

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

ELECTION PETITION NO. 004 OF 2016

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT, 2005 AS AMENDED AND THE PARLAIMENTARY ELECTIONS (ELECTION PETITIONS) RULES S.I 141 -2

EKANYA GEOFFREY.....PETITIONER

VERSUS

- 1. NYAKECHO ANNET.....1ST RESPONDENT**
- 2. THE ELECTORAL COMMISSION.....2ND RESPONDENT**

BEFORE: - HON. LADY JUSTICE P. BASAZA WASSWA

JUDGMENT

[1] The Petitioner filed his petition against the Respondents on 30th March, 2016 under the Parliamentary Elections Act, 2005 (**'The PEA, 2005'**) and the Parliamentary Elections (Election Petitions) Rules, SI 141-2 (**The PE Rules, S1141-2**). As stated in his Petition, the Petitioner seeks the following Declarations and Orders;

- a) A Declaration that the Election activities at Mission of Hope Church and Pagoya Primary School Polling Stations in Tororo North County were validly carried out and the results there from should have been accurately included in the total tally of the results for Tororo North County.

- b) A Declaration that the Petitioner; other than the 1st Respondent, was validly elected Member of Parliament for Tororo North County.
- c) In the alternative, a Declaration that the Election of the 1st Respondent be set aside and a new election be held.
- d) Costs of this Petition be awarded to the Petitioner.

Background

[2] On 18th February 2016, Elections were held for Tororo North County (**abbreviated in this judgment as "TNC"**) for the seat of directly elected Member of Parliament. There were eight (8) candidates including the Petitioner and the 1st Respondent and the other six (6) candidates were; Ochwo Godfrey Etyang, Okadet Denis, Okello Eriah Sikonde, Omita Othieno Edward Mark, Osinde Michael and Othieno Godfrey. There were a total of 61 polling stations for TNC. The results of two (2) out of the sixty one (61) polling stations were cancelled by the 2nd Respondent and the results of the remaining 59 Polling stations were tallied. The results of the said 59 Polling Stations are not contested in this petition. The two (2) Polling stations under contest are Mission of Hope Church and Pagoya Primary School Polling stations. (Abbreviated *in this judgment* for *ease of reference, as M.O.H.C and P.P.S Polling stations respectively*).

The 2nd Respondent returned and declared the 1st Respondent as the winner of the election with 8,911 votes and was published in the Uganda Gazette of 3rd March, 2016. The Petitioner who polled 8,822 votes was the runner up. The said results are set out in the return form for transmission of results [see annexure "A" to the Petition: (Exhibit P. 1)]. The Petitioner was dissatisfied with the final election results for TNC and hence this petition.

[3] Agreed issues:

1. Whether there was non-compliance with the provisions of the PEA, 2005 by the 2nd Respondent, and if so, whether such non-compliance affected the results of the election in a substantial manner?
2. Whether the Petitioner other than the 1st Respondent won the election for Tororo

North County?

3. What remedies are available to the Parties?

[4] At the trial the Petitioner was represented by Mr. Ekirapa Isaac and Mr. Frederick Ochieng Obbo, while the 1st and 2nd Respondents were represented by Mr. Ocaya Thomas and Mr. Wakida Edmund respectively. All Counsel filed written submissions.

[5] The thrust of the Petitioner's Petition that is supported by twenty two (22) affidavits, is that;

- a) The Returning Officer unlawfully and without just cause, failed and or refused to tally votes in the two polling stations **M.O.H.C & P.P.S** and entered zero votes for all candidates as shown on the results tally sheets (EXB. P. 3). That a proper tally of all the votes cast show that the Petitioner obtained 9,186 votes while the 1st Respondent obtained 9,040 votes and that the Petitioner won by a margin of 146 votes.
- b) The 2nd Respondent violated Sec. 52 of the PEA, 2005 when it failed to safeguard the election materials at the two polling stations and handed over the election materials including the metallic boxes to the Uganda police force and refused to tally the votes cast at the two polling stations.
- c) The 2nd Respondent wrongly declared the 1st Respondent winner of the election of the directly elected Member of Parliament for TNC contrary to section 58 of the PEA,2005

[6] In her answer to the Petition, that is supported by six (6) supporting affidavits, the 1st Respondent contended, in principal that;

- a) The Returning Officer cancelled the results of **M.O.H.C and P.P.S** polling stations when he discovered that the ballot boxes had been tampered with and the seals broken and thereby contained more ballots than those cast and would not be included in the tally.
- b) All the results for all three elections; President, Woman Member of Parliament and directly elected Member of Parliament were cancelled for the reason that the results never reached the tally center.
- c) The election was conducted in a peaceful, free and fair manner in accordance with the electoral laws and the electoral result in TNC reflected the true result of the majority of

voters.

- d) In the alternative, if there were any irregularities or non-compliance with the electoral laws, such non-compliance or irregularities did not affect the outcome of the election in a substantial manner.

[7] The gist of the 2nd Respondent's answer to the Petition which is supported by the affidavit of **Fred Muwya Tibakuno the Returning Officer (R.O) of Tororo District**, is that;

- a) The returning Officer cancelled the results from **M.O.H.C and P.P.S** polling stations when he discovered that the ballot boxes had been tampered with and the seals broken and they contained more ballots than those cast and could not be included in the tally.
- b) The election was conducted in a peaceful, free and fair manner and in accordance with the principle of transparency laid down in the Electoral laws of Uganda and the electoral result in TNC reflected the true will of the majority of voters.
- c) In the alternative, if there were any irregularities or non-compliance with Electoral laws, such noncompliance or irregularities did not affect the outcome of the election in a substantial manner.

Issue No. 1:

Whether there was non-compliance with the provisions of the PEA, 2005 by the 2nd Respondent and if so, whether such non-compliance affected the results of the election in a substantial manner?

[8] Learned Counsel for the Petitioner; Mr. Ekirapa and Mr. Ochieng Obbo argued that;

1. It is not in contention that the Presiding Officer at M.O.H.C failed to comply with Section 50 (1) (c) & (e) of the PEA, 2005 when he did not seal the results in an envelope and seal the metallic box.
2. It is not in contention that the Presiding Officers at M.O.H.C & P.P.S polling stations failed to comply with section 50 (2) of the PEA, 2005 when they failed to seal the black metallic box.
3. The returning officer did not comply with the provisions of section 52 of the PEA, 2005

and confessed during cross-examination that he did not know what happened to the electoral materials of both M.O.H.C & P.P.S polling stations that were in the hands of the Police.

4. During cross-examination the Returning Officer stated that he could not go and open the boxes to obtain the DRs forms. This response by the returning officer defeated section 53 (4) of the PEA and the Returning Officer wrongly cancelled the results.
5. Citing the case of **Wesonga Kamana Edward vs. Electoral Commission & Anor (Mbale High Court Election Petition No. 0014 of 2006)**, Counsel argued that the 2nd Respondent is answerable for the cancellation of 1,050 valid votes from M.O.H.C. and P.P.S polling stations and the cancellation of valid votes affected the results of the election in a substantial manner, given that the margin of votes between the Petitioner and the 1st Respondent was 89 votes.

[9] In answer, Mr. Ocaya for the 1st Respondent submitted that;

1. There is no legal basis or evidence adduced before this court that there was non - compliance with electoral laws and principles of free and fair elections.
2. The results of M.O.H.C and P.P.S polling stations were never presented to the Returning officer and the voting materials were brought to the tally center after 1:30am. The 2nd Respondent was justified in cancelling the results of the Polling stations.
3. There was contravention of sections 51 (1) and 51 (2) of the PEA, 2005.

[10] Learned Counsel for the 2nd Respondent argued that;

1. The Returning Officer carried out an inquiry with his officials involved in the polling exercise and there was no answer why the boxes were not sealed and he also inquired from the Police officers who stated that they too were still investigating the matter
2. Whereas there were irregularities and a failure to comply with the laws to the extent of time and handling of electoral materials by the 2nd Respondent, there was obvious interference by the candidates and their agents
3. The Returning Officer acted lawfully when he cancelled the results from of the two polling stations due to non-compliance. For this proposition Counsel relied on **Kizza Besigye vs. Yoweri Museveni & Anor SC Presidential Election Petition No. 1 of 2006.**

[11] In rejoinder, the Petitioner's Counsel argued that;

1. A proper, reasonable and credible explanation was given for the voting materials from M.O.H.C polling station reaching the sub-county headquarters at 12:00am
2. The results from M.O.H.C polling station ought to have been tallied even if they were not sealed in a tamper proof envelope.
3. By delivering the voting materials to the sub-county headquarters, the Presiding Officer had discharged his duties.
4. The Polling assistants, presiding officers, Parish Supervisors and the sub-county Supervisor escorted and delivered the voting materials to the Returning officer at the District Tally Centre and such delivery satisfied the requirements of Sec. 51 (1) of the PEA, 2005

5. The Returning Officer should have opened the black metallic boxes that were delivered to the District Tally Center as provided for under sec. 53 (4) of the PEA, 2005. He failed in his duty.
6. The irregularities and failure to comply with the procedures relating to sealing of envelopes and ballot boxes were no ground for the returning officer to disregard and cancel the results of the election at the two polling stations.

[12] Before I determine this issue, I shall first re-state the relevant parts of what was agreed by the parties at the pre-trial conference held in court on 16th May, 2016. The Parties agreed **that the results for M.O.H.C and P.P.S Polling stations were announced at each Polling station respectively and that the ballot boxes for the two Polling Stations were not sealed after the elections.** They also agreed that the total number of votes cast on that day for M.O.H.C and P.P.S were 612 and 438 votes respectively. At M.O.H.C polling station 309 females and 303 males voted, there were a total of 950 ballot papers issued to that polling station, 623 ballot papers were counted, 8 invalid votes, 3 spoilt ballot papers and 327 misused ballot papers. At P.P.S Polling station the total number of ballot papers issued were 700.

[13] Next, I shall point out that there is harmony in some aspects of the submissions of all Counsel; that there was non-compliance of some provisions of the PEA, 2005 by the 2nd Respondent. Counsel for the 1st and 2nd Respondents concede that there was **failure by the 2nd Respondent to seal the ballot boxes at both M.O.H.C & P.P.S Polling stations and failure to enclose and seal a copy of the DRs form in an envelope supplied by the Commission at M.O.H.C polling station.** What is clearly the point of contestation is whether the Returning Officer was justified in cancelling the results of M.O.H.C and P.P.S polling stations.

[14] *The law governing the conduct of elections after vote counting and announcement of results is as follows;*

Articles 61 (d) of the Constitution (replicated in Section 59 (1) of the PEA, 2005) provides that;

“The Electoral Commission shall...ascertain, publish and declare in writing under its seal the results of the election...” (Emphasis added)

Section 50 (1), (2) & (3) of the PEA, 2005 provides that:

“Each presiding officer shall fill the necessary number of copies of the prescribed form for the declaration of results as follows-

- *One copy.. .shall remain attached to the report book...*
- *One copy shall be retained by the presiding officer for display in a conspicuous place at the polling station*
- *One copy shall be enclosed in an envelope supplied by the commission ...sealed by the presiding officer and delivered to the sub county headquarters...together with the report book for transmission to the returning officer*
- *One copy shall be delivered to each of the candidate’s agents...or to any voters present claiming to represent the candidates*
- *One copy shall be deposited and sealed in the ballot box”.*

“The Presiding officer shall in the presence of the candidates and the candidates’ agents as may wish to be present, seal the ballot box with a seal provided for the purpose by the commission”

“The sealed ballot box referred to in sub-section (2) shall contain:

- *One duly signed declaration of results form*
- *The ballot papers received by each candidate, tied in separate bundles*
 - *The invalid ballot papers, tied in one bundle*
 - *The spoilt ballot papers, tied in one bundle,*
 - *The unused ballot papers*
 - *The voter’s roll used at the polling station*
 - *The report book”*

Section 51 (1) & (2) of the PEA provides that:

“The presiding Officer shall, immediately after close of polls, deliver the declared results and the sealed ballot box to the sub county headquarters ...to the designated officer of the commission together with the report book for transmission to the returning officer³

“Each presiding officer shall, without delay after closing the poll, transmit or deliver to the returning officer or to the nearest results collection centre-

- *The sealed ballot box*
- *The duly filled and signed declaration of results form*
 - *The report book filled in and signed by the presiding officer and the polling assistants.*

Section 52(1) & (2) of the PEA provides that:

"The returning officer shall be responsible for the safe custody of all the election documents used in the district...until the documents are destroyed in accordance with the directions of the Commission, but the Commission shall not give such directions before the settlement of disputes if any arising from the election

“A returning officer shall, on receipt of each ballot box-

- *Take every precaution for its safe custody*
- *If the box is not in good order, record his or her observations and affix a different seal supplied by the Commission*

[15] Considering that the Parties agree that there was non-compliance by the 2nd Respondent as shown in paragraph [13] above, I accordingly hold that there was non-compliance with sections 50 (1) (2) & (3), 51 (1) & (2) and 52(1) & (2) of the PEA, 2005. For clarity, these provisions were contravened in the following ways;

M.O.H.C polling station

Contrary to section 50 (2) & (3) of the PEA, 2005 the ballot boxes for the M.O.H.C Polling station were not sealed after the elections at the Polling stations.

See agreed facts No. 10 & 11 in the record of proceedings and also see the paragraphs in the affidavits cited below under (2). Also see the evidence of the 1st Respondent who stated in court during cross-examination that the black metallic boxes DID NOT HAVE SEALS when they were taken to the sub-county. (Emphasis added)

I have also taken into account the contents of paragraph 11 of the affidavit of Abbo Catherine a Parish coordinator for the 1st Respondent. Her paragraph 17 is to the effect that the boxes at M.O.H.C WERE SEALED. This averment of Abbo was not only overtaken by the said agreed facts Nos. 10 & 11 in the record of proceedings, but the same also contradicts the said evidence of the 1st Respondent.

Contrary to section 50 (1) the Presiding Officers at M.O.H.C polling station did not fill all the necessary number of copies of the declaration of results.

See Paragraphs 22 - 24 of the affidavit of Oketcho Isaac (the Presiding Officer at M.O.H.C polling station) paragraphs 10-11 of the affidavit of Okot Simon Peter (a polling agent of the 1st Respondent at M.O.H.C polling station).

This evidence is not controverted.

3 Contrary to section 50 (1) (c), a copy of the DRs form for M.O.H.C was NOT sealed at the polling station in an envelope supplied by the commission.

See paragraph 23 of the affidavit of Oketcho Isaac (the Presiding Officer at M.O.H.C polling station) and also see the testimony of PW2 (Oketcho Isaac) who stated during cross-examination that he had not finished filling the DRs forms when the Police came whereupon the Parish Supervisor told them that she had been instructed by the sub county Supervisor that the Presiding Officer completes filling the forms at the sub county Headquarters. He (PW 2) stated that what was needed to be complete at the sub-county was to fill the remaining DR forms, to seal the results in a tamper proof envelope and to seal the other electoral materials in the boxes. Refer to page 18 of the proceedings.

This evidence was not controverted.

4 Contrary to section 51 (2) & 52 (1) & (2) of the PEA, 2005 there was delay in taking all election materials of M.O.H.C polling station to the sub-county headquarters. Election materials were

taken after 11:00pm. There was also failure by the Returning Officer to keep safe custody of all election documents which were instead left in the custody of the Police.

See the testimonies of DW 1 (the 1st Respondent) and of DW 4, the Returning officer. DW1 stated that she walked out of the tally room on the morning of 19/02/2016 and saw the boxes outside the gate and after a few complaints, the boxes were brought to the verandah of the tally center and taken away by the Police. Refer to page 26 of the proceedings. DW 4 stated, with reference to both M.O.H.C & P.P.S polling stations, that the sub-county supervisor for Mukuju a one Emoit Tony advised him that he (Emoit) called in the Officer in Charge of the Police Post to investigate the matter and that he (Emoit) advised DW 4 that the sealed envelopes were not there and the other election materials were still in the hands of the Police and that up to the time of DW 4's testimony in court on 2nd May 2016, the materials were still in the hands of the Police. Refer to page 32 of the record of proceedings.

5 *See further contravention stated below in this judgment.*

P.P.S polling station

1 **Contrary to section 50 (2) & (3) of the PEA, 2005 the ballot boxes for P.P.S Polling stations were not sealed after the elections at the Polling station**

See agreed facts No. 10 & 11 in the record of proceedings and paragraphs 11- Hof the affidavit of Ongaria Moses (a Polling assistant at P.P.S polling station), paragraph 9 of the Affidavit of the 1st Respondent and paragraphs 12 & 13 of the affidavit of Mary Obonyo (a polling agent of the 1st Respondent at P.P.S polling station)

2 **The DRs forms for P.P.S Polling station were sealed in a tamper proof envelope at the polling station but the boxes were not sealed contrary to SECTION 51 (1) & (2) (a) of the PEA.**

See the testimonies in court of PW 3 Ongaria Moses, (the 2nd Respondent's polling agent at P.P.S polling station) and of DW 3; Owor Ronald, (the agent of the 1st Respondent at P.P.S polling station) at pages 20 -21 and 30 respectively of the record of proceedings.

3 **Contrary to section 51 (2) & 52 (1) & (2) of the PEA, 2005 there was delay in taking all election materials Of P.P.S polling station to the sub-county headquarters. Election**

materials were taken after 11:00pm. There was also failure by the Returning Officer to keep safe custody of all election documents which were instead left in the custody of the Police.

Refer to point No. 4 at page 14 & 15 above.

4 *See further contravention stated below in this judgment*

[16] I now turn to determine the crux of the contestation in this Petition, to wit; *whether the 2nd Respondent's returning officer was justified in cancelling the results of the two (2) polling stations of M. O. H. C and P. P. S.* The Petitioner contends that the Returning Officer (R.O) of the 2nd Respondent was not justified in cancelling the said results, while the 1st and 2nd Respondents contend that the Returning Officer was justified.

[17] The Petitioner's Counsel argued that failure by the 2nd Respondent's officials to seal the results in envelopes and seal the ballot boxes did not invalidate the results of M.O.H.C and P.P.S polling stations. Counsel argued further that a good explanation was given for failure

to seal the metallic ballot boxes and no one testified to any falsification of results during transportation of the same and that the returning officer ought to have retrieved the DRs Forms from the ballot boxes and tallied the results for these two polling stations. To support their proposition, Counsel cited two authorities: **Election Petition No. 16 of 2006 Kakooza John Baptist vs The Electoral Commission and Anthony Yiga** *and* **Election Petition Appeal No. 11 of 2007 Kakooza John Baptist vs The Electoral Commission and Anthony Yiga**.

[18] For the 1st Respondent, her Counsel argued that the results for M.O.H.C & P.P.S polling stations were never presented to the Returning officer and without results to rely on; the 2nd Respondent was justified in cancelling the results. He further argued that the law allows the 2nd Respondent to cancel results with reason such as in this case. Counsel however did not refer court to a specific provision of the law.

[19] The 2nd Respondent's Counsel argued that the Returning Officer carried out an inquiry with his officials involved in the polling exercise and there was no answer why the boxes were not sealed. The Returning Officer also inquired from the Police Officers who stated that they were still investigating the matter. Counsel argued that whereas there were irregularities and a failure to comply with the laws in respect of time and handling of the electoral materials, the 2nd Respondent's agents took all possible steps to avert the situation. The cancellation of the results was lawful and an important step in preserving the sanctity of the election. To support his argument, Counsel relied on **Supreme Court Presidential Election Petition No. 1 of 2006: Kizza Besigye vs Yoweri Museveni & Anor.**

[20] To determine whether or not the Returning officer was justified in cancelling the election results for M.O.H.C & P.P.S polling stations, the evidence on record about the circumstances proceeding and leading up to the cancellation must be evaluated. It is pertinent to point out at this stage that in parliamentary elections, the burden of proof lies upon the Petitioner who must prove any ground under section 61 of the PEA, 2005 on the basis of a balance of probabilities. See **Section 61 (3) of the PEA, 2005.**

[21] The evidence on record shows three (3) different versions by each of the parties as to what transpired after the announcement of the election results at both M.O.H.C and P.P.S polling stations up until the next morning of 19/02/2016. The Petitioner (PW 1) and his witnesses, Oketcho Isaac (PW 2) and Ekisa Charles, testified and or stated in their affidavits that after the announcement of results in both

M.O.H.C and P.P.S polling stations, the parish supervisor; Sarah Obbo instructed the 2nd Respondent's officials, on the directive of the subcounty supervisor for Mukuju; Eموit Tonny, that all election materials be loaded on a Police truck and be taken to the sub-county headquarters where filing of extra DRs forms and sealing of metallic boxes for the two stations would be done. This was on the basis that it was late and the security situation was tense.

Refer to the testimonies in court of PW 1 & PW 2 and refer also to paragraphs 22, 30 & 31, 34, 35 -37 of the Petitioner's affidavit, Paragraphs 22 -32 of the affidavit in support of the Petition of Oketcho Isaac (the Presiding Officer for M.O.H.C polling station), and paragraphs 15 and 16 of the affidavit of Ekisa Charles (a polling assistant of the 2nd Respondent)

[22] The Petitioner and his said witnesses further stated that election materials were collected, DRs forms and ballot papers were tied in bundles and were put inside the black metallic box and the box was closed and the election materials were loaded on the pick up. They further stated that the Presiding Officer for M.O.H.C and three polling assistants boarded the pickup truck and found election officials from P.P.S polling station aboard the same truck with their election materials and they left with the Parish Supervisor for Kalachi Primary School Polling station and on their way they met a Police Patrol Vehicle at Kalachi Bridge with the Sub-county Supervisor who instructed them to go to the sub-county Headquarters as the election materials from Kalachi had already been collected. They also testified that due to chaos caused by the 1st Respondent's supporters at the sub-county headquarters, it was not possible for the Presiding Officers to complete filling of the DRs forms and sealing the metallic boxes. The Presiding officers in the company of the Police Officers and the sub-county supervisor then drove at 3:00am to the District Election Commission offices where they stayed with the election materials until 8:00am in the morning of 19/02/2016 when the sub-county supervisor called them for a meeting with the Returning officer.

Refer to paragraphs 23- 32 of the affidavit in support of the Petition sworn by Oketcho Isaac; (the Presiding Officer of M.O.H.C polling station), and paragraphs 17-25 of the affidavit in support of the Petition sworn by Ekisa Charles (a polling assistant of the 2nd Respondent). Also refer to paragraphs 10- 14 of the affidavit in support of the petition sworn by Ongaria Moses (a polling assistant of the 2nd Respondent at P.P.S polling station).

[23] The 1st Respondent's version (as per her own testimony in court and as per hers and her witnesses affidavits in support of her answer to the petition) is that at M.O.H.C polling station, the

Presiding Officer Oketcho Isaac counted many invalid votes as valid votes for the Petitioner which resulted in commotion that started at about 8:00pm. That the Petitioner and his agents were responsible for the tampering with the results at M.O.H.C & P.P.S polling stations as the Petitioner's agent; Emuriat John escorted the ballot boxes and delayed with the results and the results never reached the tallying center. That the 1st Respondent noticed at the sub county that the seals that had been placed on the ballot boxes for both stations had been broken and that many boxes with voting materials were not sealed

In her version also is a statement by Okot Simon Peter, the 1st Respondent's polling agent at M.O.H.C polling station, to the effect that the Presiding officer left with the polling materials and the results of the sub county.

Refer to the testimony in court of DW 1 (the 1st Respondent) and to paragraphs 4, 5, 8-12 of the affidavit of the 1st Respondent. Also refer to paragraph 11 of the affidavit of Okot Simon Peter and to paragraphs 13, 17 & 14 respectively of the affidavits sworn by Mary Obonyo, Abbo Catherine and Owor Roland, the 1st Respondent's polling agents at P.P.S polling station and her coordinator in Kamuli Parish.

[24] The 2nd Respondent's version is that the Returning officer held a meeting with the presiding officers, polling assistants and the Parish Supervisors and all Candidate's agents of the said two polling stations, and all were unable to explain satisfactorily why the two boxes had been tampered with and he made a decision that it was unsafe to rely on these boxes not only for the Petitioner's election but also for the elections of President and District Woman Member of Parliament. The 2nd Respondent also averred that when the boxes were delivered at the sub-county headquarters at 11:35pm, they were escorted by the Petitioner's agent called Emuriat and no satisfactory answer was given to the sub-county supervisor by the presiding officer why the seals on all ballot boxes for both the said Polling stations had been broken, which prompted a riot from the voters who left them in the hands of the Police. Further that the election results for these two polling stations never arrived at the tallying center, the Police brought the said boxes to the tally center and they were left at the gate and when the R.O asked the Police Officer in Charge of Electoral Offences for the sealed envelopes containing the DRs forms, the Police said they were still investigating the boxes. The exercise of the 2nd Respondent's discretion in disregarding the results from the two polling stations was done judiciously and reasonably and it would be unjust to re-instate that result for the Petitioner alone.

Refer to DW 4's testimony in court and to paragraphs 4 -8 of the Returning officer: Fred Muwaya Tibakuno's (DW4) affidavit in support of the 2nd Respondent's answer to the Petition.

[25] My analysis of these three versions as to what transpired after the announcement of the results of the said two polling stations is that the Petitioner's version is the credible version. The 1st & 2nd Respondents' versions cannot be relied upon and I reject them. These are my reasons;

a) There was no rebuttal of the evidence adduced by the Petitioner's witnesses; Oketcho Isaac, Ekisa Charles and Ongaria Moses as to the reason given for not sealing the ballot boxes at the two Polling stations and as to the mode and manner of transportation of the election materials from the polling stations to the sub-county headquarters and to the tally center. Affidavit evidence that is not controverted should ordinarily be treated by the courts as admitted. I have however taken extra care to evaluate the probative value of these affidavits as per the caution sounded by **Odoki, C.J (as he then was) In Col (Rtd) Dr. Besiqye Kizza vs Yoweri Kaquta Museveni Presidential Election Petition No. 1 of 2001** where he stated that uncontroverted affidavits should not be taken as gospel truth but that their probative value should be taken into account.

I have found as credible, the explanation given in these affidavits.

b) The Petitioner's version is consistent with the agreed facts at the pre-trial conference that the ballot boxes were not sealed at the Polling stations after the elections. The Petitioner's version is also consistent with the affidavits of the 1st Respondent's polling agents at M.O.H.C & P.P.S polling stations: Okot Simon Peter (see paragraph 13), Mary Obonyo (see paragraph 13), and Owor Roland (see paragraph 14).

c) The versions by both Respondents that the results were tampered with by the Petitioner and or the officials of the 2nd Respondent and that the results never reached the tally center, were severely discounted by their own acknowledgments and admissions to the flaws in their said allegations.

i. The 1st Respondent (DW 1) acknowledged during cross-examination that when the ballot boxes arrived at the sub-county headquarters some had no seals at all. Although she also stated that there were boxes with broken seals, she did not clarify whether ballot boxes from M.O.H.C or P.P.S polling stations had no seals at all or had broken seals. This failure to clarify this is against the back drop that among the ballot boxes transported to the tally center that night were also boxes from other polling stations like Kalachai primary school and

Totokidwe.

ii. The 1st Respondent (DW 1) also acknowledged during cross-examination that nobody saw Emiriat tampering with the ballot boxes but was only seen on the truck carrying the ballot boxes.

iii. As to the alleged invalid votes counted as valid votes in favour of the Petitioner, the 1st Respondent (DW 1) acknowledged that she did not have the serial numbers of the alleged invalid votes. I also note that DW 2 Emokori Stanslousi on whose information the 1st Respondent relied stated during cross examination that when he complained about invalid votes, the votes were recounted. Be that as it may, at the pre-trial scheduling the parties agreed that the invalid votes at M.O.H.C were eight (8) in number, but the 1st Respondent did not demonstrate to court how and when these eight (8) invalid votes were added unto any votes that the Petitioner may have garnered. This allegation was therefore not proved.

iv. The Returning officer (DW 4) acknowledged during cross-examination that he relied on the advise given to him by the sub-county supervisor and the verbal report of the Police, he did not personally see the broken seals. He also stated that by tampering he meant the suspicious manner the boxes were delivered as reported by his officials with one agent of a candidate. The returning officer crowned his take on this point by telling court that **he would have had investigations done, but the reasons his officials gave him as to why the boxes had no seals, "he could see they were up to something"**

d) *The versions of the 1st and 2nd Respondents that the results were tampered with by the Petitioner and or the officials of the 2nd Respondent and that the results never reached the tally center. were not supported with evidence of acts of either alteration,*

falsification, ballot stuffing or any such acts that would prop and buttress their said allegations.

[26] Having found as I have under paragraph [25], I will now determine whether the 2nd Respondent's Returning officer was justified in cancelling the results of the said two polling stations.

[27] **Section 53 of the PEA, 2005** enjoins the Returning officer to tally election results using the DRs Form contained in the envelope and in the absence of the envelope, the returning officer may use the DRs form in the presiding officer's report book (Sec. 53 (3), and in the absence of the report book, the Returning officer may, in the presence of a police officer, not below the rank of Inspector of Police and any of the candidates or their agents, open the ballot box to obtain the DRs form (Sec. 53 (4) and re-seal the ballot box.

[28] In this case, the returning officer (DW 4) testified that he relied on the information given to him by the sub-county supervisor for Mukunju; Emoito Tony, that he (Emoito) did not receive the results envelope for the two stations and that when the occupants of the vehicle that had gone to collect the results of both stations tried to hand over to him (Emoito) the ballot boxes, he insisted on the results envelope and opted to call in the police to investigate the boxes. The returning officer further testified that in the absence of the results envelopes, he could not have recourse to the ballot boxes either, because the sub-county supervisor advised him that the seals of the ballot boxes had been broken and he feared for their integrity. Police were called in and they retained the election materials at the tally center. The returning officer; (DW 4) further stated that he did not personally see the broken boxes but cancelled the results based on the verbal report of the police who advised him that it was a case that he (DW 4) could not rely on the results.

[29] ***The above testimony of DW 4 as to why he did not comply with section 53 of the PEA, 2005 is in my view, very unsatisfactory.***

[30] Firstly, contrary to the allegations by the 1st & 2nd Respondents that the ballot boxes were tampered with and that they contained more ballots than those cast (see paragraph 3 of the 2nd Respondent's answer to the petition);

- i. There is no evidence on the court record that the results of M.O.H.C and P.P.S polling stations were tampered with. The evidence shows that the election materials from both M.O.H.C & P.P.S polling stations which contained DRs forms (see paragraphs 23 & 10-15 of the affidavits in

support of the petition sworn by Oketcho Isaac & Onaaria Moses respectively) where escorted in a pick-up truck to the sub-county Headquarters by Sarah Obbo (the Parish Supervisor), the Presiding Officers and some polling assistants from M.O.H.C and P.P.S polling stations and the Police. These officials later took the said election materials to the district Electoral Commission offices where they waited until 8am in the morning on 19/02/2016 when they met with the Returning Officer. No incidence of tampering by the Petitioner or any other person as alleged,

was reported to have occurred during the transportation of and watch over of the said materials before the meeting with the returning officer on 19/02/2016.

- ii. The Returning officer (DW 4) admitted during cross-examination that he personally did not physically check the ballot boxes. There was therefore no evidence on record either from DW 4 or even DW 1, or at all, that the ballot boxes contained more ballots than those cast or that the election results of the two polling stations **were not** contained in the ballot boxes or in the tamper proof envelope in the case of P. P. S polling station, or in the record books.
- iii. The Returning officer (DW 4) told court that he relied on the verbal report of the police who advised that **“it was a case that he (DW 4) could not rely on the results”**. The case referred to by the Police and indeed by DW 4 as alleged, was never explained to the Returning officer nor to court. It was a non-existent case. No written complaint was lodged by anybody at the counting stage as required by **Sec.48 of the PEA, 2005** nor was any complaint lodged in respect of any irregularity in any aspect of the electoral process as provided for under section **15 (1) of the Electoral Commission Act. Cap 140** as amended.

[31] Secondly, the evidence on record shows that **the election results reached the tally center** together with the other election materials. See the affidavits of Oketcho Isaac (paragraph 23-30), Ekisa Charles (paragraph 16-24), Ongaria Moses (paragraphs 10-15), Okot Simon Peier (paragraph 11) and of Mary Obonyo and Owor Roland (paragraphs 13, & 14 respectively).

[32] Thirdly, it is settled that non-sealing of ballot boxes per se does not invalidate the election results after the results are announced at the polling station. It is the requirement and procedure of the law (**See section 50 (4) of the PEA, 2005**) that announcement of results at the polling station must precede communication of the results to the Returning officer, but must itself have been preceded by the signing of DRs forms by the Presiding officer and the candidates or their agents. **In Kakooza John Baptist vs the Electoral Commission and A. Yiga Election Petition Appeals No. 11 of 2007 and No. 16 of 2006, in the Supreme Court and Court of Appeal respectively.** the two appellate courts upheld the Judgments of the lower courts respectively on the basis that although one ballot box from Kalama polling station left the station unsealed, the reason given that the presiding officer needed advise on how to fill the accountability form was credible and was never intended to alter the cast votes for any of the candidates. That none of the eye witnesses vouched for any change of the results from one figure to

another in favour of the 2nd Respondent as alleged.

[33] On the basis of my findings and the authorities I have cited under paragraphs [25] - [32] above, it is my considered view that the returning officer ought to have used the results in the DRs forms contained in the unsealed ballot boxes to include the results of M.O.H.C & P.P.S in the tally of results for TNC. He did not do so. **I accordingly hold that the Returning Officer of the Electoral Commission was not justified in cancelling the election results for M.O.H.C & P.P.S polling stations.**

[34] At the pre-trial conference, it was agreed that the total number of valid votes cast for M.O.H.C & P.P.S polling stations were 612 and 438 respectively. It was also agreed that the difference in votes garnered by the 1st Respondent (8,911) and those garnered by the Petitioner (8,822) in respect of the tallied results for the other 59 polling stations was only 89 votes. On the basis of these statistics **I am satisfied within the meaning of section 61 (1) (a) of the PEA, 2005 that non-compliance with the electoral laws by the Electoral Commission and its failure to include 1,050 valid votes obtained from the two stated polling stations in the tally for TNC affected the result of the election for directly elected Member of Parliament for TNC in a substantial manner.**

[35] *I have applied the definition and test of “substantial effect” on results that was laid down by Odoki CJ (as he then was) in the Besigye Kizza vs. Museveni Yoweri Kaguta case (supra). Agreeing with the opinion of Grove. J in Morgan v Simpson (1974) 3 All ER 722, (1975) 1 QB 151. Odoki C J (as he then was) stated that “substantial effect must be calculated to really influence the result in a significant manner. In order to assess the effect, the court has to evaluate the whole process of election to determine how it affected the result, and then assess the degree of the effect...numbers are useful in making the adjustments for the irregularities”.*

[36] I have also been guided in my decision by the Court of Appeal judgment in **Election Petition Appeal No. 24 of 2011: Muhindo Rehema vs Winifred Kiiza & anor** where the court of appeal used the quantitative / numerical approach described in the **Besiave Kizza vs. Museveni Yoweri Kaguta case (supra)**, to determine whether the non-compliance significantly affected the results and found that the non-compliance of the electoral laws by the Electoral Commission affected the results substantially by rendering at least 13,426 votes (over 7%) doubtful where the margin of victory was only 1,484 votes (less than 1 %). Likewise in this present petition, the 1,050 valid votes (3.9%) cast at both M.O.H.C & P.P.S have been rendered doubtful, where the Margin of victory is only 89 votes (about 0.33%).

[37] In view of the foregoing, issue No. 1 is accordingly answered in the affirmative.

Issue No. 2:

Whether the Petitioner other than the 1st Respondent won the election for Tororo North County?

[38] The Petitioner contended in his petition that a proper tally of all the votes cast for TNC show that the Petitioner obtained 9,186 votes while the 1st Respondent obtained 9,040 votes and that the Petitioner won by a margin of 146 votes. He based his contention on the evidence he presented to court and particularly on what he referred to as the results announced for M.O.H.C & P.P.S polling Stations as per DRs forms marked as "D" and as "E and E-1" to the petition at pages 13 and 14 -15 respectively. These DRs forms showed votes cast for each candidate as follows;

M.O.H.C Polling station

- i) Ekanya Geoffrey -179 votes
- ii) Nyakecho Annet -55 votes
- iii) Ochwo Godfrey Etyang 03 votes
- iv) Okadet Denis - 321 votes
- v) Okello Eriah Sikonde -05 votes
- vi) Omita Othieno Edward Mark -01 vote
- vii) Osinde Michael 04 votes
- viii) Othieno Godfrey -44 votes

P.P.S Polling Station

- i) Ekanya Geoffrey -185 votes
- ii) Nyakecho Annet -74 votes
- iii) Ochwo Godfrey Etyang 01 votes
- iv) Okadet Denis - 127 votes

- v) Okello Eriah Sikonde -28 votes
- vi) Ornita Othieno Edward Mark -00 vote
- vii) Osinde Michael 01 votes
- viii) Othieno Godfrey -22 votes

[39] The 1st Respondent on her part contended that;

- a) At M.O.H.C the 1st Respondent obtained 125 votes against the Petitioner's 119 votes as shown in the DRs form marked as Annexure "A 1" to the 1st Respondent's affidavit in support of her answer to the Petition.
- b) At P.P.S polling station, the 1st Respondent obtained 154 votes against the Petitioner's 135 votes as per the DRs form marked as annexure "A 2" to the 1st Respondent's affidavit in support of her answer to the petition.

[40] In their submissions learned Counsel for the Petitioner argued that this court can rely on the Petitioner's copies of the DRs forms to determine which results were announced at M.O.H.C and P.P.S polling stations. To support their proposition, Counsel cited **Election Petition Appeal (CA) No. 38 of 2011: Oboth Marksons Jacob vs. Dr. Otim Otaala Emmanuel and the Kakooza John Baptist vs Electoral Commission & Yiga case (supra)**. Counsel further submitted that Annexures "A1" & "A2" to the 1st Respondent's affidavit were fabricated and are attempts by the 1st Respondent to mislead the court and should be rejected.

[41] The 1st Respondent's Counsel argued that the results of the two polling stations; M.O.H.C and P.P.S are a mystery with the Petitioner and the 1st Respondent contending different results. Counsel also argued that the court cannot rely on results obtained from either the Petitioner or the 1st Respondent which are not certified by the Electoral Commission. **Counsel relied on Election Petition No. 3 of 2011 Paul Mwiru vs. Igeme Nathan S. Nabeta and Election Petition No. 07 of 2011: Kwijukye Geoffrey vs. Electoral Commission & Anor.**

[42] The 2nd Respondent did not make submissions in respect of this issue.

[43] I have carefully scrutinized the DRs forms presented by both the Petitioner (annexture "D", "E" & "E-1") and the 1st Respondent (Annextures "A1" & "A2") and **I find that all the said DRs forms were problematic and unreliable.** The Petitioner (PW 1) acknowledged during cross-examination that there were cancellations and gaps like missing names, mix-up of candidate's agents in his DRs forms "E & "E-1" (see page 14 of the proceedings). DRs form marked "D" also had cancellations. With respect to "A1" & "A2", the 1st Respondent too acknowledged that her said DRs forms had anomalies. Glaring of these anomalies were the absence of the Presiding officer's signature on "A1" and the wrong summation of votes cast for each candidate. In **Mbaphadi Frederick Nkayi & Another vs Dr. Nabwiso Frank Election Petition Appeal No. 14 & 16 of 2011**, the Justices of the Court of Appeal held that *substantial Justice warranted the court to admit the results on the DR forms omitted to be signed by the presiding officers but which results were the same as on all forms in possession of the Respondent and the 2nd Appellant... The Court of Appeal went on to decide that as regards the DR forms for Kyerinda North and Mutai II polling stations, there were glaring discrepancies between the two forms coupled with the lack of a clue from the ballot box as to the intentions of the voters, the learned judge was correct to reject such results. Like the Mbaphadi case (supra), in the present case, the results on all the DRs forms presented by the Petitioner and the 1st Respondent differed significantly and are accordingly rejected.*

[44] ***In addition to and without prejudice to my finding under paragraph [43] above, it is settled that a DRs form is a public document within the meaning of Section 73 (a) (ii) of the Evidence Act. Cap 6 and therefore requires certification as provided for under section 76 of the Evidence Act, if it is to be presented as an authentic and valid document in evidence. In Kakooza John Baptist vs the Electoral Commission and Yiga (supra), the Justices of the Supreme Court opined that the courts below could not be faulted for holding that the uncertified copies of the DRs Forms annexed to the affidavits of***

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the Appellant were inadmissible in evidence. On the strength of this authority, I accordingly agree with the submissions of Counsel for the 1st Respondent and hold that all the uncertified DRs forms presented to court by the Petitioner and the 1st Respondent are inadmissible in evidence and are accordingly rejected.

[45] For the reasons I have given under paragraphs [43] and [44] above, this court has no basis to determine who won the election for Tororo North County.

Issue No. 3: Whether there are remedies available to the Parties?

[46] Having determined issues Nos. 1 and 2 as I have, I accordingly allow this petition in part and make the following Declarations and orders:

- 1) I Declare under **Sections 61 (1) (a) & (2) and 63 (4) (c) of the Parliamentary Elections Act. 17 of 2005** that the election of the 1st Respondent; Nyakecho Annet, as the Member of Parliament for Tororo North County is hereby set aside.
- 2) I Declare the said seat for directly elected Member of Parliament for Tororo North County, vacant.
- 3) I order the Electoral Commission to hold fresh elections for the seat of directly elected Member of Parliament for Tororo North County, in accordance with the law.
- 4) For the reasons that the declarations and orders I have made under (1) - (3) above result from the non-compliance by the Electoral Commission with the provisions of the Parliamentary Elections Act, and that this Petition is allowed only in part, I order the Electoral Commission to pay 50% of the costs of this Petition to the Petitioner.

I so order,

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P. BASAZA WASSWA

JUDGE

28/06/2016