THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

ELECTION PETITION NO. 0002 OF 2012

ERIYO JESCA OSUNA :::::::::::::::::::::: PETITIONER

=VERSUS=

1. **ABABIKU JESCA**
2. **ELECTORAL COMMISSION :::::::::::::::::::: RESPONDENTS**

JUDGMENT

(BEFORE HIS LORDSHIP NYANZI YASIN)

FACTS

On the 18th day of February, 2011 the Electoral Commission which appears in this petition as the 2nd Respondent, organized Parliamentary elections for Woman Member of Parliament for the District of Adjumani.

Relevant to this petition, the Petitioner and the 1st Respondent were some of the Candidates who were involved in the Electoral race. According to the results that were announced by the 2nd Respondent the 1st Respondent won the election having polled 17.037 votes. The Petitioner was the runner-up. She polled 14.231 votes. The difference between the two candidates was 2806 votes.

For the record it is important to state that the Petitioner participated as NRM candidate while the 1st Respondent as an Independent candidate. Others in this District for the post of Woman MP were Achan Hellen for FDC. She polled 1.145 votes Ujjed Mawawi Josephine who polled 732.
She took part as an Independent candidate.

By way of amendment the petitioner introduced facts which are relevant to the issues which were framed before this court. Relevantly, it is pleased that on the 26th November 2010 the petitioner was nominated as the official flag bearer of NRM party. It is not denied that the 1st respondent belonged to NRM party and actually participated in the primary party election for selection of its official representative for the post of woman MP for Adjumani District.

At the time of her being presented as a candidate on an independent ticket the 1st respondent still held an official post in the NRM party structure. Actually she was a councilor in the District council of Adjumani. It is not denied that she did not resign from that post before she offered herself as a candidate. Based on there facts the Petitioner contested her participation in the election for having not been duly nominated as a candidate.

After the whole electoral process the 2nd respondent on the 21/02/2011 declared the 1st Respondent winner of the election gazatted her in the Uganda Gazatte of 21/02/11 Vol. CIV No. 12 which this court received as Exh. P – 4. This decision by the 2nd respondent aggrieved the petitioner. Following the law as decided that after the Electoral Commission gazettes a Winner any aggrieved party remains with no option but to institute proceedings by way of petition in the High Court, the Petitioner brought this action.

PLEADINGS

On the 1st March 2011 the Petitioner filed in this Court the present petition under S.60 (2) (a) and S.61 (1) of the Parliamentary Election Act (herein after abbreviated to PEA).

Two months later the petition presented to this court amended petition. It was filed on 20/05/2011. From both the original and amended petition the Petitioner in brief alleged that;-

1. The 1st Respondent was wrongly nominated as an independent candidate to contest in the election.
2. That the elections were conducted in contravention of the law or in other wards that there was non-compliance with the law that affected the result of the election in a substantial manner.
3. That the 1st Respondent personally or with her knowledge, consent and approved her agents committed illegal practices to wit defamation of the Petitioner making of sectarian and insulting statements in reference to the Petitioner in form of songs and speeches.

4. That the election was merred by malpractices committed by the 2nd Respondent in favour of and benefiting the 1st respondent which included;-
   - Manipulation, alterations, falsification and forgery of votes.
   - Intimidation of votes and petitioner's agents.
   - Multiple voting.
   - And other electoral malpractices.

Which in all, it is claimed that the y affected the out come of the election in a substantial manner.

5. That the results of the election were either not announced or they were announced or where announced, were wrongly announced on grounds of being;- - altered
   - forged

by the 2nd respondent in favour of the 1st respondent with her knowledge, consent and approval. That the gist of the pleadings in paragraph 19 – 21.

6. That at most polling stations ballot boxes were brought when they were open with no seals and without any explanation for such occurrence.

The petitioner based on the above pleadings intended to ask court to declare;

1) That she is and not the 1st Respondent, the duly elected Woman MP Adjumani District.
2) That the 1st Respondent be ordered to vacate the said Parliamentary seat.
3) That without prejudice if court finds that the election was conducted in non compliance with the provision of the law, the election be set aside and new election be ordered.

On the 27th May 2011 the 1st respondent filed her answer to the amended petition. In it, she denied the contents of the amended petition. Paragraph 4 of her answer made a general denial of all the contents to paragraph 4 – 24 of the petition. She later went on to answer specifically paragraphs 4, 5-6, 7-8, 13-22, 9-12, and 23-24. She prayed that the petition be dismissed.

Her answer to the amended petition was supported by her affidavit in support deponed on 26th May 2011.

On the part of the 2nd respondent, it filed its answer to the petition on the 26/05/2011 the answer concentrated much on the part of the petition that concerned it. It admitted the contents of paragraph 1, 2, 3 and 4.

It however answered in denial the contents of paragraph 5, 8, 7, in paragraph 13 of the answer to petition the second Respondent accused to be false all he contents of paragraph 7 (i), 8, 9, 10 and 14 (c) (d) (e) (f) and (g), 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24.
Paragraph 14 of the 2nd Respondent's answer denying paragraph 13 of the amended petition to be true in so far as it claims that it never received any reports of defamatory or sectarian statement, and intimidation of voters.
The 2nd Respondent prayed that the suit be dismissed.

On 7th.06. 2011 the Petitioner filed a rejoinder to the 1st Respondent's answer to the amended petition supported by 29 paragraphed affidavit. In it, the petitioner answered both the 1st Respondent's affidavit that supported her answer to the petition and the contents of affidavits that were sworn in answer in support of the 1st respondent's answer to the petition. They

included the affidavits of Otto Joseph, Drasi Cezero, Achia Grace Apollo, Azoru Fred, Abio Jane, Irene Lawrence, Igama Alex, and Maluma Jackson.

On the same day of 7/6/2011 the petitioner filed her rejoinder to the 2nd Respondent's answer to her amended petition, the contents of this affidavit re-emphasize the content of the affidavit in support of the amended petition.

Additionally these pleadings introduce a letter dated 3/5/2011 when this petition was already in court. This letter is written by the Secretary of the 2nd Respondent SAM .A. RWAKOOJO. It supported what it learned as "Certified voter information". It concerned 40 votes in number. It was attached is EC 1.

Mention is also made of voters who were validly registered but denied voting on grounds that they had left their areas of registration. This is allegedly said to have not been the true position. Annextures EC 2 to EC9 are attached for that purpose this claim affected 8 voters in number.

The above is how best the pleadings presented to this court can be summoned.

AGREED FACTS

The submission of the Petitioner filed in court on 31.08.2011 stated only one area of agreed facts namely that;-

1. There was an election held on the 18th Feb 2011 for the voting of the District Woman Member of Parliament for Adjumani.

   However in the courts view there other facts which according to the pleading, evidence and submissions were not contested or even contestable, they are the following.

2. That in addition to the Petitioner and the respondent there other participants in the Electoral race the declared results of whom stand as follows:-
    - JESCA ERIYO 14.231 VOTES
    - JESCA ABABIKU 17.037 VOTES
    - ACHAN HELLEN 1.145 VOTES
    - UJJEO MAWAWI 732 VOTES

3. That of the above contestants the 2nd Respondent awarded ABABIKU JESCA the winner of the Woman MP seat for Adjumani District on the 21/02/2011 with 17.037 votes.

I treat the above fats as undisputed because no cause of action would have arisen some that they occurred.
Secondly I have not seen any pleading or evidence denying their occurrence.

Agreed issues

The following issues were by agreement framed before court by the parties advocates for Court determination.

1. Whether the 1st respondent was at the time of election qualified and/or disqualified for election as a Member of Parliament.
2. Whether the 1st respondent personally and/or with her knowledge, consent and approval committed illegal practices and offences in connection with her election under the PEA 17 of 2005.
3. Whether the election of the District Woman Member of Parliament held on 18/2/2011 was conducted in compliance with the provisions of the Parliament Elections Act 17 of 2005.

4. If not, whether the non-compliance with the law affected the result of the election in a substantial manner.
5. Whether the Petitioner and not the 1st respondent won the election for District Woman Member of Parliament of Adjumnai District held on 18.02.2011.
6. Remedies available to the parties

ISSUE 1

Whether the first Respondent was at the time of election qualified or disqualified for election as a Member of Parliament.

The Petitioner's advocate argued that the election of the 1st respondent be set aside on the grounds as set in S.61 (1) (d) PEA. Claude 1 (a) which is relevant here is to that effect that an election will be set aside on the grounds that:-

> (1) (d) the candidate was at the time of his or her election not qualified or was disqualified for election as a Member of Parliament.

The Petitioner's complaint from pleadings and submission was that the 1st respondent breached the provisions of S.4 (4) (a) of the PEA and S.15. I have looked at section 15 and found it to be not applicable to the complaints. Perhaps the learned advocate could have intended to refer to S.13 (c) in particular.

The provisions of S.4 (4) (a) of the PEA, the 1st respondent ought to have resigned her electoral post of a councilor 90 days before the election.

To support his case the learned advocate cited to this court the decision of the Constitutional Court of Uganda in ***GEORGE OWOR –VS- WILLIAM OKETCHO & A.G Constitutional Petition No. 38/2010.***

The learned advocate for the 1st respondent did not agree. In his submission he argued that Art. 83 of the Constitution of Uganda is not applicable to the current facts. He concluded that equally the case of **GEORGE OWOR** (supra) on which the petitioner's case relied is not applicable.

On evidence the averment that the 1st respondent was not qualified at the time of her nomination are made in paragraph 5 and 22 of the Petitioner's affidavit in support of her amended petition. These same claims are denied in paragraph 4 and 5 more specifically of the 1st respondent's affidavit in support of her answer to the amended petition. In paragraph 5 she reduced the allegation to falsehood.

However since an averment had been done by way of swearing as in paragraph 5 in support of amended petition the burden of proof shifted on the 1st respondent to deny the allegation, which she did and if she wanted this court to believe her story and not that of the petitioner she would have given facts relating to her resignation. That she did not do. For that reason I will take it that the 1st respondent did not resign from her Electoral office of a Councilor in the District Council.

The issue to decide is now whether in accordance with the law the Petitioner relied on, she was under any such obligation to so resign before nomination. The petitioner's advocate based his complainant on S.4 (a) PEA and a I said S.13 (c).

S.4 (4) (a) can be reproduced here for purpose of clarity. It states

(4) Under a multiparty system political system a Public officer or a person employed in government department or agency of the government or any body in which the government has a controlling interest.

Who wishes to stand for election as a Member of Parliament shall

(c) In case of general election, resign his or her office at least 90 days before nomination day.

The second provision is section 13 (c) which was stated to be S.15 PEA. S.13 (c) states

> ***S.13 A person shall not be regarded as duly nominated for a constituency and nominated paper of any person shall be regarded as void if***
>
> ***(c) The person seeking nomination was not qualified for election under S.4.***

Section 13 apparently must have be enacted for purpose of emphasis other wise it reproduces S.4 (4) (a) to be one of the relevant considerations for the validity of nomination.

I have already said that from affidavit evidence the 1st respondent was a councilor in the district council of Adjumani. S.4 (4) (a) has given a list of persons and offices who ought to resign in conformity with clause (a) of the same section. None of those offices is elective. The office of an elected District Councilor is not mentioned. If the legislature wanted it to be, it would have mentioned it.

Secondly, to my understanding a district councilor is an elected representative of the people. Parliament did not and perhaps could not demand that the people who elected a councilor do remain with no representation for that long. In my view I do not see or interpret S.4 (4) (a) to be of such requirement since that particular office is not mentioned.

Similarly S.13 (c) would not apply having found that S.4 is not applicable. It is not worthy that the submission of the Petitioner's advocate merely relied on S.4 (4) (a) and 13. There was no justification in argument for citing or relying on those sections and their provisions.

The second aspect of the first issue is that the Petitioner's advocate by citing the case of GEORGE OKWOR which concerned itself among other articles, 83 of the Constitution, seemed to have suggested that the 1st respondent breached Art. 83 of the Constitution and hence the invocation of Art. 83 (1) (g).

Art. 83 of the Constitution states

> ***"A Member of Parliament shall vacate his or her seat in Parliament. g) if that person leaves a political party for which he/she stood as a Candidate for election to Parliament to join another party or to remain in Parliament as an independent member……".***

The wording of the above section had relevance to the facts in GEORGE OWOR that was so because the respondent who was a known MP for NRM party changed to an Independent candidate and still remained in Parliament.

In the present case, the 1st respondent has never been MP was the MP at the time she offered herself for nomination. She was merely a District Councilor. Art. 83 does not mention any other electoral office except that of Member of Parliament. It would be a grave error on the part of this court to hold that, a district councilor is included in Art. 83 of the Constitution. I consequently find Art. 83 or applicable were the petitioner's advocate relied on the decision in GEORGE OWOR to support his case. I do not agree that it would help. My words in the Constitutional Court in my view never decided GEORGE OWOR's case to apply to all situations. I say so from what my Lord's wrote as their conclusion after a very elaboration explanation. My Lord's concluded

> ***"There may be several other Ugandans who have been nominated as Independent while still holding on to their seats in Parliament to which they were elected as political party flag bearers…… All those should read this judgment very carefully and take collective measures before it is too late. We direct the Registrar of this court to serve, so as soon as possible a copy of this judgment to the Hon. Speaker of Parliament and the chairman Electoral Commission to take note of the contents and take appropriate action".***

The above conclusion clearly shows what category of people's representation their Lordships referred to. A copy of the judgment was sent to the Hon. Speaker of the Parliament for taking action. The same action was not taken in respect of Hon. Speakers for district Councils. In the body of the judgment itself the Constitutional Court judge among other article

referred to Art. 83 which I have held does not apply to the facts of the case before me let alone applying to the 1st respondent.

In conclusion I would find that GEORGE OWOR's decision is not applicable here and is distinguishable both on the facts and the law applicable. As a result I would hold that the 1st respondent was qualified for election as a Member of Parliament under the law. That is my answer to the issue No. 1.

Before I consider the remaining issue I find it important to state the general and known principles relating to evidence. As the remaining issue have much to do with to what extent is the petitioner's case proved against the respondents. In cases where it is even proved this court has to decide whether the proved fact affected the election results in a substantial manner.

S.61 (3) PEA is to the effect that non-compliance with the law, illegal practices and other offences under the Act, that a person other than the one elected won the election and qualification or disqualification of the candidate to be a member of Parliament as grounds for setting aside an election shall be proved on the basis of **balance of probabilities**.
In a number of decisions the court of Appeal and the Supreme Court of Uganda have pronounced themselves on the above legal position. In this submission the learned advocate for the petitioner rightly cited the judgment of my lord J.W.N Tsekooko JSC in Election petition Appeal No. 18 of 2007:

MUKASA ANTHONY HARRIS =VS= DR. BAGIYA MICHAEL LULUME where the learned SC Judge reasoned and stated as below;-

"It is settled law that the burden of proof in an election petition is upon the petitioner who is required to prove every allegation contained in the petition to the satisfaction of Court. The standard of proof is a matter of statutory regulation by subsection 3 of section 61 of the PEA, 2005. The subsection provides that the standard of proof required to prove an allegation in an election petition is proof upon the balance of probabilities.

The learned judge added

"On this point, I am surprised by the assertion of the learned counsel for the appellants who unfairly criticized the two courts that they misdirected themselves on the standard of proof by applying the standard of proof sanctioned by the statute which is proof on balance of probabilities"

BURDEN OF PROOF

On the question of the burden of proof it is also settled law that it falls on the party alleging a fact to prove it. In presidential election petition No. 1 of **2006 DR. KIIZA BESIGYE –VS- ELECTORAL COMMISSION Y.K. MUSEVENI** accepting the view of the judge in **CONSTANTINE LINE** case where he stated as below;-

"I think the burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is that the burden of proof lies on him who affirms a fact, not on him who denies it".

As a matter of law it is still important to state that it is not enough in election petitions to prove a ground, it must in addition be proved that such a ground affect the election result in a substantial manner. See **KIIZA BESIGYE –VS- ELECTORAL COMMISSION and Y.K. MUSEVENI Election petition No. 1/2006 (supra) and BANTALIBU ISSA TALIGOLA –VS-ELECTORAL COMMISSION & WASUGIRYA BOB FRED Election Petition No. 15 of 2006** where Justice Yorokamu Bamwine (now the Hon. P.J) made the observation that election matters are of great public concern and that a party who emerged victorious in a hotly contested election is not to be denied the fruits of his or her victory on filmsy ground.

Learned counsel for the 1st respondent cited to the court extensively from the Supreme Court decision in **Presidential Election Petition No.1 of 2001 Dr. Kiiza Besigye –Vs- Museveni Yoweri Kaguta and Electoral Commission** on burden of proof. He also cited **Karokora Katoro Zedekia –Vs-Kagonyera Mondo** HC – 05 – CV – EP – **0002 – 2001, Masiko Winfred Komulangi –Vs- Babihuga J. Winnie** Election petition No. 9 of 2012 and finally **Sarah Bireete** and another –Vs- **Bernedette Bigirwa & Electoral Commission.** Election petition Appeal No. 13 of 2002.

By citing all those counsel made a spirited attempt to persuade this court to place a high burden of proof where the statutory one spelt out under S.61 (3) PEA. An observation that has to be made is that the cases referred to are all provisions of S.61 (3) which makes the burden of proof a statutory matter other than factual. These are cases of 2001 and 2002. The decisions therein were correct then and not now. The settled position of this area of law is that

my Lord Tsekooko stated in the paragraph I quoted earlier. For those reasons I do not agree that a higher burden than the statutory one be placed on the petitioner.

ISSUE NO. 2

Whether the 1st respondent personally and I or with her knowledge, consent and approval committed illegal practices and offences in connection with her election under PEA 17/2005.

The above issue accused the 1st respondent to have committed illegal practices and electoral offences. On the side of pleadings it is pleaded in paragraph 11 (1) (a) and (g) and paragraph 22 (1) to *** of the amended petition the same is denied 1st respondent in the 1st respondent's answer to the amended petition and her supporting affidavit paragraph 4 of the answer to the amended petition denies the contents of paragraph 4-24 of the amended petition. Still paragraph 8 denies the allegations in paragraph 7-22 of the amended petition.

Part XI (eleven) of the PEA 17/2005 in the chapter which deals with illegal practices. S.68 names bribery to be an illegal practice. S.69 states procuring prohibited persons to vote to be an illegal practice and S.70 stated that publication of false statements as to illness, death or withdraws of a candidate is an illegal practice.

Finally S.71 names obstruction of voters to be an illegal practice. S.72 makes it a crime and prescribes the punishment therefor.

The pleadings and evidence before this court in the present case to do not indicate that there was bribery, procuring of prohibited persons to vote, or publication of false statement under S.70, and obstruction of voters.
Since the PEA has a separate chapter dealing with illegal practices I take the view that it was an error for the petitioner to plead in the amended petition that illegal practices were committed when none was in accordance with the provisions of S.68 – 72 of the PEA.

The Acts under S.22 and perhaps 24. The acts under S.22 (6) (b) (c) (f) S.22 (5) (b), S.24 (a) 22 (5) (b) (a) – (e) of the PEA that the petitioner pleaded in her amended petition can not be termed illegal practices when the Act provides otherwise.
I will consequently deal with them as the Act provides and not as illegal practices.

Paragraph 11 of the amended petition and paragraph 22 of the affidavit in support of the amended petition deal with this complaint. In pleading, affidavit evidence and submission, learned counsel for the petitioner presented the complaint under S.22, 24 and 73 PEA is a jointed way. The 1st respondent equally made a general denial of the same. It is consequently more convenient to this court to answer the complaint it the way it was presented.

The gist of the complainant by the petitioner under S.22 is that the 1st respondent misused the media and contrary to the law.

- Used words or made statement that were malicious c/s 22 (5) (b) PEA.

- Making sectarian statements contrary to section 24 (a), 22 (6) (a) to (e) and 73 PEA.
- Making abusive, insulting and derogatory statements contrary to S.22 (5), (6) (a-e) PEA.
- Using words of ridicule towards the petitioner contrary to 22 (6) (e) PEA.
- Using derive or mudslinging words against the petitioner contrary to section 22 (6) (f).
- And a general complaint of making statements concerning the character of the petitioner in a negative way contrary to S.73 PEA. This complaint was detailed under paragraph 11 (g) (i) to xxxi and under paragraph 22 (i) to *** of the affidavit in support of the amended petition.

The above complaints are supported in evidence primarily by the affidavit of the petitioner in support of the amended petition that is the gist of paragraph 22 to which she annexed documentary evidence in form of CDs transcribed and translated versions of those CD from Madi language to English. The annexture includes doc. J1, J7, J8, J9, J9, J11, J12 doc 3, J13, J14 and J15.
It is claimed that by use of songs and speeches the 1st respondent personally or knowingly with her consent and or approval made character assassinating statements to the effect that

- The petitioner rigged the NRM primary election for the flag bearer.
- She is married to a person from TORORO and not Adjumani and therefore Adjumani has lost its known throne the MADI ABILA.

- That the petitioner has no house or home in Adjumani but uses a Radio station as a home.
- That she abandoned her electorate for 5 years and only came back to be elected.
- That the petitioner is described in her brain.
- That the petitioner the (ORIGA) the evil spirit.
- That the petitioner killed people in 2006. That she killed Clara who was contesting with her.
- That the petitioner caused the imprisonment of the people who burnt houses after the death of Clara.
- That the petitioner knocked and injured a police man.
- That the petitioner uses bribing voters with saucepans transported in an ambulance like corps.
- That she has not helped her people as a number but her stomach.
- That she practices witchcraft with pleasure.

AFFIDAVIT EVIDENCE

The first affidavit to provide the source of evidence is the affidavit of the petitioner in support of her amended petition. Paragraph 22. This paragraph is over detailed with 33 sub-paragraph and 22 sub paragraph.

The petitioner's evidence start from paragraph 21 of her affidavit. In it, she stated

> ***"That the 1st respondent before and during the election made false statements against me through songs, speeches and statements"***

She then went on in paragraph 22 to give the details of those songs, speeches and statements.

However a part from giving a very clear narration of what transpired in such songs and speeches the deponent does not tell court how she got the contents of the songs and speeches or statements. She does not equally tell court whether she got the information personally and if not personally from which source.

0.9 r 3 (1) of the CPR provides that affidavits shall be confined to such feels as the deponent is able of his or her own knowledge to prove, except on interlocutory applications on which statements of his or her belief may be admitted provided that the grounds therefor are stated. For many of the facts the petitioner stated as a deponent she did not show that she could prove them on her own. She did not state that she added the rallis where such statements were made or songs played. I find myself unable to attach a lot of value to the clear and elaborate affidavit in support of the amended petition because it violated 0.19 r (3) of the CPR.

The petitioner's evidence in cross examination confirm how distant she was from the information or facts she gave to court as her affidavit evidence in his regard. For purpose of clarity I will state the relevant part of that evidence verbatim

> ***"I first listened to the CDs in February 2011 and they (CDs) confirmed reports that the 1st respondent was saying a lot of things about me. I was being informed by my agents ANYAMA RIVHARD, ADIGA DANIEL, OPENDI EMMANUEL and others"***

The above passage show how remotely the petitioner was connected to the evidence she gave to court. She could not and was not able of her own knowledge prove those facts. I would for those reasons decline to accept her well detailed affidavit in proof of allegations concerning issue number one.

However, there are other affidavits which were deponed in support of the petitioner's amended pleadings. These affidavits were in proof of the fact that the 1st respondent breached the provisions of SS.22, 23, 24 and 73 of the PEA where relevant to the issue before court. I will turn and review those affidavits now.

AFFIDAVIT OF IRANYA NYTON DOUGLAS

It was deponed on 06.06.2011 the deponent relevantly stated that he is employed by RADIO AMANI as a News Editor. Other relevant parts of his affidavit ran as stated below;-

3. That in the course of my duties, I deploy different individuals to father news for the Radio and visual recording among other things.
4. That in August 2010 I gave Video Camera and voice Recorders to reporters among whom were Anyama Richard, Odendi Michael Kibrai, Emanuel Aluma and Adiga Michael. I tasked them to record statements of candidates and their agents at rallies in the 2010 National Resistance Movement primary election and 2011 General elections.

5. That the Reporters Brought Back To Me Recordings from Agogugu, Boroli, Gulinua, Adropi, Pakele, Pachera, Ciforo and Hirikwa among others.
6. That I played the Video and listened to the tapes and transferred the information to CDs and DVDs copies of which I gave to Hon. Jesca Eriyo as they contained abuses and character assassination statements made against her by Ababiku (see attached annexture DVD1, CD1, CDs, A1, A2, A3, and A4).
7. That what is stated herein above is true to the best of my knowledge gave for where the information is from the source as specifically stated.

Annexture A1, to A4 contains the Madi language text and the translated English text of statements on the CD recordings. Each of them is quite detailed. The contents of these annextures are without doubt in bad language. They ridicule and others are of Secretarian nature especially on grounds of tribe.

However at his level this court is not yet concerned with they content but how this evidence came before it. If it is true that the 1st respondent used such language towards the petitioner, did the deponent IRANYA NYTON, see her or hear her say so and then proceeded to record her? That is the question now.

In paragraph 4 of his affidavit IRANYA said he gave video cameras and voice recorders to reporters. These reporters according to him did the recording to him did the recording and brought back CDs and DVDs to him

the deponent therefore has no personal knowledge of what transpired at the alleged places to which he sent the reporters.

On the recordings on CD and DVDs the deponent did not state in his affidavit that when he listened to the CDs he positively identified the voice of the maker of the statement to be that of the 1st respondent and hoe he could have identified it. Equally he did not state that when he played the alleged visual recordings, he saw the 1st respondent making the questioned statements.

In paragraph 6 he only stated that

> ***"Copies of which I gave to Hon. Jesca Eriyo as they contained abuses and character assassination statements made against her by Ababiku".***

That piece of evidence is only a conclusion that Ababiku is the one who made the statements it is devoid of any identifying evidence that the deponent himself identified the 1st respondent either by voice if at the knew her voice or any other means to be the person who made those statements. For that observation Mr. Iranya's affidavit on this aspect of not from his person knowledge as he claimed. He did not say that he attended the rallies himself but stated he sent other people.

The second problem IRANYA's affidavit presents is on the period of recording. In paragraph 4 he stated that he assigned his reporter to do the

work in August 2010. The instructions he gave were to record statements of candidates and their agents at rallies.

> ***"In 2010 National Resistance Movement primary elections and 2011 General elections".***

The deponent did not state as part of his affidavit evidence to this court where the CD and DVDs he presented concerned general questions as well presented the evidence ought to have known that this court is only concerned with matters relating to general questions and has nothing to do with NRM primary election.

Whether the statements complained were made by the 1st respondent and gathered by the deponent's employees in NRM primaries or general election, the deponent's affidavit is not of much help. To make the situation worse the speeches and other documents were apparently headed by either the interpreter at the Makerere University Institute of Language or the recorders. For example in A1 the University gives its reference as MILDC/0024/21/4/2011 then it proceeded to read the interpretation as follows

ADJUMANI DISTRICT PARLIAMENT ELECTION CAMPAIGNS, 2011.
VOICE RECORDING OF ABABIKU JESCA'S RALLY AT AGOUBU
My view is that the above words were never used by the 1st respondent is the speaker of the contents of annexture A1 (English text) they were added either by the interpreter or the recorder for reasons of creating a convenient reference to the document. Annexture A1 was itself signed on 28.04.11. I

have read annexture A1 English text and found no reference to any useful information relating to the date when it was made.

Since the reasons of paragraph 4 and 6 of IRANYA's affidavit together does not state which CD and DVDs he presented to court as evidence it is not the duty of this court to rule that the CDs and DVDs presented to court related to general election. More so since the deponent is not the one who authorized the documents in the first place. Yet still it was the evidence of the petitioner in her affidavits that the 1st respondent made similar bad statements even during the primary election of NRM. She deponent in paragraph 22 (XXII) about how the 1st respondent said she bribed the electorate in NRM primary election.
Now if the above is the situation the court cannot know which tapes, CDs and DVDs were used for interpretation. This is a fact Mr. IRANYA can not prove his affidavit.

For the above reasons I find that IRANYA is a stranger to the documents he introduced in evidence as annexture DVD1, CD1, CD2, A1, A2, A3, and A4 that being the case his affidavit cannot be used to prove that the 1st respondent committed the breach of the law the petitioner complains of under S.22, 24 and 73 PEA.

AFFIDAVIT EVIDENCE OF ALUMA EMMANUEL
Aluma Emmanuel deponed on 6/06/2011 an affidavit supporting the petitioner's amended petition. He stated he was hired by DOUGLAS IRANYA of Amani Radio. He further deponed that he covered.

4. The 2010 National Resistance Movement primary election and 2011 general elections and gave the recorded materials to Iranya Douglas.
5. That IRANYA Douglas transferred the information from the video recording for Adropi, Pakele, Pachera, Ciforo and Hikirwa to DVDs and gave copies to me others were given to Hon. Jesca Eriyo.
6. That on all the recordings Ababiku was abusing Hon. Eriyo Jesca and character assassinating her as per the transcribed and translated version of the videos I captured made by Makerere Institute of Language. (Copies attached as DVD1, A1, A2, A3, A4 and A5).

I have already stated that the period of action by the witnesses (deponents) presents problems Aluma's instructions included coverage of NRM primary election and general elections. His affidavit does not distinguish which period the information he presented related to. See paragraph 4 of his affidavit.

The contents of paragraph 5 of his affidavit are just too general to assist this court. He stated that Iranya transferred the information from the video recording for Adropi, Pakele, Pachera, Ciforo and Hitkwa to DVDs. He did not positively state that he personally attended the rallies at those places. He did not state the date when the events he claimed to have recorded occurred. If he so did it would have helped this court to distinguish NRM primary election information or facts from General National election which is the issue before court. The documents are mixed-up. To prove the point reference is made to annexture A1 to Aluma's affidavit- it is headed

“Video transcription of Ababiku Jesca during NRM primary election at Pechera sub county”.

A2 – is merely headed

VIDEO recording of ABABIKU IN PAKELE SUB COUNTY HEADQUATERS.

It does not state if it related to NRM primaries or general elections. The translation was made on 15/05/2011.

A3 – is headed

VIDEO recording of ABABIKU JESCA speech during NRM primary at AJERI primary School TIRIKWA SUB COUNTY.

That on like A1 refers to NRM primary election which is not the issue before court.

A – 4 is headed

Video Transcription of Ababiku Jesca during NRM primary elections at CIFORO SUB COUNTY.

It does not refer to general elections.

There is no annexture A5 although the deponent mentioned it in the body of his affidavit. Court just wonders what evidential value the petitioner’s advocate expect it to attach to evidence that related to NRM primary when no issue were ever framed for its determination may be that explains why no date or places are being given in the affidavit yet this is an important aspect in cases of alleged character assassination or deformation. In RTD COL.

KIIZA BESIGYE =VS= E.C & Y.K. MUSEVENI SC presidential election petition No. 1 of 2006 (supra) their Lordship made the observation below that I have found to be helpful to this case.

> ***"The books, news papers or other documents from which the words of the document are taken should be identified by date or description"*** **(emphasis added)**

I have put emphasis on dates because that is what lacks there. The statements are not dated. The fact that they are said to have been collected during NRM primary election when the general elections were not yet officially declared by the Electoral commission in conformity with S.20 (1) of PEA, making the documents completely irrelevant to this court.

The second aspect is the form of the documents presented to court. According to ALUMA's affidavit he made video recording. He never made the DVDs. There is no explanation given to court by ALUMA who made the video recording or IRANYA who used it or make the DVDs where the recording is.

It is that video recording authored by Aluma at the diverse places that is the original recording. The evidence presented as DVDs and CDs developed from the sources that was/were not accounted for in the affidavit evidence cannot be said to be original documents. S.61 of the evidence Act provides that

> **"Primary evidence means the document itself produced for the inspection of court".**

S.63 provides for proof of documents by primary evidence and states that

> **"Documents must be proved by primary evidence except in cases hereafter mentioned"**

S.64 of the same Act proceeds to name exceptions in sub section 1 (a) to (g). None of the exceptions is applicable here. Here the facts are that there was an original video recording in form Mr. Aluma never told court Mr. Iranya changed that recording to another form of DVD and neither Aluma nor Iranya explains what occurred to the original record. The exceptions under sub-section 1 of S.64 do not cover such conduct. For those reasons I would still reject the DVD which was developed from a video recording whose where abouts court does not know. Its acceptance would offend the provisions of S.61, 63 and 64 of the Evidence Act.

In the result I find that ALUMA's affidavit evidence does not prove that the 1st respondent committed breaches of the law in S.22, 23, 24 and 73 of PEA.

ANYAMA RICHARD AFFIDAVIT EVIDENCE

Mr. Anyama deponed on 18/3/11 when the original petition was being filed. Unlike other witnesses/deponents Anyama attended the rally at Boroli village Pekele Sub County and another one at his village called LEANGORU in FUNDA parish. In paragraph 4 of his affidavit he stated;-

4. "**That since I had a voice recorder with me, I decided to record her speech which was full of derogative, malicious and**

defamatory statements as well as false allegations against Eriyo Jesca.

5. **I have tendered in the recording to Eriyo Jesca for onward submission to court as evidence".**

In all her affidavit in support of the petition, in rejoinder and some supplementary there is no explanation as to what happened to the original voice recorder that Anyama Richard recorded.

According to paragraph 5 of his affidavit, the voice recording to given to the petitioner so that it is submitted to court as evidence.

IRANYA DOUGLAS who claimed to have transferred the information from video and audio recording did not explain what happened to the primary source of evidence. Suppose court decides to call for its inspection what would the petitioner present?

I find the mode evidence fathering adopted by the petitioner rather disturbing.

In the case of Anyama Richard the claim to this court would be as follows;-

1. ANYAMA RICHARD - The original recording person who had the speech in Madi language.

2. IRANYA DOUGLAS - The person who transfers the facts (evidence) from the original voice recorder to a CD in Madi language and discards the voice recorder.

3. MAKERERE UNIVERSITY
   INSTITUTE OF LANGUAGE Which interprets the CD from Madi

to English language.

4. COURT - Which receives the English text of the translated Madi text. Which court on read and understand.

I find the claim too long to attribute the contents of the English text I have read to Anyama Richard. He has never read or heard being read the Madi text to confirm it, that it is what he heard. Anything could happen to this piece of evidence in that long chain I do not believe that the Institute of Language deals with only CD or DVDs similarly the voice recorders just like the CD would have been taken to the Institute. The message it would have been transcribed and then translated. The voice recorder together with the transcribed text and the English text would have been returned to their client. Relevant affidavit would be extracted where the three documents would be attached. That is voice recorder, the main transcribed text and the English text. In my view it would be important that Richard Anyama would depone confirming that what be recorded is what has been transcribed.

That in my understanding would be the simplest way of keeping the petitioner's case within the evidence rules. Other wise like I have held earlier that kind of approach the advocates and herself adopted offended S.61, 63 and 64 of the evidence Act and I can not accept the evidence resulting from such violations.

AFFIDAVIT EVIDENCE OF AHMED KAGGWA

This affidavit was deponed on 24/06/2011 by the project coordinator of Makerere University Language and communication services.

He admits to have got CDs marked as annexture A, B, C, D, and E from the petitioner. He handed them over and assigned HARRIET MANDIKU his staff who was fluent in Madi and English language to the transcription and translation under his close supervision.

I do believe that the reason why Mr. Kaggwa Ahmed gave the assignment to Harriet Mandiku was because he himself did not know Madi language. I say so because his affidavit did not have such a positive assertion. Yet the person who did not know the Madi language afforded to supervise closely at that Harriet who was fluent in the language.

The proper thing to do, would have been for HARRIET MANDIKU to swear an affidavit. In it she would state her proficiency in both Madi and English language and how she believed that she has truly given a true translation but not Kaggwa. Kaggwa's affidavit was the most informative and show how the petitioner and her advocates were more concerned with making the case more colourful then evidential. I completely do not understand why Kaggwa as a project coordinator was made to swear an affidavit to confirm to this court that proper and true interpretation had been made from Madi language to English when he did not know the Madi language. It was even a lie for Kaggwa to claim that what he stated was within his knowledge when it was Harriet's knowledge. His affidavit is completely useless to court and is accordingly rejected. He deponed on matters he could not prove of his own knowledge.

Other reasons I have given affecting the CD, the want of the original source from which they were developed also apply to Kaggwa's affidavit.

OTHER AFFIDAVITS

There were other affidavits containing evidence on the issue under consideration these affidavits are worthy court's attention and comments, these affidavits are 12 (Twelve) in number. The deponent are stating matter or facts they claimed they heard or saw happening.

1. **MIJUZIR ANETA**

   She attended the 1st respondent's rally at Loa village, Ciforo Sub County on 10/02/11. She deponed she heard ABABIKU defaming and character assassinating the petitioner.

2. **GUMA MARY KENTEMBWE**

   Deponed on 17/march/11. her affidavit has nothing to do with the issue under consideration. Be it annexture B which counsel relied on. Annexture B shows the campaign programme which the 1st respondent is accused to have violated.

3. **AMBABUA LUKE**

   He was a campaign agent of the petitioner. He deponed that on 5th Jan. 2011 at OPENJINJI village the 1st respondent called the petitioner a killer. That she killed Clara Vuni. She made other defamatory statements about the petitioner.

4. **OPENDI MICHAEL**

   He deponed that on January 2011 at a place he did not name Mr. Edema Dominic defamed the petitioner by saying she poured blood in

past elections and events to kill the 1st respondent. The deponent does not in any way relate Edema Dominic to the 1st respondent.

The deponent added in paragraph 3 that the petitioner has no home in Adjumani and sleeps in the Radio station. Accused her of bribery of voters. That those utterances were made by the 1st respondent. That he used a voice recorder to record the speech. The affidavit does not mention any other person to have been present or the extent to which those utterances were heard.

A5 not easy to know for this affidavit where the utterances were made because it mentions no place where the rally or event occurred.

5. **TABU GEOFREY**

He deponed that on 30/1/2011 the 1st respondent went to their village at Lori – Umwia Primary School and knocked a policeman while going for nomination which was false.

6. **DRARUSI ISAAC**

He deponed that on 6th Jan 2011 at OPENZINZI central Primary School, he heard the 1st respondent say the petitioner killed Clara Vuni and he also heard the Chairman L.C 1 Edema Dominic saying that the petitioner had a gun. The deponent gave no information relating to other people who attended the rally and could have heard those utterances.

7. **CANDIA CHRISTINE**

She deponed that in December 2010 the 1st respondent campaigned at LEWA village. She said the 1st respondent called the petitioner a killer, a witch, a wizard and that she gave away the ABILA by marrying to foreigner. And several other defamatory statements.

She deponed in paragraph 25 of her affidavit that many villagers came to her asking to be given the items she had falsely been accused to have from Eriyo Jesca for distribution including money.
However on record I do not have any affidavit from such villagers to confirm how the false statements misled them to the extent of spouling the petitioner's votes.

7. **VICENCINA DRAJE**

She deponed she was a campaign agent of the petitioner at Maasa polling station. Her affidavit that was deponed on 18/03/2011. It contains several defamatory utterances. However the affidavit does not state where they were made, when they were made or that the deponent attended such place and heard them by being said.

Despite its contents, the deponent having not indicated the place, time and state if she was present or not, her affidavit cannot be used in support of the petition.

8. **IJJO LOUIS SUNDAY**

He made the affidavit on 22/6/11. He deponed that on 6/1/11 the 1st respondent went to OPENZINZI central village. He heard her say that the petitioner caused imprisonment of people, bribes votes and

the Registrar. That she is not born in Adjumani and several other allegation he did not state (see paragraph 10).

He did not state other persons who attended the campaign and heard those utterances.

9. **TARAPKWE JULLIET**

Her affidavit dated 22.06.2011 has nothing to do with the issue of character assassination and defamatory statement.

10. **UZINGA ABDALLAH KEMIS**

He made the affidavit on 22/06/2011. he deponed that sometime in September 2010 he listened to the 1st respondent on a talk show on Transnile Broadcasting station (TBS) and heard the 1st respondent using sectarian language towards the petitioner.

Paragraph 4 of this affidavit makes it to be outside the general election but NRM primary election. I have already held that such facts are irrelevant. Consequently UNZINGA's affidavit is not relevant on this issue.

11. **DRANI KERUBINO & DROPIO HARRIET**

There is affidavit of Drani Kerubino, relating to Pakele accident of character assassination and defamatory statements the affidavit of Dropio Harriet attempted in paragraph 4 to show the textent and effect of the petitioner being character assassinated. She deponed that people came to her house three weeks to elections asking her or

wondering if any person supports the petitioner who is a killer and wizard.

Above I have reviewed the evidence contained in the 12 affidavits in support of the allegations that the 1st respondent breached the provision of SS.22, 23, 24 and 73 of the PEA.

This court has observed that paragraph 22 (xxvi) the petitioner deponed that the 1st respondent cured and sang songs as contained in Doc.4 and annexture E10 and E11 to the petition. Similarly in paragraph 22 (xxvii) the petitioner deponed that the 1st respondent caused the composition and the singing of the false songs as contained in annexture J15 to the affidavit in support of the amended petition.

I have already held that those matters were not within the knowledge of the petitioner. However if there was independent affidavit evidence to the effect that a deponent heard those songs being song this court would have considered such evidence.

None of all the other deponents whose affidavit evidence I have considered talked about or referred to songs. Consequently it is not true as argued by counsel for the petitioner that the allegations about songs being composed and sang was proved and corroborated.

I have also for reasons stated in respect of each of the following affidavits found them to be irrelevant to the issue under consideration those affidavits were deponed by Guma Mary, Ondendi Michael, Vicencine Draje Julliet Tarakwe and Onziga Khemis.

I will now turn to consider the affidavits in rebuttal before coming to a conclusion on this matter.

These affidavits which sought to controvert the averments of the petitioner were in two category. There are those which were deponed by supporters of the 1st respondent and those deponed by independent observers. The 1st respondent herself swore affidavit on 4th May 2011 also denying the allegations.

In paragraph 7 of her additions affidavit in support of her answer to the petition, the 1st respondent denied ever making any false statement against the petitioner composing or causing to be composed any song as to the character of he petitioner.

ABIO JANE

Deponed on 29th.04.2011. She controverted the contents of CANDIA Christine's affidavit that it was false. She claimed she attended the rallies organized by her candidate.

ACHIA GRACE APOLLO

She deponed on 29.04.2011 she controverted the petitioner's supplementary affidavit in general. She did not refer to any particular. She however claimed that she added the rallies organized by different candidates.

DRASI CEZERO

He made the affidavit on 29/04/2011. His affidavit replies all events which related to the petitioner being accused to have wanted to kill a police man.

He swore that he was present on the nomination day when the event occurred. That actually the petitioner's vehicle knocked the 1st respondent's police guard called LAGU ALFRED. That the 1st respondent talked about the incident but never said that the petitioner wanted to kill a person.

IRAMA LAWRENCE

He deponed on 29.04.201. He made general statements of denial. He said he attended most of the rallies by different candidates and never had abusive language being used.

MESIKU ROSE ARAMBE

She swore the affidavit on 29.04.2011. She made a general denial. She claimed to have attended most rallies and not to have heard any insulting or abusive language being used. The second categories of affidavits were deponed by independent observers. There are 3 affidavits.

MOLUMA .D. JACKSON

He deponed that he was an observer for general elections 2011and a poll monitor for CEFORD (Community Empowerment for Rural Development). He said as an observer he was attending rallies of different candidates to certain of they conform to election laws and principles. That way he attended rallies in PAKELE Sub County.

He controverted the contents of the petitioner's affidavit on character assassination claims and that of Chandia Christine. That the 1st respondent did not make false statements against the petitioner. That as observers their offices never received any report to that effect.

He attached to his letter – affidavit annexture "B" an accreditation letter from 2nd respondent's agent the returning officer of Adjumani the letter is dated 1/2/11.

AZORO FRED

He also deponed as an observer of CEFORD and a poll watcher at Combani A polling station. He deponed that he attended rallies and did not hear any incidents of abusive, insulting character assassination or image tarnishing language being used.

The above is the available evidence of accusations and counter accusation. The words of the petitioner and her supporters against the words of the 1st respondent and her supporters. This is a common scenario in electoral petitions but this court has been guided on what to do. In ***MBAYO JACOB ROBERT –VS- ELECTORAL COMMISSION & TALONSYA SINAH Election Appeal No. 007/2006*** Justice Byamusisha J.A made a statement in holding which I find to be very useful to me, it runs as below

> ***"The circumstance under which the whole incident was played out was accusations and counter accusations from both sides such that some other evidence from an independent source is required to confirm what actually happened."***

I must note that he only apparently independent piece of evidence came from the affidavits of observers. The observers gave evidence in favour of the 1st respondent stating that the claims of character assassination never occurred. Their affidavits were attacked by the petitioner's advocate on the

date of appointment. Annexture "B" states MOLUMA was accredited by EC on 1/02/2011. That is not the date when CEFORD appointed an observer.

I will refer to part Annexture B paragraph 3 which states

> ***"The observation period commenced on 25/10/2010 and will end after election".***

To my mind the above means that the observers had been operating even before the letter of accreditation was issued.

Secondly the letter dated 8th Feb. 2011 is appointment of an observer but a poll watcher and it named the particular polling station a watcher was charged with.

In the letter of accreditation the electoral commission spelt out what an observer had to ensure. Interalia the observer had to be impartial and fair, she/he had to be transparent and neutral.

Those conditions observed and I have no evidence to the contrary, the evidence of observers would be that "*some other independent evidence*" as suggested by my Lord Justice BYAMUGISHA above to be used to decide who is telling the truth.

In the present petition the burden to establish the allegation fell on the petitioner. She had to prove on a balance of probabilities that;-

- The first respondent made the statements.
- That she made the statement publically.

- That she made the statement maliciously.
- That the statement was false.
- That she had no reasonable ground to believe the statement was true.
- That the statement had the effect of unfairly promising the election of the preference to the petitioner.

See the judgment of ***MULENGA JSC in Col. Rtd Dr. KIZZA BESIGYE =VS= Y.K. MUSEVENI & ELECTORAL COMMISSION. S.C. Election Petition No. 01 of 2001.***

In order to prove the above it was the petitioner who had the burden to adduce that some other independent evidence and not the 1st respondent. There are many observers in the electoral process both local and foreign. Their work does not end on the Election Day. They continue to work till the time they submit their election monitoring or observation reports to the electoral commission. Part V of the letter of accreditation requires an election observer to submit a report within six months after election. The above means that the petitioner still had access to observers even after election when she filed the petition. She instead elected to use only partisan evidence from her supporters.

In the result, in absence of that other "some other independent evidence" coming from the petitioner I can not believe the claims in the affidavit in support of the petition.

To the contrary I have believed the evidence contained in the affidavits of the observers for the reasons that they were independent. I would therefore rule in the final result that the petitioner has not proved that the 1st

respondent personally and with her knowledge consent and approval committed illegal practices and offences in connection with her election.

ISSUE NO. 3

Whether the election of the District Woman Member of Parliament of Adjumani, held on 18th Feb. 2011 was conducted in compliance with the provision of the Parliamentary Elections Act 17/2005 and in accordance with the principles laid down in those provisions.

The above issue seems to be too blanket. There are so many acts of non-compliance that the petitioner complained about. For easy of answering each of the acts will be turned into an issue of itself. In effect court amended issue number three. For powers of court to amend agreed issues. See the judgment of MANYINDO DCJ (as he then was) in **JOVELYN BARUGARE –VS- ATTORNEY GENERAL S.C Civil Appeal No. 28 of 1993 and ODDO JOBS VS MUBIA [1970] EA 476.**

The acts of non-compliance which are now issues will be answered in the order the petitioner advocate presented therein in the written submission.

3(1) Whether there was disenfranchisement of voters known to be supporters of the petitioner.

Learned counsel for the petitioner argued that disenfranchisement took different forms. The forms were pleaded in paragraph 7 (f) and 14 (a) and (b). In summary the petitioner pleaded that there was breach of sections 12, 27, 29 (4) 34 (5), 30 (4), 32 (1), 46 (1), 47(5) and (6) and 53.

In the second respondent's answer to the amended petition the above allegations were derived. In the affidavit of Eng. Badru .M. Kiggundu and

Toddu Peter both dated 25th May 2011 and filed in court on 26/05/2011. It was averred that he election were conducted in accordance with PEA.

In paragraph 17 of his affidavit Toddu Peter denies that any voters were ever turned away. He explained that those affected were allowed to vote after the candidate's agents checked their copies of the registers. He consequently disputed annexture EC1 to EC9.

In support of the pleading the petitioner pleaded and averted in paragraph 5 of her rejoinder of the 2nd respondent's answer to the amended petition her validly registered voters were denied their right to vote on the pretext that they had left their area of registration which was not true. She attached annextures EC1 to EC9 to prove the point.

However on record none of the affected voters deponed any affidavit to confirm the allegations made by the petitioner in her rejoinder. This part of the pleading remained without any evidence. Even if the petitioner had filed any affidavit in support of the rejoinder it would only be speculative to believe that the voters who were denied a chance to vote were all or any one of them her supporters or supporters unless such affected person confirmed that her/his political will was to vote for the petitioner but was denied a chance to do so.

Consequently in absence of direct evidence by way of deponing affidavits, this court can not find that it is proved that any person was denied a chance to vote that such voter's would have noted for the petitioner.

I would therefore rule that disfranchisement in respect of denying the registered voters and supporters of the petitioner a chance to exercise their political will by vote has not been proved.

3 (2) whether there was early closing of polling stations and finishing of counting of votes by 5.00 pm.

The above act of non-compliance was framed as a question for this court to answer by the learned advocates of the petitioner.

I have perused the petition to find out where this issue and the subsequent submission is developed from. I have not found any pleading to that effect.

The nearest pleading I have found is paragraph 15 (f) of the amended petition. For clarity I will reproduce it.

(f) "Vote counting commenced at 7.00 pm at some polling stations and stopped after 10.00pm in others".

Closely related to that pleading is paragraph 6 VI in the petitioner's affidavit in support of her amended petition. This paragraph reads as follows;

VI Despite voting stopping at 6.00 pm, vote counting commenced at 7.00 pm at some polling station.

The above is what is pleaded. I have not found in the petition any pleading to the effect that there was early closing of polling stations and that finishing of counting ended by 3.00pm.

To the contrary by way of pleading the petitioner stated and averted that in paragraph 6 (VI) above that voting stopped at 6.00 pm not before 6.00pm then in paragraph 15 (f) she pleaded that vote counting to the complaint her advocate submitted on that some polling stations finished counting of votes

by 5.00 pm. In short the petitioner did not only plea that some polling stations were closed before time but actually the pleadings as contrary to learned counsel's submission.

I am aware of the provisions of S.29 (2) of the PEA which provides that

> **(2) "At every polling station, polling time shall commence at seven O'clock in the morning and close at 5.00 pm O'clock in the after noon".**

However if there was non-compliance with the above provision the petitioner had to plead it and not merely submit on it. The law relating to pleadings and their purpose her repeatedly been stated by the courts.
In **INTERFREIGHT FORWARDERS (U) LTD –VS- EAST AFRICAN DEVELOPMENT BANK LTD SC CIVIL APPEAL NO. 33 of 1993** it was held that it is wrong in law to allow a party to depart from its pleadings and prove a case it had not pleaded without amendment of pleadings. That a party is bound by its pleadings. Also see **CS CA No 6 of 2001 UGANDA BREWERIES LTD –VS- UGANDA RAILWAYS CORP.** the judgment of my lord ODER JSC (RIP).

In the result I would rule that it is not persuasive to allow the petitioner to prove a point she never pleaded.
I may have to add that even if the petitioner had so pleaded the matter, she supported the allegation with only her affidavit, in addition to that of Waida Serua and TARAKPE JULLIET. The last two affidavits did not contain any information relating to the early closing of polling stations. The petitioner's affidavit could not prove that polling stations were closed early at over 30

polling stations. Since she had polling agents at such stations the best way to do it would have security affidavit deponed by agents to prove the allegations.

3 (3) Whether there was voting/polling outside the official time

Once again the petition does not reveal that the above complainant was specifically pleaded. I have only been able to see paragraph 15 (6) of the amended petition. This paragraph complains about vote counting commencing on 7.00 pm and ending at 10.00pm.

In the evidence in support of amended petitioner in her affidavit in support still paragraph 6 (VI) she deponed that voting stopped at 6.00 pm and vote counting commenced at 7.00 pm.

I may only give the pleading in 15 (6) a wider interpretation to mean that Since vote counting started at 7.00 pm the petitioner meant that voting went on from 5.00 pm to 7.00 pm before the counting exercise commence. I will use that reasoning so that I consider her complaint.

In his submission counsel for the petitioner refereed this court to about 80 polling stations were voting went beyond the statutory hour of 5.00pm. The latest polling station was Euda primary School where voting closed at 10.00 pm. The petitioner's source of information about the closing time was the declaration of results forms for each of the polling stations.

The learned advocate complained that voting in those various polling stations went on out side the official time without any reason being offered for such conduct.

I find no merit in this complaint for the following reasons

1). Except for raising it as a point was not spelt out as a pleading or any evidence given to support it by way of a clear averment in the affidavits of the petitioner herself or any other person deponing in her favour or in support of her petition.

2). The complaint that time went beyond the official without explanation amounts to an over demand by the petitioner on the part of the presiding officer. I say so because the declaration of results form is a statutory form which is already formatted. The part the presiding officer fills has a space, signature, date and time. The form has no space for the presiding officer to state reasons why the polling was conducted beyond the official time. My view would have been different if such space existed and the officer just neglected to full the form but that is not the case.

3). Thirdly and last S.29 (5) of the PEA explains how voting may go beyond the statutory time of 5 pm. For purpose of clarity I will reproduce the relevant part of this section.

> ***"(5) if at the official hour of closing the poll in subsection (2) there are any voters at the polling station, or in the line of voters under subsection (3) of section 30 who are qualified to vote and have not been able to do so, the polling station shall be kept open to enable them to vote....."***

The above is now a polling station remains open beyond 5.00pm. If there are any abuses or non-compliance in the process of keeping the station open it is the obligation of the petitioner to prove it. In any event court takes it that the petitioner had agents in such stations. They are expected to have

deponed affidavits to prove that the conduct of polling after 5.00 pm at a particular polling station was done in or for non-compliance with the electoral. I have already said no such affidavit was sworn.
For those reason I find the complaint not merited.

3(4) Whether there was ferrying and/or procuring of illegal persons to vote.

The above complaint is pleaded in paragraph 7 (d) that contrary to S.29 (4) and 34 (2) (3) and (5) of the PEA the second respondent allowed persons whose names did not appear on the register or without valid voter's card to vote.

In paragraph 6 (1) of her affidavit in support of the amended petition the petitioner deponed that non-member of Adjumani District unlawfully voted. She gave examples of such persons to include OTTO/JOSEPH, DRANI JOSEPH. Further evidence is said to be in the affidavit of IRANYA GODFREY in paragraph 6. He deponed that 12 foreign persons from Amelo village voted at Miranyi cotton stove polling station where he was the petitioner's agent. IRANYA affidavit deponed on 18/3/2011.

The complaint of illegal voters voting is essentially a complaint against the 2nd respondent.
In paragraph 6 of IRANYI affidavit he gave particulars of 12 voters their names and members who voted illegally.

I have seen two affidavits in support of the second respondent's answer to the petition.

The two are deponed by Dr. Eng. Badru Kiggundu and Toddu Peter on 31/March/2011 and 25/May/2011 respectively. These two affidavits were deponed after the petitioner had served the second respondent with the affidavit of IRANYA GODFREY.

While Iranyi gave clear particulars of the voters complained of with their numbers, the 2nd respondent as the official and only custodian of electoral records including the voter's register did not make any reply to this serious allegation. The affidavit of Toddu Peter in paragraph 16 made an attempted reply of a general nature explaining the procedure generally. It is however inadequate to answer such particular concerns as the one raised by the affidavit of Iranya Godfrey.

It is my finding that the 2nd respondent did not deny the petitioner's claims with the specificity it required and the petitioner was proved that 12 illegal persons voted as stated in as affidavit of IRANYI.
I do not agree with the submission of counsel for the 1st respondent that IRANYI did not disclose his correct capacity. Paragraph 2 and 3 clearly and sufficiently disclose who he deponent was. He gave his name, number the polling station where he was registered. In my view that suffices. The attachment of the voter's card may only be additional proof.

In the final result on this issue I find that there was non-compliance with S.29 (4) of the PEA which the petitioner has proved.

3(5) Whether there were deletions from the register (deletion of the voters' names)

The petitioner pleaded facts relating of issue in paragraph 7 (f) that it amounted to non-compliance with S.34 (3) and (5) of the PEA. She pleaded that the voters were refused to vote by reasons that their names did not exist on the register. Another pleading relevant to the case appears in paragraph 7 (d) of the amended petition. Her complaint here is that the 2nd respondent allowed persons whose names did not appear on the register to vote or those with no valid voter's card.

To support the above pleadings the petitioner relied on her affidavit in support of the amended petition dated 19.05.2011 paragraph 6 (ii) and (vi), paragraphs 16, 18 (1) and 12 and 20. Other pieces of evidence this court this court was referred to in the submission of learned counsel for the petitioner were, the affidavit of UZINGA ABDALLAH KHEMIS deponed on 22.06.2011, particularly paragraphs 8 and 9 and lastly evidence of the petitioner in cross examination.

In the opinion of learned counsel for the petitioner Exh. P – 13 which was the national voters register used in the election of Adjumani District Woman MP confirmed the petitioner's claims.

The petitioner further relied on annexture J1 to her affidavit to support of the amended petition. Annexture J1 is a letter authored by the petitioner was already before court requesting for certified voter's information in respect of 41 voters from the 2nd respondent. According to counsel for the petitioner this letter is further proof that the affected voters had their names deleted. **.....page 31 & 32 missing**.

The comments court can make on those pieces of evidence are:-

UZIGA ABDALLAH KHEMIS's affidavit refers to Hassan Butiga to have been refused to vote and attaches annexture C however there is no evidence from Hassan Butiga to confirm that he did not vote. He would have been the one to depone to that effect.

The same UZIGA's affidavit in paragraph 9 refers to annexture D being a list of people whose names appeared on the register when they had left the area.

There is no evidence to show that despite the fact that those people/voters had left the area they actually came back and voted. And that if they voted their voting favoured the 1st respondent and prejudiced the petitioner. No evidence was got from those persons to confirm the allegations.

In the authority of **RTD. COL. DR. KIIZA BESIGYE =VS= ELECTORAL COMMISSION & Y.K. MUSEVENI Elect Pres. Election petition No. 1/2006** which learned counsel for the petitioner cited to this court, the SC Supreme Court's position was stated on the question of burden of proof on alike issue to be

> ***"The burden to prove that voters were denied the right to vote was on the petitioner. In my view he has sufficiently discharged the burden by adducing credible affidavit evidence from the affected voters that they turned up to vote and they were turned away by election officials"***

The above was what the petitioner before this court would have done. Her evidence in the affidavit in support of the amended petition in paragraph 6,

11, 18, 19 and 20 is not evidence of the affected voters. She listed in annexture J1.

Secondly, the production of Exh. P-13 – the National voters roll/register cannot substitute the requirement that the affected voter do depone an affidavit to confirm that he or she did not vote or that he duly registered and his/her name was deleted or omitted from the register and on that account never voted.

The issue of Oto Joseph of identification no. 01235153 and Drani Joseph No. 31489598 voting in other areas was in my view adequately explained by the argument of the learned advocate for the 2nd respondent by quoting S.19 of the Election Commission Act. This section permits a person to register where he/she originates or resides and under subsection (3) of the same section a voter has the right to vote in the parish or ward where he/she is registered.

It was further submitted from a number of people including a pregnant women, were turned away from by the names of INYAKUA JOYCE were turned away. Counsel further referred to paragraph 10 of the petitioner affidavit in support of amended petitioner and annexture J4 and concluded that since Musa Primary polling station had 934 registered voters and the DR declaration of result forms should show that 466 were defranched. I do not understand how that figure was relied. Annexture J4 did not provide a space for such information.

All that can be said about Zainabu Omar's affidavit and that of Dropia Harriet, Odoga Alfred and Uziga Abdalah Khemis is that they could not

depone on behalf of hundreds of people they claim were affected by the conduct of the 2nd respondent without any evidence from such people. The deponent gave the names of the affected persons some timing their registration voters' numbers, their what was so difficult in making them since affidavits to confirm that they did not vote for the reason and in the manner the petitioner claimed.

I would in the result find that the petitioner has not proved to the required standard that there was non-compliance with 34 (2) (3) (5) of the PEA.

3(6) Whether there was falsification of declaration of results forms

The above issue will be considered together with the claim of the petitioner that some declaration of results forms were forged by false endorsement of signatures not being the signatures of the agent.

The issue of falsification of declaration of results forms (DRF) I face a similar challenge like others I have discussed before. That is not having evidence to proof it on this point. This was a serious issue which required immediate action being taken by the petitioner's agents. The petitioner's agents would have stated such reasons and occurances on the DRF space which is provided to state reasons for refusal to sign.

Learned counsel for the petitioner referred this court to paragraph 3 (and would have referred to 4 as well) which is a matter of analysis and not evidence. In paragraph 4 the petitioner claimed that the DRF had several anomalies but almost all the DR forms the petitioner relied on were signed

by her agents without any reservation. It is of interest to note that all agents of the other candidates other then the petitioner also signed these forms. To my mind that would show that all agents present were satisfied with the exercise since signing is optional and not forced. If they had detected any such anomaly which is even criminal in nature they would have reported the same to police and other Electoral authorities – See **SITENDA SEBALU =VS= SAM NJUBA & E.C Election petition No. 25/2006.**

By using the DR forms the agents of the petitioner confirmed the results to be true. I will find guidance in the reasoning my **LADY JUSTICE BYAMUGISHA JA IN CA NO. 11/02 NGOME NGIME –VS- EC & W. BYANYIMA** which Justice M.S ARACH-AMOKO applied in **BABU EDWARD FRANCIS =VS= EC & ERIAS LUKWAGO IN ELECTION PETITION No. 10 of 2006** and stated

> ***"When an agent signs a DR form he is confirming the truth of what is contained in the DR form. He is conforming to this principle that this is the correct result of what transpired at the polling station. The candidate in particular is therefore stopped from challenging the contents of the forms.***

The Judge added

"All the 66 declaration of results forms that I have examined contains essential information that the law requires, the agents of each candidate signed the forms. None of the deponed affidavit to show that the information contained in the forms was incorrect.

In the present case the petitioner attached 115 DR forms to her affidavit of 23.06.11. Almost all of them were signed. Then this court must take it that the petitioner's agents knew what they were doing and up to their tasks.
See **NYAKECHO KEZIA OCHWIO –VS- E.C & GRACE OBURU H.C Election petition 11/06.**

Another serious allegation is made that some of the petitioner's agents signatures were forged. To prove that point the petitioner relied on the detailed affidavit of EZAT SAMUEL a hand writing expert.
He deponed the affidavit on 24/06/11. He deponed that he made the analysis upon the request of M/s Akampumuza & Co. Advocates.
In paragraph 7 of his affidavit he concluded that there was falsification of information, forgery of signatures of agents, forgery of forms and figures by the presiding officer.

In her oral evidence in cross examination the petitioner admitted that EZAT was not provided with any specimen signatory of her say he requested for such information in his affidavit. He claimed to have analyzed 76 DR forms.

The petitioner however did not secure affidavits from her agents complaining and confirming that their signatures had been forged this makes EZAT's finding to be wanting.

Annexture "A" to his affidavit just show how the person seeking the information was so pre-determined and accordingly instructed him. The letter does not say that the makers had denounced the documents but states

"This is to request you to verify the consistency of signatures and handwritings on declaration of results forms enclosed. Each serial number declaration of result from is supposed to have been filed by the same person. Your role is to establish forgeries of signatures and handwritings/or alterations and report urgently".

The above request never provided any other signatures or writings to be compared from. One wonders how Mr. EZAT used just the same document to establish that part of it or the whole of it forged. In my view he was unscientific and just followed the instructions the advocate gave him.
I would reject his affidavit for being devoid of any evidential value.

3(c) Whether there was invalidation of votes.

The petitioner claimed that contrary to S.78 e of PEA her notes were willfully rejected and declared invalid. She deponed on her affidavit in support of the petition paragraph 6, and the affidavits of

Awonga Ali
Arizio Jackline
Amabino Luke
Uziga Abdallah Khemis
Alyayi Mesia

The details of the invalidity of votes appeared in the submission for the first time. This approach violated rule 11 and 12 of the PE (Election Petition) Rules.

Actually rule 12 prohibits the giving of any evidence without leave of court where rule 11 is not observed. See NYAKECHO KEZIA OCHWO (supra).

I would also agree with the learned counsel fro the 2nd respondent that S.48 (1) PEA requires the candidate's agents to raise any objection during counting.

I do believe if such an objection is raised then such agents may elect not to sign the DR form.

However in respect of uncontroverted affidavits I would to that extent agree that the petitioner lost

80 votes as per ARINZU

20 votes as per TARAPKE

47 votes as per UNZIGA

Making a total of 147 votes.

ISSUE 4

If so, whether the non-compliance with the law affected the result of the election in a substantial manner.

On each of the sub-issue 1 framed under issue 3 1 made a conclusion. The final position of my conclusion is that there was no such non-compliance with the law proved by the petitioner.

In my view the petitioner totally failed to prove the non compliance with the law for the required standard of a balance of probability. Consequently issue 4 need not be answered.

ISSUE 5

Whether the petitioner and not the 1st respondent won the election for the District Woman MP of Adjumani District.

The petitioner having failed to prove her case on all relevant grounds I can not hold that it is her and not the 1st respondent who won the election. If I so did it would be contrary to the political will the electorate freely expresses.

I would in the result dismiss the petition with costs. I have found no reason to grant a certificate for two counsel as prayed by Mr. Ssekaana Musa for the 1st respondent. The manner in which they chose to handle the case as advocates cannot become a cost to be born by the petitioner.

I so order

29/02/2012

29/02/2012

Mr. James Akampumuza for petitioner with Simon Tendo Kabenge

Petitioner present in court.

Mr. Musa Ssekanda for the 1st respondent present.

Second respondent Patrick Wettaka for 2nd respondent

Mr. Akampumuza:

The petition is for judgment. We are ready to receive the judgment.

Joyce Andezu court clerk.

Judgment read in open court in presence of the above

NYANZI YASIN

JUDGE

29/02/2012