to be struck out. Instead he invites Court to be cautious of allegations made by the petitioner. I undertake so to be.

At the Scheduling Conference, Mr. Kiryowa Kiwanuka, for the 1st respondent, sought to challenge the admissibility of the respective affidavits of Nambi Justine, Kakaire Ahmed, Namunena Aisha and Kirabira Rehema. Namunena Aisha's affidavit was expunged from the record. Counsel did not make any specific submission against the admissibility of any of the said affidavits. Counsel instead made general submissions

as to the evidential value of all the affidavits in support of the Petition which I will consider in the course of the judgment.

(ii) **1st Respondent's affidavits:** Mr. Mugema Peter filed an affidavit in accompaniment of his answer dated 5th April 2011 and a further Affidavit dated 20th June 2011. The 1st Respondent also filed 18 affidavits/affirmations in reply. That is a total of 20 affidavits. Mr.Kiryowa Kiwanuka, Counsel for the 1st Respondent, sought to expunge the affidavits of Hajji Mukisa Twaha, and Mwanje Faisal from the record. They were accordingly expunged. The Petitioner was granted leave to cross-examine and cross-examined 12 witnesses of the 1st Respondent.

In their Submissions Counsel for the Petitioner sought the affidavits deponed to by the 1st Respondent and the affidavits deponed to by Rev. Weguli Daniel Token and Rev. Fr. Vincent Ndanda respectively to be rejected.

The 1st Respondent's affidavit dated 5th April 2011 is indicated, sworn before Noah Edwin Mwesigwa, a Commissioner for Oaths and that dated 20th June 2011 as sworn before Innocent Kihika, a Commissioner for Oaths. When Cross-examined as to where he signed his affidavits he stated:

“I signed both affidavits from the Chamber of Kiryowa Kiwanuka. I was alone with Mr. Kiryowa Kiwanuka. After signing the affidavits, I left his chambers”

In re-examination he stated:

“After typing he gave me a copy to certify what I had told him. I found it was what I had stated and I signed it. The office where I signed the statement was not the particular office where I had made the statement. I signed the affidavit before the same lawyer. I made the statement before Kiryowa Kiwanuka after reading it next

to the reception. The name Innocent Kihika is new to me. Noah Edwin Mwesigwa is not new to me. The person who stamped on the affidavit introduced himself by that name”

Section 5 of the Commission of Oath (Advocates) Act provides:-

“Every Commissioner for Oath before whom any Oath or affidavit is made or stated under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”.

Section 6 of the Oaths Act has a similar provision. And the Commissioner for Oaths Rules, Rule 7 provides:

“ A Commissioner before taking an oath must satisfy himself or herself that the person named as the deponent and the person before him or her are the same and that the person is outwardly in a fit state to understand what he or she is doing” (emphasis added).

The above provisions require the deponent to personally appear and sign the affidavit before the Commissioner of Oaths and swear by saying or repeating after the person administering the Oath the words prescribed by the law. Affidavit evidence is made on oath. In **Kakooza John Baptist v/s the Electoral Commission and Anthony Yiga S.C. Election Petition Appeal No. 1 of 2007** during cross-examination on an affidavit, the appellant answered that;

“I read through the affidavit signed it before I sent it to the Commissioner”

Court found that the deponent had not appeared before the Commissioner for Oath, the Commissioner did not administer the oaths for he did not see the deponent signing the affidavit. The Supreme Court upheld the decision of the trial Judge and of the Court of Appeal rejecting the affidavit.

On the basis of the 1st Respondent's statements both in cross-examination and re-examination, Mr. Tebyasa argued that the 1st Respondent did not appear before the Commissioners of Oaths Edwin Noah Mwesigwa and Innocent Kihika who purportedly commissioned his affidavits. He submitted that both affidavits were incompetent and should be rejected. Further that by rejecting the two affidavits, court should find that the 1st Respondent has no valid and competent answer to the Petition. Rule 8(3) requires an answer to the petition to have an accompanying affidavit.

I have carefully considered the 1st Respondents statements and I find them contradictory. From his statements it cannot emphatically be concluded that he signed the affidavits before Mr. Kiryowa Kiwanuka. As regards the affidavit dated 5th April 2011 and which accompanied the 1st Respondent's answer, it is sworn before Noah Edwin Mwesigwa. In re-examination the 1st Respondent stated that the person who stamped on the affidavit had introduced himself to him by that name. I am sorry I did not make the observation Mr. Tebyasa comments about in his submission. Mr. Noah Edwin Mwesigwa was not a witness to either confirm or not that he had administered the oath in respect to that affidavit. Also Mr. Innocent Kihika was not a witness. The 1st Respondent stated that the office where he signed the affidavits is not the office where he had been interviewed. The 1st Respondent appeared in a state of confusion and it is normal to forget. This case is distinguishable from the case of **John Baptist Kakooza** where the deponent emphatically stated that he did not sign before the Commissioner for oaths. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. See Sections 101, 102 and 103 of the Evidence Act. It is the Petitioner who wanted this Court to find that the 1st Respondent did not appear before the Commissioners of Oaths Edwin Noah Mwesigwa and Innocent Kihika who apparently commissioned his affidavits.

In the circumstances I am unable to find that the 1st respondent's affidavits are defective.

In the event I am faulted in my finding above, the respondent is not mandatory required to oppose the Petition

Rule 9(6) provides:

“Notwithstanding that the Petitioner is not opposed it shall not be abated on that account”

This is a clear anticipation of the law that the Petitioner has to prove his case and not the Respondent to prove his defence. So even if I were to find that the 1st Respondent's affidavits were defective, and thus find that the 1st Respondent's answer did not comply with the requirements of the law still the Petitioner's petition cannot automatically succeed, he must prove his case.

The Petitioner's counsel sought the affidavits of Rev. Wejuli and Rev. Fr. Ndunda to be rejected on the ground that in their respective oral testimonies they stated that they signed their affidavits before Mr. Thomas Ochaya, Co-Counsel for the 1st Respondent. In cross-examination Rev. Wejuli stated:

“The Counsel was there when I signed this document (affidavit) and he is in Court (Points at Mr. Ochaya). It was the two of us. There was no other person. After signing I left his office”

He was not re-examined. His affidavit is purportedly commissioned by Mr. Noah Edwin Mwesigwa. Rev. Wejuli's testimony emphatically shows he signed before Mr. Ochaya. Apparently his affidavit was not legally commissioned. The same is accordingly struck off the record.

Rev. Fr. Vincent Ndauda in cross-examination stated:

“I signed this affidavit from the Chambers of Counsel representing Peter Mugema..... He typed what I had explained. I read through and I signed in his presence. That counsel is in court (points at Mr. Ochaya). We were the two of us. After signing I left.”

He was also not re-examined. He emphatically states that he signed before Mr. Ochaya though his affidavit is purportedly commissioned by Noah Edwin Mwesigwa. I similarly find that his affidavit was not legally commissioned. It is accordingly struck off the record.

BURDEN AND STANDARD OF PROOF

Rule 4(3) provides that:

“The only grounds on which an election maybe set aside are those set out in section 61 of the Act”.

Sub-section 1 of the section requires such grounds to be proved to the satisfaction of the court and sub-section 3 thereof states:

“Any ground specified in sub-section (1) shall be proved on the basis of a balance of probabilities”

Counsel for all the parties agree that it is now settled law that the burden of proof in election petitions lies upon the Petitioner and he or she is required to discharge that burden on the basis of the balance of probabilities but to the satisfaction of the court.

In Presidential Election Petition No. 1 of 2001 Col. (Rtd) Dr. Kizza Besigye Vs Museveni Yoweri Kaguta and Election Commission, the Supreme Court held, as to satisfaction of court; that;

“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”

In Presidential Election Petition No. 1 of 2006 Rtd Col. Dr. Kiza Besigye Vs Electoral Commission and Yoweri Kaguta Museveni again the Court stated:-

“ One of the principles established in Presidential Election Petition No. 1 of 2001 was that the burden of proof lies on the Petitioner to satisfy the Court on balance of probabilities that the non compliance with the law and principles affected the result of the election in a substantial manner. The standard of proof is higher than in an ordinary Civil case and is similar to standard of proof required to establish fraud but it is not as high as in criminal cases where proof beyond reasonable doubt is required”.

In Court of Appeal Election Petition Appeal No. 9 of 2001 Masiko Winifred Komuhangi and Babihuga J Winnie, Justice Mukasa Kikonyogo , DCJ stated; at page 13:

“.....A Petitioner has a duty to adduce credible or cogent evidence to prove his allegation at the required standard of proof”.

Then at page 46 stated:

“.....It must be that kind of evidence that is free from contradictions, truthful so as to convince a reasonable tribunal to give Judgment in a party’s favour.....”.

Counsel for the 1st Respondent cited the **Zambia Supreme Court Election Petition No. 1 of 2006, Anderson Kambela Mugooka & Others Vs Patrick Mwanawasa, EC & AG** where the court stated:

“.....For the Petitioners to succeed in the present Petitions, it is not enough to say that the Respondents have completely failed to provide a defence or to call witnesses but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred, or the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority voters.....”

As observed by **Lord Denning in Blyth Vs Blyth (1966) AC 643** and cited with approval by Hon. Justice Odoki, CJ in **Presidential Election Petition No. 1 of 2001** (Supra)”

“.....No one whether he be a judge or juror would infact be ‘satisfied’ if he was in a state of reasonable doubt.....”

The burden of proof is upon the Petitioner on a balance of probabilities to prove the grounds upon which he/she bases his/her petition to the satisfaction of the court.

CAUTION:

I wish to quote the wise words of Justice Yorokamu Bamwine in **Banatib Issa Taligola Vs EC and Wasugirya Bob Fred** where he observed:

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

In **Karokora Vs EC and Kagonyera Election Petition No. 002 of 2001**, Justice VF Musoke –Kibuuka had this to say:

“...It would be difficult intended for a Court to believe that supporters of one candidate behaved in a saintly manner, while those of the other candidate were all servants of the devil”

In **Paul Mwiru Vs Igeme Nathan Samson Nabeeta, EC & NCHE**, Hon. Justice Monica Mugenyi stated that:

“.....The evidence of both parties is, in its entirety, quite subjective and cannot be relied upon without testing its authenticity from a neutral and independent source. Indeed in Mbayo Jacobs Vs Electoral Commission & Anor, Election Petition Appeal No. 7 of 2006 Byamugisha JA alluded to such subjectivity when she said of evidence in election petition:

“Some other evidence from an independent source is required to confirm what actually happened”.

In the Tanzania case of **Nelson Vs A.G & Anor (1999) EA 160 (CAT)** Court held that evidence of partisans must be viewed with great care and caution, scrutiny and circumspection. In election petitions Court must cautiously evaluate all the evidence adduced by either party.

I now proceed to consider the merits of the Petition with the above principles in mind. The grounds upon which the election of a Member of Parliament may be set aside are provided in Section 61(1) PEA. It provides:

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

- (a) Non-compliance with the provisions of this Act relating to elections if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the non-compliance and the failure affected the results of the election in a substantial manner;*
- (b) That a person other than the one elected won the election; or*
- (c) That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval, or*
- (d) That the candidate was at the time of his or her election not qualified or was disqualified from election as a Member of Parliament”.*

I intend to handle issue **No. 3 and 4 together** first. In paragraph 7 of his Petition, the Petitioner contends that the 1st Respondent either personally or through his agents committed the illegal practices and offences enumerated therein. Counsel for the Petitioner submitted that the 1st Respondent personally committed several illegal practices

of bribery, carrying on fundraising and giving donations. He further submitted, and I agree, that proof of commission of a single illegal practice is enough to annul an election.

Bribery – Section 68 PEA provides_

“(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.

(2) A person who receives any money, gift or other consideration under subsection (1) also commits the offence under that subsection.

(3)

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

In their Submissions Counsel for the Petitioner allege the following incidents of bribery:-

- (a)** Bribery at Nakavule Anglican Church.
- (b)** Bribery by money to Kirabira Rehema
- (c)** Bribery by Shs. 100,000 at the funeral of Maganda Mohamed Wakabi.
- (d)** Bribery by way of Panadol tablets and cash
- (e)** Bribery by way of a saucepan to Iganga Women in Development Association.
- (f)** Money given to vendors of Iganga Central Market.
- (g)** Bribe of Shs. 2,000,000/= to Kiwanuka Abdul Magid and Dhikusooka Hussein of Iganga Truck Loaders & Off Loaders Association.
- (h)** Bribery by money, soap and sugar on the eve of the election.

(i) Bribery by money by Hajji Walubiri at Nakavule on voting day.

The **Harlsbury's Law of England 4th Ed Vol. 15** Page 534 states:

“As a general rule, due proof of a single act of bribery by or with knowledge and consent or approval of the candidate or by the candidate’s agents, however insignificant the act may be, is sufficient to invalidate the election. Court is not at liberty to weigh its importance nor can it allow any excuse, whatever the circumstance may be”.

Hon. Justice Arach Amoko in **Namboze Betty Bakireke Vs Bakaluba Peter Mukose & Anor- Election Petition No. 14 of 2006** stated:

“In law a bribe is a bribe. The amount is immaterial”

I now proceed to consider each of the alleged events of bribery.

(a) **Bribery at Nakavule Anglican Church** – In paragraph 28(a) of his affidavit in support of the Petition the Petitioner states that in December 2010 the 1st Respondent participated in a fundraising for the Nakavule Anglican Church, donated two bags of Cement and pledged to pay rent for the priest’s house if he was voted as the Member of Parliament of Iganga Municipality. In support of this claim the Petitioner relied on the affidavits of Mpagi Richard, Hassan Muyinda, Waiswa Paul and Kibedi Geoffrey. In their respective affidavits, they state that they attended with Mugema Peter the fundraising conducted at Nakavule Anglican Church on 12th December, 2010. That at the function Mugema Peter brought two bags of Cement and pledged to continue paying house rent for the Church Chaplain and provide more iron sheets for the church renovation if voted the area Member of Parliament. That he asked the Christians of Nakavule for their support.

The four deponents above were not cross-examined. In paragraph 22 of his affidavit in support of the Answer the 1st Respondent admits participating in the fundraising but denies making any pledge or contribution with the intention of influencing voters to refrain from voting for the Petitioner and vote for him.

Counsel for the Petitioner concedes that the function at Nakavule Anglican Church took place on 12th December, 2010 before the campaign period thus not covered by Section 68(7) PEA which prohibits a candidate from fundraising or giving of donations during the period of campaigning. They however argue that the 1st Respondent's conduct is covered by sub-section (1) of section 68 which is wider in that it prohibits giving of money or gifts or other considerations by candidates before or during an election. They contend that a person becomes a candidate upon nomination and remains so until after declaration and publication of the results. Section 1(1) PEA defines "**Candidate**" to mean;

"a person nominated as a candidate for election as an elected Member of Parliament"

The candidates giving or provision of money, gift or other considerations to amount to the offence of bribery under it must have an intent on the part of the giver or provider to either directly or indirectly to influence another person to vote or refrain from voting for any candidate. The first Respondent denies having had any such intention.

An '**intent**' is a state of mind which most times is inferred from the conduct of the giver or provider before, during or after the event and from the circumstances of a particular case. In the instant case all the deponents in support of the Petitioner's claim in this regard state that several partial aspirants in Iganga Municipality attended this fundraising, including Waiswa Paul (Mayoral contestant), Hon. Milton Muwuna, Nkutu Shaban, Alex Kiwanuka, Mugema Peter (1st Respondent) and Mudiobole Abedi Nasser (Petitioner) among others. It must be noted that save Mpagi Richard who avers that he accompanied the Petitioner to this fundraising indicating that the Petitioner also attended the other three deponents tactfully avoid mentioning the Petitioner among the political aspirants

present. Even the Petitioner, in his affidavit does not state that he participated in the fundraising. All the four deponents state that the fundraising was coordinated by Hon. Muwuma Milton. Waiswa Paul, Kiberi Geoffrey, Hassan Muyinda state in their respective affidavits:

“.....Hon Muwuma Milton who contributed UGX 100,000/= to the Church and called upon (us) the contestants present to donate towards the renovation of the Church”

The candidates present were of different political parties or organizations, for example Nkutu Shaban (NRM), Alex Kiwanuka (DP), Mugema Peter (NRM), Waiswa Paul (Independent), Mudhiobole Abedi Nasser (FDC) and others. As observed by Hon. Justice Musoke-Kibuuka in **Karokora Vs Electoral Commission & Kagonyera** (Supra) none of them could have been more saintly than the other.

The evidence adduced shows that the political aspirants present were called upon by the Chief fundraiser to make donations. Such evidence does not show an independent intent on the part of the aspirants present, the 1st Respondent inclusive. However the four deponents state that the 1st Respondent had come with two bags of cement which he delivered in kind. This shows he had come with a set intent to donate the cement towards the renovation of the Church. It is also stated that the 1st Respondent promised to continue paying house rent for the Church Chaplain and to provide more iron sheets. The Petitioner's evidence shows that renovation of the Church was ongoing and the inference from the respective deponents' averments on record is that the 1st Respondent had before this function been paying rent for the Church chaplain and provided iron sheets. Such already existing conduct cannot be claimed to have transformed into influencing Nakavule Anglican Church congregation to vote for him or refrain from voting for any candidate.

In **Fred Badda and EC Vs Prof Muyanda Mutebi Election Petition Appeal No. 21 of 2007**, the issue was whether or not the appellant committed the electoral offence of bribery. In that case the dates for the tournament were shifted to coincide with the

campaign period. The Badda tournament had been in place since 2001. The 1st Appellant being a sponsor gave a calf to the winning team Nakayiba FC. The runners up Kagoya FC were supposed to get a goat which they did not get. The 1st Appellant promised the runners up a cow within a week's time and pleaded with its supporters not to let him down during the elections, after they had threatened not to vote for him during the elections. The Supreme Court upheld the decisions of the trial Court and the Court of Appeal that the cow had been offered to Kagoya FC as an inducement to vote for the appellant.

It was upon the Petitioner to prove that the 1st Respondent's conduct of contributing to the renovation of Nakavule Anglican Church and paying rent for the Church Chaplain's house was a bribe on the basis of the 1st Respondent's continuation to do so following his nomination. The instant case is distinguishable from the **Fred Badda** case in that the offer was in response to a threat not to vote for him and the usual entitlement to a runner up was a goat not a cow. In the instant case all the candidates participated in the fundraising.

Considering all the circumstances of the instant case I find that the Petitioner has failed to prove that the required intent under section 68(1) PEA for the electoral offence of bribery. This claim fails.

(b) Bribery by money to Kirabira Rehema

In her affidavit Kirabira Rehema states that she is a registered voter of Iganga Municipality at Gift Primary School Polling Station. She avers that one day during the campaign period Mugema Peter in the company of another man came to her home. That Mugema asked for her vote, gave her Shs. 2,000 and told her that if any one falls sick at her home she should go and get free medicine from his Clinic. In his affidavit dated 20th June 2011, the 1st Respondent denies knowing Kirabira Rehema. Counsel for the Petitioner invited Court to believe Kirabira Rehema's testimony in that the 1st Respondent did not specifically deny giving money to her and that it was the 1st Respondent's testimony that his campaigns were mostly door to door which tends to corroborate Kirabira Rehema's evidence that he went to her house in the campaign period.

For the electoral offence of bribery under Section 68(1) PEA the money, gift or other consideration must have been given to ***“influence another person to vote or to refrain from voting for any candidate”***. Therefore the given must be a person capable of voting. Unless one is a voter he or she cannot be influenced to vote or refrain from voting for a candidate. In **Presidential Election Petition No. 1 of 2001, RTD. Col. Dr. Kizza Besigye Vs Y.K Museveni & EC** (Supra) it was held that the offence of electoral bribery is not committed unless the gift, money or other consideration is given or received by a person who is proved to be a registered voter.

There is no evidence to support Kirabira Rehema’s averment that she is a registered voter of Iganga Municipality. She did not attach a copy of her Voters’ Card and did not give her Registration Number. Her affidavit is signed not thumb printed. While being led to identify her affidavit she said:

“It is me who wrote the name there with guidance of another person”.

In cross-examination she stated:

“I cannot write my name because I do not know how to write”.

When asked to write down her name as it appears on her affidavit she wrote the specimen on exhibit D8. She explained that she had learnt to write her name on the day she had signed on her affidavit. That prior to that she did not know how to write anything and that she had not signed anywhere on her Registration Form. Though I am not a handwriting expert the three specimen signatures on exhibit D8 are similar to the signature on her affidavit. These could not have been writings by a person who had just learnt to write the name the day she signed on her affidavit and could not write her name prior to that and who did not say that she had since been practicing writing her name. I have doubts whether the person who appeared before me was that registered voter who did not know how to write her name on the Registration date and who had not signed on

her Registration forms. In the circumstances I find that the Petitioner has failed to prove that Kirabira Rehema was a registered voter of Iganga Municipality. This claim fails.

(c) Bribery of Shs, 100,000/= at funeral of Maganda Mohamed Wakabi

This allegation is also contained in Kirabira Rehema's affidavit. She avers that on 15th January 2011, during the funeral of her father-in-law Maganda Mohamed Wakabi, at the deceased's resident in Nabidhongha 'B' the 1st Respondent offered shs. 100,000/= which he handed over to the person who was collecting condolences and told mourners that when he becomes the Member of Parliament his contributions at such funerals will be much more.

In his affidavit dated 20th June 2011, the 1st Respondent states that he knew Maganda Mohamed Wakabi who past away sometime in January. He admits having attended the funeral but denies speaking or making a contribution to the funeral expenses.

It is common knowledge that mourners make contributions towards funeral expenses. If at all the 1st Respondent made any contribution at the funeral of Maganda Mohamed Wakabi the burden is upon the Petitioner to prove that such contribution was intended beyond the usual purpose of contribution towards funeral expenses, to prove that it was intended by the 1st respondent to influence the mourners to vote for him. It is also common knowledge that funerals are attended by people from far and near, relatives, friends and others. In the instant case no evidence has been adduced to show that the person who was collecting the condolences was a registered voter in Iganga Municipality or what percentage of mourners were registered voters in the Constituency. The Petitioner's evidence available is of a single relative/mourner against the evidence of the 1st Respondent. Could this contribution and the accompanying words allegedly made on a microphone been seen and heard by a single mourner!?. In her oral evidence Kirabira Rehema said she had been a resident of that village for thirty years but that she did not know the name of the condolence collector who was a deceased's' friend and a resident of the same village. She did not know the others who had made contribution towards the

funeral expenses. I find her evidence suspect and accordingly fail to believe her. This claim also fails.

(d) Bribery by way of Panadol tablets and Cash.

There are several alleged incidents of bribery by Panadol tablets and Cash.

(i) **At Hajji Muwayi's home in Buligo.** Sadat Muwayi, son of Hajji Ali Muwayi, states in his affidavit that in the afternoon of 25th January 2011 he saw Mugema Peter and Walubi Bakali in the compound of his father's house campaigning to two Moslem dressed women. He states:

4. *That after talking to the women who were in compound outside the house, I saw Mr. Mugema Peter and Mr. Walubi Bakali opening the boot of their Toyota RAV4 UAJ series, picked out a pack of Paracetamol tablets and a bundle of one thousand shilling notes from the inner pocket of his jacket.*

5. *That Mr. Mugema gave each of the women in the compound who were well over fifteen in number a packet of Paracetamol tablets and shillings three thousand each and emphasizing that it was a reward to them for supporting him as the MP flag bearer for NRM.*

6. *That the group of women after each receiving her package from Mr. Mugema left as many other women continued to enter our compound.*

.....”

He rang Mpagi Richard and informed him of what was going on. In his affidavit Mpagi Richard states:

“12 THAT when I reached the place Mr. Mugema's Toyota RAV4 was packed on the compound in the company of about eight people majority women who were holding seals of Paracetamol tablets and small brown unlabelled bottles that I was later informed contained syrup mixtures”.

The 1st Respondent in his affidavit denies having distributed any Panadol tablets to the population during the campaign.

I have already stated that for the electoral offence of bribery under Section 68(1) PEA the receiver must be capable of voting thus a registered voter in the Constituency. In the **2006 Kizza Besigye Vs Y.K Museveni** (Supra) Odoki CJ stated that:

“.....The mere distribution of money to agents or their supporters did not amount to bribery unless corrupt motive and status of the receiver of the money as a voter were established.....”.

Justice Katurebe JSC stated that:

“.....It is therefore not enough for a Petitioner or any person to merely allege that agents gave money to voters; a high degree of specificity is required: The agent must be named, the receiver of the money must be named and he/she must be a voter. The purpose of the money must be to influence this voter”

(Emphasis added)

Both Sadat Muwayi and Mpagi Richard do not name any of the receivers of the Panadol tablets and money and do not state that the alleged people were registered voters in Iganga Municipality Constituency. This claim is not proved.

(ii) **To Magola Geoffrey at Buligo**

Magola Geoffrey who states in his affidavit that he is a resident of Buligo and a registered voter of Iganga Municipality at Royal College (A-M) polling Station under voter registration No. 33852180 avers that on 25th January 2011 at about 3.30 p.m. while at his home he was approached by Walubi Bakali who was campaigning for Mugema Peter. That Mugema Peter joined them and Walubi introduced him as the official NRM candidate for Iganga Municipality MP. Mugema Peter called Abdallah, son of Said Tom, who was holding a black bag and told him to give the deponent shs. 5000/= and two strips of Panadol tablets which he did.

The 1st Respondent in his affidavit denied distributing any Panadol tablets. Hajji Walubi Abubakar admits having campaigned for the 1st Respondent. He however denies knowing Magoola Geoffrey and throughout the campaign period denies conducting door to door campaigns with the 1st Respondent or Abdullah. He specifically denies witnessing the 1st Respondent or Abdullah giving out money or distributing medicine. Counsel for the Petitioner argued that since Walubi stated in his affidavit that he did not know where he was on 25th January 2011 then he must have been with the 1st Respondent and Abdullah campaigning door to door in Buligo bribing voters. It doesn't follow so mathematically and it is human to forget.

Abdullah Said in his affidavit admits that he was a driver for the 1st Respondent and his supporter. He states that he moved around with the 1st Respondent for almost the entire campaign. He, however, denies that they gave out medicine or money to voters.

Magola Geoffrey did not attach a copy of his voter's card to prove that he is a registered voter No. 33852180. Section 68(2) PEA provides that:

“A person who receives any money, gift or other consideration under sub-section (1) also commits the offence under that sub-section”.

His evidence was of that an accomplice thus acquired independent corroborative evidence which was not provided.

(iii) To Namususwa Amina.

She states in her affidavit that she and her friend Sarah were campaigners for their candidate Mudiobole Abed Nasser. That around February 2011, the 1st Respondent came across them and thanked them for having voted him in the NRM Primaries. That he told another man who was in his company and carrying a black bag to give them some Panadol tablets. They were each given a strip of Panadol. That she reported the incident to Iganga Police Station under SD 64/11/2/2011. Contrary to the Petitioner's Counsel's

Submission the 1st respondent does not in his affidavit dated 5th April 2011 admit that Namususwa Amina made a complaint against him to the Police for distributing drugs. He admits that a complaint was made against him by the Petitioner. In paragraph 24 of his affidavit the Petitioner states:

“That I also made complaints of the first Respondents’ bribery of voters to the police and a case was registered as SD N. 64/1/2/2011 at Iganga Police Station.

He attached a letter annexure “W” received as exhibit P1. He therein writes:

“Today 11th February 2011 he was found in Kayaga zone distributing tablets, we have filed another case with the police (i.e. Iganga CPS SID No. 64/11/2011) with two sachets of tablets as exhibits to the police”

The letter says that the 1st Respondent was distributing tablets at Kayaga Zone. It does not mention Namususwa Amina as one of the people who were given tablets and for her they were at Kasokoso Central. Further, lodgment of a complaint with the Police perse is not evidence or proof of commission of the offence reported. Namususwa’s evidence is that of an accomplice being a receiver of the bribe. Evidence shows that they were supporters of the 1st Respondents’ in the NRM Primaries who had in the Parliamentary Elections switched to support the Petitioner and of an opponent Political Party. Her evidence requires some other independent evidence to confirm what actually happened.

The would be corroborative evidence is Exhibit D1, a letter dated 13th June 2011 by the District CID Officer Iganga. According to that letter the report lodged on 11th February 2011 was made by Mirembe Sarah a resident of Buligo. The officer writes;

“After this matter was reported to police, inquiries were opened into the allegations and one Namususwa Amina a resident of

Nabiduola “A” was brought as the witness on the matter, statements were recorded and two sachets of Panadol were produced as evidence. The candidate one Mugerwa Peter was summoned to Police and his statement was recorded and attached to file. The case was investigated but no other witness were produced, the matter was referred to the Director of Public Prosecution and was subsequently put away for inadequate evidence, much as the exhibits were bought it was hard to prove that the same were bought or were really given to the complainant by suspect”

The complainant to Police, Mirembe Sarah, did not give evidence before this Court. The Police investigations were not satisfied with Namususwa’s evidence. It was subject to other explanation, like buying the sachets of Panadol and produce them to implicate the 1st Respondent whose mother was a known dealer in Panadols.

In paragraph 22 of his affidavit dated 20th June 2011 the 1st Respondent explains that he had been nicknamed and commonly known by the people of Iganga as **“Panadol”** because of his mother’s long history in the trade of off the shelf drugs such as Panadol.

(iv) **To Ntono Ruth-**

She states in her affidavit that she is a resident of Nabidongha “B” and a registered voter at Gift Primary School Polling Station, Iganga Municipality. That sometime in late January, 2011 during the campaign period Mugerwa Peter in company of one Alex came to her home. Mugerwa Peter gave her ten Panadol tablets and requested her to vote for him. He also gave her five year old daughter a five hundred shillings coin.

The 1st Respondent in his affidavit dated 20th June 2011 denied giving out Panadol tablets to anybody. In cross-examination he admitted that he used to move with Alex Baswire to help him put up posters. Baswire in his affidavit and cross-examination denies going

around the constituency in a door to door campaign exercise distributing Panadol to voters.

Though Baswire had contradicted himself on whether he had campaigned for the 1st Respondent or not, there is no independent evidence to show that he jointly with the 1st Respondent or by himself with the 1st Respondent's knowledge, consent or approval distributed Panadol tablets to Ntono Ruth or any other voter.

Ntono Ruth's evidence is again that of a receiver who confesses to receiving a bribe. It is not supported by any independent evidence. She does not state her voter's number nor attach her voter's card. She provides no evidence to prove that she was a Registered Voter.

(v) **To Nangobi Kulsm** –

She states that she is a registered voter of Iganga Municipality at Tawuhid Polling Station and a resident of Nabidhonga "B". That on 13th February 2011 while at her home around 12.00 noon, the 1st Respondent came home in the company of Tanazilaba Elvis and they gave her Shs. 3000/= of shs 500/= coins denominations and two strips of Paracetamol tablets promising to continue giving her free medicine for her children if the 1st Respondent went through as Member of Parliament. That she voted for the 1st Respondent.

In cross-examination the 1st Respondent named Tanazilaba Elvis as one of his supporter and volunteered campaigners. In his affidavit and in cross-examination Tanazilaba denies conducting door to door campaigns with the 1st Respondent. He also denies knowing Nangobi Kulsm.

Nangobi is a receiver who confesses to having received a bribe. Her evidence is not supported by any other independent evidence. She provides no evidence to prove that she was a registered voter in Iganga Municipality Constituency.

(e) Bribery by way of a Saucepan to Iganga women in Development Association.

This claim is contained in the respective affidavits of Nakisungi Hadija and Kawuma Aisha. Nakisungi states that she is a registered voter of Iganga Municipality at Masjid Tawuhid polling Station while Kawuma states that she is registered voter of the same constituency at Gift Primary School Polling Station. Both state that they are residents of Nabidhonga “B” and members of Iganga Women Development Association. That on 30th January 2011 while in their monthly meeting, with other members, the 1st respondent, in the company of Abdallah son of Tom Said, delivered to the group a saucepan he had earlier promised the group. That he told them that he was their obedient son ready to serve them in Parliament.

In his affidavit dated 20th June 2011, the 1st Respondent denies giving any Women’s Association any assistance in form of a Saucepan or at all. Abdallah Said in his affidavit denies having distributed any items during the election campaigns. Both the 1st Respondent and Abdallah Said were not cross-examined about this incident.

Both Nakisunga Hadja and Kawuma Aisha did not provide any evidence to prove that they were registered voters in the Constituency. They neither provided their voters’ cards or registration numbers. The names of the Members of the Association was not given and no evidence was adduced to show that the Association members were voters in the constituency. Both deponents state that the meeting was on 30th January 2011.

In cross-examination Kawuma Aisha stated that the Association meets once every month on the last Friday of each month. With the help of a 2011 Calendar she confirmed that 30th January 2011 was a Sunday. That creates doubt whether there was any meeting of the Association on 30th January 2011 at which the 1st Respondent donated a saucepan to the Association. Further the alleged Saucepan was not exhibited in Court. In the premises I find that the Petitioner has failed to prove this claim.

(f) Money given to Vendors of Iganga Central Market

In paragraph 28(c) of his affidavit in support of the Petition the Petitioner claims that on 4th February 2011, at Mwana Highway Hotel, the 1st Respondent gave Shs. 18,000,000/= gave to Chairmen of the Departments of Iganga Central Market for distribution to market vendors. The Petitioner relies on the respective affidavits of Lusaga Simiyoni, Kendo Abdul, Mutamba Joseph, Walujjo Twahiri, Kizito Abdul, Namulondo Jane, Nabirye Nubuwat and Mbabazi Aisha all vendors in the various Departments of Iganga Central Market. Lusaga, Walujjo, Kizito and Nabirye state that the money was given to them, respectively, by Shaban Kangola a fellow vendor and a renowned supporter of NRM. Kendo states that the money was given to him by Mwavu Chairman of the Butchery Department. Namulondo and Night each state money in their department was first distributed by Mugoya but that following a disagreement on the distribution Dheyongera took over the distribution role. Nambi and Mbabazi each state that the money was given to her by Mutamba. Mutamba Joseph states that on the invitation of Kawuma Kanifa, he on 4th February 2011 attended a meeting at Mwana Hotel. Shaban Nkutu informed the people at the meeting that he had brought shs. 18,000,000/= from NRM for support of NRM Candidates. He on 5th February 2011 received Shs. 800,000/= for distribution to members of his department. Each of the deponents stated that the money was for them to vote NRM supporters/flag bearers, that is the 1st Respondent for area MP and Shaban Nkutu LC5 Chairman and other NRM candidates.

In cross-examination Kendo Abdul contradicted his affidavit evidence when he said that Mwavu when giving him the sum of Shs. 4,000/= had told him that it was lunch sent to him by the 1st Respondent, a fact he did not state in his affidavit. Otherwise none of the above named deponents stated that the money was from the 1st Respondent.

Shaban Kongala, in his affidavit, denies being an agent of the 1st Respondent. He avers that he was a candidate for Parish Councilor to the Division Council and campaigned for himself. He does not indicate for which political party. He was not cross-examined.

Mugoya Yusuf, in his affidavit, admits that he received Shs. 800,000/= for distribution to members of his group from the Chairman Grocery Department. According to him the money was in fulfillment of the Presidents' pledge to assist the vendors develop and get out of poverty. He denied that he had told anybody who had received money to vote the 1st Respondent or any other candidate. He stated that he was neither a resident nor a registered voter in Iganga Municipality Constituency but a resident and voter in Kigulu South Constituency. He denied campaigning for the 1st Respondent.

Wafula Samuel, a 1st Respondent's witness and a vendor in Iganga Central Market, states in his affidavit that he received money from Kasifa Kawuma who told them that it was part payment of a pledge by the President made to assist vendors of Iganga which had been brought by Shaban Nkutu. He admits having given part of that money to Mutumba Joseph but denied that he had instructed him to instruct the beneficiaries to vote for any candidate. He contends that Mutumba Joseph was a well known supporter of FDC whom he would not have given money if it was for buying votes for NRM candidates.

In his affidavit dated 5th April 2011 the 1st Respondent states:-

“23. THAT I did not by myself or through my agents or anyone else before, during or after the election give out any money, gift or other consideration while urging voters to vote for me or to refrain from voting for the Petitioner or any other person”.

In his affidavit dated 20th June 2011 he states that Madam Kawuma Kasifa, Mugoya Yusuf, Mwanzi Mohammed, Kabata Magidu, Mweyongera and Shaban Kangola were not his agents. He admits knowing Shaban Nkutu and that he was an NRM flag bearer for LCV Iganga District but denies that he was his agent and contends that he was not aware of his activities and denies personal knowledge of the Ug. Shs. 18,000,000/= allegedly distributed to the market vendors.

There is no evidence to connect the 1st Respondent with the Ug.shs 18,000,000/= save for the fact that he was an NRM flag bearer. There is no evidence to prove that he gave out this money or that any of the people involved in the distribution thereof were his agents. In cross-examination the Petitioner states that the Agents who were giving out this money were of the NRM Party and it was during the campaign period for the Presidential, Parliamentary and Local Government Elections.

Counsel for the Petitioner argued that the 1st Respondent was an NRM flag bearer for MP Iganga Municipality where the money was distributed a few days to the elections. That the source of the money was President Yoweri Museveni the Chairperson of the NRM Party. According to the 1st Respondent President Museveni supported the NRM Party flag bearers and in his campaign rally in Iganga Municipality had urged people to vote for NRM candidates. They argued that the money was given to the vendors of Iganga Market with the natural consequences that it will influence them to vote for NRM candidates including the 1st Respondent.

Counsel cited **Betty Nambooze Vs Peter Bakaluba Mukasa – Election Petition No. 14 of 2006** where there was evidence by one Bogere that sometime in January 2006, he attended a meeting organized by Moses Byaruhanga, the Presidential Political Assistant whose purpose was to campaign for NRM candidates. During the meeting, Byaruhanga promised to assist them by giving out money for development but those who needed it had to go to State House. Later they met Byaruhanga in Kampala who gave Bogere and his group of five people Shs. 400,000/=. The trial Judge Arach Amoko J (as she then was) held that this was a bribe for which the NRM candidate Bakaluba Mukasa was liable.

They also cited the dissenting judgment of Justice Oder JSC in **Kizza Besigye Vs Yoweri Kaguta Museveni Presidential Election Petition No. 1 of 2001** where his Lordship stated:

“...The word ‘agent’ does not mean only the ‘official agent’ but included any unofficial agent, and where a candidate and his official agent rely on a political organization to promote the campaign and bring the election to a successful conclusion the accredited members of the association should be held to be agents of the candidates and all those employed by the association are within the limits of their duties in the same sense agents of the candidate himself”.

With due respect this would be extending agency too far in election matters. The right position was pronounced by Hon. Justice Odoki CJ in the **2006 Kizza Besigye Petition** when he cited with approval a book entitled **Election Laws Being a Commentary of the People of India 1951 by SK Gosh 3rd Ed 1998-**

“.....A leader of a Political Party is not necessarily an agent of every Candidate of that party. An agent is ordinarily a person authorized by a candidate to act on his behalf or a general authority conferred on him by the Candidate.

The agent is the understudy of the candidate and has to act under instructions given by him, being under his control. The position of a leader is different and he does not act under the instructions of a candidate or under his control. The candidate is held to be bound by act of his agent because of the authority given by a candidate to act and perform on his behalf. There is no such relationship between the candidate and the leader.....

For this reason the consent of the candidate or his agent is necessary when the act is done by any other person”.

In the instant case, the 1st Respondent had no authority over the President or State House let alone any of the players in the giving out of the Ug. Shs. 18,000,000/=. The Party Officials could have been representing the interest of the NRM party to which the 1st Respondent belongs but were not his personal agents.

(g) Bribe of Shs 2,000,000/- to Kiwanuka Abdul Magidu and Dhikusoka Hussein of Iganga Truck Loaders & Off-Loaders Association.

Kiwanuka Abdul Magidu states in his affidavit that he is a registered voter of Iganga Municipality- at Iganga Muslim Health Unit 'B' Polling Station under Voter Registration No. 35570431. On the 6th February 2011 in the company of Dhikusoka Hussein went to Hon. Kirunda Kiveijinja's residence at Buwale. That Hon. Kiveijinja, Shaban Nkutu and Kagela, a campaign agent for Hon. Kiveijinja spoke to them. They were given Shs, 2,000,000/= which Hon. Kiveijinja told them came from State House and was for voting President Museveni, Shaban Nkutu for LCV and Mugema Peter for MP Iganga Municipality. That the money was handed to them by Shaban Nkutu who told them to call Mugema Peter for details. That Dhikusoka called Mugema Peter who told them to meet him at Ntinda Resort Hotel. They did so and found Mugema having lunch with Alex, Abdallah, and Kalulu Faisal. That Mugema told them that he had solicited the money for them and told them to go and share the money with their colleagues and tell them it was him who had sent it.

Dhikusoka Hussein states in his affidavit that he is a registered voter No. 04748721 of Iganga Municipality at Iganga Muslim Health Unit 'A' Polling Station. He also gives the same evidence as regards to receiving shs. 2,000.000/= from Hon. Kiveijinja and thereafter meeting Mugema Peter at Ntinda Resort Hotel.

In cross-examination the 1st Respondent admits knowing Kiwanuka Abdul Magidu but denies knowing Dhikusoka Hussein. He denies ever meeting the two at Ntinda Resort View Hotel during the campaign period. Alex Baswire denied knowing any of the two and denied that they had met him with the 1st Respondent at Ntinda Resort View Hotel. In cross-examination Abdallah Said was only asked whether he knew the two which he denied.

There is no independent evidence to confirm the 1st Respondent's meeting with Kiwanuka and Dhikusoka at Ntinda Resort View Hotel. None of the two says that the money was given to them by the 1st Respondent. Hon. Kivejinja, Shaban Nkutu and Kagele were not the 1st Respondent's agents.

(i) Bribery by money, soap and sugar on the Eve of the Election-

The Petitioner alleges in paragraph 26 that on the eve of polling the 1st Respondent's campaign agents, namely Mugaga, Kamukama Isabirye and ten Police Officers went around the Constituency in particular at Walugogo Estate in a door to door exercise distributing sugar, soap, salt and money to voters. That the Policemen were arrested by the members of the public with some of the items that they were distributing. Copies of photographs stated to have been taken by him on the arrest were tendered to be received as exhibits.

In cross-examination the Petitioner states that he was arrested and charged on allegations that he arrested and confined armed Policemen at his residence at Walugogo Housing estate and damaged their Patrol vehicle UP0350. In re-examination he stated that Police Officers were arrested by his supporters who were guarding his residence, outside the gate to his residence. That when he came out he found the Police Patrol Vehicle had been blocked by stones and wood logs. The mob was claiming that the Policemen had been distributing items to voters and threatening to burn the Policemen and their Vehicle. There were 10 Police Officers, two of whom were armed with rifles. That he asked the mob to push the vehicle into his compound which was done and to give him the unarmed eight Policemen whom he locked in his mosque for their safety. That he took pictures of the vehicle and the Policemen. That on the vehicle were empty boxes of soap and a lot of sugar poured on the base of the pick-up. He stated that the Police officers denied that they had been distributing the items to voters but that the items he had seen in the vehicle were remains of items they had picked for SPC's at the Barracks. That he called and handed over the Policemen to the DPC, Mr. Manzi.

Mr. Wasswa Hamuza states in his affidavit that he is a resident of Walugogo Estate and a registered voter No. 03421056 of Iganga Municipality at Iganga Muslim Health Centre B Polling Station. On 17th February 2011 at about 8.30p.m a group of about seven people came to his home. Among them was Mrs. Kamkama Isabirye, a village mate. She called for someone from a vehicle parked a distance who brought him a kilogram of sugar and Shs. 10,000/=. He identified this person as James commonly known as Jimmy Utoda Police Post, Main Iganga Taxi Park.

That Ms Kamukamu Isabirye told him to give his vote to the 1st Respondent. About two hours thereafter he heard an alarm and noise from the direction of the Petitioner's home. He went to answer the alarm. He found a large group outside the Petitioner's house. He saw the same Policeman James and another Policeman with a gun. When he entered into the Petitioner's compound there was a Police Van which had boxes of soap and sugar in the front seat and some civilian clothes on the back. In cross-examination he states the Police Pick up was loaded with blue polythene bags containing sugar, boxes of soap three properly sealed and one opened and civilian clothes. While he says that he only saw two policemen outside the gate one armed and the other unarmed, he contradicts himself when he says the two Policemen were in uniform and again say that the one who had given him the items was not in uniform yet in cross-examination he had said that one of the two police officers he saw at the gate was the James/Jimmy. He contradicts the Petitioner who stated that the two Police Officers who were left outside the gate were both armed. The Police Officers who had visited his home were seven according to him yet according to the total number of Officers on the pick-up was ten. Further according to this witness there was still sugar in polythene bags and soap in boxes on the pick-up. Yet according to the Petitioner the boxes were empty and sugar was poured on the back of the pick-up.

Tibenkana Farouk states in his affidavit that he is a resident of Walugogo Estate and registered voter No. 02957986 of Iganga Municipality at Nkatu Proper Polling Station. On 17th February 2011 his neighbor Muganga; a renown NRM supporter; and Simolo Kamukamu; Isabirye's wife, and James; a Policeman attached to Taxi Park Police Post

and other people unknown to him came to his home. Muganga gave him a small Kavera that had a bar of soap, a kilogram of sugar and Shs. 5000/=. He urged him to vote for the 1st Respondent. Forty minutes later he heard noise outside. When he opened the door he saw a group of people surrounding a Police Patrol Car with Policemen on board at the Petitioner's gate. On reaching the scene for him he saw five boxes of soap and sugar packed in white transparent polythene bags. He also saw James with another Policeman who was armed with a gun. The witness was not cross-examined about his evidence with regard to this incident.

There is an affidavit in reply filed by Betty Isabirye. She states that she is a resident of Walugogo Estates but denies being Mrs. Kamukamu Isabirye. She denies giving out any sugar, soap and money to any voter. She states that on 17th February 2011 she arrived at her home at 6.30 p.m from her shop and never left home until the next morning. She denies having met and seen Muganga Peter who is her brother in law, on 17th February 2011. She admits campaigning for the 1st Respondent as a supporter on voluntary basis.

In cross-examination she admits that she knows Waiswa Hamuza but that he does not know where his home is. She states that she does not know Tebenkana Faruk. She also denies knowing a Police Officer called James or Jimmy.

Muganga Peter in his affidavit, states that he is a resident of Walukuba Housing Estate. He states that on 17th February 2011, he spent the night at the 1st Respondent's home preparing and appointing polling agents. He says Mrs. Isabirye is his sister-in-law but denies meeting her on 17th February 2011 at all. He denies that he along with Mrs. Isabirye and Policemen went distributing sugar, soap, salt and money to voters.

Mugema Peter in his affidavit dated 20th June 2011 states he had a meeting with his polling agents, monitors and supervisors. That they all, including Muganga Peter, spent the night at his home.

At the hearing I promised, in this Judgment, to determine whether the photographs annexed to the Petitioner's affidavit were admissible in evidence. At the Scheduling Conference by consent of all parties the Petitioner's affidavit, among others, was admitted in evidence together with all the documents annexed thereto. These photographs were among the documents. Secondly, it was not disputed that the photographs were taken by the Petitioner thus the best witness to tender them in evidence. I accordingly confirm their receipt in evidence as exhibits. I however find the photographs of little evidential value, if at all. The items on the back of the pick-up and in the Cabin of the Vehicle cannot be made out, that is one cannot tell what they are. Nor were the items allegedly impounded on the Vehicle exhibited in Court. The Photographs do not show the Registration Number of the vehicle so as to prove that it was a Police Vehicle. The Petitioner and both Tebenkana and Waiswa do not say that Mrs. Isabirye or Muganga was among the people arrested together with the Policemen. The mob which was so vigilant to the extent of arresting Policemen, two of whom were armed, could not have failed to arrest Isabirye and Muganga. Though Isabirye and Muganga were the 1st Respondent's campaign agents, appointed or voluntary; there is no evidence placing them at the scene of the alleged incident. Tebenkana says that among the people who went to his home were Mrs. Isabirye and Muganga but Waiswa does not mention Muganga. I am not persuaded to believe that ten Policemen were out in the night distributing items as agents of the 1st Respondent. I am inclined to believe the explanation given by the Policemen to the Petitioner upon their being intercepted. I accordingly find that the Petitioner has failed to prove to the satisfaction of this Court that the 1st Respondent's agents were in the night of 17th February 2011 involved with the Police in distributing items to voters.

(j) Bribery by money by Hajji Walubi at Nakavule on the voting day.

This claim is based on the evidence of Malowoza Yazid, a boda boda rider. He states in his affidavit that on the voting day he was stopped by two men who offered to give him work. They took him behind Nakavule Mosque and was introduced to Walubi Bakali whom he knew as a campaign agent of the 1st Respondent. There was a group of about ten people who had lined up and were being given Shs. 2,000/= each by Walubi and were

told to vote Mugema Peter who was Number three on the ballot paper as Member of Parliament. That Walubi instructed him to pick several people from different destinations around Nakavule and Mutambala villages and bring them to near the mosque where some other people will be waiting for them. He was given Shs. 20,000/= for the job.

In cross-examination he specifies that Walubi was giving money to several women. He says that he was to ride some of those women to Nakavule and others to Mutambala. He did not know the names of any of the people whom he found Walubi giving money.

It is not disputed that Walubi was an agent of the 1st Respondent. In his affidavit he denies giving people money behind Nakavule Mosque and denies paying any boda-boda rider to transport voters.

Mulwooza says he is a resident of the area but it is his evidence that he did not know the names of any of the people whom he found Walubi giving money. He does not say that he saw any of these people vote. There is no evidence to show that the alleged people were registered voters in the constituency. His evidence is not supported by any other evidence. According to him he was a voter in the Constituency, yet he does not say that he was himself given any money to solicit for his vote. I am not satisfied by the evidence of this sole witness that Walubi gave out money to voters at Nakavule on the voting day.

Fundraising for Prisons Chapel.

In paragraph 28(b) of the Petitioner's affidavit he alleges that on 13th February 2011 at Iganga Prisons the 1st Respondent participated in a fundraising for the construction of a Catholic Prison Chapel in which he donated Shs. 100,000/=, a bag of maize flour and pledged or promised to give a trip of aggregate stones for construction of the Chapel.

Section 68(7) PEA provides;

“A candidate or an agent of a candidate shall not carry on fundraising or giving donations during the period of campaigning”.

The Petitioner did not attend this function. Alex Luganda, Hassan Muginda and Wasswa Paul attended the function and in their respective affidavits state that Mugema Peter gave a cash contribution of Shs. 100,000/=, promised a bag of posho and pledged to deliver a trip of aggregate stones for construction of the chapel. In paragraph 22 of his affidavit dated 5th April 2011, the 1st Respondent states:

“.....I state that I participated in the fundraising activities but did not make any pledge or contribution with the intention of influencing voters to refrain from voting for the Petitioner and vote for me”.

In cross-examination he admits having pledged a sack of maize which he says he made as a Choir member of St. Jude Church which was the parent Church for St. Gonzaga. He does not specifically deny having contributed cash of Shs. 100,000/= or having pledged a bag of Posho and a trip of aggregate stone. All that he says is that his pledges and contribution were not intended to influence voters to refrain from voting for the Petitioner and vote for himself.

Counsel for the 1st Respondent submitted that there is nothing wrong with participating in fundraising or even giving money. The problem will be the purpose which the Petitioner has not proved to be for influencing voters.

With due respect to Counsel, they misdirected themselves on the Law. For commission of an illegal practice under Section 68(7) PEA the intention or purpose is not an ingredient. I agree with Counsel for the Petitioner that under this subsection the law does not look at the intention of a candidate who carries out a fundraising or gives donations during the period of campaigning. The subsection strictly prohibits fundraising or giving donations by candidates or their agents during the campaign period. The 1st Respondent unequivocally admitted, Under 61(c) PEA a single illegal practice or offence under the Act if proved to the satisfaction of the court is enough ground to set aside the election of a candidate as a Member of Parliament. The law does not require a combination of illegal practices or offences under the Act.

I find that the petitioner has proved that the 1st Respondent committed the illegal practice by carrying on fundraising and donating money in the sum of Shs. 100.000/= at the fundraising for St Gonzaga Prison Chapel

Issue No. 1 – Whether in the conduct of the election by the 2nd Respondent there was non-compliance with the electoral laws and principal thereof.

The Petitioner states that the entire electoral process in Iganga Municipality Constituency, beginning with the campaign period up to the polling day was characterized by acts of violence, lack of freedom, intimidation, lack of transparency, bribery, unfairness or commission of various electoral malpractices and offence, illegal practices and/or acts of contravention of the Parliamentary Elections Act, the Electoral Commission Act, and the Constitution of the Republic of Uganda. The Petitioner then raises several complaints in detail and I will handle them in the order raised.

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(1) **Disenfranchisement of voters by deleting their names from the voters' role and/or denying the Petitioner's registered supporters the right to vote.**

The Petitioner did not produce any evidence to support this claim save for that of Mulowoza Yazid. He stated in his affidavit that he was registered voter at Gift Primary School Polling Station having registered in 2010. He complains that on voting day when he went to Gift Primary School the Presiding Officer told him that his name was not at the Station. He was referred to Nabidhonga Prison Polling Station but still his name was not there. The witness did not state his voters' number and did not produce a voter's card or registration certificate. He failed to prove that he was a Registered Voter who had been denied his right to vote. This claim was apparently abandoned by the Petitioner since his counsel did not submit on it.

(2) **Intimidation, arrest and detention of the Petitioner's supporters during campaign- by officers of Uganda Police and UPDF**

The Petitioner complains of unusual deployment of UPDF, Police and Security agents on the eve of the election. In cross-examination the Petitioner conceded

that he did not personally witness any act of violence committed by the UPDF soldiers or Police and that if there was any intimidation it was not selective to his supporters. There is no evidence brought by anyone who states that he was intimidated, arrested and/or detained by the Uganda Police, UPDF or other Security Agencies. Again the Petitioner's Counsel made no submission on this claim.

(3) **Denial of Representation during voting and Counting at Polling station-**

The Petitioner claims that his polling agents were chased away from the polling states. There is no evidence adduced by any Petitioner's Polling Agents who was chased away from any Polling station. In cross-examination the Petitioner concedes that he lacks such evidence. Again the Petitioner apparently abandon this claim since his Counsel did not submit on it.

(5) **Rigging, Ballot Stuffing, Multiple Voting and Pre-ticking of Ballots for Voters and manipulation of the Voters Roll.**

The only valuable evidence with regard it this allegation in that of the Jackson Higenyi Pabire, the Returning Officer who stated that results at one polling station were discovered during tallying that the number of ballot papers used exceeded the number that was supplied before the start of voting. However it is his uncontradicted evidence that the 2nd Respondent took appropriate action and cancelled the results of that Polling Station. Otherwise the Petitioner did not produce any direct evidence to support his claim. DR forms were filed duly signed by his agents and none had a complaint filled in. The Petitioner attempted to disown some of the signatures and names of the Agents on the forms but none of such agents had sworn an affidavit to disown his signature and he did not provide a list of his agents for comparison. In **Shaban Sadeq Nkutu Vs Asuman Kyafu & Election Petition No. 08 of 2006**, Justice Wangutusi held that once the declaration of results forms had been signed by the agents of the Petitioner and the persons who signed the DR Forms were the Petitioners agents and the Petitioner himself had not denied them court could only but conclude that these were the Petitioner's agents and what they endorsed was a correct

reflection of what the voters in the area decided. He further found that in DR Forms there is provision for recording mishaps and since none were recorded the allegations by the Petitioner had not been proved.

As regards pre-ticking it is Abdalah Hilal and Hajat Nabirye Zurah who state in their respective affidavits that they found their names ticked when they came to vote. They were however allowed did vote. These are isolated incidents. There is no other evidence of such other incident.

Kilanda Said states in his affidavit that after counting votes for St. Peter Church (K-L) as they were carrying Ballot boxes to the District Headquarters while outside the Electoral Commission Offices they were attacked by Policemen and civilians on a double cabin vehicle who shot bullets and chased them away. That they abandoned the boxes and ran away. When they later walked to the tally Centre they found that the Ballot boxes for St Peter Polling station had not yet reached. However Exhibit D2(b), the DR Form for St. Peter's Church (K-L), shows as duly signed by Kakewe Ismail and Kaziba Abubaker as the Petitioners Agents at that station and not Kilanda Said. No complaint was recorded thereon. The Petitioner admits that the alleged incident was not reported to the Police or any authority. I find Kilanda Said unreliable.

As to the impersonation stated in Kwimi Fred's affidavit the person who was allegedly impersonated is not named nor his/her registration number given and the person who voted is not named. There is no evidence adduced by way of anybody claims to have been impersonated.

(6) Making false, malicious, sectarian, Divisive and Mudslinging statements Against the Petitioner

Section 22(6) PEA prohibits such acts. Such statements are attributed to Mpiya Hussein allegedly made by him at the 1st Respondent's rally at Menya Ziraba Muzale Primary School in Walugogo Estate. The Petitioner did not attend this rally so

whatever he states in his affidavit is hearsay. Reliance is put on the affidavits of Waiswa Shaban and Ahmed Kakaire. Kakaire in his affidavit states that Mpiiya in his address stated that the Petitioner was a foreigner in Iganga Municipality with no home in the area. That thereafter people at the rally started chanting that Mudiobole should go back to Kasido village where he is born. That the 1st Respondent in his address stressed that the Petitioner was a foreigner and that they should vote him a son of the area. Waiswa Shaban states in his affidavit that Mpiiya told the crowd that he did not know Mudiobole Abed Nasser as a resident of Walugogo, that even the house he held out as his doesn't belong to him but it is for his sister. That Mudiobole was a foreigner in the area and people should not give him votes and leave children of the area like Mugema Peter. That Mugema echoed what Mpiiya had said.

There are varying versions of what Mpiiya exactly said. None of the two quote Mpiiya verbatim in their respective affidavits. Both Mpiiya said Mugema's version differ from what is attributed to Mpiiya. In **Presidential Election Petition No. 1 of 2001** (Supra) Odoki CJ states:

“ I accept the Submission of Dr. Byamugisha that the charges in the petition relating to false, malicious or defamatory statements were defectively framed as they did not set out verbatim the statements complained in the petition. Words take their meaning from the contest and if the contest or background is not provided or the full statement not produced, their malicious or defamatory effect may not be easy to discover. The particular of the statement also enable the Respondent or defendant to know what case he or she has to meet and defend”

He further states:

“In considering the statements complained of the context in which they are made must be taken into account instead of analyzing each offensive word. As we have seen use of hyperbole or colourful language, may be

employed to drive points home or to counter criticisms from other candidates. It is also clear that a candidate is not guilty of making such statements if he had reasonable grounds for believing the statements to be true”.

The actual words stated by Mpiiya or Mugema were not reproduced to enable this court make its own inference as to their meaning.

(7) Failure to provide light during the counting of votes.

In his affidavit Jackson Higenyi Pahire, the Returning Officer, states that they provided lamps and torches at all Polling Stations and contends that polling ended before darkness and counting of votes was done before darkness. There is no evidence by any candidates’ agent, even those of the Petitioner to contradict this evidence.

(8) Denial The Petitioners’ Agents the Declaration of Results Forms –

There is no evidence by any of the Petitioners agents who was denied Declaration of Results Forms. The Declaration of Result Forms exhibited by the 2nd Respondent show that they were duly signed by the Petitioner’s agents. A Petitioner whose agents signed cannot turn around and deny the DR Forms – **Nkutu Vs Kyafu** (Supra).

(9) Assisting of voters to vote –

The only evidence is that of Naigaga who says that at Iganga High School Polling station she saw Alili escorting people up to Polling Stations and telling the Polling Supervisors that they were his people who needed to be helped to vote. There is no such complaint endorsed on that Polling Station’s DR form.

In the final result I find that the Petitioner has failed to prove that there was non-compliance with the electoral laws and principles by the 2nd Respondent.

ISSUE NO. 2 –

If so, whether the non-compliance affected the results of the elections in a substantial manner. In view of my finding on the 1st issue I find that there was no effect on the results due to non-compliance with the electoral laws and principals by the 2nd Respondent.

REMEDIES:

In view of my finding that the Petitioner has proved that the 1st Respondent committed an illegal practice by carrying on fundraising donating money in the sum of Shs. 100,000/= at the fundraising for the construction of St. Gonzaga Prison Chapel, I have no alternative but to set aside, and hereby do, the election of Mugema Peter as the Member of Parliament Iganga Municipality Constituency. The Electoral Commission is hereby directed to organize and conduct fresh elections for the Constituency pursuant to the provisions of the Law.

In light of my findings on the majority of the Petitioner's claims the 1st Respondent will pay only 40% of the Petitioner's taxed Costs.

As between the Petitioner and the 2nd Respondent each party will bear its own Costs.

LAMECK N. MUKASA

JUDGE

20/08/2011