

# The **2016** **Parliamentary Elections Case Digest**

A FOCUS ON DECISIONS OF THE COURT  
OF APPEAL OF UGANDA



Lillian Tibatemwa-Ekirikubinza

Busingye Kabumba



# **THE 2016 PARLIAMENTARY ELECTIONS CASE DIGEST**

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New Vision and Publishing Company  
P. O. Box 9815  
Kampala Uganda  
Plot 19/21 First Street, Industrial Area  
[www.newvision.co.ug](http://www.newvision.co.ug)

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First published 2021

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ISBN: 978-9970-61-794-4

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## Acknowledgment

As an organization mandated to promote constitutionalism, good governance and democratic development in Eastern Africa, electoral justice is core to Kituo cha Katiba's work. Electoral justice is core to democracy because it guarantees the legality of electoral processes and the political rights of citizens - which ultimately averts or diminishes political conflict, violence and lawlessness in society. This Case Digest is particularly relevant in Uganda's current context where adjudication of electoral disputes has been on the rise in successive elections in recent times. To effectively fulfil their role of delivering justice, judicial officers need easily accessible information to facilitate their work, which we believe this Case Digest will offer. It is also our earnest belief that this publication will benefit legal practitioners and scholars.

Kituo cha Katiba extends its special gratitude to Hon. Prof. Lady Justice Lillian Tibatemwa-Ekirikubinza, Ph.D of the Supreme Court of Uganda and Dr Busingye Kabumba, Ph.D, School of Law, Makerere University, for their critical review, development and collating of the case digests that formed this publication. We appreciate the expertise and meticulous work Ms. Rose Kawesa Nalule, the Head, Law Reporting, Research and Law Reform at the Law Development Centre, Kampala, expended in editing, formatting and standardizing the Case Digest. Your collective and individual professional contributions elevated the quality of the work tremendously. Finally, to our partner, the Democratic Governance Facility (DGF), without whose support this invaluable piece of work would not have been produced, we are deeply grateful.

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**Akuguzibwe Lawrence vs. Muhumuza David, Mulimira Barbara and the Electoral Commission**

**Court of Appeal (Coram: Owiny-Dollo; DCJ, Kavuma and Kiryabwire, JJ A)**

**Election Appeal No. 22 of 2016**

**January 23, 2017.<sup>1</sup>**

(Arising from Election Petition No.2 of 2016 (High Court of Uganda at Fort Portal, decision of Henrietta Wolayo, J)

***Burden and standard of proof in election petitions***—*Burden on petitioner—Standard of proof is on the balance of probabilities—Proof of an eligible registered voter—Possession of National Identity Card does not prove that the holder is an eligible registered voter.*

***Right to a fair hearing***—*Article 28 of the Constitution of the Republic of Uganda, 1995—Duty of court to remain impartial during a hearing—Trial court relying on a non-existent witness—Effect thereof.*

***Tallying results***—*Section 53 of the Parliamentary Elections Act, No. 17 of 2005—It is not mandatory for tallying to be done in the presence of candidates or their agents—Rights of candidates at polling centres—Right to be present at voting, counting and ascertain results—Article 68(3) of the Constitution of the Republic of Uganda, 1995—Relationship between Article 68 (3) and section 53.*

***Evidence in election petitions***—*Evidence in favour or against the petition—Evidence is by way of affidavit—Rule 15 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2—Time limit within which to file the affidavits—Whether all affidavits are to be filed within the time limit stipulated by law.*

***Nullification of an election***—*Non-compliance with electoral laws and Principles—Section 61(a) of the Parliamentary Elections Act No.17 of 2005—Petitioner must prove that non-compliance with the law affected the results of the election in a significant or substantial manner.*

***Costs***—*Award of costs—Costs follow the event—Rule 27 of the Parliamentary Elections (Interim Provisions) (Elections Petitions) Rules, SI 141-2—Circumstances under which the appellate court can interfere with an award of costs by the trial court.*

The appellant and 1<sup>st</sup> respondent were among the candidates for the position of Member of Parliament for Mwenge County North Constituency in Kyenjojo District. The 2<sup>nd</sup> respondent (the District Returning Officer) gazetted the appellant as winner, with 19,144 votes compared

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<sup>1</sup> Written notes on Judgment indicate that it was delivered on 23<sup>rd</sup> January 2018.

to the 1<sup>st</sup> respondent's 18,426 votes. The difference between the declared winner and first runner up was 718 votes.

The 1<sup>st</sup> respondent challenged the election before the High Court on 1<sup>st</sup> April 2016. In a judgment delivered on 24<sup>th</sup> June 2016, the High Court made the following orders; (i) allowed the petition; (ii) set aside the election; (iii) ordered a fresh election to be conducted by election officers other than those who conducted the annulled one; and (iv) ordered costs to be borne in the proportion of 80% by the Electoral Commission and 20% by the present appellant.

The appellant being dissatisfied with the decision of the High Court lodged an appeal seeking orders to, *inter alia*, set aside that decision. The 2<sup>nd</sup> and the 3<sup>rd</sup> respondents filed a Cross-Appeal with seven grounds of appeal.

Counsel for the appellant submitted that the trial court heavily relied upon extraneous evidence of a one Ategeka Willison yet there was no such person and neither did he swear any affidavit. Further, that the trial court wrongly found that there was no evidence that tallying had been done since there was sheet. He also pointed out that there was non-compliance with electoral laws and the principles therein at only two out of 91 polling stations and that some people were denied a chance to vote yet each of them had National Identity cards as evidence of registered voters. To him, the mere holding a national identity card did not entitle one to vote. On the finding that there was ballot stuffing, at some polling stations, counsel pointed out that the said polling agent signed the Declaration of Results Forms without any reservations and complaints and that nothing adverse was recorded in the Declaration of Results Forms and therefore it was not proper to question them.

Counsel further contended that it was not proper for the respondent to keep on filing affidavits after even the appellant had already made his answer to the petition thus the Court erred in over ruling that objection. The trial court mixed up polling matters and tallying of results were not related. To him it was immaterial, where the results tally sheet was handed to the respondent because at the very least, he admitted that he received it at Kampala and the Returning Officer explained the circumstances that led to her handing over the tally sheet there.

**HELD:**

1. The burden of proof lies on the petitioner.<sup>2</sup> This means that he or she who alleges must prove.
2. The standard of proof is slightly above that of the balance of probabilities as employed in ordinary suits.<sup>3</sup> In the instant case, it was not enough for the 1<sup>st</sup> respondent, in support of his allegation that certain four persons had been denied the right to vote, to rely on their National Identity Cards. Possession of a National Identity Card was not proof that the holder was an eligible registered voter or that they did not vote. The 1<sup>st</sup>

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<sup>2</sup> Citing Section 61 of the PEA and *Dr Kiiza Besigye vs. YK Museveni & Another*, Presidential Election Petition No.1 of 2001.

<sup>3</sup> Citing *Matsiko Winfred Kyomuhangi vs. J Babihuga*, Election Petition No.9 of 2002.

respondent should have shown that the said persons were present and ready to vote but were denied the right to do so.

3. A trial court should not descend into the arena in support of one candidate against another, as this would be contrary to natural justice- a right guaranteed under Article 28 of the Constitution of the Republic of Uganda, 1995 and rendered non-derogable under Article 44 (c). The court must remain, and be seen to be, impartial at all times. In this instance, it was a fatal error for the trial court to rely upon the evidence of a non-existent witness in the petition that is to say; one who neither swore an affidavit nor testified in person.
4. Article 68 (3) of the Constitution of the Republic of Uganda, 1995 entitles the candidate in person, or through their agents, to be present at the polling station throughout voting, counting of votes and ascertaining of the results.<sup>4</sup> Article 68 (3) relates only to events at polling stations and not tallying centres.
5. The law applicable to tallying of results is section 53 of the Parliamentary Elections Act No. 17 of 2005. Under the terms of that provision, it is not mandatory for tallying to be done in the presence of the candidate or their agents.<sup>5</sup> In the present case, given the technical breakdown of the tally system, the Returning Officer could not be faulted for resorting to desperate measures.
6. It is sufficient compliance with the law for a petitioner to file, within the 30 days stipulated under the Parliamentary Elections Act No. 17 of 2005, their petition together with an accompanying affidavit (s), and to then file other evidential affidavits thereafter. The law; including rules 4 (8) and 15 of the Parliamentary Elections (Interim Provisions) (Elections Petitions) Rules, SI 141-2 does not stipulate that all affidavits intended to be relied upon by the petitioner have to be filed within the restricted time.
7. In terms of section 61 (a) of the Parliamentary Elections Act No. 17 of 2005, the election of a candidate as a Member of Parliament may be set aside for non-compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the noncompliance and the failure affected the result of the election in a substantial matter. This position had been confirmed by the jurisprudence of the Ugandan Supreme Court.<sup>6</sup>

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<sup>4</sup> Article 68 (3) provides that: 'A candidate is entitled to be present in person or through his or her representatives or polling agents at the polling station throughout the period of voting, counting of the votes and ascertaining of the results of the poll.'

<sup>5</sup> According to Section 53 (1) of the PEA: 'After all the envelopes containing the declaration of results forms have been received the returning officer shall, in the presence of the candidates or their agents or such of them as wish to be present, open the envelopes and add up the number of votes cast for each candidate as recorded in each form.'

<sup>6</sup> Citing *Amama Mbabazi vs. Yoweri Kaguta Museveni and 2 Others*, Presidential Election Petition No.1 of 2016 and *Col (Rtd) Dr. Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission* (dictum of Odoki CJ, himself citing the decision of Grove J in *Borough of Hackney Gill vs. Reed* [1874] XXXI L.J 69).

8. In the instant case, the non-compliance identified by the trial court related to 2 out of 91 polling stations. This did not justify nullifying the election, as this would have the effect of disenfranchising the people in the remaining 89 polling stations. That is not mentioning the tension among the population that is normally experienced during campaign and election time. The financial pressure exerted on the national and personal economies, especially of the candidates is a matter not to be lost sight of.<sup>7</sup> In addition, in finding some irregularities in the 2 polling stations, the trial court relied on the evidence of a non-existent witness, itself a grave error. In the circumstances, it could not be said that the irregularities affected the results in a substantial manner.
9. The position in regards to costs is that established under rule 27 of the Parliamentary Elections (Interim Provisions) (Elections Petitions) Rules, SI 141-2.<sup>8</sup> Even where there is an error in principle, the court has to interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause an injustice to one of the parties;<sup>9</sup> In the instant case, the non-compliance, such as existed, was largely caused by the Electoral Commission.
10. Electoral litigation is a matter of great national importance in which courts should carefully consider the question of awarding costs so as not to unjustifiably deter aggrieved parties from seeking court redress.<sup>10</sup> Having further regard to the circumstances surrounding the appeal and, in particular, the winning margin of 718 votes in a constituency of 91 polling stations, it was the court's view that neither of the candidates should be condemned to pay costs.

*Appeal upheld. Cross appeal dismissed.*

*Decision and orders of High Court set aside.*

*Appellant confirmed as duly elected Member of Parliament for Mwenge North Constituency in Kyenjojo District.*

*Each party to bear own costs.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Articles 68 (3)

Interpretation Act, Cap 3, section 3 (3)

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 30

Parliamentary Election Act, No. 17 of 2005 as amended, sections, 18 (1), 54, 60 (3), 61, 63 (4)

Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI-141-2, rule 4 (8)

**Cases cited:**

Bogere Moses and Another vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1996

Brian Kaggwa vs. Peter Muramira, Court of Appeal Civil Appeal No. 26 of 2009

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<sup>7</sup> At Page 31.

<sup>8</sup> This Rule is to the effect that: 'All costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the court may determine'.

<sup>9</sup> Citing *Paul Semwogerere and Another vs. Attorney General*, Supreme Court Civil Application No.5 of 2001.

<sup>10</sup> Citing with approval the dictum of Bamwine P.J., in *Kadama Mwogezaddembe vs. Gagawala Wambuzi*, Election Petition No.1 of 2001.

Kadama Mwogezaddembe vs. Gagawala Wambuzi, High Court Election Petition No. 2 of 2001  
Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997  
Kizza Besigye vs. Y. K. Museveni and Another, Presidential Petition No. 1 of 2001  
Makula International Ltd vs. His Eminence Cardinal Emmanuel Nsubuga and Another [1982] HCB 11  
Matsiko Winfred Kyomuhangi vs. J. Babihuga, Election Petition No. 9 of 2002  
Mugema Peter vs. Mudiabole Abedi Nasser, Election Petition Appeal No. 30 of 2011  
Nangiro John vs. Loroti, Election Petition Appeal No. 26 of 2006  
Ngoma Ngime vs. the Electoral Commission and Winnie Byanyima, Election Petition Appeal No. 11 of 2002  
Osuana vs. the State (210) LPELR/ CA/OW/ 150/ 2009  
Pandya vs. R [1957] EA 336  
Paul Semwogerere and Another vs. Attorney General, Civil Application 5 of 2001

*Mr. Ngaruye Ruhindi Boniface, Mr. Serunjonji Nasser and Mr. Busingye A. Victor for the appellant*

*Mr. Geoffrey Kandebebe Ntambirweki for the cross-appellant*

*Mr. James Byamukama and Mr. Vincent Mugisha for the respondent*

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**Hellen Adoa and Electoral Commission vs. Alice Alaso**

**Court of Appeal (Coram: Kavuma; DCJ, Barishaki and Mugamba, JJ A)**

**Election Appeal Nos. 57 and 54 of 2016**

**February 10, 2017**

(Arising from Election Petition No. 5 of 2016 (High Court of Uganda at Soroti, decision of David K Wangutusi, J.)

***Standard of proof in election petitions***—Standard of proof is on a balance of probabilities.

***Vote counting***—Validity of votes—Excess unused and unexplained ballot papers—Effect thereof.

***Distribution of voting materials***—Ballot stuffing—Verification—Use of Declaration of Results forms as a measure of excess ballot papers and for evaluation of effect on results.

***Election results***—Evaluation of effect of anomalies in results—Use of sampling in the course of evaluation of effect of anomalies in results.

***Election results***—Irregularities in the results—Proof—Inferences regarding non-compliance—Effect on results.

***Electoral offences***—Harassment and intimidation—Proof thereof—Effect on results.

***Electoral offences***—Bribery—Proof thereof—Effect on results.

***Electoral malpractices or irregularities***—Proof thereof—Substantiality effect on the results.

The 1<sup>st</sup> appellant and respondent were candidates for the position of Woman Member of Parliament for Serere District. The 2<sup>nd</sup> appellant declared the 1<sup>st</sup> appellant as winner. The margin between the 1<sup>st</sup> appellant and respondent was 16,111 votes. The respondent challenged the results before the High Court. In a decision rendered on 25<sup>th</sup> July 2016, the petition was upheld.

**HELD:**

1. It is now well established that the standard of proof in election petitions is higher than that which is applied in ordinary civil cases, that is to say, on a balance of probabilities; although it is not equal to the standard of proof beyond reasonable doubt which is applied in criminal cases.
2. The legal position regarding validity of votes is stipulated under sections 47 (1) and (4), and 50 (3) of the Parliamentary Elections Act, No. 17 of 2005. The critical factor in vote counting is the number of votes cast in favour of each candidate.



3. The trial court having found that there was no alteration of results, it was erroneous for him to nullify the entire election. Its finding that the total number of ballot papers at the end of the day exceeded the ballot papers which had been issued was, in fact, only an irregularity which did not affect the votes cast. In addition, there was no evidence to suggest that at the time the voting started, there were any ballot papers already in the ballot boxes at the polling stations.
4. The law relating to distribution of election materials is stipulated under section 27 of the Parliamentary Elections Act, No. 17 of 2005.
5. The proper means of verifying ballot stuffing is by reference to the forms alongside which ballot papers are issued to each polling station, which includes serial numbers.<sup>11</sup>
6. In the instant case, it was not proper to infer ballot stuffing or multiple voting from Declaration of Results forms produced in court. <sup>12</sup> In the instant case, the trial court should have relied on the provisions of section 27 (b) of the Parliamentary Elections Act, No. 17 of 2005 to determine the exact number of ballot papers and their serial numbers that had been issued to every polling station in order to reach a conclusion on the excess ballot papers delivered at a polling station.
7. Sampling is not a wrong method, *per se*, as a means of evaluating the impact of anomalies upon the result of an election. Cross-sectional studies or sampling are aimed at finding out the prevalence of a phenomenon, problem or issue, by taking a snap shot. There are many methods of sampling such as simple random, stratified, cluster and systematic sampling. In this case, the trial judge appeared to have applied the simple random method. In the instant case, before applying this method, the court should have addressed its mind to the criteria for selecting the samples; the number of Declaration of results (DR) forms; and their spread in the constituency. It did not take this necessary initial step. In the circumstances, sampling 5 out of 203 DR forms that were available on court record, as the trial court had done, was not sufficient to determine the effect that they could have had on the election.
8. Where a specific irregularity has been proved and the number of votes affected by that irregularity has been established, then adjustments have to be made and, if the successful candidate still retains victory, the irregularities cannot be said to have affected the result of the election in a substantial manner. In the instant case, the excess ballot papers were neither cast nor taken into consideration in determining the poll results. They therefore had no effect on the result of the election.
9. In addition, even if the 14,457 ballot papers in issue were deemed to have been wrongfully given to the 1<sup>st</sup> appellant in order to bolster her results, the appellant would still be in the lead by 333 votes. In any case, since the trial court had not found evidence of tampering with results, and since the candidate's agents had signed the

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<sup>11</sup> Citing *Dr Kiiza Besigye vs. YK Museveni & Another*, Presidential Election Petition No.1 of 2001 (dictum of Odoki CJ).

<sup>12</sup> *Ibid.*

Declaration of Results forms and thus authenticated the results, it should not have held that there was complete non-compliance with the electoral laws and process.

10. The arrest of one of the respondent's campaigners was an isolated case and a one-off incident, which did not amount to generalized violence and intimidation by the army. There was also no evidence that the additional soldiers, deployed to support the police, made any arrests of the respondent's supporters. In the circumstances, it was incorrect for the trial court to conclude that there had been harassment and intimidation of the respondent's supporters throughout the District.
11. The offence of bribery is provided under section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005. Given the gravity of the offence of bribery in elections, it is necessary that persons said to have committed the offence and those said to have been bribed be clearly identified and such evidence be corroborated. In the instant case, the failure to cross-examine the deponent who alleged bribery in his affidavit did not mean that his evidence had to be taken to have been unchallenged.<sup>13</sup>
12. In any case, the deponent did not give clear particulars of the persons he claimed were a part of the electoral malpractice, 'for instance [he] mentions people like Isaac, administrator of Halycon Secondary School and Hellen Adoa's brother without giving full details. Such description leaves doubt as to which Isaac [he] was talking about or whether Hellen Adoa has one brother among other things'. In addition, the respondent had not provided sufficient evidence to show that the deponent was the 1<sup>st</sup> appellant's agent, for the purposes of establishing the electoral offence of bribery.
13. With regard to bribery claims relating to the donation of an ambulance, from the evidence on record, the 1<sup>st</sup> appellant had donated the same outside the campaign period, and its possession had changed from herself to the Ministry of Health as at 1<sup>st</sup> December 2015. The vehicle was registered to the District Local Government on 29<sup>th</sup> January 2016, and delivered, at the request of the CAO, to the district on 1<sup>st</sup> February 2016, with a public handover ceremony on 2<sup>nd</sup> February 2016. The 1<sup>st</sup> appellant could not be deemed to have been responsible for the delivery of the vehicle to the District on 2<sup>nd</sup> February 2016 within the campaign period. There was also no evidence that the use of the ambulance during the campaign period was done with the full knowledge of the 1<sup>st</sup> appellant.
14. The election that was sought to be nullified was in respect of an exercise of the right by the 80,000 voters of Serere District to elect a representative of their choice. The court could not interfere with the democratic choice of the voters where the 1<sup>st</sup> appellant had polled 48,762 votes and the respondent 32,651, the margin in question being 16,111 votes, unless it was established to the required standard of proof that there were such irregularities and electoral malpractices that would render the said election null and void and therefore subject to nullification.

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<sup>13</sup> Citing *Uganda Breweries Limited vs. Uganda Railways Corporation*, SCCA No.6 of 2001.

15. It was not sufficient for the respondent to only establish that electoral malpractices or irregularities did occur. She had a duty to establish that the said electoral malpractices were of such magnitude that that they *substantially and materially* affected the outcome of the electoral process. She failed to discharge this burden.

*Appeal allowed.*

*Decision and orders of High Court nullifying election of 1<sup>st</sup> appellant, ordering the 2<sup>nd</sup> appellant to hold fresh elections and granting a certificate of two counsel set aside.  
1<sup>st</sup> appellant confirmed as duly elected Woman Member of Parliament for Serere District.  
respondent to bear the costs of the appeal and those at the High court.*

**Legislation considered:**

Parliamentary Elections Act, No. 17 of 2005, sections 27 (b), 47 (1) and (4), and 50 (3), 68 (1)

*Mr. Kiryowa Kiwanuka and Mr. Elton Mugabi for 1<sup>st</sup> appellant*

*Mr. Latigo Richard for 2<sup>nd</sup> appellant*

*Mr. Emmanuel Twarebireho and Mr. Wandera Dan Ogalo for respondent*

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**Rehema Tiwuwe Watongola vs. Proscovia Salaamu Musumba**

**Court of Appeal (Coram: Buteera, Barishaki and Mugamba, JJA)**

**Election Petition Appeal No. 27 of 2016**

**February 14, 2017**

(Arising from Election Petition No.14 of 2016 (High Court of Uganda at Jinja, decision of Godfrey Namundi, J.)

**Academic qualifications**—*The Constitution of the Republic of Uganda, 1995, Article 80 (1) (c) and the Parliamentary Elections Act, No. 17 of 2005, section 4 (1)(c)—Authenticity of academic documents—Proof thereof—Burden is on petitioner—Shifting of burden—Alleged forgery of documents—Proof thereof.*

The appellant, respondent and two other persons contested for the position of Member of Parliament for Kamuli Municipality. The appellant was declared winner by the Electoral Commission. The respondent challenged the results of the election before the High Court. The High Court, in a decision rendered on 28<sup>th</sup> June 2016, upheld the petition and ordered that a fresh election be conducted.

**HELD:**

1. The relevant law in regards to academic qualifications is that under Article 80 (1) (c) of the Constitution of the Republic of Uganda, 1995 and section 4 (1) (c) of the Parliamentary Elections Act No. 17 of 2005. From the record, the assembled evidence created doubt as to the authenticity of the impugned certificate, a certificate in public administration from Busoga University. The awarding university itself claimed to have conducted an investigation and found the certificate to be a forgery.
2. In view of the fact that questions were raised regarding the authenticity of the appellant's academic documents, the appellant bore the burden of proving that the documents she presented for nomination were authentic. The burden of proof lay with the petitioner under section 101 of the Evidence Act, Cap 6. However, once an allegation is made challenging the qualifications of a candidate or Member of Parliament, then the burden shifts to the party who claims to have the qualifications to prove so.<sup>14</sup> In the instant case, the appellant did not discharge this burden.

*Appeal dismissed.*

*Declaration and orders of the High Court upheld.*

*Appellant to bear the costs.*

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<sup>14</sup> Citing *Abdul Balingira Nakendo vs. Patrick Mwendah*, Supreme Court Election Appeal No. 9 of 2006 – dictum of Katureebe JSC.

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 80 (1) (c)

Evidence Act, Cap 6, section 101

Parliamentary Elections Act, No. 17 of 2005, section 4 (1) (c)

**Case cited:**

Abdul Balingira Nakendo vs. Patrick Mwondah, Supreme Court Election Appeal No. 9 of 2006

*Mr. Frank Kanduho for appellant*

*Mr. John Isabirye and Mr. Julius Galisonga for respondent*

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**Namujju Dionizia Cissy and the Electoral Commission vs. Martin Kizito  
Sserwanga**

**Court of Appeal (Coram: Kavuma; DCJ, Barishaki and Bamugemereire, JJ A)**

**Election Petition Appeal No. 62 of 2016**

**March 7, 2017**

(Arising from High Court Election Petition decided by Margaret Tibulya on 7<sup>th</sup> July, 2016).

***Duty of first appellate court***—*Duty of first appellate court to re-appraise the evidence and draw inferences of fact—Rule 30 of the Judicature (Court of Appeal Rules) Directions SI 13-10.*

***Statutory interpretation***—*Duty of courts in regards to statutory interpretation.*

***Signatures in support of an election petition***—*Requirement of 500 signatures in support of petition filed by a registered voter who was not a candidate in the election—Limitations within the electoral laws on time and numbers—Rationale thereof—Difference between ordinary suits and election petitions.*

***Technicalities in applying the law in election petitions***—*Application of Article 126(2e) of the Constitution of the Republic of Uganda, 1995—Implication of the Article 126(2e)—Fredrick J.K. Zaabwe vs. Orient Bank Limited, Supreme Court Civil Appeal No. 4 of 2006.*

***Doctrine of stare decisis***—*Meaning of the stare decisis—Implication.*

***Nature of election petitions***—*Procedure of filing, hearing and determination of election petitions—Difference between election petition procedure and ordinary suits.*

***Nomination***—*Nomination to be elected Member of Parliament (MP)—Qualification to be nominated MP—A person qualifies to be nominated for election as MP if he or she has completed minimum formal education of Advanced Level or its equivalent—Article 80(1) (c) of the Constitution of the Republic of Uganda, 1995 and section 4(c) of the Parliamentary Elections Act No. 17 of 2005—Challenging an academic qualification awarded by a statutory body mandated to make the award.*

***Nomination***—*Name changes and general discrepancies in names—Effect thereof on nomination.*

On 18<sup>th</sup> February, 2016, the 1<sup>st</sup> appellant and 3 others excluding the respondent participated as national electoral candidates for the position of Woman Member of Parliament for Lwengo District. The 1<sup>st</sup> appellant was declared the winner of the election.

In his capacity as a registered voter of Mbirizi in Lwengo District, the respondent lodged a petition in the High Court at Masaka wherein he successfully asserted that the 1<sup>st</sup> appellant

was not academically qualified to be nominated and elected as the Woman MP for Lwengo District. His petition had, however, been supported by the signatures of 469 voters rather than the mandatory minimum of 500 voters.

On 7<sup>th</sup> July, 2016, the High Court allowed the petition, set aside the election of the 1<sup>st</sup> appellant, declared the seat vacant, and ordered for the holding of fresh elections. The court also awarded costs to the respondent or petitioner.

#### **HELD:**

1. A first appellate court has a duty to review the evidence of the case and reconsider the materials that were before the trial court. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. Under Rule 30 of the Judicature (Court of Appeal Rules) Directions, SI 13-10, the court has the power to reappraise the evidence and draw inferences of fact and to 'in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner'.
2. It is the duty of a court of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute under scrutiny. In enacting section 60(2) (b) of the Parliamentary Elections Act No. 17 of 2005, Parliament intended to restrict persons who could file election petitions, to litigants who are serious and not vexatious, and whose action is supported by a sizeable number of voters in the constituency.<sup>15</sup> The requirement under section 60 (2) (b), that an election petition filed by a non-candidate who is registered voter in a concerned constituency be supported by the signatures of at least 500 registered voters in the same constituency, is not a mere technicality. It is a substantive legal requirement. Election petitions are not ordinary suits where a party is enforcing a right that accrues to him or her as a person. It is an exercise which involves the determination of the constitutional rights of many people. The procedures set down to be followed are therefore, special and must be followed strictly and failure by a party to comply should not be taken lightly.
3. The limitations within the electoral laws on time and numbers are meant to bring to a close an emotive and strenuous period of electioneering.
4. There has to be proof that the 500 (or more) signatories are in fact registered voters in the concerned constituency. The names of the 500 supporting signatories must be shown together with their voter's Identity Card numbers, the polling station, and the District; and the voters must also additionally sign the list. In considering the respondents' petition whereas it was supported by 469 and not the mandatory minimum of 500 signatures, the trial court had also wrongfully departed from the doctrine of *stare decisis* since this was in disregard of the Court of Appeal's precedent in *Wanambwa Milton vs. Wanjusi Wasieba and the Electoral Commission, Election*

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<sup>15</sup> Section 60(2b) reads that, "An election petition may be filed by... a registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the constituency in a manner prescribed by the regulations."

*Petition Appeal No. 1 of 2005* wherein a petition that had been supported by 495 signatures was dismissed for not meeting the minimum requirement of 500 signatures.

5. The case of *Fredrick J.K. Zaabwe vs. Orient Bank Limited, Supreme Court Civil Appeal No. 4 of 2006* and Article 126(2) (e) of the Constitution of the Republic of Uganda, 1995 do not imply that the courts must not apply the law. The requirement under section 60 (2) (b) of the Parliamentary Elections Act No. 17 of 2005, that an election petition filed by a non-candidate who is registered voter in a concerned constituency be supported by the signatures of at least 500 registered voters in the same constituency, is not a mere technicality. It is a substantive legal requirement.
6. The doctrine of *Stare decisis* means by implication, the High Court is ordinarily bound by the decisions of the Court of Appeal and ought to follow them.
7. A person is qualified to be a Member of Parliament if that person has completed a minimum formal education of Advanced Level Standard or its equivalent. The trial court was correct in stating that the academic documents presented were inherently valid since the candidate that they spoke to had satisfied the requirements for the issuance of an A- Level Certificate at least one subsidiary pass in a subject offered at principal level; pursuant to the Examination Regulations and Syllabus for Uganda Advanced Certificate of Education.
8. The trial court erred in finding that the academic certificates, although inherently valid, were not the 1<sup>st</sup> appellant's. A copy of the Uganda Advanced Certificate of Education certificate presented by the 1<sup>st</sup> appellant bore the name "Namujju Dionizia" and presented a clear photograph of the 1<sup>st</sup> appellant. Furthermore, the 1<sup>st</sup> appellant's Identity Card, bore a photograph similar to the one on the certificate. If the trial court doubted the validity of the photograph on the certificate as being a picture of the 1<sup>st</sup> appellant, she should have subjected it to an expert witness. Seemingly therefore, there was no need to obtain the evidence of the 1<sup>st</sup> appellant's father, former classmates, and teachers to prove that the person named in the certificate was in fact the 1<sup>st</sup> appellant. Conclusively, there was ample evidence to show that the academic credentials in the certificates belonged to the 1<sup>st</sup> appellant.
9. The 1<sup>st</sup> appellant had never been registered in the national registration of births until the year 2015, when the Births and Deaths Registration Act, Cap. 309, had already been repealed and replaced by the Registration of Persons Act, 2015 that came into effect on 26<sup>th</sup> March, 2015. Consequently, it was erroneous to require the 1<sup>st</sup> appellant to fulfill the requirements of a repealed law. As a further consequence, a deed poll was therefore not necessary to explain the changes in the 1<sup>st</sup> appellant's names from Gusaba Dionizia at baptism, to Namujju Dionizia within academic documents, and finally to Namujju Cissy Dionizia as per election-related documents.

*Appeal allowed and the decision and orders of the High Court set aside.*

*The 1<sup>st</sup> appellant was the validly elected Woman Member of Parliament for Lwengo District;*



*Respondent ordered to pay the costs of the appeal as well as the costs incurred in defending the petition before the High Court.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Articles 80 (1) (c), 126 (2) (e)

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 30

Parliamentary Election Act No. 17 of 2005, sections 4 (1) (c), 60 (2) (b)

**Cases cited:**

Fredrick J.K. Zaabwe vs. Orient Bank Limited, Supreme Court Civil Appeal No. 4 of 2006

Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997

Kizza Besigye vs. Museveni Yoweri Kaguta and Another, Presidential Election Petition No. 1 of 2001

Wanambwa Milton vs. Wanjusi Wasieba and the Electoral Commission, Election Petition Appeal No. 1 of 2005

*Mr. Kandebe Ntambirweki for appellant*

*Mr. Dyida Barnabas and Mr. Asuman Basalirwa for respondent*

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**Kintu Alex Brandon vs. Electoral Commission and Walyomu Moses**

**Court of Appeal (Coram: Owiny-Dollo; DCJ, Egonda-Ntende and Mugamba, JJ A)**

**Election Petition Appeal No. 64 of 2016**

**March 9, 2017**

(Arising from Election Petition No.4 of 2016 (High Court of Uganda at Jinja, decision of Namundi, J.)

***Evidence**—Recanting witnesses—Intimidation of witnesses to get evidence—Proof—Whether cross-examination is necessary in the circumstances.*

***Advocates**—Professional conduct of advocates—Conduct of advocate in obtaining evidence*

***Affidavits**—Untested affidavits—Effect thereof.*

***Electoral Offences**—Bribery—What amounts to bribery—Proof—Effect on elections—Burden of proof.*

The appellant, 2<sup>nd</sup> respondent and others contested for the position of Member of Parliament for Kagoma County, Jinja District. The 2<sup>nd</sup> respondent was declared winner by the 1<sup>st</sup> respondent with 16,391 votes compared to the appellant's 14,254 votes. The appellant challenged the results of the election before the High Court. In a decision rendered on 17<sup>th</sup> June 2016, the petition was dismissed.

**HELD:**

1. It was evident, from the third affidavits deposed by particular persons, that they had been approached by the 2<sup>nd</sup> respondent who told them that they would suffer arrest and prosecution for bribery unless they cooperated and recanted their earlier testimony. This was intimidation or inducement for purposes of getting the witnesses to change their testimonies which they did with the swearing of second affidavits, recanting their earlier affidavits and in support of the answer to the petition. The trial court erred in asserting that there was no evidence of intimidation in this regard.
2. The actions of the 2<sup>nd</sup> respondent and his legal team, in approaching the witnesses of the petitioner and obtaining further affidavits from them was contrary to rule 19 of the Advocates (Professional Conduct) Regulations SI 267-2. This not only rendered the counsel involved open to disciplinary proceedings for professional misconduct but ought to have been sufficient ground for rejecting or striking out those affidavits for violating the tenets of a fair trial. Under the Rules, the challenge to such evidence would only be way of cross-examination to test its veracity. An adverse side is prohibited from approaching witnesses for the other party with a view to inducing them to testify against that other party.

3. It was erroneous for the trial court to take the view that the final (third) affidavits sworn by the recanting witnesses had been made to fit the holding in *Bakaluba Peter Mukasa vs. Nambooze Betty Bakireke*.<sup>16</sup> It was the conduct of the 2<sup>nd</sup> respondent and his advocates which brought the facts of the instant case within the case of *Bakaluba*. The trial court was required to review all the evidence on record, including the final affidavits deposed before reaching a conclusion as to what really took place regarding the contested facts. The refusal by the trial court to consider the final affidavits was erroneous.
4. Neither party in the instant case had opted to cross examine any witness or party on the opposite side. This meant that the evidence before the court was largely untested affidavits from either side, that is to say, oath against oath.<sup>17</sup> What tipped the scale was the outrageous conduct of the 2<sup>nd</sup> respondent and his legal team, to extinguish the evidence pointing to illegal practice. The court was satisfied that the 2<sup>nd</sup> respondent need not have undertaken such conduct unless he believed such evidence to be true, hence the need to douse it.
5. Bribery is provided for under section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005, read together with section 61 (1) (c). In the instant case, the court was satisfied that the 2<sup>nd</sup> respondent committed the illegal practice and/or crime of bribery of a community of voters by his donation of UGX 50,000/- to the leaders of a particular Mosque, following his address to the congregation. However, with regard to the allegations that the 2<sup>nd</sup> respondent had contributed UGX 50,000/- at a certain fundraising for a school, this was a case of oaths against oaths, with neither side being able to ‘penetrate the patina of the oath and discover the truth’ by means of cross examination. It was the petitioner’s duty to establish the case to sustain the petition. He had not discharged this burden with regard to this allegation.

*Appeal allowed.*

*Election of 2<sup>nd</sup> respondent as Member of Parliament for Kagoma County nullified.*

*1<sup>st</sup> respondent directed to hold a by election in respect thereof.*

*2<sup>nd</sup> respondent to bear the costs of the appeal and of the proceedings in the High Court.*

*Registrar of the court directed to supply a copy of the judgment to the Law Council.*

**Legislation considered:**

Advocates (Professional Conduct) Regulations, SI 267-2, rule 19

Parliamentary Elections Act, No. 17 of 2005, sections 61, 68

**Cases cited:**

*Bakaluba Peter Mukasa vs. Nambooze Betty Bakireke*, Supreme Court Election Petition Appeal No. 4 of 2009

*Uganda vs. Moses Ndifuna*, High Court Criminal Case No. 4 of 2009 (2009) UGHC

*Mr. Galisonga Julius and Mr. Alex Luganda for the appellant*

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<sup>16</sup> Supreme Court Election Petition Appeal No. 4 of 2009.

<sup>17</sup> Citing Katutsi J., in *Uganda v Moses Ndifuna*, High Court Criminal Case No.4 of 2009 [2009] UGHC 83.

*Mr. Ssekaana Musa for 1<sup>st</sup> respondent*

*Mr. Tibyasa and Mr. Ocheng Evans for the 2<sup>nd</sup> respondent*

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**Kirya Grace Wanzala vs. Nelson Lufafa and the Electoral Commission**

**Court of Appeal (Coram: Owiny-Dollo; DCJ, Kavuma and Obura, JJ A)**

**Election Petition Appeal No. 104 of 2016**

**March 16, 2018**

(Arising from High Court Election Petition 16 of 2016 (High Court of Uganda at Jinja, decided by Godfrey Namundi, J.)

***Duty of first appellate court***—Duty to reappraise evidence and consider all materials which were before the trial court and come to its own conclusions—Rule 30 of the Judicature (Court of Appeal Rules) Directions SI 13-10.

***Burden and standard of proof in election petitions***—Petitioner bears the burden of proving his or her petition—Standard of proof is a balance of probabilities to the satisfaction of court—Section 61(1) and (3) of the Parliamentary Elections Act No. 17 of 2005.

***Nomination***—Nomination to be elected Member of Parliament (MP)—Qualification to be nominated MP—A person qualifies to be nominated for election as MP if he or she has completed minimum formal education of Advanced Level or its equivalent—Article 80(1) (c) of the Constitution of the Republic of Uganda, 1995 and section 4 (c) of the Parliamentary Elections Act No. 17 of 2005—Challenging an academic qualification awarded by a statutory body mandated to make the award—An election petition cannot be used to cancel or impeach an academic qualification—Proper body to impeach or cancel an academic qualification.

***Election offences***—Offence of bribery—Proof of bribery—Whether there was sufficient evidence in the instant case to prove bribery.

***Evidence***—Testimony of witness—Contradiction in evidence of witness—Effect thereof—Partisan witness—Uncorroborated evidence of partisan witness—Effect thereof—Defacing appellant's posters.

The appellant and the 1<sup>st</sup> respondent were candidates for the position of Member of Parliament for Butembe Constituency in Jinja District. The 2<sup>nd</sup> respondent announced the 1<sup>st</sup> respondent as the winner of the election.

The appellant's case was that the 1<sup>st</sup> respondent completed his Uganda Certificate of Education (UCE) and scored aggregate 46 with result 6. That according to a notice issued by Uganda National Examination Board to all Heads of UCE and Uganda Advanced Certificate of Education (UACE) centers, the qualifications of a candidate eligible to register and sit UACE and the 1<sup>st</sup> respondent did not qualify because of his score in UCE. Further, that the guidelines state that grades 1, 2, 3 and 4 as the minimum to sit for UACE and yet the 1<sup>st</sup> respondent scored grade 6 and the guidelines were put in place in 2014, the year which the 1<sup>st</sup> respondent registered and sat UACE.

The appellant filed a petition before the High Court, challenging the 1<sup>st</sup> respondent's win on the grounds that: (i) The 1<sup>st</sup> respondent did not have the requisite academic qualifications at the time of his nomination; (ii) The 1<sup>st</sup> respondent committed illegal practices and offences either personally or through others, and made defamatory statements against the appellant; and that (iii) the 2<sup>nd</sup> respondent failed to organize free and fair elections.

The petition was decided in favour of the respondents.

**HELD:**

1. A first appellate court has the duty to review or reappraise the evidence and consider all materials which were before the trial court and come to its own conclusion in the matters before it.<sup>18</sup> The appellate court must make up its mind after carefully weighing and considering the evidence that was adduced at trial.
2. The petitioner bears the burden of proof in parliamentary election petitions.<sup>19</sup>
3. In election petitions, the standard of proof is slightly above the balance of probabilities.<sup>20</sup> The standard of proof in parliamentary election petitions is a balance of probabilities, but to the satisfaction of the court. Having reevaluated the evidence that was before the trial court, the Court of Appeal concluded that the standard of proof had not been met.
4. The minimum academic qualification for a Member of Parliament is formal education of Advance Level standard or its equivalent.
5. An election petition cannot be used to cancel or impeach an academic qualification awarded by a lawfully mandated body such as the Uganda National Examinations Board. All that the court will consider is whether the award in question was indeed awarded by the lawfully mandated body.<sup>21</sup>
6. The equating of academic qualifications is a technical matter which should be left to mandated bodies. The courts are neither suited to doing it, nor is it their job to do it. The argument that the 1<sup>st</sup> respondent had scored Aggregate 46 in his Uganda Certificate of Education exams and was therefore allegedly ineligible for admission to Uganda Advanced Certificate of Education (UACE) post-2014 was not for the court to consider and determine. The law only requires it to consider whether the appellant had a valid UACE award or an equivalent award.

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<sup>18</sup> Cited: *Kifamunte Henry vs. Uganda*, Supreme Court Criminal Appeal No. 10 of 1997; *Pandya vs. R.* [1957] EA 336; and *Bogere Moses and Another vs. Uganda*, Supreme Court Criminal Appeal 1 of 1997. Also cited Rule 30 of the Judicature (Court of Appeal Rules) Directions.

<sup>19</sup> Cited *Dr. Kiiza Besigye vs. Y.K. Museveni and Another*, Presidential Election Petition No. 1 of 2001 and Section 61 of the Parliamentary Elections Act.

<sup>20</sup> Cited *Matsiko Winfred Kyomuhangi vs. J. Babihuga*, Election Petition No. 9 of 2002.

<sup>21</sup> Cited *National Council for Higher Education vs. Anifa Kawooya Bangirana*, Constitutional Appeal No. 4 of 2011 in which the Supreme Court stated that it would be improper for courts of law to usurp the powers that are explicitly set out for an institution in an Act of Parliament.

7. The trial court correctly found that there was insufficient evidence of alleged bribery at Bulondo because:
  - (i) although the appellant referred to 4 persons who were allegedly bribed, only two swore affidavits and the affidavit of one of those two deponents contained contradictions on the question of how much was alleged promised as a bribe, thereby affecting his credibility;
  - (ii) there was no rejoinder to the affidavit sworn by the person accused of having been the 1<sup>st</sup> respondent's agent, in which he denied being an agent of the 1<sup>st</sup> respondent and having ever gone to meet the persons alleged to have been bribed; and
  - (iii) there was no *tangible* evidence as to time, place and number of attendees of the meeting at which youth were allegedly bribed.
  
8. Regarding allegations of bribery at Busige Trading Centre:
  - (i) the 1<sup>st</sup> respondent's and his alleged agent's affidavits denying the alleged incident of bribery were not rejoined to;
  - (ii) The evidenced of the appellant's witness on this issue was not corroborated by any evidence;
  - (iii) there was no evidence that the persons allegedly bribed were registered voters;
  - (iv) there was no evidence linking the 1<sup>st</sup> respondent's alleged agent to the 1<sup>st</sup> respondent himself;Consequently, the evidence adduced was insufficient to nullify the 1<sup>st</sup> respondent's election.
  
9. Regarding allegations of bribery of residents of Busie, Buwolomera, Itengeya and Irongo:
  - i) one of the parties alleged to have distributed money swore an affidavit in which she raised an alibi that was not challenged in rejoinder;
  - ii) the evidence adduced consisted of a sole deponent whose evidence was not corroborated;
  - iii) the evidence was therefore insufficient.
  
10. Regarding alleged bribery at Nabitambala Trading Centre:
  - (i) although the evidence in support of the appellant alluded to a video recording, the same was never adduced before the court;
  - (ii) there was no evidence that the persons alleged to have been bribed were in fact registered voters;
  - (iii) the appellant's two witnesses on this issue gave contradictory accounts on what was distributed as an inducement, i.e. one of them referred to money while the other referred to sweets;
  - (iv) there was need to obtain other evidence from an independent source to corroborate the evidence of the appellant's two partisan witnesses.Consequently, the evidence on this allegation was not sufficient.
  
11. Where witnesses called by a party contradict themselves in their evidence in a material way, then none of them should be believed.
  
12. Regarding the alleged bribery of youth, women, and elderly persons at Bulondo:

- (i) the affidavit sworn by one of the Appellant’s witness, on this issue, was not supported by any other evidence;
  - (ii) there was no proof that the persons who were allegedly bribed were registered voters. Relatedly, there were no affidavits from any of the youth, women and elderly persons who allegedly received the money;
  - (iii) allegations dismissed for lack of proof to the satisfaction of the court.
13. In an election petition, the uncorroborated evidence of a partisan witness should not be relied on.
14. Regarding the alleged bribery using a trophy, a bull, and uniforms in the alleged ‘Lufafa Super Cup’:
- (i) the evidence of the appellant’s witnesses on this issue was full of contradictions and therefore rejected as unbelievable;
  - (ii) the existence of a ‘Lufafa Super Cup’ was not proven;
  - (iii) there was no clear evidence of the 1<sup>st</sup> respondent’s alleged sponsorship of the alleged tournament and his purchase of the prizes;
15. There was no evidence of the alleged defacing of the appellant’s posters. No defaced posters were produced in evidence and neither was a complaint made to the Police, linking the 1<sup>st</sup> respondent to any such defacing. The appellant failed to prove his case against the 1<sup>st</sup> respondent to the satisfaction of the court.

*Appeal dismissed with costs to the 1<sup>st</sup> respondent;*

*Orders of the High Court declaring the 1<sup>st</sup> respondent as the validly elected Member of Parliament for Butembe Constituency upheld.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 80 (1) (c)

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 30

Parliamentary Election Act No. 17 of 2005, sections 4 (1) (c), 61 (1), (3)

**Cases cited:**

Bogere Moses and Another vs. Uganda, Supreme Court Criminal Appeal 1 of 1997.

Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997

Kizza Besigye vs. Museveni Yoweri Kaguta and Another, Presidential Election Petition No. 1 of 2001

Matsiko Winfred Kyomuhangi vs. J. Babihuga, Election Petition No. 9 of 2002.

National Council for Higher Education vs. Anifa Kawooya Bangirana, Constitutional Appeal No. 4 of 2011

Pandya vs. R. [1957] EA 336

*Mr. Abdullah Kiwanuka held brief for Mr. Medard Ssegona for appellant*

*Mr. Caleb Alaka and Mr. Julius Galisonga for respondent*



**Freda Nanziri Kase Mubanda vs. Mary Babirye Kabanda and the Electoral Commission**

**Court of Appeal (Coram: Kasule, Buteera and Musoke, JJ A)**

**Election Petition Appeal No. 38 of 2016**

**March 22, 2017**

(Arising from High Court Election Petition No. 12 of 2016 (High Court at Masaka, presided over by Michael Elubu, J., delivered on 27<sup>th</sup> July, 2016)).

***Burden and standard of proof in election petitions—Burden on petitioner—Standard of proof on balance of probabilities.***

***Duty of first appellate court—Duty to re-appraise evidence—Rule 30 of the Judicature (Court of Appeal Rules) Directions, SI 13-10.***

***Adjournments—Grant thereof—Trial court’s refusal to grant an adjournment for counsel to produce deponents for cross-examination—Effect thereof.***

***Record of proceedings—Missing or uncaptured part of trial record—Effect thereof.***

***Electoral laws—Non-compliance thereof—Effect thereof on election results—Substantiality test.***

***Falsification of results in elections—Proof thereof—Effect on the outcome.***

***Electoral offences and illegal practices—Proof thereof—Effect on the outcome of the election—Burden of proof—What amounts to illegal practices.***

***Costs in election petitions—Award thereof—Rationale—Costs award at discretion of court.***

On 18<sup>th</sup> February, 2016, the appellant, the 1<sup>st</sup> respondent, and another stood for the position of Woman Member of Parliament (MP) for Masaka District. The 1<sup>st</sup> respondent was declared the winner with 53,518 votes against the appellant’s 33,837 votes; representing a margin of 19,681 votes, or a 22.5% lead.

Dissatisfied with this outcome, the appellant petitioned the High Court at Masaka for an order annulling and setting aside the election on the grounds that: (i) there was non-compliance with electoral laws; (ii) the respondents singly or jointly committed illegal practices or offences proscribed by the Parliamentary Elections Act; (iii) the 1<sup>st</sup> respondent had bribed voters; (iv) the 2<sup>nd</sup> respondent had unlawfully interfered with the electioneering process; and that (v) the respondents connived to falsify results in a number of polling stations. The petition was dismissed with costs to the respondents.

## HELD:

1. The trial court misdirected itself on the standard of proof when it stated that it was higher than the usual balance of probabilities applicable in ordinary civil suits. The standard of proof in parliamentary elections is proof on a balance of probabilities, as provided for under section 61(3) of the Parliamentary Elections Act No. 17 of 2005.
2. The trial court was wrong to rely on *Col. Kiiza Besigye vs. Yoweri Kaguta Museveni, Supreme Court Presidential Election Petition No. 1 of 2001*, a presidential election petition, as to the standard of proof in parliamentary election petitions. While the Parliamentary Elections Act prescribes a standard of proof on a balance of probabilities, the Presidential Elections Act does not. Instead, the Presidential Elections Act uses the phrase 'to the satisfaction of the court' and the Supreme Court has interpreted this to mean proof that leaves no doubt in the mind of the court. This is different from the standard under the Parliamentary Elections Act.<sup>22</sup>
3. Despite the misdirection as to standard of proof, the trial court's evaluation of the evidence was done properly in the sense, it seems, that it considered the evidence comprehensively and that even if it had applied the proper standard it would still have come to the same conclusion. On application of the correct standard of proof, the Court of Appeal still arrived at the same conclusion as the trial court.
4. When sitting as a first appellate court, the Court of Appeal is bound to reappraise all the evidence that was adduced in the court below and draw inferences of fact therefrom.<sup>23</sup>
5. It is trite law that while a party to a suit has a right to apply for an adjournment, it is in the discretion of court to either grant or deny such an application for any sufficient cause. This discretion must, however, be exercised judiciously. If exercised judiciously, an appellate court will normally not interfere with the exercise of the discretion.
6. The appellant did not advance sufficient reasons for the grant of an adjournment. Counsel's mere announcement that not all witnesses had been summoned was not sufficient for court to grant an adjournment. He should have explained the failure to summon or invite the witnesses. In any case, the hearing of the appellant's case had been adjourned to the following day and this should therefore have been utilized to invite witnesses to appear and testify. The appellant and her advocates had been informed as early as 26<sup>th</sup> May, 2016, that the hearing of the petition was going to be on the 14<sup>th</sup> and 15<sup>th</sup> of June, 2016 and had thus been put on prior notice that their witnesses would be cross examined on their affidavits then.
7. Given that the record had a certificate of correctness signed by the registrar and another certificate of correctness signed by counsel for the appellant, there was no

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<sup>22</sup> Cited: *Paul Mwiru vs. Hon. Igeme Nathan Nabeta Samson & 2 Others*, Court of Appeal Election Petition Appeal No. 6 of 2011

<sup>23</sup> Extensively quotes from *Fr. Narsensio Begumisa vs. Eric Tibebaga*, Supreme Court Civil Appeal No. 17 of 2002 which in turn quotes from *Coghlan vs. Cumberland* (1898) 1 Ch. 704, decided by the Court of Appeal of England.

cogent evidence for the assertion that counsel's explanation for why the appellant's witnesses were not present in court on the relevant day was not recorded. There was therefore no cogent evidence of a missing record or that a substantial part of the proceedings was left unrecorded.

8. Section 61(1) (a) of the Parliamentary Elections Act is the textual root of the substantiality test.<sup>24</sup> According to *Kiiza Besigye vs. Yoweri Kaguta Museveni and Another*<sup>25</sup> which had in turn cited *Mbowe vs. Eliuffo [1967] EA 240*, the principle that the word 'result' does not only refer to the eventuality that one candidate won and another or others lost. The result of an election may also be 'affected'; if after making adjustments for the effect of proved irregularities the contest seems much closer that it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.
9. Falsification of results is against the spirit of section 47(1) of the Parliamentary Elections Act No. 17 of 2005 which provides that votes cast at a polling station shall be counted at the polling station immediately after the Presiding Officer declares the polling closed and the votes cast in favour of each candidate shall be recorded separately in accordance with this Part of the Act. The spirit of the Section is that votes cast should be accurately recorded in favour of the candidates for whom they are cast.
10. Falsification of electoral results is also contrary to the principle that the decision in an election must be a reflection of the will of the majority of the voters. In the instant case, there was no evidence of falsification of results. The few Declaration of Results Forms produced by the appellant as evidence of falsification in fact bore the same results as those contained in the tally sheets. The appellant had no evidence to show that there were any other alternative figures.
11. The appellant did not produce sufficient evidence to prove pre-ticking of ballots in favour of the 1<sup>st</sup> respondent. The lone witness produced at trial did not have direct evidence of any pre-ticking of ballots but only referred to what she had been told by a Police Constable about one errant Polling Assistant at a polling station she had not been present at the time of the alleged incident. The assertion that there were discrepancies in the reported number of male and female voters, which allegedly pointed to falsification of results, had been convincingly explained away by the Returning Officer who testified that Polling Agents could make mistakes in filling the number of male and female voters because of the time constraints involved in the election exercise. The court accepted that these errors were minor as long as the votes

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<sup>24</sup> This provision reads, "The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court—noncompliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the noncompliance and the failure affected the result of the election in a substantial manner."

<sup>25</sup> Supreme Court Presidential Election Petition No. 1 of 2001.

obtained by each candidate were correctly counted and correctly entered on those Forms.

12. The errors also did not prejudice the appellant in any way since they did not change the number of votes obtained by the candidates, in total. According to *Nadimo vs. Independent Electoral and Boundaries Commission and Others [2014] 1 EA 355*, although perfection is an aspiration in an election, allowance must be made for human errors. What is paramount is that the ultimate will of the electorate is ascertained and upheld. Therefore, the alleged non-compliance did not affect the election's outcome in a substantial manner.
13. The appellant had the burden of proving that a gift or money was given to a voter or voters by the 1<sup>st</sup> respondent or her agents in order to induce the voter or voters to vote for her.<sup>26</sup> The evidence showed that one of the 1<sup>st</sup> respondent's witnesses had been in Kyanamukaka acting as an agent for the 1<sup>st</sup> respondent. The evidence was insufficient to prove that the 1<sup>st</sup> respondent's agent and 4 others were, on election eve, giving out gifts or money to voters. The witnesses that were presented gave secondary evidence of what they had been told by others but none of the persons that had allegedly been bribed was presented in court. The exhibits of money and gifts allegedly recovered were not brought before the court. Neither did the person that took the said items into custody give evidence regarding the same. The appellant did not, on this issue, adduce evidence that was satisfactory on either the standard of a balance of probabilities or a higher standard.
14. On the other hand, the 1<sup>st</sup> respondent gave a clear account of the activities she carried out and her movements on the relevant day, showing that she was not engaged in illegal practices then. This account of her whereabouts and activities was not challenged in cross-examination and was more believable than the evidence of the above witness for the appellant, who had unconvincingly testified to being bribed by the 1<sup>st</sup> respondent and her witnesses. The allegations of bribery were not proved to the satisfaction of the court.
15. It is trite law that in civil matters, costs follow the event unless court otherwise orders, for good reason and in exercise of its discretion.<sup>27</sup> Also, an appellate court will not interfere with the exercise of discretion by the trial court unless there has been a failure to exercise such discretion or a failure to take into account a material

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<sup>26</sup> Cited Sections 61(1c) and 68(1) of the Parliamentary Elections Act. Section 61(1c) provides that, "The election of a candidate as a Member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court—that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval..." On the other hand, Section 68(1) provides that, "A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy-two currency points or imprisonment not exceeding three years or both."

<sup>27</sup> Cited rule 27 of the Parliamentary Elections Rules, S.I. 141-2 which provides that, "All costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the court may determine."

consideration, or that an error in principle was made while exercise that discretion.<sup>28</sup> Although no reasons were provided by the trial court for awarding costs to the respondents, there was no reason to interfere with its exercise of discretion since all the petitioner's claims had been answered in the negative and the petition had been dismissed. It was only fair that the respondents would be awarded costs by the trial court.

*Appeal dismissed with costs to the respondents both in the Court of Appeal and the High Court.*

*Election of 1<sup>st</sup> respondent as Women Member of Parliament for Masaka District upheld.*

**Legislation considered:**

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 30

Parliamentary Election Act No. 17 of 2005, sections 47, 61 (1) (3), 68 (1)

**Cases cited:**

Banco Arabe Espanol vs. Bank of Uganda, Supreme Court Civil Appeal No. 8 of 1998

Fr. Narsensio Begumisa vs. Eric Tibebaga, Supreme Court Civil Appeal No. 17 of 2002

Kizza Besigye vs. Museveni Yoweri Kaguta and Another, Presidential Election Petition No. 1 of 2001

Mbowe vs. Eliuffo [1967] EA 240

Mohindra vs. Mohindra [1953] 20 EACA 56.

Nadimo vs. Independent Electoral and Boundaries Commission and Others [2014] 1 EA 355

Nitin Jayant Madhvani vs. East African Holdings Limited and 5 Others, Supreme Court Civil Appeal No. 14 of 1993

Paul Mwiru vs. Igeme Nathan Nabeta Samson and 2 Others, Court of Appeal Election Petition Appeal No. 6 of 2011

Twiga Chemical Industries Limited vs. Viola Chemical Industries Limited, Court of Appeal Civil Appeal No. 9 of 2002

Uganda Electricity Board vs. Luande Stephen Sanya, Court of Appeal Civil Appeal No. 1 of 2000

Yahaya Kiriisa vs. the Attorney General and Another, Supreme Court Civil Appeal No. 7 of 1994

*Mr. Gabriel Byamugisha and Mr. Frank Oweyesigire for the appellant*

*Mr. Medard Ssegona Lubega and Mr. Samuel Muyizi for 1<sup>st</sup> respondent*

*Mr. Lawrence Tumwesigye for the 2<sup>nd</sup> respondent*

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<sup>28</sup> Cited: *Banco Arabe Espanol vs. Bank of Uganda*, Supreme Court Civil Appeal No. 8 of 1998; and *Twiga Chemical Industries Ltd vs. Viola Chemical Industries Limited*, Court of Appeal Civil Appeal No. 9 of 2002.

# Waligo Aisha Nuluyati vs. Ssekindi Aisha and the Electoral Commission

## Court of Appeal (Coram: Kasule, Musoke and Bamugemereire, JJ A)

### Election Petition Appeal No. 29 of 2016

April 3, 2017

(Arising from High Court Election Petition 4 of 2016 (High Court at Masaka, presided over by Michael Elubu, J., dated 27<sup>th</sup> June, 2016).

***Duty of the first appellate court***—Duty to re-appraise the evidence adduced at trial and to draw inferences therefrom.

***Evidence***—Determining credibility of a witness—Appellate court to be guided by the impressions made on the trial judge who saw and observed the witnesses as they testified—Mode in which a witness answers questions—Effect thereof.

***Burden and standard of proof in parliamentary election petitions***—Section 61(3) of the Parliamentary Elections Act No. 17 of 2005—Proof required is on a balance of probabilities—Applying standard of proof of presidential election petitions to parliamentary elections petitions—Standard of proof required in presidential election petitions is slightly higher than that required in Parliamentary Elections Petitions.

***Nominations***—Nominations to be elected Member of Parliament (MP)—Qualifications to be nominated candidate for elections of MP—Article 80 of the Constitution of the Republic of Uganda, 1995 and section 4(1) of the Parliamentary Elections Act No. 17 of 2005—Candidate must be in possession of Advanced Level or its equivalent—Issuing of a certificate of equivalence—Certificate of equivalence is issued in consultation with Uganda National Examination Board (UNEB)—Certificate valid for one election—Procedure of consulting with UNEB—Academic documents presented with discrepancies—Effect thereof—Shift of burden of proof.

***Pleadings***—Pleading an issue that was not raised on trial—Issue of failure to pay fees for a certificate of equivalence raised by witness that was invited by court—Consideration of a fresh issue—Effect thereof.

***Electoral offences***—Bribery—What constitutes bribery in election petitions—Section 68(1) of the Parliamentary Elections Act No. 17 of 2005—Candidate making a donation to village—Effect thereof.

On 18<sup>th</sup> February, 2016, the appellant, 1<sup>st</sup> respondent, and 3 Others contested for the position of Woman Member of Parliament (MP) for Kalungu District. The 1<sup>st</sup> respondent was declared the winner by the 2<sup>nd</sup> respondent.

Dissatisfied with this outcome, the appellant petitioned the High Court for an order annulling and setting aside the election. The appellate alleged that the 1<sup>st</sup> respondent was not validly

elected in accordance with the law. That the first respondent had not proved that she had attended secondary education at Kadugala Secondary School, nor had she proved that she had passed primary leaving examinations to join secondary. He also argued in the alternative that in case the 1<sup>st</sup> respondent had qualifications, the same had not been equated in accordance with the law.

The 1<sup>st</sup> and 2<sup>nd</sup> respondent denied the allegations. The 1<sup>st</sup> respondent contended that at the time of her nomination and election, she held the requisite academic qualifications as well as all the other requirements provided for under the law. She also denied the allegations of bribery, intimidation of voters or non-compliance with the provisions of electoral laws during the election process.

The trial court dismissed the petition with costs to the respondent. The appellant being dissatisfied with the decision of the High Court filed the instant appeal. The following issues were framed on appeal:-

- (1) whether the trial court erred in law and fact by holding that the 1<sup>st</sup> respondent was possessed with the minimum academic qualifications for the nomination and election as MP.
- (2) whether the trial court erred in law when it held that the National Council of Higher Education duly and lawfully equated the academic qualifications of the 1<sup>st</sup> respondent;
- (3) whether the trial court erred in law and fact when it held that the 1<sup>st</sup> respondent was not guilty of bribery;
- (4) whether the trial court erred in law by placing a higher burden and standard of proof on the petitioner than is required by law; and
- (5) whether the trial court erred in law and fact by failing to evaluate evidence properly and therefore arriving at a wrong conclusion.

**HELD:**

1. The court has the duty to reappraise the evidence adduced at trial and to draw inferences therefrom while bearing in mind the fact that it did not have the opportunity to observe the demeanor of witnesses at the trial.<sup>29</sup>
2. In a situation where a trial Judge had to determine whom to believe amongst a number of witnesses, and his or her determination turns on manner and demeanor of the witnesses, the appellate court must be guided by the impressions made by the trial Judge who saw and observed the witnesses as they testified.<sup>30</sup> The trial Judge had, in this case, ably recorded the conduct of the witnesses who testified, using phrases like “after substantial hesitation”, “witness is evasive”, “demeanor of the witness is shaky and uncertain”, and “long pauses before answering”.
3. The mode in which a witness answers questions also reflects the conduct of the witness without the record specifically stating as such.

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<sup>29</sup> Cited: *Fr. Narsensio Begumisa vs. Eric Tibebaga*, Supreme Court Civil Appeal No. 17 of 2002.

<sup>30</sup> Relied on *Kifamunte Henry v. Uganda*, Supreme Court Criminal Appeal No. 10 of 1997.

4. Although, per *Kifamunte Henry vs. Uganda*<sup>31</sup> and *Pandya vs. R.*,<sup>32</sup> there may be other circumstances apart from manner and demeanor when testifying, which would also show whether a witness is credible or not, and warrant an appellate court to differ from the trial court's opinion on the credibility of the witnesses, a witness that the appellate court would not have itself seen, those circumstances were not present in the instant case.
5. As regards parliamentary election petitions, the standard of proof is that prescribed by section 61(3) of the Parliamentary Elections Act No. 17 of 2005, namely proof on a balance of probabilities. The standard of proof that is slightly higher than that on a balance of probabilities is applicable to presidential election petitions on the authority of *Kiiza Besigye vs. Museveni, Supreme Court Election Petition No. 1 of 2001*. Unlike the Parliamentary Elections Act, the Presidential Elections Act does not specify a standard of proof for presidential election petitions hence *Kiiza Besigye vs. Museveni* (supra) is the controlling precedent for such petitions.
6. The burden of proof lies on the petitioner considering that one who alleges must prove. This is in line with section 101 of the Evidence Act, Cap 6.<sup>33</sup> However, where a fact is especially within the knowledge of any person, the burden of proving that fact is upon that person as laid out in section 106 of the Evidence Act<sup>34</sup>
7. Concerning the academic documents of the 1<sup>st</sup> respondent; once the trial court found that there were discrepancies in those documents, that raised suspicion, the burden of proof shifted to the 1<sup>st</sup> respondent to show that the qualifications presented in the documents were valid and that they belonged to her.<sup>35</sup> The minimum academic qualification for a parliamentary candidate is formal education of Advanced Level standard or its equivalent.
8. A person who is required to establish their academic qualifications under section 4(5) of the Parliamentary Elections Act No. 17 of 2005<sup>36</sup> must do so by producing a

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<sup>31</sup> Supreme Court Criminal Appeal No. 10 of 1997.

<sup>32</sup> [1957] EA 336.

<sup>33</sup> Section 101 of the Evidence Act provides that, "(1) Whoever desires court to give any judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

<sup>34</sup> Section 106 of the Evidence Act provides that, "In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person."

<sup>35</sup> Also relied on *Electoral Commission and 3 Others vs. Chelimo Nelson Kaprokuto*, Court of Appeal Election Petition Appeal No. 33 of 2011 and *Balingilira Abdul Nakendo vs. Patrick Mwendha*, Election Petition Appeal No. 19 of 2007.

<sup>36</sup> Section 4(5) reads, "For the purposes of paragraph (c) of subsection (1), any of the following persons wishing to stand for election as a member of Parliament shall establish his or her qualification with the Commission as a person holding a minimum qualification of Advanced Level or its equivalent at least two months before nomination day in the case of a general election, and two weeks in the case of a by election—a) persons, whether their qualification is obtained from Uganda or outside Uganda, who are claiming to have their qualification accepted as equivalent to advanced level education; b) persons claiming to have advanced level qualifications from outside Uganda; c) persons claiming to have academic degrees which were obtained outside Uganda."



certificate issued to them by the National Council for Higher Education in consultation with Uganda National Examinations Board.<sup>37</sup>

9. Although the National Council for Higher Education (NCHE) is the entity that issues Certificates of Equivalence, it must do so in consultation with Uganda National Examination Board (UNEB). In the instant case, the NCHE had consulted UNEB on the question of whether a Certificate of Equivalence should have been issued to the 1<sup>st</sup> respondent. NCHE harboured the opinion that it should have been so issued, and UNEB concurred in that opinion. Therefore, UNEB had in fact been consulted and this did not change merely because UNEB concurred in an opinion held by NCHE.
10. Under the current law, a certificate of equivalence is only valid for one election at a time, specifically the election for which it is issued. A fresh certificate of equivalence must be obtained for every fresh election.<sup>38</sup> The 1<sup>st</sup> respondent had obtained a fresh certificate of equivalence for the 2016 elections, and had therefore not relied on the old certificate which she had obtained in respect of the 2006 elections.
11. Concerning the academic documents of the 1<sup>st</sup> respondent; once the trial court found that there were discrepancies in those documents that raised suspicion, the burden of proof shifted to the 1<sup>st</sup> respondent to show that the qualifications presented in the documents relating to Primary Leaving Examinations (PLE) were valid and that they belonged to her. (However, by the time the 1<sup>st</sup> respondent joined secondary school in 1984, there was no requirement that she be in possession of PLE as a qualification.<sup>39</sup> Possession of the PLE qualification as a prerequisite for joining secondary school only become a requirement upon the enactment of the Education (Pre-Primary and Post-Primary) Act, 2008. Although the 1<sup>st</sup> respondent did not prove that she had a Primary Leaving Examinations qualification, this did not have any bearing on her secondary school education; and it is her secondary school education that gained her entry into Kibuli Teachers Training College and the Institute of Teacher Education, Kyambogo.
12. Concerning the discrepancy in name between the 1<sup>st</sup> respondent's Uganda Certificate of Education (UCE) and her Grade III Teachers Certificate issued by the Institute of Teachers Education, Kyambogo, the 1<sup>st</sup> respondent had given a satisfactory explanation to the effect that her name was misspelt as 'Ayisa' at UCE level, and then corrected to 'Aisha' at the insistence of her tutors at the College level. The 1<sup>st</sup> respondent clarified this through her statutory declaration in verification of names and also in her evidence at trial.
13. The assertion that the 1<sup>st</sup> respondent had not paid the requisite fees for equating of qualifications by the National Council for Higher Education and in consultation with Uganda National Examination Board, had not been raised in the appellant's pleadings at the trial court. It had been raised as a question to the last witness in the trial, who

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<sup>37</sup> Per Section 4(6) of the Parliamentary Elections Act.

<sup>38</sup> Reliance had on *Paul Mwiru vs. Hon. Igeme Nathan Nabeta*, Court of Appeal Election Petition Appeal No. 2 of 2011.

<sup>39</sup> Cited: *Butime Tom vs. Muhumuza David and Another*, High Court Election Petition No. 2 of 2011 and Court of Appeal Election Petition Appeal No. 11 of 2011.

had been invited by the court. Considering the assertion would therefore amount to taking the 1<sup>st</sup> respondent by surprise and would prejudice the 1<sup>st</sup> respondent's right to a fair hearing.<sup>40</sup> While the appellant had generally criticized the entire equating process, and this would arguably include the issue of non-payment of fees, the allegation would have been too general as to deny the 1<sup>st</sup> respondent an opportunity to specifically respond to that said issue.

14. Bribery is one of the illegal practices prescribed by the Parliamentary Elections Act No. 17 of 2005 and a possible ground for the setting aside of the election of a Member of Parliament pursuant to sections 61(1) (c) and 68(1).<sup>41</sup>
15. Bribery consists of provision of a gift, money, or other consideration from one person to a voter with knowledge that the gift, money, or other consideration is for the purpose of bribing voters. Because every village is a polling station and has registered voters, a donation to a village in a constituency by a candidate seeking votes would be targeting the voters in that village and those that can influence them to vote.
16. The evidence of the witnesses for the appellant on the issue of bribery was not credible and contained grave contradictions and inconsistencies. Furthermore, the observed manner and demeanor of most of these witnesses led the trial court to conclude that they were not credible. On the other hand, the evidence of the 1<sup>st</sup> respondent's witnesses were straightforward and more credible. It was to the effect that the 1<sup>st</sup> respondent was merely an invited guest at the said football tournament along with other politicians and that was only requested to hand over a goat that had been bought by another, to the winning team. Neither had she handed out money.
17. Several affidavits in support of the petition were a nullity because there was no credible evidence to prove that an oath was administered to the deponents. Several witnesses stated that oath had been administered to them by a one Counsel Tebusweke, but their affidavits indicated another named Commissioner for Oaths.

*Appeal dismissed.*

*Respondents awarded ¾ of the costs of the appeal because the appellant succeeded on one ground of the appeal and full costs in the High Court.*

#### **Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 80 (1) (c)

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<sup>40</sup> Relied on: *Interfreight Forwarders Ltd vs. East Africa Development Bank*, Supreme Court Civil Appeal No. 33 of 2011.

<sup>41</sup> Section 61(1c) provides that, "The election of a candidate as a Member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court-that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval..." On the other hand, Section 68(1) provides that, "A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy-two currency points or imprisonment not exceeding three years or both."

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 30  
Parliamentary Election Act No. 17 of 2005, sections 4 (5), 61 (1) (3), 68 (1)

**Cases cited:**

Balingilira Abdul Nakendo vs. Patrick Mwendha, Election Petition Appeal No. 19 of 2007.  
Butime Tom vs. Muhumuza David and Another, High Court Election Petition No. 11 of 2011  
Electoral Commission and 3 Others vs. Chelimo Nelson Kaprokuto, Court of Appeal Election Petition Appeal No. 33 of 2011  
Interfreight Forwarders Ltd vs. East Africa Development Bank, Supreme Court Civil Appeal No. 33 of 2011.  
Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997.  
Kirunda Kivejinja vs. Katuntu Abdul, Court of Appeal Election Petition Appeal No. 24 of 2006  
Kizza Besigye vs. Museveni Yoweri Kaguta and Another, Presidential Election Petition No. 1 of 2001  
Pandya vs. R [1957] EA 336  
Paul Mwiru vs. Hon. Igame Nathan Nabeta, Court of Appeal Election Petition Appeal No. 6 of 2011  
Toolit Simon Akecha vs. Oulanyah Jacob L’Okori, Court of Appeal Election Petition Appeal No. 19 of 2011

*Mr. Medard Lubega Ssegona, Mr. Ahmed Kalule and Mr. David Mayinja for the appellant  
Mr. Ntambirweki Kandebe for 1<sup>st</sup> and 2<sup>nd</sup> respondent*

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**Apollo Kantinti vs. Sitenda Sebalu, the Independent Electoral Commission and the Returning Officer, Wakiso**

**Court of Appeal (Coram: Buteera, Barishaki and Mugamba, JJ A.)**

**Consolidated Election Petition Appeals Nos. 31 and 33 of 2016; and Consolidated Election Petition Applications Nos. 5 and 55 of 2016, arising out of the aforementioned appeals**

**April 26, 2017**

(Appeals arising from High Court Election Petition No. 5 of 2016 (High Court of Uganda, presided over by Henry Kaweesa, J., dated 1<sup>st</sup> July, 2016).

***Duty of the first appellate court***—Duty to re-appraise the evidence on record, draw inferences of fact, and come to its own conclusion—Rule 30 (1) (a) Judicature (Court of Appeal Rules) Directions, SI 13-10.

***Pleadings in election petitions***—Amendment of pleadings—Considerations for amending pleadings—Period of time when an application for amendment of pleadings should be made—Rationale for amendment of pleadings—Mistake of Counsel not to be visited on an innocent litigant.

***Reserved rulings during hearing***—Trial court undertaking to make a ruling at the close of the defense—Court has the discretion to reserve a ruling during and a make the ruling later.

***Disfranchisement***—Meaning—Process of voting—Election extends to having the cast vote counted and being given the same weight as other votes—Failure to consider results of 7 polling stations—Effect thereof.

***Setting aside or annulling election of a Member of Parliament***—Grounds for setting aside or annulling an election—Petitioner to prove non-compliance with the electoral laws amounted to substantial effect—Section 61(1)(a) Parliamentary Elections Act No. 17 of 2005—Substantiality test—Principles to be followed in determining that noncompliance affected the result of the election in a substantial manner—Failure to consider results from 9 polling stations—Effect thereof.

***Affidavits***—Affidavits in election petitions—Non-payment of court fees for an affidavit—Effect thereof—Remedies—Treatment of affidavits by court.

***Scheduling conference***—Purpose of scheduling conference—Scheduling conference to enable parties agree on non-contentious matters of evidence.

***Costs***—Award of costs—Costs follow the event—Discretion to deny a successful party costs must be exercised judiciously—Circumstances where a successful party may be denied costs.

**Costs—Certificate of costs for two counsel—Circumstances governing the grant of a certificate of costs for two counsel—Complexity or difficulty of the case—Rationale.**

The appellant, the 1<sup>st</sup> respondent, and six others contested for the position of Member of Parliament for Kyadondo East Constituency. The appellant was declared winner with 9,005 votes while the 1<sup>st</sup> respondent was the runner up with 8,679 votes. Aggrieved, the 1<sup>st</sup> respondent successfully petitioned the High Court to nullify the appellant's election.

On appeal, the parties agreed to the consolidation of the appeal and the applications filed under them. The 3<sup>rd</sup> respondent had applied for leave to file a memorandum of appeal and record of appeal in Election Petition No. 31 of 2016 to be amended by adding the applicant as the respondent.

Both the applicant and advocate were aggrieved by the decision of the High Court and gave instructions to appeal. The advocate filed a notice of appeal with the 2<sup>nd</sup> respondent and the applicant as the intending respondents.

There was an error in omitting the name of the applicant on the memorandum of appeal when the advocate filed the memorandum of appeal in the names of the 2<sup>nd</sup> respondent only. It was submitted that the error was committed by the advocate who had instructions to represent both the 2<sup>nd</sup> respondent and the applicant.

An application was made during the hearing for a witness to tender in a Declaration of Results Form for the station as the author of the document but the 1<sup>st</sup> respondent objected. The court did not make a ruling at close of the defense as had earlier indicated.

The trial court on appeal was faulted for having found that the first appellant approved and consented to non-compliance with electoral laws as complained by the respondent in the petition.

The appellant also contended that people voted at the seven polling stations with missing results and therefore they were not denied the right to vote and the trial court erred when it held that they were disenfranchised. It was also contended for the appellant that elections of the 9 polling stations that were not tallied did not affect the result of the election in a substantial manner

**HELD:**

1. As a first appellate court, the Court of Appeal has a duty to re-appraise the evidence on record, draw inferences of fact and come to its own conclusion.
2. The court cited with approval the following principles derived from *Gasu Transport Services (Bus) Limited vs. Martin Adala Obene*, Supreme Court Civil Appeal No. 4 of 1994:-
  - (i) courts are [now] more flexible in allowing amendments whenever applications for leave to amend are made promptly at the earliest stage of litigation;
  - (ii) the earlier an application for leave to amend is made, the likelier it will be for the court to be persuaded that the request ought to be granted;

- (iii) although belatedly filed applications for leave to amend place a heavy burden on the applicant to convince court why they did not apply earlier, courts generally give leave to amend a defect in a pleading to avoid giving judgment in ignorance of facts that ought to be known prior to definitively deciding on rights;
  - (iv) the object of the court is to decide the rights of the parties and not to punish them for the mistakes that they make in the conduct of their cases by deciding otherwise than in accordance with their rights;
  - (v) the court ought to allow the correction of all kinds of errors or mistakes if the correction can be done without injustice to the other parties; and
  - (vi) once it appears that the way a party has framed their case will not lead to a decision on the final matter in controversy, it becomes a right on that party's part to have the correction done if it can be done without injustice to the other parties.
3. The application for leave to amend had been made early, before the hearing of the appeal. The omission of the 3<sup>rd</sup> respondent from the relevant memorandum of appeal as one of the appellants was an error and this was a proper case for the court to exercise its discretion and allow for the correction of that error so that the applicant would be able to exercise his right of appeal. Furthermore, the error in question had been occasioned by counsel and the client should not have been punished for the mistake of their advocate. *Godfrey Magezi and Brian Mbazira vs. Sudhir Ruparelia, Supreme Court, Civil Appeal No. 10 of 2002* followed the 'binding' principle that omission or inadvertence of counsel ought not to be visited on the litigant, leading to the striking out of their appeal and therefore a denial of justice.
  4. When an issue is raised at trial and court reserves it for a later ruling, the ruling should be made at that later time. The trial court undertook to make a ruling at the close of the defence, on the admissibility of a Declaration of Results (DR) Form in respect of which an application to tender as an exhibit had been made. The trial court did not make the said ruling, although it considered the issue later in his final judgment and took the said DR Form into account, having admitted it as admissible. The trial court exercised its discretion properly and did not err.
  5. While the appellant and the 1<sup>st</sup> respondent had both agreed that the non-inclusion of results from 7 polling stations within the final tally amounted to non-compliance with electoral laws, there was no evidence that the appellant had known of, approved or consented to the said non-compliance.
  6. Elections are a process and the importance of a vote to a voter does not end with voting that is the mere casting of a ballot. It extends to having the cast vote counted and being given the same weight as other votes. The process of voting must therefore be viewed as a whole, from casting to counting and thereafter to the declaration of results.<sup>42</sup>

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<sup>42</sup> Cited, with approval, *Dr. Otiam Otaala Emmanuel vs. Oboth Markons Jacob and the Electoral Commission*, High Court Election Petition No. 7 of 2011; (per Rugadya Atwooki, J.,) for the following principle: "Disenfranchise means to deprive of the right to vote. The right [to] vote entails not only casting a ballot paper for a candidate of one's choice, but also and equally important, knowledge that that vote will be treated equally as all the other votes cast in the election, before a candidate is declared a winner thereof."

7. The 2<sup>nd</sup> respondent did not consider the results of 7 polling stations, which had a combined 5,282 votes cast. Additionally, an error in tallying had omitted 56 votes that had been cast in favour of the 1<sup>st</sup> respondent at one of the polling stations. Further still, there was confusion concerning whether the appellant had polled 11 of 111 votes at another polling station. There was thus improper counting regarding 9 polling stations. Consequently, the voters at the above 9 polling stations had been disenfranchised since their votes were not given any value.
  
8. Before the results of an election of a Member of Parliament may be annulled or set aside pursuant to section 61 (1) (a) of the Parliamentary Elections Act No. 17 of 2005, the petitioner must prove to the satisfaction of court that there was non-compliance with the provisions of the Act and that that non-compliance affected the outcome of the elections in a substantial manner.<sup>43</sup>
  
9. On the substantiality test, court relied on *Col. (Rtd) Dr. Besigye Kiiza vs. Museveni Yoweri, Supreme Court Presidential Election Petition No. 1 of 2001* for the following principles:-
  - (i) the effect of non-compliance must be calculated to influence the result in a significant manner;
  - (ii) to assess the effect of non-compliance, the court has to evaluate the whole electoral process to determine how the result was affected, and then assess the degree of that effect;
  - (iii) numbers are useful and so are the conditions that produced those numbers;
  - (iv) there must be cogent whether direct or circumstantial evidence to establish both the effect of the non-compliance and the substantiality thereof; and
  - (v) the substantiality test is whether the votes a candidate obtained would have been different in a substantial manner, if it were not for the non-compliance substantially. Hence, to succeed, the petitioner should prove that the non-compliance was such that the winning majority would have reduced enough to put the victory in doubt.
  
10. The affected votes from the 9 polling stations were more than 5,000. The results from these votes were left in doubt due to improper counting. There was also doubt as to the actual difference of votes between the winner and the runner up. Therefore, the outcome of the entire election was left in doubt. The non-compliance did in fact affect the outcome in a substantial manner and the trial court was right to annul the result and was also justified in not declaring the 1<sup>st</sup> respondent as the default winner of that election; just because the appellant's victory had been cancelled and the 1<sup>st</sup>

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Also cited paragraph 2 clause 2 of the Declaration for Free and Fair Elections adopted unanimously by the Inter Parliamentary Council in 1994 at its Paris sitting for the proposition that every voter is entitled to exercise his or her right equally with others and to have his or her vote accorded a weight that is equivalent to that accorded to others.

<sup>43</sup> Section 61(1a) of the Parliamentary Elections Act provides that, "The election of a candidate as a Member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the Court: noncompliance with the provisions of this Act relating to elections, if the court is satisfied that there had been failure to conduct the election in accordance with the principles laid down in those provisions and that the noncompliance and the failure affected the result of the election in a substantial manner."

respondent had been the runner up. The substantial effect made it unclear who the rightful winner was.

11. Election petitions are important proceedings and court should take a liberal approach to affidavits so that petitions are not defeated on the basis of technicalities.<sup>44</sup> Non-payment of court fees is a minor procedural error which can be remedied by an order to a defaulting party to pay the requisite fees, at any stage of the proceedings. The trial court was correct when it overruled objections as to the admission of affidavits due to the non-payment of fees in their respect.
12. The purpose of a scheduling conference is to enable parties agree on non-contentious matters of evidence. The agreed facts and documents thereafter become part of the evidence on record and are evaluated along with other evidence before judgment is given.<sup>45</sup> What is agreed to at a scheduling conference is yet to be subjected to a trial and cannot be equated to a decree provided under section 67(2) of the Civil Procedure Act, Cap 71 which provides that, no appeal lies from a decree passed by court with the consent of parties.
13. According to *Besigye Kizza vs. Museveni Yoweri Kaguta*, Supreme Court Presidential Election Petition No. 1 of 2001, the following principles apply to costs:-
  - (i) costs follow the event unless, for good reason, the court orders otherwise;
  - (ii) the discretion to deny a successful party costs must be exercised judiciously and with good cause;
  - (iii) costs are not meant to be punitive, but to indemnify or compensate the successful party for the expenses they incurred during the litigation;
  - (iv) a successful party may only be deprived of their costs in exceptional circumstances; and
  - (v) in making its decision on costs, the court must balance the principle of compensating a successful litigant and thereby letting justice take its course, and the principle that poor litigants should not be discouraged from accessing justice through the award of exorbitant costs.
14. On the circumstances governing the grant of a certificate of costs for two counsel, *Gole Nicholas Davis vs. Loi Kageni Kiryapawo*, Supreme Court Election Petition Appeal No. 19 of 2007 is to the effect that a certificate of costs for more than one counsel must be supported by sound reasons such as the complexity or difficulty of the case and that the rationale for this is to ensure that losing parties in the litigation process only meet the reasonable costs of the successful party. In the instant case, the election dispute between the parties was ordinary and not different from other election petitions and appeals. Neither were the records so voluminous nor the case itself so complicated as to warrant a certificate of costs for two counsel. The order as to costs varied to a certificate for only one counsel.

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<sup>44</sup> Cited with approval: *Kizza Besigye vs. Electoral Commission and Y.K. Museveni*, Supreme Court Presidential Election Petition No. 1 of 2006; and *Amama Mbabazi and Another vs. Musinguzi Garuga James*, Election Petition Appeal No. 2 of 2002, Court of Appeal.

<sup>45</sup> Citing: *Administrator General vs. Bwanika James and 9 Others*, Supreme Court Civil Suit No. 7 of 2003.



*Appeal dismissed, and trial judge's decision upheld.*

*Election set aside.*

*2<sup>nd</sup> respondent ordered to conduct fresh elections for the constituency;*

*1<sup>st</sup> respondent granted costs in the Court of Appeal as against the appellant, with a certificate for only one counsel;*

*1<sup>st</sup> respondent granted costs in the High Court as against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents but with a certificate for only one counsel.*

**Legislation considered:**

Civil Procedure Act, Cap 71, section 67 (2)

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 30

**Cases cited:**

Administrator General vs. Bwanika James and 9 Others, Supreme Court Civil Suit No. 7 of 2003.

Amama Mbabazi and Another vs. Musinguzi Garuga James, Election Petition Appeal No. 12 of 2002, Court of Appeal

Bank of Uganda vs. Banco Arabe Espanol, Supreme Court Civil Appeal No. 8 of 1998

Gasu Transport Services (Bus) Ltd vs. Martin Adala Obene, Supreme Court Civil Appeal No. 4 of 1994

Godfrey Magezi and Brian Mbazira vs. Sudhir Ruparelia, Supreme Court Civil Appeal No. 10 of 2002

Gole Nicholas Davis vs. Loi Kageni Kiryapawo, Supreme Court Election Petition Appeal No. 19 of 2007

Kizza Besigye vs. Electoral Commission and Y.K. Museveni, Supreme Court Presidential Election Petition No. 1 of 2006

Kizza Besigye vs. Museveni Yoweri Kaguta and Another, Presidential Election Petition No. 1 of 2001

Otiem Otaala Emmanuel vs. Oboth Markons Jacob and the Electoral Commission, High Court Election Petition No. 7 of 2011

Pandya vs. R [1957] EA 336

Wambugu vs. Public Service Commission [1972] EA 296

*Mr. Musa Sekaana for the appellant*

*Mr. Justine Semuyaba and Mr. Dennis Mudhola for the 1<sup>st</sup> respondent*

*Mr. Brian Kabayiza and Terence Kavuma for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents*

# Chebrot Stephen Chemoiko vs. Soyekwo Kenneth and the Electoral Commission

Court of Appeal (Coram: Kavuma; DCJ, Musoke and Mugamba, JJ A)

Election Petition Appeal No. 56 of 2016

May 4, 2017

(Arising from Election Petition No.12 of 2016 (High Court of Uganda at Mbale, decision of Andrew K Bashaija, J.)

**Burden of proof and standard of proof in election petitions**—*Petitioner bears the burden of proof—Standard of proof is on the balance of probabilities—Cogent evidence required.*

**Affidavits**—*Contents of an affidavit—Affidavits must be confined to such facts as the deponent is of his own knowledge able to prove—Order 19 Rule 3(1) of the Civil Procedure Rules SI 71-1—Effect of failure of the deponent failing to disclose source of information.*

**Evidence**—*Hearsay evidence—Statement made to a witness by a person who is not called as a witness—Admissibility of such a statement.*

**Election materials**—*Control and use of ballot papers—Role of Electoral Commission—Role of Returning Officer in safety of election materials.*

**Electoral laws**—*Non-compliance thereof—Proof that non-compliance has substantial effect on the result of the election.*

**Illegal practices during elections**—*Prohibition of candidates making donations during elections—Section 68(7) and (8) of the Parliamentary Elections Act, No. 17 of 2005.*

**Election offences**—*Bribery—Ingredients of bribery in elections—Requirement for an independent source to confirm the truthfulness or falsity of the allegation of bribery.*

**Costs**—*Award thereof—Considerations in awarding costs in election petitions—Election petitions being of public importance.*

The appellant, 1<sup>st</sup> respondent and another person contested for the position of Member of Parliament for Tingey Constituency. The 1<sup>st</sup> respondent was declared winner by the 2<sup>nd</sup> respondent, with 8,469 votes against the appellant's 8,307 votes; a margin of 161 votes. The appellant challenged the results of the election before the High Court. The High Court, in a decision rendered on 22<sup>nd</sup> July 2016, dismissed the petition.

The petitioner essentially contended that the conduct of election for Tingey County Constituency was non-compliant with the electoral laws and the principles therein. He singled out disenfranchisement of voters, failure to control the use of ballot papers, intimidation and violence and the failure to manage the environment of the election and several other irregularities as the specific instances of the non-compliance. The petitioner also contended

that there were illegal practices such as donations at a fundraising which was contrary to section 68 (7) of the Parliamentary Elections Act, No. 17 of 2005. There were also alleged acts of bribery at different polling stations.

The petitioner averred that he was informed by his agents and supporters that without any justification, the Presiding Officer cancelled results of Chebonet polling station and denied 589 registered voters from exercising their democratic right to choose their leader.

**HELD:**

1. Burden of proof lies on the petitioner to prove the assertions in his or her petition.
2. The standard of proof required is proof on a balance of probabilities.<sup>46</sup> Though the standard of proof is set by statute to be on a balance of probabilities, because of the public importance of an election petition, the facts in the petition have to be proved to the satisfaction of the court. A petitioner has the duty to adduce credible and/or cogent evidence to prove the allegations to the stated standard of proof.<sup>47</sup>
3. It was trite law that the failure to disclose the source of information in an affidavit renders the affidavit null and void.<sup>48</sup> In the instant case, the petitioner had stated his source of information as being his 'supporters and agents' without specifically stating their names. This would suffice as disclosure of sources of information, especially in so far as the said supporters and agents went ahead to file affidavits in support of the petition, giving substance to the relevant allegations. All these affidavits were filed on the same day; 1<sup>st</sup> April 2016 and later all read in court before the commencement of the hearing.
4. Section 12 (1)(b) of the Electoral Commission Act, Cap 140 empowers the 2<sup>nd</sup> respondent to design, print, distribute and control the use of ballot papers.
5. Section 52 of the Parliamentary Elections Act, No. 17 of 2005 enjoins the Returning Officer to keep all election materials safely until they are destroyed in accordance with the directions of the Electoral Commission. In the instant case, 141 ballot papers were clearly missing from the ballot box at a particular polling station; in the course of a recount ordered by the Chief Magistrate. In the absence of a clear explanation regarding their whereabouts, the inevitable inference was that they were not kept safely, and therefore tampered with. This amounted to non-compliance with the electoral law.

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<sup>46</sup> Citing Section 61 (1) and (3) of the Parliamentary Elections Act and *Anthony Harris Mukasa vs. Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No.18 of 2007.

<sup>47</sup> Citing *Masiko Winifred Komuhangi vs. Winnie J Babihuga*, Court of Appeal Election Petition Appeal No. 9 of 2002; *Paul Mwiru vs. Hon Igeme Nathan Nabeta Samson and 2 Others*, Court of Appeal Election Petition Appeal No.6 of 2011 (dictum of Byamugisha JA); Citing *Blyth vs. Blyth* (1966) AC 643 (dictum of Lord Denning) and *Rtd. Col. Dr. Kiiza Besigye vs. Electoral Commission and YK Museveni* Presidential Election No. 1 of 2006 (dictum of Odoki CJ).

<sup>48</sup> *Uganda Journalist Safety Commission and Others vs. Attorney General*, Constitutional Petition No.7 of 1997.

6. The legal requirement for substantial effect is provided for under section 61 (a) of the Parliamentary Elections Act, No. 17 of 2005, and has been confirmed by jurisprudence in Uganda and elsewhere.<sup>49</sup>
7. It was not sufficient to show that there had been irregularities in the election. It had to be proved that the non-compliance or irregularities affected the results of the election in a substantial manner. The principle is that an election should not be set aside basing on trivial errors and informalities.<sup>50</sup>
8. The test to be applied in determining whether the alleged malpractices or irregularities affected the result of the election in a substantial manner is both quantitative and qualitative.<sup>51</sup> In the instant case, although the winning margin was 162 votes and although there were 141 unaccounted for ballot papers from a particular polling station, the appellant had failed to adduce evidence showing that these 141 unused ballots had been used to the advantage of the 1<sup>st</sup> respondent. It appeared that all candidates suffered equally no candidate was advantaged over another. As such there was no evidence to the satisfaction of the court that the non-compliance with electoral law had had a substantial effect on the result of the election.
9. The offence of bribery is provided for under section 68 of the Parliamentary Elections Act, No. 17 of 2005. In petitions of this nature, witnesses tend to be partisan while giving evidence in support of a candidate of their choice. The court therefore has to take more caution while evaluating it.<sup>52</sup>
10. A charitable donation may be unobjectionable as long as no election is in prospect; but if an election is imminent, the danger of the gift or donation being regarded as bribery increases.<sup>53</sup> In the instant case, the various allegations of bribery were either not pleaded, or not proved to the satisfaction of the court.

*Appeal dismissed.*

*Appellant to recover 1/3 of the costs of the appeal from the 2<sup>nd</sup> respondent.*

*1<sup>st</sup> respondent to recover 2/3 of the costs of the appeal, that is to say, 1/3 from the appellant and 1/3 from 2<sup>nd</sup> respondent*

*1<sup>st</sup> respondent to recover 2/3 of the costs in the lower court jointly and severally from both the appellant and 2<sup>nd</sup> respondent.*

#### **Legislation considered:**

Civil Procedure Rules, SI 71-1, Order 19 Rule 3 (1)

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<sup>49</sup> Citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (itself citing with approval *Mbowe vs. Eliuffo* (1967) EA240).

<sup>50</sup> Citing *Gunn vs. Sharpe* (1974) 2 ALL ER 1058.

<sup>51</sup> Citing *Amama Mbabazi and Another vs. James Musinguzi Garuga* Election Petition Appeal No.12 of 2002 (dictum of Odoki CJ).

<sup>52</sup> Citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (dictum of Mulenga JSC).

<sup>53</sup> *Odo Tayebwa vs. Bassajabalaba Nasser and The Electoral Commission*, Court of Appeal Election Appeal No. 13 of 2011.

Electoral Commission Act, Cap 40, section 12 (1)(b)  
Parliamentary Elections Act, No. 17 of 2005, sections 52, 68

**Cases cited:**

Amama Mbabazi and Another vs. James Musinguzi Garuga, Election Petition Appeal No.12 of 2002

Anthony Harris Mukasa vs. Michael Philip Lulume Bayiga, Supreme Court Election Petition Appeal No.18 of 2007

Blyth vs. Blyth [1966] AC 643

Gunn vs. Sharpe (1974) 2 ALL ER 1058

Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission, Supreme Court Presidential Election Petition No.1 of 2001

Kizza Besigye vs. Electoral Commission and YK Museveni, Presidential Election No. 1 of 2006

Masiko Winifred Komuhangi vs. Winnie J Babihuga, Court of Appeal Election Petition Appeal No. 9 of 2002

Mbowe vs. Eliuffo [1967] EA 240

Odo Tayebwa vs. Bassajabalaba Nasser and the Electoral Commission, Court of Appeal Election Appeal No. 13 of 2011.

Paul Mwiru vs. Hon Igeme Nathan Nabeta Samson and 2 Others, Court of Appeal Election Petition Appeal No.6 of 2011

Uganda Journalist Safety Commission and Others vs. Attorney General, Constitutional Petition No.7 of 1997.

*Mr. Charles Wamukota and Geoffrey Ojok for the appellant*

*Mr. Nelson Nerima and Yusufu Mutembuli for 1<sup>st</sup> respondent*

*Mr. Jude Mwasia for the 2<sup>nd</sup> respondent*

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**Ernest Kiiza vs. Kabakumba Labwoni Masiko**

**Court of Appeal (Coram: Kavuma; DCJ, Barishaki and Owiny-Dollo, JJ A)**

**Election Petition Appeal No. 44 of 2016**

**May 8, 2017**

(Arising from Election Petition No.2 of 2016 (High Court of Uganda, decision of Elizabeth Ibanda Nahamya, J.).

**Burden and standard of proof in election petitions**—*Burden is on the petitioner even when the respondent raises an alibi—Standard is on the balance of probabilities—Meaning of cogent.*

**Bribery**—*Meaning of bribery in elections—Section 68(1) of Parliamentary Elections Act, No. 17 of 2005—Ingredients—Proof of bribery.*

**Bribery**—*Bribery through agents—Proof of agency relationship—Degree of specificity required—Agent must be named and he or she must be a registered voter—Purpose of the bribe must be stated.*

**Evidence**—*Corroboration—Meaning thereof—Corroboration of electoral offences—Corroborative evidence—Evidence of different days involving different people at different locations is not corroborative evidence of incidents that happened in different places.*

**Evidence**—*Witnesses—Number of witnesses to prove a fact in election petitions—One witness can prove a fact if he or she is credible—Exceptions where the evidence of the witness is suspect—Evidence of agents or supporters of the petitioner needs corroboration.*

**Agents**—*Election agents—Definition thereof—Section 2 (1) of the Parliamentary Elections Act No. 17 of 2005—Determining existence of agency relationship—Agent includes a representative or a polling agent of a candidate—Person alleging must show that the principal authorised, knew and sanctioned the actions of the agent.*

**Bribery**—*Bribery in elections—Person bribing and the one being bribed must be known in order to affect elections.*

**Affidavits**—*Supplementary affidavits—Period within which parties are required to file supplementary affidavits in election petitions—Rule 18 of Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, S1 141-2.*

**Affidavits**—*Part of parts of an affidavit which are defective—Defective parts are severed from the parts which are credible and confirm to legal requirements.*

**Bribery—Bribery in elections—Requirement of the court to subject each allegation of bribery thorough and high level scrutiny.**

The appellant, respondent and three others contested for the position of Member of Parliament of Masindi Municipality. The appellant was declared winner by the Electoral Commission, with 14,125 votes as against the respondent's 9076 votes. The respondent challenged the result of the election contending that the election was conducted in contravention of the provisions of the Constitution and the Electoral Commissions Act. In a decision rendered on 20<sup>th</sup> July 2016, the High Court upheld the petition and ordered that fresh elections be held hence this appeal.

The appellant contended that bribery was said to have been by construction of wells and distribution of salt. In finding whether there was bribery, the trial court mainly relied on the evidence of Biingi Moses who deponed that on February 17 2016, Isigoma Edward a known agent of the appellant brought salt and gave it to one Santa and Kamanyire Richard whom he instructed to distribute it to the village. Mugisa Emmanuel deponed that he saw Muga sharing bundles of denominations of 1000 with voters who were on the line and instructing them to go and vote the appellant.

The trial court was also said to have erred in its application of the law of agency because it had been argued that the offence was by the agents of the appellant.

It was also alleged that there was bribery through distribution of sports jerseys and a yellow ball. It was contended that the affidavit of Susu Media which deponed that they were given dominations of 3000 should have been rejected by the trial court because it was full of contradictions.

**HELD:**

1. It was now trite law that the petitioner has to adduce cogent evidence to prove his or her case to the satisfaction of the court. It has to be that kind of evidence which is free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's favour.<sup>54</sup> 'Cogent' means compelling or convincing.<sup>55</sup>
2. The burden of proof rests on the petitioner. Even where the respondent raises the defence of alibi, the petitioner still has the burden to place the witness at the scene.
3. The standard of proof required is proof on a balance of probabilities as stated under section 61 (3) of the Parliamentary Elections Act, No. 17 of 2005.<sup>56</sup>
4. The offence of bribery is provided for under section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005. Bribery is an offence committed by a person who gives

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<sup>54</sup> Citing *Masiko Winifred Komuhangi vs. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002, (dictum of Kikonyogo DCJ).

<sup>55</sup> Citing Black's Law Dictionary, 6<sup>th</sup> Edition.

<sup>56</sup> Citing *Paul Mwiru vs. Hon Igeme Nathan Nabeta Samson and 2 Others*, Court of Appeal Election Petition Appeal No.6 of 2011 and *Anthony Harris Mukasa vs. Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No.18 of 2007.

or promises to give or offers money or valuable inducement to a voter, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, or as a reward to the voter for having voted in a particular way or abstained from voting.<sup>57</sup>

5. The offence of bribery has three ingredients. There has to be evidence that: i) a gift was given to a voter; ii) the gift was given by a candidate or their agent; and iii) it was given with the intention of inducing the person to vote.<sup>58</sup> Unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient.
6. While it is true that it is not easy to prove bribery especially when it is done secretly, given the dire consequences it carries on the person alleged to have committed it, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand.
7. It is possible to bribe a community. However, the person bribing and the persons being bribed have to be known in order to affect the elections. In the instant case, the persons who had received the items in question, that is to say, football jerseys were not known. Evidence that they were registered voters should have been adduced.<sup>59</sup> The quality of evidence adduced has to be considered with complete thoroughness commensurate to the gravity of the matter and the consequences which follow by virtue of section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005.
8. The general position of the law is that no particular number of witnesses is required to prove any particular fact.<sup>60</sup> There are however, exceptions to this general rule, where corroboration is called for such as the credibility of witnesses- more especially in the adversarial system where deponents to affidavits are usually supporters of either party.<sup>61</sup> In the instant case, most of the witnesses of the respondent were either her agents or supporters and as such their evidence was suspect and needed corroboration from independent witnesses.<sup>62</sup>
9. The actual act of bribery has to be described in sufficient details for the court to reach a determination that indeed such bribery took place. In the instant case, from a review of the evidence, the various accounts provided were too inconsistent and not sufficiently corroborated to support the offence of bribery. The evidence was not cogent.

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<sup>57</sup> Citing Black's Law Dictionary, 6<sup>th</sup> Edition.

<sup>58</sup> Citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001.

<sup>59</sup> Citing *Kwijuka Geofrey vs. Electoral Commission and Another*, Election Petition No.7 of 2011.

<sup>60</sup> Citing *Kikulukunyu Faisal vs. Muhammad Muwanga Kivumbi*, Election Petition Appeal No.44 of 2011.

<sup>61</sup> Citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (dictum of Oder JSC).

<sup>62</sup> Citing *Kamba Saleh Moses vs. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal Number 27 of 2011.



10. Section 2 (1) of the Parliamentary Elections Act, No. 17 of 2005 provides that an 'agent' by reference to a candidate includes a representative and polling agent of a candidate.
11. There is no precise rule as to what constituted evidence of being an agent. Every instance in which it is shown that either with the knowledge of the member or candidate him or herself a person acts in furthering the election for him or not, trying to get votes for him or evidence that the person so acting is authorized to act as his or her agent. It can thus be concluded that any person whom the candidate puts in his or her place to do a portion of his or her task, namely to procure his or her election as a Member of Parliament is person for whose acts he or she will be liable.<sup>63</sup> In the instant case, it was not enough to show that the persons constructing wells were agents of the appellant. It was incumbent upon the respondent to prove that the appellant authorized, knew of and/or sanctioned the construction, inscription and subsequent erasure of the inscriptions on the wells; which she failed to do.
12. There has to be a sufficient nexus between the person given the bribe and either candidate or his or her known agent who has to be proved to have been acting with the appellant's knowledge or with his or her approval. It is only then that the requirements of section 68 of the Parliamentary Elections Act No.17 of 2005 would be met.
13. All evidence at the trial of an election petition is required to be adduced by affidavits.
14. Cross-examination of deponents can only be permitted only with the leave of the court as stipulated under rule 15 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, S1 141-2.
15. The trial court was right to have struck out the appellant's supplementary affidavits in reply to the respondent's rejoinder. At the same time, it ought to have severed the new evidence adduced in the respondent's affidavits in rejoinder, in the interests of justice.

*Appeal allowed in substantial part.*

*Decision and orders of the trial judge set aside.*

*Appellant declared validly elected Member of Parliament for Masindi Municipality Constituency.*

*Respondent to bear the costs of the appeal.*

**Legislation considered:**

The Constitution of the Republic of Uganda 1995, Article 126 (2) (e)

Civil Procedure Rules, SI 71-1 Order 9, Order 17 Rule 3

Evidence Act, Cap 6, sections 111, 112

Parliamentary Elections Act, sections 2(1), 6, 61(1) (c), 68(1)

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<sup>63</sup> Citing *Odo Tayebwa vs. Nasser Basajabalaba and Another*, Election Appeal No.13 of 2001 (dictum of Mpagi-Bahigeine DCJ).

Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2, rules 15, 17 and 18

**Cases cited:**

Achieng Sarah Opendi vs. Ochwo Nyakecho Keziah, Election Petition Appeal No. 39 of 2011  
Anthony Harris Mukasa vs. Michael Philip Lulume Bayiga, Supreme Court Election Petition Appeal No.18 of 2007  
Bakaluba Mukasa vs. Nambooze Betty, Election Petition Appeal No.4 of 2009  
Bitaitana vs. Kananura, Civil Appeal No. 47 of 1976  
Fred Badda vs. Prof Muyanda Mutebi, Election Petition No.25 of 2006  
James Serunjoi Mukiibi vs. Lule Mawiya, Court of Appeal Election Petition Appeal No. 1 of 2006  
Kamba Saleh Moses vs. Hon Namuyangu Jennifer, Election Appeal No. 0027 of 2011  
Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission, Supreme Court Presidential Election Petition No.1 of 2001  
Kizza Besigye vs. Yoweri Museveni, Supreme Court Election Petition No. 1 of 2006  
Kikulukunyu Faisal vs. Muwanga Kivumbi Mohammed, Election Petition No. 44 of 2011  
Kirunda Kivejinja vs. Abdu Katuntu, Court of Appeal No. 244 of 2006  
Kwijuka Geofrey vs. Electoral Commission and Another, Election Petition No.7 of 2011  
Masiko Winifred Komuhangi vs. Babihuga J Winnie, Election Petition Appeal No. 9 of 2002  
Oddo Tayebwa vs. Basajjabalaba, Election Petition Appeal No. 013 of 2001  
Paul Mwiru vs. Igeme Nabeta and Others, Election Petition Appeal No.06 of 2011

*Mr. Wandera Ogalo and Mr. Kato Sekabanja for the appellant,  
Mr. Simon Peter Kinobe, Mr. Mularila Faisal Umar, Mr. Mutyaba Najib, Mr. Sozi Stephen and  
Mr. Kasozi Ronald for the respondent*

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**Mashate Magomu Peter vs. the Electoral Commission and Sizomu Gershom Rabbi  
Wambedde**

**Court of Appeal (Coram: Kavuma; DCJ, Barishaki and Mugamba, JJ A)**

**Election Petition Appeal No. 47 of 2016**

**May 8, 2017**

(Arising from an Election Petition of 2016 in High Court of Uganda at Mbale).

**Evidence**—*Admission of evidence in election petitions—Evidence is by way of affidavit.*

**Academic qualifications Member of Parliament candidates**—*Names on the academic documents different from deed pool—Whether change of names requires change of the names on the academic documents- Circumstances where burden of proof shifts.*

**Persons eligible to contest for Member of Parliament (MP)**—*Traditional cultural leaders prohibited from participation in elections of MPs—Section 5 (2) (c) Parliamentary Elections Act, No. 17 of 2005—Definition of a cultural leader—Article 246 of the Constitution of the Republic of Uganda, 1995—Second respondent being a leader of Abayudaya a religious community group—Whether such a leader is a cultural leader.*

**Evidence**—*Proof of documents—Use of primary and secondary evidence—Section 60 and 62 of the Evidence Act Cap 6—Use of letters of verification of results from Uganda National Examination Board as evidence of an academic qualification.*

**Evidence**—*Relying on Public documents for evidence—Public documents must be certified—Sections 75 and 76 of the Evidence Act, Cap 6—Admissibility in evidence of Declaration of Results forms which are not certified.*

**Amendment of pleadings**—*Filing an amended petition without filing fresh affidavits in support of the petition—Effect thereof—Validity of the old affidavits to the amended petition.*

The appellant and the 2<sup>nd</sup> respondent contested for the position of Member of Parliament where the 2<sup>nd</sup> respondent was declared winner by the 1<sup>st</sup> respondent. The appellant brought an appeal against the respondents contesting the decision of the High Court where the appellant's petition had been dismissed with costs.

The appellant amended his petition and relied on the same to argue his case. The court heard the petition based on the amended petition and its attachments. The court further directed that a written consent to the amendment be filed. The said consent was filed and it stipulated that the amended petition would be fused with the affidavits in the original petition. The consent order was, however, not signed by the judge and also not considered in her judgment. The petitioner attached photocopies of affidavits of the original petition to his

amended petition and affidavits in rejoinder to the supplementary affidavit in support of the 1<sup>st</sup> respondents answer to the petition.

**HELD:**

1. Rule 15 of the Parliamentary Election (Interim Provisions) (Election Petitions) Rules, SI 141-2 required all evidence at the trial in favour of or against the petition to be by way of affidavit read in open court. This in no way refers to photocopies which will otherwise be secondary evidence and will deny the other party a chance to cross examine the witnesses. In the instant case, the appellant should have filed fresh affidavits in support of his amended petition, rather than relying on photocopies of defunct affidavits which were part of an original petition which had been replaced by consent.
2. The relevant law in regards to academic qualifications is section 61 of the Parliamentary Elections Act, No. 17 of 2005. Mere allegations as to the inauthenticity of a candidate's academic documents were not sufficient to shift the burden of proof to that candidate. For the burden of proof to shift, there has to be clear evidence creating doubt as to the authenticity of the document in question, which demand an explanation from the respondent.<sup>64</sup> In the instant case, the appellant ought to have taken extra steps to prove his allegations.
3. The relevant law in regards to traditional cultural leaders being involved in participating in parliamentary elections as candidates is Article 246 (6) of the Constitution of the Republic of Uganda, 1995, read together with section 5 (2)(C) of the Parliamentary Elections Act, No. 17 of 2005. In the instant case, based on a perusal of the Constitution of the 'Abayudaya', the trial court had correctly concluded that it was a religious organization rather than a cultural or traditional institution.
4. The position of the law is that documents have to be proved by primary evidence except as provided in section 64 of the Evidence Act, Cap 6, which is to the effect that a party wishing to rely on uncertified documents is required to give notice to the party in possession of the original. Declaration of Results forms are public documents. A party who wishes to rely on them has to have them certified in accordance with sections 75 and 76 of the Evidence Act. Without such certification, such documents cannot prove any fact which they seek to prove.<sup>65</sup>
5. The exception in section 64 (1) of the Evidence Act, Cap 6 refers to a scenario where the party seeking to rely on uncertified Declaration of Results (DR) forms gives notice to the party in possession of the originals requesting for certification and they refuse or fail to do as requested. On proving this, the court will accept the uncertified copies of the DR forms. In the instant case, the appellant attached receipts showing payments made to the 1<sup>st</sup> respondent for certification. There was no notice or letter requesting for the certified copies. Receipts could not be considered sufficient notice to the other party. The appellant should have taken an extra step to notify the

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<sup>64</sup> Citing *Rehema Tiwwe Watongola vs. Prosscovia Salaamu Musumba*, Election Petition Appeal No.27 of 2016.

<sup>65</sup> Citing *Kakooza John Baptist vs. EC and Anthony Yiga*, Supreme Court Election Petition Appeal No.11 of 2007.

Commission. He could not be covered under section 64 (1). Therefore, the trial court properly rejected the uncertified DR forms.

6. An amended pleading is one that replaces an earlier pleading and that contains matters omitted from or not known at the time of the pleading. The intention of the amendment is to replace the original petition. Once a pleading ceases to be on court record, it cannot be restored in a judgment. In the instant case, the defunct affidavits were part of the petition the 2<sup>nd</sup> respondent departed from. He could not therefore be seen to rely on them.

*Appeal dismissed.*

*Decision and orders of the trial court upheld.*

*Appellant to bear the costs of the appeal and at the High Court.*

**Legislation cited:**

The Constitution of the Republic of Uganda, 1995, Articles 80, 246

Evidence Act, Cap 6, sections 64 (1), 75 and 76

Parliamentary Elections Act, No 17 of 2005, section 61

Parliamentary Elections (Interim Provisions) (Election Petitions) Rules SI 141-2, rule 15

**Cases cited:**

Amama Mbabazi vs. Musinguzi Garuga, Election Petition No. 12 of 2002

British American Tobacco (U) Limited vs. Sedrach Mwijakubi and 4 Others, Supreme Court Civil Appeal No 1 of 2012

Kakooza John Baptist vs. Electoral Commission and Anthony Yiga, Election Petition Appeal No. 11 of 2007

Kasirye Byaruhanga and Co. Advocates vs. Uganda Development Bank, Supreme Court Civil Appeal No 2 of 1997

Rehema Tiwuwe Watongola vs. Proscovia Salaamu Musumba, Election Petition Appeal No. 0027 of 2016

Shah Hemraj Bharmal and Brothers Santosh Kumari [1961] EA 679

*Mr. Richard Mwebembezi appeared for the appellant*

*Mr. Yusuf Mutembuli appeared for the 1<sup>st</sup> respondent*

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## Okabe Patrick vs. Opio Joseph Linos and Electoral Commission

Court of Appeal (Coram: Kavuma; DCJ, Buteera and Barishaki, JJ A)

Election Petition Appeal No. 82 of 2016

May 8, 2017

(Arising from Election Petition of 2016, High Court of Uganda at Soroti)

**Filing election petitions**—Locus to present a petition—Presentation of petition where candidate is not properly nominated to contest for Member of Parliament—Validity of petition—A petition challenging the results of a parliamentary election can be presented either by a candidate who lost an election, or by a registered voter in the relevant constituency—Section 60 of section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005.

**Election Petition Appeals**—Appealing a decision of a Returning Officer—Section 8 of the Electoral Commission Act, Cap 140—Procedure for determining an appeal of Returning Officer decision—Period within which a person should file the complaint to Electoral Commission—Period within which to receive decision—Section 16 of the section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005.

**Time for doing acts in election petitions**—Extension of time—Special powers of the Commission to enlarge time within which to receive decision—Section 50 of the section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005—Circumstances under which the Commission may invoke such powers—Whether it was proper in the instant case for the Commission to invoke its special powers under section 50.

The appellant, 1<sup>st</sup> respondent and four others were candidates for elections for Member of Parliament (MP) for Serere County, Serere District. The 2<sup>nd</sup> respondent returned the appellant as validly elected. The 1<sup>st</sup> respondent filed a petition in the High Court challenging the appellant's victory on grounds that he was not validly nominated because he did not possess the requirements to be nominated. The trial court held that the appellant was not qualified to contest and be elected MP and the elections of Serere County Constituency were not carried out in accordance with the law. The appellant being dissatisfied appealed.

The appellant argued that the respondent was not validly nominated to contest as MP because the persons nominating the appellant were not registered voters. The appellant contended that the 1<sup>st</sup> respondent claimed to have been nominated by the Chairperson of the 2<sup>nd</sup> respondent but the said nomination was invalid as it did not comply with the procedure prescribed by section 8 of the Electoral Commission Act, Cap 140. That the 2<sup>nd</sup> respondent was required to sit as a commission on appeal with a quorum of five members and that the Commission never invoked its powers under section 50 of the Election Commission Act to extend the time for acting beyond the stipulated period of 7 days.

**HELD:**

1. In terms of sections 60 and 68 (1) of the Parliamentary Elections Act, No. 17 of 2005, a petition challenging the results of a parliamentary election can be presented either by a candidate who lost an election, or by a registered voter in the relevant constituency; in the latter case supported by 500 signatures of voters registered in that constituency. In the instant case, the 1<sup>st</sup> respondent was not nominated by the Returning Officer of the Constituency. Rather, he was purportedly nominated by the 2<sup>nd</sup> respondent itself in exercise of power under section 15 (1) of the Electoral Commission Act, Cap 140.
2. A body exercising quasi-judicial powers, such as the 2<sup>nd</sup> respondent in this case, is bound to take that decision properly, with all officials required acting jointly.<sup>66</sup> In the instant case, in reaching such a decision, the 2<sup>nd</sup> respondent was bound to follow the procedure set out under section 8 of the Election Commission Act, Cap 140, which required the 2<sup>nd</sup> respondent to sit as a Commission with a quorum of 5 members and take a decision by consensus, or failing, by a majority vote. There was no indication that the 2<sup>nd</sup> respondent actually sat as a Commission when purporting to exercise this power. All that was apparent was an endorsement on a document, apparently by the 2<sup>nd</sup> respondent Chairperson. There were no minutes indicating that any meeting took place. As such, it could not be said that the 1<sup>st</sup> respondent was nominated by the 2<sup>nd</sup> respondent. In any case, in terms of section 16 (b) of the Electoral Commission Act, any such nomination by the 2<sup>nd</sup> respondent would have had to take place within 7 days. The endorsement letter from the 2<sup>nd</sup> respondent was dated 15<sup>th</sup> January 2016, which was 36 days late and clearly far beyond the 7 days prescribed.
3. It was incorrect for the trial court to find that the endorsement was made in terms of section 50 of the Electoral Commission Act, Cap 140. In *Joy Kabatsi and Another vs. Anifa Kawooya*, Election Petition Appeal No. 25 of 2007, court had held that section 50 (1) applies with regard to cases which include any of these factors: (i) a mistake; (ii) miscalculation; (iii) emergency or (iv) unusual or unforeseen circumstances. It was also clarified that section 50 was not meant to cure or validate non-compliance with provisions of the Act or other law relating to elections. In the instant case, there was no evidence whatsoever showing that the 2<sup>nd</sup> respondent invoked section 50. In any case, there was no justification for its invocation. As such the 1<sup>st</sup> respondent was neither nominated by the Returning Officer nor by the 2<sup>nd</sup> respondent as a candidate for parliamentary elections. In so far as he had brought the petition as a candidate, which he was not, he did not qualify to present the particular petition. There was therefore no proper petition before the trial court to handle.

*Appeal allowed.*

*Decision of High Court set aside.*

*Appellant confirmed as validly elected Member of Parliament for Serere County Constituency. 1<sup>st</sup> respondent to bear the costs of the appeal and of proceedings in the High Court.*

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<sup>66</sup> Citing *Sam Kuteesa and 2 Others vs. The Attorney General*, Constitutional Petition No.46 of 2001.

**Legislation considered:**

Electoral Commission Act, Cap 140, sections 15, (1), 16 (b), 50 (1)

Parliamentary Elections Act, No. 17 of 2005, sections 60

**Case cited:**

Joy Kabatsi and Another vs. Anifa Kawooya, Election Petition Appeal No.25 of 2007

Sam Kuteesa and 2 Others vs. The Attorney General, Constitutional Petition No.46 of 2001

*Mr. Kimuli Moses for the appellant*

*Mr. Deogracious Odekel Opolot for the 1<sup>st</sup> appellant*

*Mr. Sabit Eric for the 2<sup>nd</sup> respondent*

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**Paul Omara vs. Acon Julius Bua, Electoral Commission and Uganda National Examinations Board and National Council for Higher Education**

**Court of Appeal (Kakuru, JA.)**

**Election Petition Miscellaneous Application No. 346 of 2016**

**May 12, 2017**

(Arising from Election Petition No.3 of 2016 (High Court of Uganda at Lira, decision of Wilson Masalu Musene, J.).

*Filing a memorandum of appeal and record of appeal—Time within which to file a memorandum and record of appeal—Memorandum and record of appeal to be filed separately—Procedure for filing the said documents.*

*Filing a memorandum of appeal and record of appeal—Extension of time—Grounds for extension of time to file a memorandum of appeal and record of appeal—Extensive research required before counsel could formulate the grounds—Whether sufficient ground for extension of time to file a memorandum of appeal.*

The High Court delivered judgment in favour of the respondents on 15<sup>th</sup> May 2016. The applicant filed a Notice of Appeal within 7 days, and on the same day applied for a certified record of proceedings from the High Court. He filed a memorandum of appeal on 6<sup>th</sup> September 2016 (after 114 days) and served all respondents with the same. He therefore sought for orders that the memorandum of appeal filed on 6<sup>th</sup> September 2016 and the record of appeal filed on 24<sup>th</sup> October 2016 and any other documents filed out of time be validated by grant of extension of time within which they ought to have been filed and served.

The applicant contended that the delay to file and serve the memorandum of appeal was occasioned by the extensive research required before counsel could formulate the grounds of appeal. Further that the failure to file and serve the record of appeal in time was occasioned by the High Court's delay to prepare and certify the record within the time prescribed by law.

The respondent argued that the failure by the applicant and his counsel to file and serve the memorandum of appeal and the record of appeal was entirely due to their own dilatory conduct and inexcusable failure to take necessary steps to prosecute the appeal.

The issue for determination was whether or not sufficient reasons were adduced by the applicant for the grant of extension of time within which the memorandum of appeal and the record of appeal ought to have been filed and served.

**HELD:**

1. Rule 29 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2 requires a party intending to appeal against a decision of the High Court to

file a written notice of appeal within 7 days of the judgment or to give it orally immediately upon delivery.

2. Rule 30 (2) of the Parliamentary (Interim Provisions) Rules, SI 141-2 requires a memorandum of appeal to be filed within 7 days of the filing of the notice of appeal where, as in the present case, a written notice had been given.
3. Rule 31 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2 requires an intending appellant to lodge with the registrar of the Court of Appeal a record of appeal within 30 days of filing the memorandum of appeal. This rule fundamentally differs from rule 83 of the Judicature (Court of Appeal Rules) Directions, SI 13-10. Under rule 83, an intending appellant who applies for a copy of the High Court decision within 30 days of the judgment is granted a consequential extension of time until the High Court has prepared and delivered to the appellant a copy of the Certified High Court Record. Before then, the time to file a record of appeal does not begin to run. Again, under rule 83 (1), an intending appellant has to file a memorandum of appeal together with the record of appeal. This is not so under the electoral law referenced above.
4. Under the referenced electoral law, no consequential extension of time is provided for the filing of either the memorandum of appeal or the record of appeal. Each of these documents has to be prepared and filed within the time prescribed by the electoral law. In the instant case, therefore, the notice of appeal having been filed on 15<sup>th</sup> June 2016, the memorandum of appeal ought to have been filed on or before the 22<sup>nd</sup> of June 2016 and not 6<sup>th</sup> September. The record of appeal ought to have been lodged with the Court of Appeal registry by 22<sup>nd</sup> June 2016 and not 24<sup>th</sup> October 2016.
5. Article 126 (2)(e) of the Constitution of the Republic of Uganda, 1995 is not a magic wand in the hands of defaulting litigants.<sup>67</sup> In the instant case, both the applicant and his counsel were very guilty of very dilatory conduct. Their failure to comply with the timeframe set by the law was inexcusable. The court has no time for frivolous and vexatious applications such as the present one.

*Application dismissed.*

*Notice of appeal struck out.*

*Costs awarded to each of the respondents.*

#### **Legislation considered:**

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 83

Parliamentary Election (Interim Provisions) (Elections Petitions) Rules, SI 141-2, rules 29, 30 (2), 31

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<sup>67</sup> Citing *Abiriga Ibrahim vs. Musema Mudathir Bruce*, Court of Appeal Election Application No.24 of 2016; *Kiryra Grace Wazala vs. Daudi Migereko and Another*, Election Reference Appeal No. 39 of 2012; *Peter Mukasa Bakaluba and Another vs. Mary Margaret Nalugo Sekiziyivu*, Court of Appeal Election Petition Application No. 24 of 2011 and *Moses Kasibante vs. The Electoral Commission*, Court of Appeal Election Petition Application No.7 of 2012.

**Cases cited:**

Abiriga Ibrahim vs. Musema Mudahir Bruce, Court of Appeal Election Application No. 24 of 2016

Kirya Grace Wazala vs. Daudi Migereko and Another, Election Reference Appeal No. 39 of 201

Moses Kasibante vs. the Electoral Commission, Court of Appeal Election Petition Application No.7 of 2012

Peter Mukasa Bakaluba and Another vs. Mary Margaret Nalugo Sekiziyivu, Court of Appeal Election Petition Application No. 24 of 2011

*Mr. Makmot Kibwanga and Mr. Peter Kibilango for appellant*

*Mr. Oyugi Onono Quirinus for the 1<sup>st</sup> respondent*

*Mr. Paul Kuteesa and Mr. Justus Nuwamanya for the 2<sup>nd</sup> respondent*

*Mr. Ssemakula for the 3<sup>rd</sup> respondent*

*Mr. Asuman Nyonyintono together with Ms. Fiona Kunihira for the 4<sup>th</sup> respondent*

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**Akurut Violet Adome vs. Emurut Simon Peter**

**Court of Appeal (Coram: Kavuma; DCJ, Cheborion and Mugamba, JJ A)**

**Election Petition Appeal No. 40 of 2016**

**May 23, 2017**

(Arising from High Court Election Petition No. 002 of 2016)

***Duty of the first appellate court in election petitions***—Duty to review evidence on record—*Pandya vs. R [1957] EA 33.*

***Burden of proof in election petitions***—Burden on petitioner—Proof is on the basis of a balance of probabilities.

***Technicalities in regards to procedures for challenging elections***—Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995—Dealing with technicalities in election petitions—Failure to adhere to the electoral stipulations—Procedures for challenging elections to be swift—Reasons thereof.

***Time for doing acts in election petitions***—Time within which to file and serve documents—Application for extension of time—Application not to be open ended and indefinite—Time frame involved in the enlargement or abridgment set by the law should be mentioned.

***Interpretation of the Constitution***—What amounts to constitutional interpretation—Jurisdiction for constitutional interpretation—Whether the trial court by delving into the reason for the promulgation, the history and deciding how a provision should be applied, went beyond its remit to interpreting the Constitution which is the role of the Constitutional Court.

***Definition of public officer in election petitions***—Article 80 (4) of the Constitution of the Republic of Uganda, 1995 and section 4 (4) (a) (19) of the Parliamentary Elections Act, No. 17 of 2005—Exceptions to the definition—Article 257(2)(b)—Whether a member of Uganda Human Rights Commission (UHRC) is a public officer—Section 2(1) (2) and 5 (d) of UHRC Act, Cap 24—Whether the appellant had to resign from UHRC as a Commissioner before nomination and election.

The respondent had earlier petitioned the High Court at Soroti contesting the election of the appellant as the duly elected Woman Member of Parliament for Katakwi District. The respondent was a registered voter in the area who had premised the petition on the provisions of section 60(2) (b) of the Parliamentary Elections Act, No. 17 Of 2005. The main contention was that the nomination and subsequent election of the appellant were null and void given that she had not resigned from her public service employment. At the time of her election and immediately prior to then, the appellant was a Commissioner with the Uganda Human Rights Commission (UHRC). The agreed issues were that the trial court;

- (1) failed to properly evaluate the evidence and came to the wrong conclusion that the respondent was personally served with the petition and that the petition had been rightly served.
- (2) erred in law and in fact when it held that Miscellaneous Application Nos. 5 and 19 of 2016 arising out of Soroti Election Petition No 2 of 2016 were filed in time and in accordance with the electoral laws.
- (3) erred in law and in fact when it interpreted the Constitution without jurisdiction and thereby occasioned a miscarriage of justice.
- (4) erred in law and in fact when it found that the respondent was such a person employed by the UHRC who ought to have resigned 90 days to nomination.
- (5) erred in law and in fact when it found that a member of the UHRC had to resign 90 days to nomination if she or he wanted to run for parliamentary elections.
- (6) failed to properly evaluate the evidence on record and came to the wrong conclusion when it nullified the respondent's election and held that the appellant had not been validly nominated as Member of Parliament for Katakwi District.

**HELD:**

1. According to *Pandya vs. R* [1957] EA 33, the duty of a first appellate court is to review the evidence on record and reconsider the materials before the trial court so that it may arrive at its own conclusion as to whether the finding of the trial court can be upheld; bearing in mind, however, that the Court of Appeal does not share the unique advantage of the trial court which witnessed as the witnesses testified.
2. The burden of proving an election contest rests ordinarily upon the contestant, to prove to the satisfaction of the court the grounds upon which he or she relies to get the election nullified. The burden does not shift. Many of the issues relating to trials in civil cases are generally applicable. Section 61 (3) of the Parliamentary Elections Act No. 17 of 2005 provides that any of the grounds specified in section 61(1) thereof are to be proved on the basis of a balance of probabilities.
3. Elections are serious matters of state with its citizens. Once the outcome is announced, the electorate must know their political leader quickly and assuredly. There must be limited or no uncertainty about this because the roles of representatives are many and diverse *vis-a-vis* their electors and must be performed well. So either the election is accepted at once or when challenged, the procedure must be swift enough to restore certainty. And for that, election petitions are governed by the Parliamentary Elections Act, No. 17 of 2005 with its rules in a very strict manner which law is unique and only intended for elections. It does not admit to other laws and procedures governing other types of disputes, unless it says so itself. Hence, failure to adhere to the electoral stipulations should not simply be dismissed as a technicality although it should be eschewed and looked at with disfavor by court. In the instant case, the appellant was served with the petition to which she proceeded to reply within time. In the circumstances, the quest of how service came to be effected remains of academic interest. No prejudice resulted to either party. The petition was heard in the fullest of time and it is its questionable outcome the court was addressing hence the ground lacks merit.

4. The decision by the trial court that since no particular time was set for the filing of the application, and also that they were filed within the time provided for service, applications 5 and 19 of 2016 were filed in time and in accordance with the electoral laws; could not be sustained. This was because it suggested that the application be open ended and indefinite. There must be mention of the time frame involved in the enlargement or abridgment, were necessary. Secondly, there exists no basis for court deducing that since no particular time frame was set, the applications in issue were filed in time and in accordance with the electoral laws. Nothing can be farther from the truth.
5. The trial court went beyond reading and applying the Constitution. By delving into the reason for the promulgation, the history and eventually deciding how a provision should be applied, the court went beyond its remit, it essayed to interpret the Constitution which clearly is not its role.
6. According to Article 80 (4) and section 4 (4) (a) of the Parliamentary Elections Act, No. 17 of 2005, an employee of any Commission is a public officer. Section 4 (19) shows that an employee of any Commission is a public officer. Article 257(2)(b) ordains that in the Constitution, a reference to an officer in the public service does not include a reference to the Office of the President, the Vice President, the Speaker, Deputy Speaker, a Minister, the Attorney General, a member of any Commission, authority, council or committee established by the Constitution. Article 51 (1) and (2) establishes the Uganda Human Rights Commission (UHRC) and the appointment of Commissioners. The UHRC Act, Cap 24 section 2 (1) (2) relates to appointment and composition of the Commission. Section 5(d) states that a Public Officer ought to relinquish his or her office on being appointed a member of the Commission. In that regard, a Public Officer cannot be a member of the Commission. Section 10 relates to other staff of the Commission who hold office upon such terms and conditions as may be determined by the Commission in consultation with the Public Service Commission. From the above, it is clear that Commissioners are appointed differently from officers and employees of the UHRC, who according to Article 257(2) (b) do not belong to an office in Public Service. In the circumstances, Article 175 too, is not inclusive of the Commissioners; one of whom the appellant was. Receipt of money by the Commission from the consolidated fund is of no consequence in the circumstances. There was no requirement for the appellant as a member of the UHRC to resign.
7. No impediment existed to the nomination and eventual election of the appellant. The trial court erred in law when it found that a requirement existed for the appellant to resign ninety days prior to her nomination or at all. There was no evidence of such imperative. The appellant was properly elected and nullification of her election by the High Court must in the circumstances, be set aside.

*Issues 1 and 2 are inconsequential. Issues 3, 4, 5 and 6 succeed with the following orders:-*

- (i) *nullification of the appellant as woman Member of Parliament for Katakwi District set aside and her status immediately prior to the verdict of the High court in Soroti Election Petition No. 2 of 2016 restored; and*

*(ii) costs of the instant appeal and in Soroti High Court Election Petition No. 2 of 2016 to the appellant.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Articles 50, 51 (1), 80 (4), 126 (2) (e), 137 (1), 175 and 257 (2) (b)

Parliamentary Elections Act, No. 17 of 2005, sections 4 (4) (a), (19), 60 (2) (b), 61 (1), (3), 62

Parliamentary Election (interim Provisions) Rules, S.I. No. 141-2, rules 6 (3) (4), 19

Uganda Human Rights Commission Act, Cap 24, section 2(1) (2), 5 (d), 10 (1) (2)

**Cases cited:**

Electoral Commission and Another vs. Piro Santos, Civil Application No. 22 of 2011

Hassan Ali Joho and Another vs. Suleiman Shahbal and 2 Others (2013) eKLR

Jude Mbabaali vs. Sekandi and Attorney General, Constitutional Petition No. 28 to 2012

Kwizera Eddie vs. Attorney General, Constitutional Petition No. 14 0 2005

Muiya vs. Nyangah and Others [2003] 2 EA 616

Odo Tayebwa vs. Basajjabalaba Nasser and Electoral Commission, Election Petition Appeal No. 13 of 2011

Pandya vs. R [1957] EA 336

*Mr. Kiryowa Kiwanuka and Mr. Usaama Sebuufu for appellant.*

*Mr. Caleb Alaka, Mr. Okecha Michael and Mr. Okiror Bosco for respondent*

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## Apolot Stella Isodo vs. Amongin Jacqueline

Court of Appeal (Coram: Owiny-Dollo; DCJ, Musoke and Barishaki, JJ A)

Election Appeal No. 60 of 2016

May 25, 2018.

(Arising from Election Petition No.6 of 2016 (High Court of Uganda decision of Kainamura, J.)

***Burden and standard of proof in election petitions—Burden on the petitioner—Standard of proof is on the balance of probabilities.***

***Electoral Offences—Bribery—Meaning thereof—Ingredients of bribery—Proof of bribery—Effect thereof—No specific number of witnesses required to prove a given fact.***

The appellant and respondent contested for the position of Woman Member of Parliament for Ngora District. The respondent was declared winner of the election, with 24, 539 votes compared to the appellant's 19,766 votes. The appellant challenged the results before the High Court. In a decision rendered on 25<sup>th</sup> July 2016, the court dismissed the petition and upheld the election.

### HELD:

1. It is trite law that in election petitions the petitioner must adduce cogent evidence to prove his or her case to the satisfaction of the court.<sup>68</sup>
2. Section 61 (3) of the Parliamentary Elections Act, No. 17 of 2005 provides the standard of proof in parliamentary election petitions to be to the satisfaction of the court, on a balance of probabilities. The standard of proof is slightly higher than on a preponderance of probabilities but short of proof beyond reasonable doubt.<sup>69</sup>
3. The offence of bribery is provided for under section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005. Bribery is an offence committed by a person who gave or promised to give or offered money or valuable inducement to a voter, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, or as a reward to the voter for having voted in a particular way or abstained from voting.<sup>70</sup>
4. The offence of bribery has three ingredients. There has to be evidence that: (i) a gift was given to a voter; (ii) the gift was given by a candidate or their agent; and (iii) it was given with the intention of inducing the person to vote.<sup>71</sup> In the instant case, clear and

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<sup>68</sup> Citing *Masiko Winifred Komuhangi vs. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002 (dictum of Kikonyogo DCJ).

<sup>69</sup> Citing *Odo Tayebwa vs. Nasser Basajabalaba and Another*, Election Appeal No.13 of 2001 and *Rtd. Col. Dr. Kiiza Besigye vs. Electoral Commission and YK Museveni*, Presidential Election No. 1 of 2006.

<sup>70</sup> Citing Black's Law Dictionary, 6<sup>th</sup> Edition.

<sup>71</sup> Citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001.



unequivocal proof, *rather than mere suspicion*, was required before a case of bribery would be held to have been established.<sup>72</sup> Election petitions were highly partisan and supporters were likely to go to any lengths to establish adverse claims. Therefore, it was important to look for cogent, independent and credible evidence to corroborate claims to satisfy the court that the allegations made by the petitioner were true.<sup>73</sup>

5. It is a well-known principle in law that there is no specific number of witnesses required to prove a given fact. Even one witness can prove a case if he or she were credible.<sup>74</sup> In the instant case, there was no cogent evidence to establish that the various items donated, that is to say, boats, jerseys, iron sheets, hoes etc amounted to bribes under the law; in terms of the period during which they were given or the circumstances under which they were provided. In some cases, they appeared to have been delivered as part of the regular provision of Government services, under the NAADS programme. In any case, it did not appear that any items had been provided or received during the relevant campaign period.

*Appeal dismissed.*

*Decision and orders of High Court upheld.*

*Appellant to bear 50% of the costs of appeal and those at the lower court.*

#### **Legislation considered:**

Parliamentary Elections Act, No. 17 of 2005, sections, 61 (3), 68 (1)

#### **Cases cited:**

Anthony Harris Mukasa vs. Michael Lulume Mayiga, Supreme Court Election Petition Appeal No.18 of 2007

Masiko Winifred Komuhangi vs. Winnie J Babihuga, Election Petition Appeal No. 9 of 2002

Odo Tayebwa vs. Nasser Basajabalaba and Another, Election Appeal No.13 of 2011

Kabuusu Moses Wagabo vs. Lwaiga Timothy Mutekanga and Electoral Commission, Election Petition No. 15 of 2011

Kikulukubyu Faisal vs. Muhammad Muwanga Kivumbi, Election Petition Appeal No.44 of 2011

Kiiza Besigye vs. Electoral Commission and YK Museveni, Presidential Election No. 1 of 2006.

Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission, Supreme Court Presidential Election Petition No.1 of 2001

*M/s Obore, Engulu Advocates and M/s Isodo & Co. Advocates for appellant*

*Mr. Tebusweke Mayinja, Okello & Co. Advocates and M/S Luzige, Lubega, Kavuma & Co.*

*Advocates for respondents*

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<sup>72</sup> Citing *Kikulukubyu Faisal vs. Muhammad Muwanga Kivumbi*, EPA No.44 of 2011 and *Anthony Harris Mukasa vs. Dr Michael Lulume Mayiga*, SCEPA No.18 of 2007).

<sup>73</sup> Citing *Kabuusu Moses Wagabo vs. Lwaiga Timothy Mutekanga and Electoral Commission*, Election Petition No. 15 of 2011.

<sup>74</sup> Citing *Kikulukubyu Faisal vs. Muhammad Muwanga Kivumbi*, EPA No.44 of 2011 and *Anthony Harris Mukasa vs. Dr Michael Lulume Mayiga*, SCEPA No.18 of 2007.

**National Resistance Movement and Kiiza Stella vs. Kabahenda Flavia Rwabuhoro**

**Court of Appeal (Coram: Buteera, Musoke and Obura, JJ A)**

**Election Petition Appeal No. 1 of 2016**

**June 6, 2017**

(Arising from High Court Election Petition No. 4 of 2015 (High Court at Fort Portal, presided over by Batema N.D.A., J., and dated 12<sup>th</sup> January, 2016).

***Election Petition Appeals—Mootness of appeal—Meaning of mootness—Determining mootness.***

***Mootness of appeal—Effect of a case becoming moot on appeal—Steps taken in case of mootness of appeal—Exceptions—Holding party primaries.***

***Court orders—Consequential court orders—Application for consequential orders—Person entitled to apply for consequential orders.***

***Nominations—Closure of national nominations—Effect thereof—Consequential orders by court to open fresh nominations.***

The 2<sup>nd</sup> appellant and the respondent were both candidates in the 1<sup>st</sup> appellant political party's primary elections for a flagbearer to contest, on national level, for the position of Woman Member of Parliament (MP) for Kyegegwa District for the 2016-2021 term. The primary elections were held on 27<sup>th</sup> October, 2015, by the 1<sup>st</sup> appellant's Electoral Commission, and the 2<sup>nd</sup> appellant was declared the winner thereof.

Dissatisfied, the respondent filed High Court Election Petition No. 4 of 2015, challenging the outcome of the elections and seeking, amongst others, an order setting aside the election and compelling the holding fresh primaries, on the main grounds that: (i) the primaries were unfair and null and void; and that (ii) the primaries were marred by illegality, disenfranchisement, incompetence, and other irregularities.

Through Miscellaneous Application (MA) No 122 of 2015, the respondent also obtained a temporary injunction on 1<sup>st</sup> December, 2015, restraining the 1<sup>st</sup> appellant from presenting the 2<sup>nd</sup> appellant as its flagbearer pending the determination of the main suit.

The respondent was successful in her petition and through M. A No. 17 of 2016, obtained a consequential order directing and compelling the Independent Electoral Commission to recognize, confirm, and treat her as the 1<sup>st</sup> appellant's flagbearer for Woman MP for Kyegegwa District, to the dissatisfaction of the appellants.

**HELD:**

1. By the time the court heard the appeal, the appeal was already moot because it concerned party primaries in respect of national elections that had since been

concluded the 2016 national elections. The 2<sup>nd</sup> appellant had already stood as an independent candidate, consequent to the consequential order which had compelled the Independent Electoral commission to treat the respondent as the 1<sup>st</sup> appellant's flagbearer, and had prevailed over the respondent.

2. It was no longer possible or practical to hold party primary bye-elections or issue orders to effect changes in the 1<sup>st</sup> appellant's party flagbearer after the conclusion of the national elections. Although the appeal had been filed in time, it had since become moot because the remedies sought could were not available (anymore) or could not be enforced. Furthermore, the court could not answer the questions in the memorandum of appeal because they were now largely hypothetical and moot.
3. By their very nature, party primaries must be conducted before national elections.
4. It is now settled law that where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to fail, a court of law may decline to determine the issues arising therefrom as they would have become lifeless, academic, speculative, hypothetical and moot.<sup>75</sup>
5. In determining whether a case is moot, court rests on the principle that the law confers jurisdiction upon courts to determine actual controversies and not just to give opinion upon hypothetical questions or abstract propositions or to declare principles of rules of law which cannot affect the matter in issue.
6. The courts generally only have subject-matter jurisdiction over live controversies, and when a case becomes moot at the appellate stage, the proper step to take is to dismiss the appeal. Nevertheless, a court may consider a case that is technically moot, if it involves a matter of public interest or is of general public importance and deserves prompt resolution.<sup>76</sup> Although the appeal presented substantial issues regarding the integrity of primary electoral processes, matters of the 1<sup>st</sup> appellant merely concerned a select group rather than the public in general.<sup>77</sup> In any case, the decision on appeal would have turned on the consequences of the consequential order in Miscellaneous Application No. 17 of 2015 which compelled the Independent Electoral Commission to recognize the respondent (and not the 2<sup>nd</sup> appellant) as the NRM flagbearer.
7. The court declined to pronounce itself on the appeal save for the issue relating to the validity of the trial court's consequential orders that had the effect of reopening party nominations after national nominations had already closed. These were held to have been 'invalid' because once national nominations are closed, party nominations cannot be reopened by court or otherwise.
8. A party who succeeds in a proceeding has the liberty to subsequently apply to the court for consequential orders as would be necessary to effect the court's findings,

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<sup>75</sup> Cited: *Legal Brains Trust vs. the Attorney General of Uganda*, East Africa Court of Justice Appeal No. 4 of 2012.

<sup>76</sup> Cited: *N.C. State Bar vs. Randolph* 325 N.C. 699, 701, 386 S.E. 2d 185, 186 (1989).

<sup>77</sup> The NRM had urged the court to consider the appeal so that the result could facilitate the 2<sup>nd</sup> Appellant's return to the party, from being an independent.

holdings, and prior orders. *Kanawagi S/o Seperumaniam vs. Penang Port Commission* [2001] 5 MLJ 433 Miscellaneous Application No. 17 of 2015 was used by the respondent to exercise her 'liberty to apply' for a consequential order, and the order so obtained did not deviate much from the original order. However, the court faulted the trial court for awarding the consequential order in the first place so as to effectively reopen party nominations yet nominations at national level had already been completed.

9. Once electoral nominations at the national level are completed, party nominations cannot be reopened whether by court or otherwise. The judgment of the High Court in Election Petition No. 1 of 2016 had been delivered on 12<sup>th</sup> January, 2016 while the consequential orders were issued on 18<sup>th</sup> January, 2016. On the other hand, nomination of candidates at the national level had already been completed by December, 2015. Therefore, the orders issued by the trial court 'were invalid and should not have been issued'. The courts faced with this situation are also often called upon to consider whether the lower court's judgment should also be vacated

*No appeal lay, the appeal having 'abated'.*

*No order made as to costs.*

**Cases cited:**

*Kanawagi S/o Seperumaniam vs. Penang Port Commission* [2001] 5 MLJ 433

*Legal Brains Trust vs. the Attorney General of Uganda*, East Africa Court of Justice Appeal No. 4 of 2012

*Mills vs. Green* 159 U.S. 651, 653 (1895)

*N.C. State Bar vs. Randolph* 325 N.C. 699, 701, 386 S.E. 2d 185, 186 (1989)

**Other legal materials referred to:**

Lord Mackay of Clashfern in *Halsbury's Laws of England* (4<sup>th</sup> Edition), Reissue, Volume 37, 2001, paragraph 1230

*Mr. Collins Acellam for the appellants*

*Mr. Kiiza Aaron for the respondents*

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**Nakate Lilian Segujja and the Electoral Commission vs. Nabukenya Brenda<sup>78</sup>**

**Court of Appeal (Coram: Kavuma; DCJ, Mugamba and Owiny-Dollo, JJ A)**

**Consolidated Election Petition Appeals No. 17 and 21 of 2016**

**June 7, 2017**

(Arising from High Court Election Petition No. 26 of 2016 (Presided over by D.N.A. Batema, J., and dated 17<sup>th</sup> June, 2016)

***First appellate court—Duty of first appellate court—Duty to re-evaluate evidence.***

***Burden and standard of proof in election petitions—Burden on the petitioner—Standard of proof is on the balance of probabilities.***

***Electoral offences—Bribery—Proof of bribery—Uncorroborated evidence of single partisan witness.***

***Evaluation of evidence in election petitions—Cross-examination—Error in evaluation of a witness' response in cross examination.***

***Evidence in election petitions—Partisan witnesses—prejudging a witness—Failure to evaluate all evidence—Effect thereof.***

***Evidence in election petitions—Number of witnesses required—Effect of a single witness' testimony.***

***Affidavit evidence in election petitions—General indication of jurat—Form of jurat—Certification where the deponent is blind or illiterate.***

***Affidavit evidence vs oral evidence in election petitions—Validity of oral evidence given in cross-examination where deponent's affidavit is subsequently struck off the record.***

***Pleadings—Closure thereof—Introduction of new allegation after pleadings have been closed—Effect thereof.***

***Vote counting—Absence of Presiding Officer during vote counting—Procedure taken to continue with voting—Polling station being overrun.***

***Electoral laws—Non-compliance with electoral laws—Effect thereof.***

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<sup>78</sup> Consolidated Election Petition Appeals 17 and 21 of 2016 (Steven B.K. Kavuma, DCJ; Paul K. Mugamba, JA; and Alfonse Owiny-Dollo, JA: judgment delivered on 7<sup>th</sup> June, 2017) – arising from High Court Election Petition No. 26 of 2016 (Presided over by D.N.A. Batema, J., and dated 17<sup>th</sup> June, 2016)

In 2016, the 1<sup>st</sup> appellant and respondent, along with three other persons, contested for the position of Woman Member of Parliament for Luwero District. The 1<sup>st</sup> appellant polled the highest number of votes i.e. 57,728 and was declared the winner of the election, to the dissatisfaction of the Respondent who had polled 54,615 votes representing a difference of 3,113 votes or a 2.8% lead.

The respondent filed a petition before the High Court alleging that the 1<sup>st</sup> appellant had engaged in voter bribery and other illegal acts. In her petition, the respondent also alleged that the 2<sup>nd</sup> appellant, had failed to comply with various electoral laws and that the election had been marred by ballot stuffing, pre-ticking of ballots and a 'breakdown in the electoral process'.

At the hearing of the petition, the respondent only pursued the allegations of voter bribery, irregular voting for the elderly and intimidation during the vote counting process.

The trial court found that the 1<sup>st</sup> appellant had committed an act of bribery, that the 2<sup>nd</sup> appellant had allowed for an irregular voting process, and that there had been a breakdown in the electoral process. The election of the 1<sup>st</sup> appellant was therefore annulled and the holding of a fresh election was ordered.

The 1<sup>st</sup> and 2<sup>nd</sup> appellants had filed separate appeals but these were later consolidated at the instance of the parties for convenience.

**HELD:**

1. A first appellate court has a duty to make a fresh appraisal of the evidence on record and to make its own conclusions thereon. Whereas an appellate court will not have had the benefit of observing the demeanor of witnesses who gave oral testimony before the trial court, this is not true of affidavit evidence which is documentary in nature.
2. In a parliamentary election petition, the burden of proof lies on the petitioner since it is he or she that seeks the nullification of the election result.
3. Proof of an allegation in a parliamentary election petition is established to the satisfaction of the court when it rises to the level of a balance of probabilities. Section 61(1) and (3) of the Parliamentary Elections Act No. 17 of 2005 is neither contradictory nor mutually exclusive; It is complementary. Section 61(1) restricts nullification of an election result to situations where the grounds for setting aside an election provided within section 61(1) the Act) are proved 'to the satisfaction of the court' while section 61(3) provides that the grounds for setting aside an election under Section 61(1) have to be proved 'on the basis of a balance of probabilities'.
4. The standard of proof applicable to presidential election petitions drawn from case law should not be blanketly applied to parliamentary election petitions because unlike the Presidential Elections Act, 2005, the Parliamentary Elections Act, No. 17 of 2005 contains a prescribed standard of proof.

5. For court to be satisfied that an allegation of bribery has been proved, it is enjoined under the provisions of section 61 (3) of the Parliamentary Elections Act No. 17 of 2005, to apply a higher degree of proof than is required for proof of ordinary allegations made in civil cases. However, this higher degree of proof is still on a preponderance of probabilities.
6. There was no satisfactory evidence to prove the respondent's allegation of bribery, given that the evidence adduced was that of a single, partisan witness and it had been robustly denied by the 1<sup>st</sup> Appellant and her witnesses. If the trial court had directed himself as to the weight of the testimony of a single, partisan witness and fully [and properly] evaluated the 1<sup>st</sup> Appellant's evidence, he would have come to the conclusion that the Respondent had not met her burden and standard of proof as to the allegation of bribery.
7. The trial court failed to properly evaluate the evidence adduced before it when it held that the 1<sup>st</sup> appellant had not, during cross-examination, stated that she had appeared before a Commissioner for Oaths to swear her affidavit whereas the record shows that she had so stated. The question that was put to the 1<sup>st</sup> appellant in cross-examination as to the procedure that was followed when commissioning her affidavit was ambiguous and therefore, her response to it was not a proper justification for the trial court to conclude that she had not sworn her affidavit before a Commissioner for Oaths. The trial court should have intervened to clarify the question for her so as to solicit an accurate response.
8. It is unsafe and inadvisable to rely on the uncorroborated and refuted evidence of a partisan witness. In the instant appeal, witness who alleged the commission of an act of bribery was, by his own confession, an agent of the respondent as his coordinator during the election period. Not only had his evidence not been corroborated, it had also been refuted by the 1<sup>st</sup> appellant and her witnesses.
9. The trial court's statement that no amount of denial by one of the 1<sup>st</sup> appellant's witnesses, regarding the allegation of bribery, could convince of the absence of bribery, perilously bordered on judicial bias and indicated that the trial judge had prejudged the witness. The trial court failed to consider the evidence of some of the 1<sup>st</sup> appellant's witnesses by which they refuted the bribery allegation imputed onto her. This was an error since the trial court had a duty to evaluate all the evidence adduced before him in court.
10. The trial court's deliberate avoidance to evaluate the evidence of those witnesses or even remark upon it, led to a logical conclusion that it found their evidence to be cogent and reliable partly because if their demeanor had made a poor or negative impression on him, it would have said so. Consequently, the trial court should have been persuaded by those witnesses' testimony, which was adverse to the evidence of the respondent's single partisan witness on the issue of bribery.
11. One of the respondent's witnesses who alleged that a one Kasigwa Mohammed had connived with a Presiding Officer and illegally cast votes for several persons, was an

agent of the respondent and therefore a partisan witness whose evidence required corroboration by other evidence before it could be relied upon. Moreover, this partisan witness' evidence had been selectively evaluated without equally evaluating the evidence of the Presiding Officer and the said Kasigwa Mohammed, who both denied the allegation and asserted that Kasigwa had only assisted one elderly person to cast their vote.

12. There is no rule of law requiring a plurality of witnesses to prove any fact. A single witness can suffice if is credible and reliable. Despite the above, it is now well settled that the evidence of a single witness as regards an allegation in an election petition must be received by court with utmost caution because election petitions present a peculiar and extraordinary situation in which the litigants and their supporters extend their political contest into the court process. 'In this contest, not infrequently, the parties and their witnesses do everything and anything possible, including blatant fabrication of evidence, to ensure victory for their cause.
13. Section 6 of the Oaths Act, Cap. 19, enjoins a Commissioner for Oaths and not any other person, -to state the place wherefrom the oath was administered to the deponent and the date on which this was done. In the instant case, whereas the oath was administered to the 1<sup>st</sup> appellant at Luwero, the affidavit indicated 'Kampala'. The trial court ought to have, on a balance of probabilities, found that the affidavit had been sworn in Luwero and not Kampala, based on the 1<sup>st</sup> appellant's oral testimony.
14. The form of jurat and certification of affidavits as regards blind or illiterate deponents is governed by Form B under the first schedule to the Oaths Act, Cap. 19. Two forms of jurats are provided for; the first is applied where the contents of the affidavit are read over and explained to the deponent by the Commissioner for Oaths and the second is applied where the contents of the affidavit are read over and explained to the deponent by a third party but in the presence of a Commissioner for Oaths. In both cases, however, it is the Commissioner for Oaths who has to certify, in a jurat, that the contents of the affidavit were read over to and explained to the deponent and by whom.
15. The jurat must further state that the deponent, who appeared to perfectly understand the contents of the affidavit, made his or her mark or signature thereon in the presence of the Commissioner for Oaths.
16. The requirement of indicating a Jurat certifying that the applicable laws have been complied with in properly deposing an affidavit is not merely a matter of form; it is a matter of substance.
17. While the inclusion of a Jurat within an affidavit is an indispensable matter of substance, the manner of its certification and the person who does it are matters of form. In the instant case, one of the affidavits relied upon at trial had been certified by both an interpreter and a Commissioner for Oaths, instead of being certified only by the Commissioner for Oaths. This did not amount to a failure to comply with a statutory requirement or provision; but amounted to compliance without strict



adherence to the relevant statutory provision. Additionally, the Commissioning of the affidavit here by a Commissioner for Oaths served as a certification too.

18. The statement by the Commissioner for Oaths, of the date and place where the affidavit was sworn before him, was itself a Jurat in accordance with section 5 of the Commissioner for Oaths (Advocates) Act, Cap. 5 and the third schedule to the Commissioner for Oaths Rules which are themselves contained in the Schedule to the Act.
19. Where the interpretation or explanation of the contents of an affidavit to a deponent is done by a third party and not the Commissioner for Oaths, it is presupposed that it was the third party who was conversant with the language that the deponent understood and not the Commissioner for Oaths. Given this presupposition, the interpreter is better placed to certify in the jurat that the deponent appeared to fully understand the contents of the affidavit. Therefore, the certification by the interpreter was an insubstantial deviation which did not 'seriously flout the intention of the Legislature' to protect blind or illiterate deponents.
20. Where a Commissioner for Oaths administers an oath in an affidavit to a deponent after a third party has effectively interpreted the contents of that affidavit to the deponent's understanding, the affidavit should not be regarded as irredeemably defective so as to be rejected because such a result could not have been Parliament's intention.
21. The court inconclusively suggests that whether a failure to adhere to a statutory requirement should result in the total nullification of an act or not is to be gathered, not from a consideration of whether the provision is linguistically mandatory or merely directory, but from an analysis of whether having regard to the intention of Parliament in enacting the provision, a result of nullifying the act in toto would have been intended by the said Parliament.<sup>79</sup>
22. The Illiterates Protection Act, Cap 78 and the Oaths Act, Cap 19 converge in their purpose and complement each other. The former is a statute of general application that applies to affidavits as well as other documents capable of use as evidence, while the latter is a statute of more specific application. Therefore, it is advisable to apply the two Acts together in order to give full effect to the 'true intention' of the Legislature, -the intention to protect illiterate persons from any form of manipulation.
23. Rejection of an affidavit by court does not affect the validity of evidence given *viva voce* in cross examination, and such evidence still has to be taken into consideration by the court. This is in accordance to section 58 of the Evidence Act, Cap 6 and

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<sup>79</sup> The Court variously cited the following decisions but did not conclusively affirm that it supported some over the others: *Nanjibhai Prabhudas & Co Ltd vs. Standard Bank Ltd* [1968] EA 670; *Mugema Peter vs. Mudiobole Abedi Nasser*, Court of Appeal Election Petition Appeal No. 30 of 2011; *Sitenda Sebalu vs. Sam Njuba and Another*, Supreme Court EPA No. 26 of 2007; *The Secretary of State for Trade and Industry vs. Langridge* [1991] 3 All ER 591; *Regina vs. Soneji & Another* [2005] UKHL 49; *Project Blue Sky Inc. vs. Australian Broadcasting Authority* (1998) 194 CLR 355.

*Mugema Peter vs. Mudiobole Abedi Nasser, Court of Appeal Election Petition Appeal No. 30 of 2011* wherein it was stated that the evidence given to court on oath *viva voce* under the supervision and superintendence of a presiding judge, is proper and valid evidence that the court must consider.

24. Although the allegation that a one Kasigwa Mohammed had illegally voted for several persons under the guise that they were unable to cast their votes had not been pleaded by the respondent in her petition, and had instead been raised in the affidavit of one of the respondent's witnesses, no prejudice or injustice to the appellants had resulted since they had responded to it and the issue was also fully canvassed at the hearing.
25. Although the Presiding Officer at one polling station had abandoned the station at the time of vote counting over disagreements as to her determination of invalid votes, the Sub-County Supervisor had remedied the situation by appointing the Assistant Polling Officer to take over the process and in this replacement's charge, vote counting continued smoothly in the presence of the candidates' agents and security officials. Even without the Sub-County Supervisor's intervention, section 34(2) of the Electoral Commission Act, Cap. 140 mandates the oldest Polling Assistant at the polling station to take charge where the Presiding Officer is unable to act if the returning officer does not appoint a replacement themselves. There was no evidence that 'anything untoward' did not happen in the period between the Presiding Officer abandoning the station and the Assistant Polling Officer taking over. If anything, the evidence that vote counting went on without further complaint when the Assistant Polling Officer took over was cogent as it was uncontroverted.
26. There was no evidence to support the trial court's finding that there had been intimidation and hijacking of the voting exercise by hooligans who allegedly overran the polling station and thereby forced the Presiding Officer to flee. If anything, the respondent (petitioner) had abandoned her claims that there had been ballot-stuffing, multiple pre-ticking of ballot papers, and errors in tallying. Therefore, the voting process had not been 'invaded' as found by that court.
27. There was no widespread or systemic non-compliance with electoral laws since the alleged non-compliance was restricted to two polling stations only. Additionally, the registered voters at both impugned polling stations numbered 1,137 whereas the difference between the total number of votes polled by the 1<sup>st</sup> appellant (57,728) and the respondent (54,615) was 3,113 votes in the entire District. Even if all 1,137 registered voters at the two impugned polling stations had cast their votes in favour of the respondent alone-and this was an 'unthinkable'- the 1<sup>st</sup> appellant would still prevail. Therefore, even if the allegations of non-compliance had been fully proved by the evidence, they would not have amounted to substantial non-compliance. They could not have affected the election results in a substantial manner.

*Given that the allegations of bribery and non-compliance with electoral laws had not been satisfactorily proved, the nullification of the 1<sup>st</sup> appellant's election had been unjustified. Appeal allowed. Judgment and orders of the High Court set aside.*

*Declaration: The 1<sup>st</sup> appellant was validly elected.*

*Respondent ordered to pay costs in the Court of Appeal as well as the High Court.*

**Legislation considered:**

Commissioner for Oaths (Advocates) Act, Cap 5, section 5, third schedule to the Commissioner for Oaths Rules, 2015

Electoral Commission Act, Cap 140, section 34 (2)

Evidence Act, Cap 6, section 58

Parliamentary Elections Act, No. 17 of 2005, section 61(1) and (3)

**Cases cited:**

Arumadri John Drazu vs. Etuka Isaac and Another, Court of Appeal Election Petition Appeal No. 37 of 2016

Banco Arabe Espanol vs. Bank of Uganda, Supreme Court Civil Appeal No. 8 of 1998

Kasaala Growers Co-operative Society vs. Kakooza Jonathan and Another, Supreme Court Civil Appeal No. 19 of 2010

Kikulukunyu Faizal vs. Muwanga Kivumbi Mohammed, Election Petition Appeal No. 44 of 2011

Mugema Peter vs. Mudiobole Abedi Nasser, Court of Appeal Election Petition Appeal No. 30 of 2011

Mukasa Anthony Harris vs. Bayiga Michael Philip Lulume, Supreme Court Parliamentary Election Petition Appeal No 18 of 2007

Nanjibhai Prabhudas & Co Limited vs. Standard Bank Limited [1968] EA 670

Ngoma Ngime vs. the Electoral Commission and Winnie Byanyima, Court of Appeal Election Petition Appeal No. 11 of 2002

Project Blue Sky Inc. vs. Australian Broadcasting Authority (1998) 194 CLR 355

Regina vs. Soneji and Another [2005] UKHL 49

Secretary of State for Trade and Industry vs. Langridge [1991] 3 All ER 591

Sitenda Sebalu vs. Sam Njuba and Another, Supreme Court Election Petition Appeal No. 26 of 2007

*Mr. Kiryowa Kiwanuka and Ronald Tusingwire for 1<sup>st</sup> appellant*

*Mr. J.P Baligawa for 2<sup>nd</sup> appellant*

*Mr. Mpenje Nathan for the respondent*

**Tubo Christine Nakwang vs. Akello Rose Lilly**

**Court of Appeal (Coram: Buteera, Kakuru and Owiny-Dollo, JJ A)**

**Election Petition Appeal No. 80 of 2016**

**June 15, 2017**

(Arising from Election Petition No.7 of 2016 (High Court of Uganda at Soroti, decision of Billy Kainamura J.)

*Fair hearing in election petitions—Litigant entitled to all proceedings and relevant documents—Purpose thereof—Effect of denial of proceedings.*

*Electoral offences—Bribery—Establishment thereof—Effect on election results.*

The appellant, respondent and another person contested for the position of Woman Member of Parliament for Kaabong District. The appellant was declared winner by the Electoral Commission, with 19,460 votes compared to the respondent's 19,344 votes. The respondent challenged the results of the election before the High Court. The High Court upheld the petition and ordered that a fresh election be conducted hence the instant appeal.

**HELD:**

1. Every litigant and their counsel were entitled to know the whole case before they could adequately prepare for a trial. In the instant case, it appeared that the lawyers on both sides agreed to cut short the proceedings at the prompting of the trial court who felt constrained by time. In these circumstances, the trial court ought to have expunged from the record the 24 affidavits which had been filed late and without leave of court, since the appellant had not been granted an opportunity to reply to them and to cross examine the witnesses, at the closure of the trial. This was an error as it was prejudicial to the appellant. In the instant case, however, the court did not make any positive finding based on the affidavits, and the failure to expunge the affidavits from the record had no bearing on the final outcome of the petition.
2. The relevant law in regards to bribery is set out in section 68 (1) and (4) of the Parliamentary Elections Act, No. 17 of 2005. No specific number of witnesses is required to prove a given fact and even one credible witness can prove a case.<sup>80</sup> The court does not require a multiplicity of incidents of bribery to annul an election.<sup>81</sup> Based on the above legal principles and on the evidence on record, the trial court could not be faulted for finding that particular incidents of bribery had been established.

*Appeal dismissed.*

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<sup>80</sup> Citing *Kikulukubyu Faisal vs. Muhammad Muwanga Kivumbi*, Court of Appeal EPA No.44 of 2011.

<sup>81</sup> *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001.

*Declaration and orders of the High Court upheld.  
Appellant to bear the costs.*

**Legislation considered:**

Parliamentary Elections Act, No. 17 of 2005, section 68

**Cases cited:**

Kikulukubyu Faisal vs. Muhammad Muwanga Kivumbi, Court of Appeal Election Petition Appeal No. 44 of 2011

Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission, Supreme Court Presidential Election Petition No.1 of 2001

*Mr. Joseph Kyazze, Mr. Richard Outek, Mr. Daniel Okalebo and Richard Latigo for appellant  
Mr. Caleb Alaka, Mr. Alfred Okello Oryem, Mr. Bosco Okiror and Mr. Ochieng Evans for respondent*

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**Baleke Peter vs. Electoral Commission and Kakooza Joseph**

**Court of Appeal (Coram: Buteera, Musoke and Mugamba, JJ A)**

**Election Petition Appeal No. 4 of 2016**

**June 19, 2017**

(Arising from Election Petition No.4 of 2016 (High Court of Uganda at Mubende, decision of Joseph Murangira, J.)

**Academic qualifications**—*Equating of academic documents—Equating to be done every time an election is conducted—Presumption of genuineness.*

**Variance in names on nomination and certificates**—*Proof of variance—Burden is on petitioner.*

The appellant and 2<sup>nd</sup> respondent contested for the position of Member of Parliament for Buwekula Constituency. The 2<sup>nd</sup> respondent was declared winner by the 1<sup>st</sup> respondent. The appellant challenged the results of the election before the High Court. The High Court dismissed the petition hence this appeal.

**HELD:**

1. The relevant legal provisions in regards to academic qualifications are Article 80 (1)(c) of the Constitution of the Republic of Uganda, 1995 and sections 4 (1)(c), (5), (6) and (9) of the Parliamentary Elections Act, No. 17 of 2005. Equating of academic documents has to be done each time an election is conducted. It is not the case that once the relevant academic body; Uganda National Examination Board or National Council for Higher Education issues a certificate for one election, that certificate is valid for further elections. Equating of academic papers is not a once in a life time exercise unless the requisite law is amended.<sup>82</sup>
2. There has to be a basic presumption that the academic certificates are genuine, and duly issued by the academic institutions named therein. If it is proved that those certificates on which the National Council for Higher Education (NCHE) bases its decision to issue its own are not genuine, then it will follow that the NCHE certificates will be a nullity as the person will not have the necessary qualifications.<sup>83</sup> In the instant case, it was clear that NCHE carried out its mandate of equivalence and certification not only in 2010 but also in 2015. In addition, from the evidence on record, there was nothing to suggest that the qualifications certified by NCHE were not genuine.
3. It was incumbent on the appellant to prove his allegations that the differing names, on nomination and certificates, did not refer to the same person. For his part the 2<sup>nd</sup>

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<sup>82</sup> Citing *Paul Mwiru vs. Hon Igeme Nathan Nabeta Samson and 2 Others*, Court of Appeal Election Petition Appeal No.6 of 2011 (dictum of Byamugisha JA).

<sup>83</sup> Citing *Abdul Balingira Nakendo vs. Patrick Mwendah*, Supreme Court Election Appeal No. 9 of 2007.

respondent had adduced uncontroverted evidence to show that the impugned names all related to him. As such, there was no ground in faulting the trial court's finding that this ground was not proved.

*Appeal dismissed.*

*Appellant to bear the costs of the appeal and of the proceedings in the High Court.*

**Legislation considered:**

The Constitution of Uganda of the Republic of Uganda, 1995, Article 80

Parliamentary Elections Act, No. 17 of 2005, sections 4, 9

**Cases cited:**

Abdul Balingira Nakendo vs. Patrick Mwendah, Supreme Court Election Appeal No. 9 of 2007

Paul Mwiru vs. Hon Igeme Nathan Nabeta Samson and 2 Others, Court of Appeal Election Petition Appeal No 6 of 2011

*Mr. Bamujje Ahmed and Mr. Joseph Balikuddembe for the appellant*

*Mr. Musa Sekaana and Mr. Lule Kennedy for the 1<sup>st</sup> respondent*

*Mr. Kiryowa Kiwanuka for the 2<sup>nd</sup> respondent*

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## Tuunde Mary vs. Kunihira Agnes and the Electoral Commission

Court of Appeal (Coram: Kavuma; DCJ, Buteera and Owiny-Dollo, JJ A)

Election Petition Appeal No. 36 of 2016

July 11, 2017

(Arising out of High Court Election Petition No. 21 of 2016 (High Court of Uganda at Kampala; presided over by Rugadya Atwooki, J., on 8<sup>th</sup> July, 2016).

***Duty of first appellate court***—It is the duty of the Court of Appeal as a first appellate court to reappraise the evidence and draw inferences of fact—Rule 30 of the Judicature (Court of Appeal Rules) Directions, SI 13-10.

***Nominations***—Nominations of workers Members of Parliament—Requirement by the Electoral Commission to issue a notice in the Gazette appointing dates for nominations—Sections 9, 10, 11 of the Parliamentary Elections Act No. 17 of 2005—There is no legal requirement for the publication of a notice in the Gazette appointing two days for the nomination of workers' Members of Parliament.

***Election of Workers' Members of Parliament (MP)***—Display of voters' register—Section 25 Parliamentary Elections Act No. 17 of 2005—The display of the Voters' Roll or Register, is not applicable to the election of workers' MP's—Rationale thereof.

***Counting of votes***—Irregularities in counting votes—Proof of such regularities—Effect of irregularities on the outcome of the election.

***Election Offences***—Bribery—Ingredients of the offence of bribery—Proof of bribery in election matters.

The appellant and 1<sup>st</sup> respondent were candidates for the position of Female Workers' MP, held on 11<sup>th</sup> March, 2016. The 2<sup>nd</sup> respondent declared the 1<sup>st</sup> respondent the winner with 209 votes, against the appellant's 202 votes representing a margin of 6 votes, or a 1.46% lead.

Dissatisfied, the appellant petitioned the High Court against this result on the grounds that: (i) the entire electoral process was characterized by unfairness and lack of transparency; and (ii) that there was commission of electoral offences which affected the outcome of the election in a substantial manner. The appellant thus sought an annulment of the election and a declaration that she was the rightful winner or an order compelling the holding of a bye-election.

The High Court dismissed the petition with costs to the 1<sup>st</sup> respondent.

### HELD:

1. It is the duty of the Court of Appeal as a first appellate court to reappraise the evidence and draw inferences of fact. The court thus undertook to reconsider and evaluate the



evidence on record as a whole before drawing its own conclusions and determining whether the trial court's findings were supported by the evidence and the law.

2. Sections 9, 10, and 11 of the Parliamentary Elections Act do not apply to the election of workers' Member of Parliament's (MP) but to the election of ordinary MP's, who may be nominated by political parties or be independent and whose supporters at the nomination stage have to indicate their villages within the candidate's nomination paper.<sup>84</sup> Instead, the election of workers' MP's is governed by section 8G of the same Act.
3. There is no legal requirement for the publication of a notice in the Gazette appointing two days for the nomination of workers' Member of Parliament's (MP), as it is in respect of general MP's under section 9 (1) of the Parliamentary Elections Act No. 17 of 2005. There was therefore compliance with the law. In fact, the 2<sup>nd</sup> respondent had nevertheless gazetted its appointment of nomination and polling dates for the election.
4. Section 25 of the Parliamentary Elections Act No. 17 of 2005, on the display of the Voters' Roll or Register, is not applicable to the election of workers' MP's because this provision concerns the display of the said Register at every Parish or Ward and this does not apply to workers' Member of Parliament's who are elected by a special electoral college of delegates. There was evidence of the display of the Voters' Register at Namboole stadium, where the Electoral College met, on the voting day and this was sufficient display. There was no evidence to prove that non-eligible persons voted because the Voters' Register was allegedly neither displayed nor updated.
5. There was no evidence to impugn the counting of votes at the election. There was, in fact, no record of any complaint or protest made to the Returning Officer at the time of counting and neither did 'the video clip' show any such complaint or protest being made and yet all candidates had agents at the table where counting was done.
6. It was highly improbable that an extra nine votes were illegally awarded to the 1<sup>st</sup> respondent since this would have increased their votes from 206 to 215 and yet this was not the case in the final result. In any case, omitting the supposedly added votes would still leave a result in which the 1<sup>st</sup> respondent would prevail over the appellant by 4 votes i.e. 206 against 202 votes. On a balance of probabilities, failure to control the counting of votes was not proved.
7. The ingredients of the electoral offence of bribery are: (i) that a gift was given to a voter; (ii) that the gift was given by a candidate or his agent; and (iii) that the gift was

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<sup>84</sup> Section 9(1) makes it is mandatory for the Electoral Commission to issue a notice in the Gazette appointing two dates for the nomination of candidates for the position of Member of Parliament while Section 10 provides that nominated candidates for the position of MP may be nominated by a Party or be independent. On the other hand, Section 11(c) provides that a nominated candidate must be supported by at least 10 persons that are registered voters in the constituency where the candidate is seeking nomination, and the said supporting persons must state within the nomination paper their village, occupation, and personal voter registration number.

given to induce the person to vote for the candidate. In the instant case, the appellant had failed to prove that the person who allegedly bribed voters was either the 1<sup>st</sup> respondent or the 1<sup>st</sup> respondent's agent. The evidence on record did not identify (by name) the persons who gave money to voters waiting in line to vote and the 1<sup>st</sup> respondent was not alleged to have given the said bribe personally. Failure to name the alleged bribery made it impossible to establish whether that person was or was not an agent of the 1<sup>st</sup> respondent. The persons alleged to have been bribed were not named and neither was there evidence of the purpose for which the money was given or received. Consequently, the appellant failed to prove the allegation of bribery.

8. The trial court's finding that on a balance of probabilities, the appellant had not campaigned on election day (by raising a thumbs-up sign) was arrived at after judicious consideration of the evidence on record and would therefore not be disturbed.

*Appeal dismissed with costs to the 1<sup>st</sup> respondent in the appellate as well as in the trial court.*

**Legislation considered:**

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 30

Parliamentary Election Act No. 17 of 2005, sections 8G, 9, 10, 11, 25

**Case cited:**

Kizza Besigye vs. Museveni Yoweri Kaguta and Another, Presidential Election Petition No. 1 of 2001

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# Mutembuli Yusuf vs. Nagwomu Moses Musamba and the Electoral Commission

## Court of Appeal (Coram: Kakuru, Egonda-Ntende, and Musoke, JJ A)

### Election Petition Appeal No. 43 of 2016

July 27, 2017

(Arising from High Court Election Petition No. 13 of 2016 (High Court at Mbale, presided over by Andrew Bashaija, J., and dated 19<sup>th</sup> August, 2016).

***Duty of a first appellate court—Duty to re-evaluation evidence—Rule 30 of the Judicature (Court of Appeal Rules) Directions, SI 13-10.***

***Grounds of appeal—Nature thereof—Grounds to be non-argumentative.***

***Pleadings and affidavits in election petitions—Presentation of evidence—Affidavits considered as evidence—Affidavits in rejoinder—When are affidavits in rejoinder used—Affidavits filed by strangers to petition—Adduce of supplementary affidavits—Introduction of fresh issues on appeal—Reply to defence.***

***Pleadings—Introduction of new issues in pleadings—Closure of pleadings.***

***Burden and standard of proof in parliamentary election petitions—Burden on petitioner—Standard on balance of probabilities.***

***Evidence—Hearsay evidence—Effect thereof Proof of hearsay evidence.***

***Academic qualifications—Production thereof—Valid academic qualifications.***

***Name discrepancies—Interchanging names—Effect thereof—Procedure for change of names.***

***Electoral Offences—Bribery—Proof thereof—Effect on election.***

***Evaluation of evidence—Evaluation in electoral malpractice.***

***Non-compliance with electoral laws—Proof thereof—Substantiality test.***

***Costs—Certificate of costs for two counsel—Circumstances when it is issued.***

The appellant, 1<sup>st</sup> respondent and one other person all contested for the position of Member of Parliament for Bunyole East Constituency in Butaleja District in February 2016. The 1<sup>st</sup> respondent was declared the winner of the election by the 2<sup>nd</sup> respondent and his name was thus gazetted.

Dissatisfied, the appellant filed an election before the High Court, in which he alleged that: (1) the 1<sup>st</sup> respondent did not meet the required minimum academic qualifications for a

Member of Parliament; (2) the 1<sup>st</sup> respondent, or his agents-with his consent and approval-committed illegal practices in connection with the election; and (3) there was noncompliance with electoral laws on the part of the 2<sup>nd</sup> respondent, which affected the results in a substantial manner.

The High Court dismissed the appellant’s petition on all grounds.

**HELD:**

1. A first appellate court is required to re-evaluate the evidence adduced at trial and make its own inferences of law and fact.
2. A ground of appeal should specify exactly the point which is alleged to have been wrongly decided, and this requirement is not a mere technicality. This is in accordance with rule 86 (1) of the Judicature (Court of Appeal Rules) Directions, SI 13-10.<sup>85</sup> In the instant case, a series of raised grounds of appeal did not specify the exact nature of complaint being proffered against the judgment of the trial court.
3. Although counsel for the appellant submitted extensively on the issue of bribery, there was nothing in the grounds of appeal that dealt with bribery.
4. Parties are prohibited by the court’s rules from arguing matters that are not specified in the memorandum of appeal. This is in accordance with rule 102 of the Judicature (Court of Appeal Rules) Directions, SI 13-10.<sup>86</sup> Grounds 3, 5, 6, 7, and 12 were struck out for offending rule 86 (1). Despite striking the said grounds, the court would ‘still consider all the issues raised by the parties even though they had not been specifically referred to in the memorandum of appeal because as a first appellate court, it was required to re-evaluate all the evidence adduced at the trial and make its own inferences.
5. In parliamentary election petitions, evidence in favour of or against a petition at trial is by way of affidavits read in open court. Additionally, a deponent may, with the leave of court-be cross-examined by the opposite party and re-examined by the party on whose behalf the affidavit is sworn.
6. Pleadings must come to a close at some point. The court applied the Civil Procedure Rules (S.I. 71-1) pursuant to rule 17 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, S.I. 141-2.<sup>87</sup>

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<sup>85</sup> This Rule states that, “A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make.” Emphasis Court’s.

<sup>86</sup> Rule 102a specifically states that, “At the hearing of an appeal in the court— no party shall, without the leave of the court, argue that the decision of the High Court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the High Court on any ground not relied on by that court or specified in a notice given under rule 93 of these Rules.”

<sup>87</sup> Rule 17 states that, “Subject to these Rules, the practice and procedure in respect of a petition shall be regulated, as nearly as may be, in accordance with the Civil Procedure Act and the Rules made under that Act

7. A reply to a defence is permitted only to the extent that it responds to new issues raised therein that were not anticipated in the plaint. This is in accordance to Order 8 Rule 18 of the Civil Procedure Rules, S.I. 71-1. A plaintiff read 'Petitioner' cannot be permitted to raise fresh claims or change the nature and/or extent of his or her claims in the reply to the defence."
8. If an election petition and the reply thereto are considered as pleadings. A petitioner is not permitted to introduce fresh issues or to change the substance of his or her claim by introducing new matter by way of affidavits in rejoinder. Additionally, a party cannot adduce evidence in respect of a matter that is not pleaded.
9. Affidavits are considered purely as evidence, and may therefore only contain what has already been pleaded. Under the rules of evidence, re-examination of witnesses is limited only to matters raised in cross-examination that were not anticipated in examination-in-chief. This is in accordance with section 136 of the Evidence Act, Cap. 6 and as regards to submissions in rejoinder, they are limited to new issues raised in submissions in reply. Implicitly, the court shows a legal pattern of limiting all forms of rejoinders to the scope of a prior pleading, submission, or testimony.
10. Affidavits in rejoinder can only be sworn to clarify or rejoin specific issues raised by the respondent in affidavits in reply. They cannot be used to introduce fresh issues which were not alluded to in the petition or in the reply to the petition; doing so would amount to introducing a fresh petition and this would partly contravene rule 13 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, S.I. 141-2, which requires expeditious hearing of election petitions.<sup>88</sup>
11. A stranger to a petition may validly file an affidavit in reply if the facts or issues that call for the rejoinder are within that person's knowledge.
12. All the impugned 86 affidavits, which purported to be affidavits in rejoinder, did not make reference to particular affidavits in reply or to particular issues that they were rejoining. They were therefore disguised affidavits in support of the petition or supplementary affidavits in support which could only be adduced with the leave of the court and were therefore all rightfully expunged.
13. In election petitions, the burden of proof lies on the petitioner. This burden remains on the petitioner throughout the trial and does not shift.
14. The grounds for setting aside a parliamentary election must be proved by the petitioner to the satisfaction of the court and on a balance of probabilities. It is not enough to merely set them out in the petition. This is in accordance with section 61 of the Parliamentary Elections Act, No. 17 of 2005.

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relating to the trial of a suit in the High Court, with such modifications as the court may consider necessary in the interests of justice and expedition of the proceedings."

<sup>88</sup> Rule 13(1) reads, "The court shall, in accordance with section 93(2) of the Statute, hear and determine the petition expeditiously; and it shall declare its findings not later than thirty days from the date it commenced the hearing of the petition unless the court for sufficient reason extends the time."

15. The paragraphs of the appellant's affidavit, which disclosed the Appellant's belief that the 1<sup>st</sup> Respondent was unlawfully passing his cousin's Ordinary Level education certificate off as his own, did not divulge the source of that belief or information and were therefore hearsay statements. The parts of an affidavit that constitute hearsay are severable from the affidavit so that the remaining portions may be relied upon, if doing so does not render the remaining parts meaningless.
16. No valid evidence was adduced to show that the 1<sup>st</sup> respondent did not possess a valid Ordinary Level education certificate. The allegation that the 1<sup>st</sup> respondent was using his cousin's certificate had not been proven, particularly since the appellant's allegations to that effect were inadmissible hearsay statements, and the true holder of the Certificate in question had not been called to testify. Neither had any other evidence been adduced to prove the same allegation.
17. A person who has an Advanced Level Certificate of Education or any higher qualifications obtained in Uganda has no obligation to produce an Ordinary Level certificate.
18. Interchanging names, that is to say, writing the same name in a different order cannot affect one's qualifications. Mere difference in ordering of names does not automatically mean a certificate is invalid or that the holder is a different person. That would be an impermissible absurdity in law. The court did not agree with the proposition that the order of names would have any effect on the candidate's academic qualifications on their own. More evidence must be adduced to prove to the satisfaction of the Court, that a person who sat and obtained certain academic qualifications is not the same person who was nominated for election. The 1<sup>st</sup> Respondent did not change his name; he merely added his father's own to it. In so doing, the 1<sup>st</sup> Respondent did not have to comply with section 12 of the Births and Deaths Registration Act, Cap 309 because he had never been registered under it and there would therefore be nothing to alter within the register. The purpose of the procedure for change of name under that Act, is to enable the registrar amend the name that already exists on the register. Where the name does not exist on the register in the first place, there is nothing to amend.
19. The appellant failed to adduce sufficient evidence to prove that the 1<sup>st</sup> respondent was guilty of the electoral offence of bribery. The evidence adduced was weak, substantially hearsay, and had been denied by the 1<sup>st</sup> respondent's witnesses. The trial court had correctly evaluated the evidence on this issue and rightly found that it was insufficient.
20. There was no proof that results from 8 polling stations, which were alleged to have arrived late at the tally centre, had been cancelled. No evidence was adduced to show that the results tallied were not a reflection of the actual votes cast at those 8 polling stations. The appellant had also not shown that such cancellation of results from the said 8 polling stations, if true, would have affected the results of the election in a substantial manner.

21. The trial court had correctly awarded costs with a certificate for two counsel because the petition was voluminous and had involved a substantial amount of research. In fact, the 1<sup>st</sup> respondent had engaged two law firms to tackle the arduous tasks involved.<sup>89</sup>

*Appeal dismissed with costs.*

**Legislation considered:**

Births and Deaths Registration Act, Cap 309, section 12

Civil Procedure Rules, SI 71-1, Order 8 Rule 18

Evidence Act, Cap 6, section 136

Judicature (Court of Appeal Rules) Directions, SI 13-10, rules 30, 86 (1),102

Parliamentary Elections Act, No. 17 of 2005, section 61

Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2, rules 13, 15 and 17

**Cases cited:**

Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997

Kizza Besigye vs. Yoweri Kaguta Museveni and Another, Presidential Election Petition No. 1 of 2001

Narcensio Begumisa and Others vs. Eric Tibebaga, Supreme Court Civil Appeal No. 17 of 2002

*Mr. Hassan Kamba, Mr. Musa Sekaana and Mr. Wakibi Nasur for appellant*

*Mr. Ambrose Tebyasa and Mr. Evans Ochieng for 1<sup>st</sup> respondent*

*Mr. Joseph Kyazze and Mr. Sserunjogi Nasser for the 2<sup>nd</sup> respondent*

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<sup>89</sup> Court also cited Rule 27 of the Parliamentary Elections (Election Petitions) Rules, S.I. 141-2 on the issue of costs in parliamentary election matters. The provision reads, "All costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the court may determine."

# Nakato Mary Annet vs. Babirye Veronica Kadogo and Electoral Commission

(Coram: Kasule, Barishaki and Mugamba JJ A)

Election Petition Appeal No. 89 of 2016

August 7, 2017

(Arising from Election Petition No.18 of 2016 (High Court of Uganda at Jinja, decision of Godfrey Namundi J.)

***Burden and standard of proof in election petitions**—Burden on petitioner—Standard on balance of probabilities—Meaning of ‘proof to the satisfaction of court’—Rationale.*

***Electoral offences**—Bribery—Establishment of bribery—Proof of a single act of bribery—Effect on election results—Burden of proof on petitioner to adduce cogent evidence without contradictions—Requirement of corroboration.*

***Principle-agent relationship in election petitions**—Proof of agency relationship—Proof of relationship in cases of bribery—Credible evidence to be adduced not mere allegations—Requirement for corroboration of evidence.*

The appellant, the 1<sup>st</sup> respondent and Nawegulo Sarah contested in the elections for Woman Member of Parliament for Buyende District held on the 9<sup>th</sup> of March 2016. The 1<sup>st</sup> respondent emerged winner and was declared as such by the 2<sup>nd</sup> respondent.

The appellant being dissatisfied with the results of the election petitioned the High Court contending that the election was marred with illegalities and malpractices by both respondents and as such did not comply with the electoral laws.

The trial court dismissed the petition with costs and held that the election complied with the laws and principles governing elections and that there was no non-compliance that had a substantial effect on the outcome of the election. The appellant still discontented appealed.

## HELD:

1. Section 61 (1) and (3) of the Parliamentary Elections Act No. 17 of 2005 required that grounds had to be proved first to the satisfaction of court and second on a balance of probabilities. The satisfaction of court and balance of probabilities went hand in hand. The balance of probabilities in election petitions was higher than that in ordinary civil suits though not beyond reasonable doubt.<sup>90</sup>
2. Elections petitions were of critical importance to the public and raising mere suspicion was not enough. Satisfaction of court was key especially where there were allegations

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<sup>90</sup> Citing *Kamba Saleh Moses vs. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal No. 27 of 2011 and *Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (dictum of Odoki CJ).



of illegal practices and offences. No court could be satisfied if they were in a state of reasonable doubt.<sup>91</sup> In the instant case the requisite high standard was applied, and the trial judge was correct to have found that the evidence on record relating to bribery was not sufficient to prove the allegations to the satisfaction of court.

3. Proof of a single act of bribery to the required standard by or with the knowledge and cost or approval of candidate, however significant, is sufficient to invalidate the election. There was no evidence from people who were alleged to have received the donations from the respondent and as to whether they were registered voters.
4. It is trite law that to succeed on an alleged act of bribery by an agent, one must adduce evidence which proves the existence of the agency relationship. Evidence was necessary to prove knowledge, consent and approval by the candidate of the acts of the alleged agent. The one who alleges an agent or principal relationship must adduce credible evidence to prove that relationship. It cannot be a matter of mere alleging.
5. Bribery in election petitions is a grave illegal practice which must be given serious consideration. Cogent and credible evidence must be adduced in proof and not mere raising of suspicion.
6. The trial court's requiring corroboration of evidence was done as an endeavour on its part to determine whether it could place any credibility on the evidence. It rightly evaluated in detail all the evidence and gave its reasons for rejecting the same.

*Appeal dismissed.*

*Appellant to bear the costs of the appeal and in the lower court.*

**Legislation considered:**

Parliamentary Elections Act, No. 17, 2005, section 61 (1) and (3)

**Cases cited:**

Achieng Sarah Opendi and Election Commission vs. Ochuro Nyakecho Keziah, Election Petition Appeal No. 39 of 2011

Blyth vs. Blyth [1966] AC 643

Joy Kabatsi Kafura vs. Anifa Kawoya Bangirana, Court of Appeal, Parliamentary Elections Appeal No. 25 of 2007

Kamba Saleh Moses vs. Hon. Namuyangu Jeniffer, Election Petition Appeal No. 27 of 2011

Kizza Besigye vs. Museveni Yoweri Kaguta and the Electoral Commission, Presidential Petition No. 1 of 2001

Mukasa Harris vs. Lulume Bayiga, Election Petition Appeal No. 18 of 2007.

Nsubuga vs. Kavuma [1978] HCB 307

Pandya vs. R [1957] EA 336

Toolit Simon Akecha vs. Oulanya Jacob L'okori and another, Election Petition Appeal No. 19 of 2011

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<sup>91</sup> Citing *Blyth vs. Blyth* (1966) AC 643 (dictum of Lord Denning).

*Mr. Allan Nshimye and Mr. Robert Kirunda for appellant  
Mr. Galisonga and Mr. John Isabirye for 1<sup>st</sup> respondent  
Mr. Enoch Kugonza for 2<sup>nd</sup> respondent*

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## Christopher Acire vs. Reagan Okumu and Electoral Commission

Court of Appeal (Coram: Buteera, Egonda-Ntende and Musoke, JJ A)

Election Appeal No. 9 of 2015

August 16, 2017

(Arising from Election Petition No.4 of 2016 (High Court of Uganda at Gulu, decision of David Matovu, J.)

***Setting aside an election***—*Grounds for setting aside an election.*

***Electoral offences***—*Defamation—Establishment of defamation as electoral offence—Effect on results of election.*

***Costs in election petitions***—*Award thereof—Costs at discretion of court—Election matters are ones of national importance.*

The appellant, the 1<sup>st</sup> respondent and three others contested for the position of Aswa County Constituency Member of Parliament. The 2<sup>nd</sup> respondent declared the 1<sup>st</sup> respondent the winner, with 16,859 votes compared to the appellant's 5,316 votes. The appellant's petition to set aside the 1<sup>st</sup> respondent's election was dismissed by the High Court.

### HELD:

1. The grounds for settling aside an election are stipulated in section 61 (1) of the Parliamentary Elections Act;<sup>92</sup> that is to say: (i) non-compliance with electoral laws which has a substantial effect on the results of the election (ii) that another person won the election (iii) illegal practices and offences and (iv) lack of qualifications.
2. The law on parliamentary elections is not limited to the Parliamentary Elections Act No. 17 of 2005 but extends to orders of court which have the force of law in governing elections. In the instant case, there had been an order by the High Court requiring the appellant to be registered as the flag bearer for the Forum for Democratic Change. Although this order failed to be implemented by the 2<sup>nd</sup> respondent, it had been stayed by the Court of Appeal. There was nothing from the Court of Appeal to indicate that that the stay had lapsed. In those circumstances, the 2<sup>nd</sup> respondent could not be

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<sup>92</sup> In terms of that provision: 'The election of a candidate as a Member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the Court:- (a) non-compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the noncompliance and the failure affected the result of the election in a substantial matter; (b) that a person other than the elected won the election; (c) that an illegal practice or any other offence under this Act was committed in connection with the election by the candidates personally or with his or her knowledge, consent or approval; (d) that the candidate was at the time of his or her election not qualified or was disqualified for election as a Member of Parliament.'

faulted for not implementing the High Court order. This is established under section 73 (1) and (2) of the Parliamentary Elections Act.

3. A petitioner must set out the statements alleged to be false, malicious or defamatory. Since words derive meaning from context or background, if such context or background is not provided- or a full statement not provided- their malicious or defamatory effect may be difficult to discover. These particulars also allow the respondents to know what case they have to defend.<sup>93</sup> In the instant case, the appellant did not set out the alleged defamatory statements verbatim, as required. It was not enough to attach the full speeches, even if these were accompanied by their translation. He should have set out the alleged defamatory statements, accompanied by a translation from Langi to English, by an authorized translator. The failure in this regard rendered the claims unsustainable. In terms of section 73 (2) of the Parliamentary Elections Act No. 17 of 2005, however, it remained open to the appellant to pursue separate or further legal action in defamation. The charges relating to defamation were, therefore framed defectively.
4. The position in regards to costs is that established under rule 27 of the Parliamentary Petitions Rules, SI 141-2.<sup>94</sup> At the same time, election petitions are matters of national and/or political importance, a factor which a court should bear in mind while awarding costs.<sup>95</sup> In the present case, however, the court found no reason to interfere with the High Court's discretion in awarding costs as it did.

*Appeal dismissed.*

*Costs awarded to respondents in Court of Appeal and High Court.*

**Legislation considered:**

Parliamentary Elections Act, No. 17 of 2005, section 61 (1), 73 (1) and (2)

Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2, rule 27

**Cases cited:**

Kadama Mwogezaddembe vs. Gagawala Wambuzi, Election Petition No.1 of 2001

Kizza Besigye vs. Electoral Commission and YK Museveni, Presidential Election No. 1 of 2006

*Mr. Mugoya Martin and Mr. Bikala Rogers for the appellant*

*Mr. Wandera Ogalo for the 1<sup>st</sup> respondent*

*Mr. Isaac Bakayana for the 2<sup>nd</sup> respondent*

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<sup>93</sup> Citing *Rtd. Col. Dr. Kiiza Besigye vs. Electoral Commission and YK Museveni*, Presidential Election No. 1 of 2006 – dictum of Odoki CJ.

<sup>94</sup> This Rule is to the effect that: 'All costs of and incidental to the presentation of the petition shall be defrayed by the parties in such manner as and in such proportions as the court may determine'.

<sup>95</sup> Citing *Kadama Mwogezaddembe vs. Gagawala Wambuzi*, Election Petition No.1 of 2001, per Bamwine J ('There is another dimension to such petitions; the quest for better conduct of elections in future ... Keeping quiet over weaknesses in the electoral process for fear of heavy penalties by way of costs in the event of losing the petition, would serve to undermine the very foundation and spirit of good governance.'

**Amoru Paul and Electoral Commission vs. John Baptist Okello**

**Court of Appeal (Coram: Kavuma; DCJ, Barishaki and Owiny-Dollo, JJ A)**

**Election Appeal Nos. 39 and 95 of 2016**

**August 28, 2017**

(Arising from Election Petition No.2 of 2016 (High Court of Uganda at Lira, decision of Wilson Masalu Musene, J.)

**Handling of Declaration of Results (DR) forms**—Procedure for handling DR forms—Section 50 (1) and (2) of the Parliamentary Elections Act No.17 of 2015—Effect of failure to seal ballot box after counting votes.

**Tallying of results**—Failure to include results during tally—Effect thereof on the election—Excess or unaccounted for ballot papers—Substantial effect as a result of non-compliance with electoral laws.

**Voting materials**—Distribution thereof—Section 27 of the Parliamentary Elections Act No. 17 of 2005—Role of returning Officer—Failure to execute role.

**Affidavits**—Unsealed annexures to affidavits—Effect thereof.

**Tallying election results**—Signing of Declaration of Results (DR) forms by the Presiding Officer—Effect of unsigned DR forms.

**Tallying election results**—Presence of candidate or agent during tallying—Objection to counting—Effect—Procedure.

**Tallying election results**—Determination of invalid votes—Procedure.

**Electoral Offences**—Bribery—Ingredients of bribery—Proof of bribery—Effect thereof on the election—Number of witnesses required to prove a fact.

The 1<sup>st</sup> appellant and respondent were the only contestants for the position of Member of Parliament for Dokolo North Constituency. The 1<sup>st</sup> appellant was declared winner by the 2<sup>nd</sup> appellant, with a margin of 464 votes. The respondent challenged the result before the High Court. In a decision rendered on 8<sup>th</sup> July 2016, the court upheld the petition, nullified the election and ordered that fresh elections be held for that constituency.

**HELD:**

1. The procedure for handling Declaration of Results (DR) forms is set out in section 50 (1) and (2) of the Parliamentary Elections Act No.17 of 2015. Under the provisions, each Presiding Officer must fill several DR forms. Of these; (i) one copy is attached to the report book (ii) one retained for display at the polling station (iii) one sealed copy

enclosed in an envelope sent to the Returning Officer (iv) a copy given to each of the candidates' agents and (v) one copy deposited and sealed in the ballot box. The ballot box containing the results is to be sealed in the presence of the candidates or their agents. In the instant case, the Returning Officer did not receive the Declaration of Results forms for a particular polling station. This amounted to non-compliance with the law.

2. The Returning Officer could have used a Declaration of Results form, for that station, presented by the respondent. His failure to do so was an irregularity which resulted in the failure to include the results of that station in the final tally for the Constituency.
3. The position of the law is that an election should not be nullified unless the irregularities or non-compliance with the electoral law affected the results of the election in a substantial manner.<sup>96</sup> In the instant case, however, as the difference in votes obtained by the 1<sup>st</sup> appellant and respondent was only 16 votes, it could not be said that the irregularities in question had affected the results in a substantial manner.
4. Section 27 of the Parliamentary Elections Act No. 17 of 2005 requires every Returning Officer to, within 48 hours prior to the polling day, furnish each Presiding Officer in the District with; (i) a sufficient number of ballot papers to cover the number of voters likely to vote at the polling station (ii) a statement showing the number of ballot papers thus supplied, with the serial number indicated in that statement and (iii) any other necessary materials for the voters to mark the ballot papers and complete the voting process. This legal provision is intended to ensure that the election is transparent; that the materials are the right quantity to cover all the registered voters; and that they are delivered in time.
5. In the instant case, although at some polling stations the number of ballot papers issued had been misstated, there was no evidence that any of the excess ballots had been cast as votes for either candidate. There was no basis for imputing dishonesty on the part of the 2<sup>nd</sup> appellant, as it was human to err.
6. The critical legal question was whether any of the excess ballot papers had been cast in favour of any candidate.<sup>97</sup> The Presiding Officer had tallied the actual ballots cast, as was his duty under section 53 of the Parliamentary Elections Act No. 17 of 2005, read together with Article 68 (2) of the Constitution of the Republic of Uganda, 1995. None of the candidates' agents raised any objection or concern regarding the declared results.
7. The general position, under rule 8 of the Commissioner for Oaths Rules, was that all exhibits to affidavits had to be securely sealed to the affidavits under the seal of the Commissioner for Oaths, and marked with the serial number of the identification. However, this was a technicality which is curable under Article 126 (2) (e) of the

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<sup>96</sup> Citing *Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2006– dictum of Odoki CJ.

<sup>97</sup> Citing Article 68 (4) (b) of the Constitution; Section 47 (5) of the PEA, 2005 and *Ngoma Ngime vs. Electoral Commission and Hon Winnie Byanyima*, Electoral Petition Appeal No.11 of 2002 (dictum of Justice Byamugisha).

Constitution of the Republic of Uganda, 1995, as failure to comply with it would not occasion any injustice.<sup>98</sup>

8. Elections petitions are very important, and courts are especially enjoined to take a liberal view of affidavits so that petitions are not defeated on technicalities.<sup>99</sup> The trial court erred in not ignoring this technicality, and in refusing to consider the annexures in question.
9. It is trite law that the signing of Declaration of Results (DR) forms by the Presiding Officer is mandatory and failure to do so invalidates the result.<sup>100</sup> DR forms which are not signed cannot be relied on in tallying results.<sup>101</sup> The trial court therefore erred in relying on unsigned DR forms. The position of the law in this regard is provided under section 49 of the Parliamentary Elections Act No. 17 of 2005, which stipulates the circumstances under which a cast vote is deemed invalid.
10. Section 47 (3) of the Parliamentary Elections Act No. 17 of 2005 entitles a candidate to be present in person or through his or her agent at each polling station, and at the place where the Returning Officer tallies the votes for each candidate or conducts a recount under section 54. This is for the purposes of safeguarding the candidate's interests with regard to all stages of the counting, tallying or recounting processes.
11. Under section 48 of the Parliamentary Elections Act No. 17 of 2005, a candidate, his or her agent or any voter present is entitled to raise any objection during the counting of the votes, which had to be duly recorded by the Presiding Officer. In the instant case, none of the respondent's agents recorded any complaints or raised any objections. Rather, they signed Declaration of Results forms confirming the results from the various polling stations. It was not sufficient for them to depone in their affidavits that they made complaints to the Returning Officers and polling assistants which were not addressed. Cogent and sufficient evidence had to be produced to prove these allegations to the satisfaction of the court.
12. The offence of bribery is provided under section 68 (1) of the Parliamentary Elections Act No. 17 of 2005. Bribery is an offence committed by a person who gives or promises to give or offers money or valuable inducement to a voter, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, or as a reward to the voter for having voted in a particular way or abstained from voting.<sup>102</sup>

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<sup>98</sup> Citing *Egypt Air Corporation T/a Egypt Air Uganda vs. Suffish International Food Processors Ltd and Another*, Supreme Court Civil Application No.14 of 2000 and *Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2006 (dictum of Odoki CJ).

<sup>99</sup> Citing *Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2006 (dictum of Odoki CJ).

<sup>100</sup> Citing Section 47 (5) of the PEA; *Joy Kafura Kabatsi vs. Hanifa Kawooya*, Supreme Court Election Appeal No.25 of 2011 (dictum of Mulenga JSC) and *Kakooza John Baptist vs. Electoral Commission and Another*, Supreme Court Election Petition Appeal No.11 of 200 (dictum of Katureebe JSC).

<sup>101</sup> Citing *Kakooza John Baptist vs. Electoral Commission and Another*, Supreme Court Election Petition Appeal No.11 of 2007.

<sup>102</sup> Citing Black's Law Dictionary, 6<sup>th</sup> Edition.

13. The offence of bribery has three ingredients. There has to be evidence that; (i) a gift was given to a voter; (ii) the gift was given by a candidate or their agent; and (iii) it was given with the intention of inducing the person to vote.<sup>103</sup> Clear and unequivocal proof was required before a case of bribery is held to have been established. Suspicion was not sufficient, and the confession of the person alleged to have been bribed is not conclusive.<sup>104</sup>
14. Bribery is a grave illegal practice and must be given serious consideration. The standard of proof is required to be slightly higher than that of ordinary civil cases. It does not, however, require proof beyond reasonable doubt as in the case of criminal cases. What is required is proof to the satisfaction of the court.<sup>105</sup> The court is required to subject each allegation of bribery to thorough and high level scrutiny and to be alive to the fact that in an election petition, in which the prize is political power, witnesses might resort to telling lies in their evidence, in order to secure judicial victory for their preferred candidate.<sup>106</sup>
15. Although, in terms of section 133 of the Evidence Act, Cap 6, no particular number of witnesses is required to prove any particular fact,<sup>107</sup> it was not safe for the trial court to rely, with regard to the bribery allegation, upon the evidence of one witness. This was especially so since the court disregarded, without valid reasons, the evidence of another witness which controverted those allegations. The trial court ought to have looked for independent evidence from an independent witness to corroborate the evidence in question. There was no such evidence on record.

*Appeal upheld.*

*Decision and orders of High Court set aside.*

*1<sup>st</sup> Appellant declared to be the validly elected Member of Parliament for Dokolo North Constituency, Dokolo District.*

*Respondent to bear the costs of the appeal and those at the trial.*

**Legislation considered:**

Commissioner for Oaths Rules, 2015, rule 8

The Constitution of the Republic of Uganda, 1995, Articles 68 (2), 126 (2) (e)

Evidence Act, Cap 6, section 133

Parliamentary Elections Act, No. 17 of 2005, sections 27, 47 (3), 49, 50 (1) and (2), 53, 54 and 68 (1)

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<sup>103</sup> Citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001.

<sup>104</sup> Citing Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 15, Paragraph 695.

<sup>105</sup> Citing *Bakaluba Peter Mukasa vs. Namboozie Betty Bakireke*, Supreme Court Election Petition Appeal No.4 of 2009.

<sup>106</sup> Citing *Kamba Saleh Moses vs. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal Number 27 of 2011.

<sup>107</sup> Citing also *Wadada Rogers vs. Sasaga Isaiah Jonny and Electoral Commission*, Court of Appeal Election Petition No. 31 of 2011.



**Cases cited:**

Bakaluba Peter Mukasa vs. Nambooze Betty Bakireke, Supreme Court Election Petition Appeal No.4 of 2009

Joy Kafura Kabatsi vs. Hanifa Kawooya, Supreme Court Election Appeal No. 25 of 2011

Kakooza John Baptist vs. Electoral Commission and Another, Supreme Court Election Petition Appeal No. 11 of 2007

Kamba Saleh Moses vs. Namuyangu Jennifer, Court of Appeal Election Petition Appeal No. 27 of 2011

Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission, Supreme Court Presidential Election Petition No.1 of 2001

Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission, Supreme Court Presidential Election Petition No.1 of 2006

Wadada Rogers vs. Sasaga Isaiah Jonny and Electoral Commission, Court of Appeal Election Petition No. 31 of 2011

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## Acen Christine vs. Abongo E Elizabeth

Court of Appeal (Coram: Kavuma; DCJ, Barishaki and Mugamba, JJ A)

Election Appeal No. 58 of 2016

August 29, 2017

(Arising from Election Petition No.5 of 2016 (High Court of Uganda at Lira, decision of Jessica Naiga Ayebare, J.).

***Nominations—Qualifications for nominations to be elected Member of Parliament—Article 80(1) (c) of the Constitution of the Republic of Uganda, 1995 and section 4(1) (c) of the Parliamentary Elections Act No. 17 of 2005—Nominated Candidate possesses an ordinary certificate attained without having three (3) credit Units at Uganda Certificate of Education—Whether such a candidate qualifies for election as Member of Parliament—Verification of documents—Forgery of academic documents—Effect of forgery.***

***Burden and standard of proof in election petitions—Burden on petitioner—Standard of proof is on the balance of probabilities—Exception to these rules—Standard of proof in regards to forgery of academic documents.***

The High Court had set aside the appellant’s election, based on the fact that she obtained Grade 35 (Division ‘U’) in Primary Leaving Examinations and thus should not have proceeded to secondary school.

### HELD:

1. Article 80 (1) of Constitution of the Republic of Uganda, 1995 and section 4 (1) Parliamentary Elections Act, No. 17 of 2005 are to the effect that to be nominated as a Member of Parliament, one has to fulfill the following requirements; (i) be a citizen of Uganda (ii) a registered voter and (iii) having completed minimum formal education of Advanced Level or its equivalent.
2. At the relevant time (1996-2001) that is to say before the passage of the Education (Pre-Primary, Primary and Post-Primary) Act No.13 of 2008, there was no legal requirement that one should pass Primary Leaving Examinations before joining secondary school.
3. The National Council for Higher Education (NCHE) was correct to refuse to verify the appellant’s diplomas, since they were higher qualifications than Uganda Advanced Certificate of Education according to section 4 (13) of the Parliamentary Elections Act, No. 17 of 2005.<sup>108</sup>

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<sup>108</sup> In terms of that provision: ‘For avoidance of doubt, if a candidate has an advanced level certificate obtained in Uganda or qualifications higher than the prescribed qualification obtained in Uganda or obtained from the former University of East Africa or any of its constituent colleges, then, there shall be no need for the verification of his or her qualification by the National Council for Higher Education.’

4. The courts can investigate the decisions of administrative bodies, such as NCHE, even if their powers are expressly stipulated by Statute. This does not constitute usurpation of the power of those bodies.
5. Forgery of academic documents is criminal in nature and the standard of proof in this regard is 'beyond reasonable doubt', a higher standard than in election petitions according to section 5 (1) (b) of the Parliamentary Elections Act, No. 17 of 2005.<sup>109</sup> In so far as police investigations into the appellant's conduct in this regard were still ongoing, it could not be said that this high standard of proof had been met.
6. The general position in election petitions is that the petitioner must adduce cogent evidence to prove his or her case to the satisfaction of the court. An exception to this rule relates to situations where the authenticity of one's academic credentials is challenged. In that case, the burden of proving the authenticity of the impugned academic credentials rests on the person who relies on those credentials. The trial court was therefore correct to have shifted the burden of proof to the appellant. The appeal succeeds substantially.

*Judgment and orders of the lower court quashed and set aside.*

*Appellant declared to be validly elected Woman Member of Parliament of Alebtong District.*

*Costs to appellant in the Court of Appeal and High Court.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 80 (1) (c)

Parliamentary Elections Act No. 17 of 2005, sections 4 (1) (c), (13), 5 (1) (b)

**Cases cited:**

Abdul Balingira Nakendo vs. Patrick Mwondah, Supreme Court Election Appeal No. 9 of 2006

David Nicholas Gole vs. Loi Kageni Kiryapawo, Supreme Court EPA No 19 of 2008

Masiko Winifred Komuhangi vs. Winnie J Babihuga, Election Petition Appeal No. 9 of 2002

National Council for Higher Education vs. Anifa Kawooya, Supreme Court Civil Appeal No. 4 of 2011

Tom Butime vs. David Muhumuza and Electoral Commission, Court of Appeal Election Petition Appeal No. 11 of 2011

*Mr. Okello Oryem Alfred and Mr. Kenneth Engoru for the appellant*

*Mr. Mike Agwang Otim for the respondent*

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<sup>109</sup> This provides that: 'A person who forges any academic certificate, commits an offence and is liable on conviction to a fine not exceeding two hundred and forty currency points or imprisonment not exceeding ten years or both.'

**Wakayima Musoke Nsereko and Electoral Commission vs. Kasule Robert Sebunya**

**Court of Appeal (Coram: Kavuma; DCJ, Barishaki and Obura, JJ A)**

**Election Petition Appeal Nos. 50 and 102 of 2016**

**September 15, 2017**

(Arising from Election Petition No.4 of 2016 (High Court of Uganda, decision of Vincent Okwanga, J.).

**Registered Voter**—*Proof of a registered voter—Section 1 of the Parliamentary Elections Act, No. 17 of 2005—Candidate with a National Identity Card as evidence of being a registered voter—Proof is by a person’s name appearing on the National Voters’ Register.*

**Burden of proof**—*Proof of authenticity of academic documents—Disparity of names on academic documents—Nominated as Wakayima Musoke Nsereko while academic documents present Hannington Musoke—The intending candidate for elections bears the burden to show that he or she has authentic academic documents.*

**Pleadings**—*Filing subsequent pleadings in election petitions—Subsequent pleadings are filed with leave of court—Rule 18 (2) of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules SI 141-2.*

**Declaration of results forms**—*Right of candidate to retain copies of Declaration of Results (DR) Form—Section 50 of the Parliamentary Elections Act—Certification of DR Forms—Electoral Commission cannot certify DR Forms using the candidates copies without any other copies for comparison.*

**Nullification of an election**—*Election can be nullified for non-compliance with the electoral law Substantial effect—Meaning of “affecting the election in a substantial manner”—Whether 17,239 registered voters in all 244 affected polling stations whose results were cancelled affected the result of the election in a substantial manner.*

**Costs**—*Certificate of costs to counsel—Certificate to more than one advocate—Reasons for granting a certificate to more than one advocate—Instance where notice of instructions is filed by advocates from two law firms.*

The respondent, 1<sup>st</sup> appellant and 4 Others contested for the position of Member of Parliament for Nansana Municipality, Wakiso District. The 1<sup>st</sup> appellant was declared winner, with 25,053 votes compared to the respondent’s 23,415 votes.

The respondent filed an election petition challenging the election of the 1<sup>st</sup> appellant as Member of Parliament for Nansana Municipality, Waiso District. In the petition, the respondent alleged that the 1<sup>st</sup> appellant was nominated irregularly because he was not a registered voter as his name did not appear on the voters’ register. It was also alleged that

the 1<sup>st</sup> appellant did not possess the formal minimum educational qualifications of Advanced Level standard or its equivalent. According to the respondent, the election was null and void or invalid as it contravened Article 80 (1) (b) and (c) of the Constitution of the Republic of Uganda, 1995.

The High Court nullified the 1<sup>st</sup> appellant's election and declared the respondent duly elected Member of Parliament for Nansana Municipality and a certificate of two counsel.

The appellants dissatisfied with the decision of the trial court appealed. The issues were:-

- (1) whether the 1<sup>st</sup> appellant was nominated in error
  - a. whether the 1<sup>st</sup> appellant was a registered voter
  - b. whether the 1<sup>st</sup> appellant has the minimum academic qualifications of A Level or its equivalent
- (2). whether there was non-compliance with electoral laws when the results of 2 polling stations were not tallied;
- (3). whether the trial court erred in rejecting the evidence of the results in the 24 polling stations;
- (4). whether the cancellation of the results of 24 polling stations affected the outcome of the election in a substantial manner;
- (5). whether the trial court erred to declare the respondent as the duly elected Member of Parliament for Nansana Municipality; and.
- (6). whether the trial court erred to award a certificate of 2 counsel

The National Identity Card of the 1<sup>st</sup> appellant attached to his pleadings bore the name *Musoke* as a surname with *Hannington Nsereko* as the given names. It is the same name that appeared on the National Voters register for Nansana Municipality Constituency under Nansana West 11 village. However, he was nominated as *Wakayima* as a surname and *Musoke Nsereko* being other names. Counsel for the 1<sup>st</sup> appellant submitted that it was National Identification Authority that omitted *Wakayima* as part of his name when his National Identity Card was produced.

There was disparity in the name of the 1<sup>st</sup> appellant in the academic qualifications that he produced in evidence. The Uganda Certificate of Education and Uganda Advanced Certificate of Education Certificate had the name *Musoke Hannington*.

Counsel for the respondent alleged that the appellants' supplementary affidavits were filed without leave of court.

Counsel for the 2<sup>nd</sup> appellant did not dispute results from 24 polling stations were not found in the ballot box and were cancelled. However, counsel contended that the irregularity was negligible. Counsel argued that the results should have been considered because they came from the respondent who was considered a legitimate source under section 50(1)(1)(d) of the Parliamentary Elections Act, No.17 of 2005.

**HELD:**

1. According to Article 80 (1) of the Constitution of the Republic of Uganda, 1995 and sections 1 (1) and 4 (1) of the Parliamentary Elections Act, No. 17 of 2005, *inter alia*; to

stand for Member of Parliament (MP), a candidate must be a registered voter. In the instant case, the 1<sup>st</sup> appellant's National Identity Card bore the name 'Musoke' as surname and 'Hannington Nsereko' as the given names. It was the same name that appeared in the National Voter's register for Nansana Municipality Constituency. However, he was nominated as 'Wakayima' as surname and 'Musoke Nsereko' being other names. In the circumstances, he was not a registered voter and as such was not qualified for nomination and election as MP for that constituency. If he intended to use the name 'Wakayima Musoke Nsereko' who was not a registered voter, then he should have followed the requirements of section 36 of the Registration of Persons Act.

2. By the terms of section 1 (1) of the Parliamentary Elections Act, No.17 of 2005, conclusive proof of being a registered voter is by evidence of the person's name appearing in the National Voter's Register, and not by possession of a National Identity Card. By virtue of section 66 of the Registration of Persons Act, 2015, the National Identity Card is only used to cross check and confirm particulars in the Voters' Register before a voter could be allowed to vote. The National Identification Card does not replace or do away with the Voter's Register, which was a special document prepared by the 2<sup>nd</sup> appellant.<sup>110</sup>
3. The burden of proof lay with the 1<sup>st</sup> appellant prove that his academic credentials were genuine. Where the authenticity of a candidate's certificates is questioned, the burden is upon that candidate to show that he has authentic certificates.<sup>111</sup> In the instant case, the 1<sup>st</sup> appellant was nominated as 'Wakayima Musoke Nsereko' while his academic credentials bore the name 'Hannington Musoke'. This disparity, coupled with two contradictory letters written by the Headmaster of the relevant school, raised suspicion as to the authenticity of the 1<sup>st</sup> appellant's academic qualifications. He failed to discharge the burden of proving that the questioned certificates were authentic.
4. The variation in the names was not minor. The 2<sup>nd</sup> appellant should have done more than it did during the nomination of the 1<sup>st</sup> appellant, and should have rejected his nomination.
5. The trial court was correct to hold that the total number of 17,239 registered voters in all the 24 affected polling stations whose results were cancelled; on account of unreliable Declaration of Results forms affected the outcome of the election in a substantial manner.
6. According to section 63 (4) of the Parliamentary Elections Act, No.17 of 2005, the High Court has the power to declare that a candidate, other than the person as declared elected, was validly elected. In declaring the respondent, the validly elected Member of Parliament (MP), the trial court did not thereby disenfranchise the voters in the constituency. Having found that the 1<sup>st</sup> appellant was nominated in error, with him off the scene, the respondent was the person with the highest number of votes that the people of Nansana municipality voted for as their MP. In accordance with section 63

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<sup>110</sup> Citing *Hon. Otada Sam Amooti Owor vs. Taban Idi Amin*, EPA No.93 of 2016.

<sup>111</sup> Citing *Abdul Balingira Nakendo vs. Patrick Mwendah*, Supreme Court Election Appeal No. 9 of 2006 – dictum of Katureebe JSC.

(6)(b), the respondent was the person entitled to be declared the duly elected MP for the constituency. The trial court could not be faulted in duly declaring him so.

*Appeal substantially fails.*

*1<sup>st</sup> appellant nominated in error for Member of Parliament, on account of not being a registered voter, and not possessing the minimum academic qualifications.*

*There was substantial non-compliance with electoral law when the results for 24 polling stations were not tallied.*

*Respondent was the duly elected Member of Parliament for Nansana Municipality Constituency.*

*Certificate of two counsel granted in respect of counsel who appeared for the respondent.*

*Appellants to bear the costs of the appeal and of proceedings in lower court.*

**Legislation considered:**

The Constitution of the Republic of Uganda 1995, Article 1(4), 2(1), 59(1) & (1), 61, 80(1)

Evidence Act, Cap 6, sections 75 and 76

Parliamentary Elections Act, No.17 of 2005, sections 1(1), 4 (1), 12 (2) (b), 39 (1) (a), 50 (3) (g), 63 (4)

Parliamentary Elections (Interim Provisions) (Election petitions) Rules, SI 141-2, rule 17

Registration of Persons Act, No. 4 of 2015, section 3

**Cases cited:**

Abudul Bangirana Nakendo vs. Patrick Mwondah, Supreme Court Election Petition Appeal No. 9 of 2006

Acheng Sarah Opendi and Electoral Commission vs. Ochwo Nyakecho Keziah, Election Petition Appeal No. 39 of 2011.

Arumadri John Drazu vs. Etuuka Isaac Joackino and the Electoral Commission, Petition Appeal No. 37 of 2016

Butime Tom vs. Muhumuza David and Electoral Commission, Court of Appeal Election Petition Appeal No. 11 of 2011

Commissioner General of Uganda Revenue Authority vs. Meera Investments Limited, Supreme Court Civil Appeal No. 22 of 2007

Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997

Machete Maomu Peter vs. Electoral Commission and Another, Election Petition Appeal No. 47 of 2016

Mbaghadi Fredrick Nkayi and Electoral Commission vs. Nabwiso Frank Wilberforce, Election Petition Appeal No. 14 and 16 of 2011

Muhindo Rehema vs. Winfred Kiiza and the Electoral Commission, Election Petition No. 29 of 2011

Mwiru Paul vs. Igeme Nathan Samson Nabeta and Electoral Commission, Election Petition No. 6 of 2011

Namujju Dionizia Cissy and Another vs. Martin Kizito Sserwanga, Election Appeal No. 62 of 2016

Oboth Markson Jacob vs. Otiam Otaala Emmanuel, Election Petition Appeal No. 38 of 2011

Ongiis James Micheal vs. the Electoral Commission and Ebukalin Sam, Election Petition No. 0008 of 2006

Opio Joseph Linos and the Electoral Commission vs. Okabe Patrick and Others, Court of Appeal, Election Petition No. 87 of 2016

Otada Sam Amooti Owor vs. Taban Amin, Election Petition Appeal No. 39 of 2016

Sekigozi Steven vs. Sematimba Simon Peter, Election Petition No. 10 of 2016

The Chief Electoral Officer vs. the Electoral Commission, Case No. 4 of 2009 (South Africa)

Waligo Aisha Naluyati vs. Sakindi Aisah and Electoral Commission, Court of Appeal Election Petition No. 29 of 2016

Yeri Ofwono Appolo vs. Tanna Sanjay, Election Petition Appeal No. 9 of 2011

*Mr. Edmand Wakida, Mr Joseph Kyazze and Mr. Richard Latigo Komakech for 1<sup>st</sup> appellant*

*Mr. Brian Kabayiza for 2<sup>nd</sup> appellant*

*Mr. Musa Ssekana and Mr Lule Kennedy Ben for respondent*

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**Sematimba Peter Simon and National Council for Higher Education vs. Sekigozi Stephen**

**Court of Appeal (Coram: Owiny-Dollo; DCJ, Barishaki and Bamugemereire, JJ A)**

**Election Petition Appeals Nos. 8 and 10 of 2016**

**September 18, 2017**

(Arising from Election Petition No.10 of 2016 (High Court of Uganda at Kampala, decision of Lydia Mugambe, J.)

***Burden of proof in election petitions***—*Burden of proof lies on petitioner—Where the authenticity of the 1<sup>st</sup> respondent's qualification was challenged—Shift of burden on respondent to prove that his or her qualifications were authentic.*

***Evidence***—*Cogent—Meaning thereof.*

***Nominations***—*Qualifications for a candidate to be nominated as a candidate for Member of Parliament—Section 4(1)(c) of the Parliamentary Elections Act, No. 17 of 2005 and Article 80(1)(c) of the Constitution of the Republic of Uganda, 1995—Determining Equivalence to Advanced Level standard—Role of National Council for Higher Education (NCHE) in determining qualifications and their equivalence—Verification of documents—Procedure for applying for a certificate of equivalence.*

***Costs***—*Award of costs—Award of costs is discretionary but such discretion must be exercised judiciously.*

The 1<sup>st</sup> appellant, the respondent and three others contested for the position of Member of Parliament for Busiro South Constituency. The Electoral Commission declared the 1<sup>st</sup> appellant winner of the said election. The respondent dissatisfied with the results filed a petition contending that there were electoral malpractices committed by the 1<sup>st</sup> and 2<sup>nd</sup> appellants, lack of authenticity and validity of the 1<sup>st</sup> appellant's academic qualifications which the 2<sup>nd</sup> appellant relied on to issue a certificate of advanced level standard or its equivalent. Judgment was given in favour of the respondent. Being dissatisfied with the decision, the appellant appealed.

**HELD:**

1. The general position of the law in election petitions was that the petitioner had to adduce cogent evidence to prove his or her case on a balance of probabilities to the satisfaction of the court. It had to be that kind of evidence which was free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's favour.<sup>112</sup>

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<sup>112</sup> Citing Section 61(3) of the PEA; *Masiko Winifred Komuhangi vs. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002) (dictum of Kikonyogo DCJ.) and *Paul Mwiru vs. Hon Igeme Nathan Nabeta Samson and 2 Others*, Court of Appeal Election Petition Appeal No.6 of 2011.

2. 'Cogent' means compelling or convincing.<sup>113</sup>
3. The relevant law in regards to burden of proof is that under Article 80 (1) (c) of the Constitution of the Republic of Uganda, 1995 and section 4(1)(c) of the Parliamentary Elections Act, No. 17 of 2005. The burden of proof generally lies with the appellant. However, in the instant case, where the authenticity of the 1<sup>st</sup> respondent's qualification was challenged, the burden then lay on him to prove that his qualifications were authentic.<sup>114</sup>
4. The National Council for Higher Education (NCHE) is required to determine equivalence in the manner stipulated by law, and the court should not ordinarily interfere with the NCHE's decision to equate, where the qualifications presented are valid. But where qualifications presented for equating are challenged, the court is obliged to enquire into the validity of the same, and not the equating. In the event that the court finds that the decision taken by the NCHE is irrationally made or was not based on proper diligence, the court has the power, and obligation, to so declare.<sup>115</sup>
5. Having faulted the National Council for Higher Education (NCHE) for not being diligent in authenticating and validating the 1<sup>st</sup> appellant's diploma, the trial court's declaration was consistent with the power of court stipulated in *Nakendo's case*. However, the trial court erred in law and in fact when it went ahead to further hold and declare that the certificate of equivalence issued by the NCHE was illegal, invalid, null and void.
6. The 1<sup>st</sup> respondent produced his original diploma certificate in the trial court, and a former classmate swore an affidavit attaching her own certificate. It was also an agreed fact that the Pacific Coast Technical Institute USA closed in 1989. The awarding institute would have been the best placed to have certified the 1<sup>st</sup> appellant's certificate but that was impossible in the circumstances. In addition, the respondent did not lead any evidence on his part to prove that the 1<sup>st</sup> appellant's qualification was recalled by the awarding institution.<sup>116</sup> Failure by the respondent to prove fraud in the acquisition of the 1<sup>st</sup> appellant's documents left them intact, valid and presentable.
7. The argument that the graduation photographs presented by the 1<sup>st</sup> respondent's classmate were not reliable- because they did not show where they were taken or what course the 1<sup>st</sup> appellant was graduating in- did not have merit: '... because one cannot expect a photograph to reveal all the details that counsel for the respondent is asking for. The classmate was also never cross-examined, which meant that her evidence was not being challenged.

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<sup>113</sup> Citing Black's Law Dictionary, 6<sup>th</sup> Edition.

<sup>114</sup> Citing *Abdul Balingira Nakendo vs. Patrick Mwendah*, Election Appeal No. 9 of 2006– dictum of Katureebe JSC.

<sup>115</sup> Citing *Gole Nicholas Davis vs. Loi Kagani Kiryapawo*, SCEPA No.19 of 2007 (dictum of Katureebe JSC.) and *Abdul Balingira Nakendo vs. Patrick Mwendah*, Election Appeal No. 9 of 2006– dictum of Katureebe JSC.

<sup>116</sup> Citing *Joy Kabatsi vs. Hanifa Kawooya and the Electoral Commission*, Election Petition Appeal No. 25 of 2008.

8. The Parliamentary Elections Act No. 17 of 2005 did not provide the procedure for applying for a certificate of equivalence. Section 100 empowered the Minister to make regulations in that regard, which had not been made. However, the University and Other Tertiary Institutions Act empowered the National Council for Higher Education to regulate its own operations, which it had done through Rules made in 2007.
9. The award of costs is at the discretion of the court but such discretion must be exercised judiciously. The trial court during its analysis and evaluation of evidence pointed out mistakes of the 2<sup>nd</sup> appellant. It was the 2<sup>nd</sup> appellant that provided the 2<sup>nd</sup> appellant with application forms made under rules of 2005 which were repealed and did not require certified forms and it did very little in verification of the qualifications of the appellant. The trial court exercised its discretion judiciously in the award of costs against the 2<sup>nd</sup> appellant.

*Appeal allowed.*

*Judgment and orders of the lower court set aside.*

*1<sup>st</sup> appellant awarded costs of the appeal and of proceedings in the lower court.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 80 (1)(c)

Parliamentary Elections Act No. 17 of 2005, section 4(1)(c)

**Cases cited:**

Abdul Balingira Nakendo vs. Patrick Mwondah, Election Petition Appeal No. 9 of 2006

Gole Nicholas Davis vs. Loi Kageni Kiryapawo, Election Petition Appeal No.19 of 2007

Joy Kabatsi vs. Hanifa Kawooya and the Electoral Commission, Election Petition Appeal No. 25 of 2007

Masiko Winifred Komuhangi vs. Winnie J Babihuga, Election Petition Appeal No. 9 of 2002

Paul Mwiru vs. Hon Igeme Nathan Nabeta Samson and 2 Others, Court of Appeal Election Petition Appeal No.6 of 2011.

*Mr. Kandebe Ntambirweki, Mr. Nsubuga Sempebwa, Mrs. Christine Ntambirweki, Ms.*

*Barbara Akulo Oboke and Mr. Arnold Kimara counsel for the appellant*

*Mr. Ben Wagabaza and Mr. Asuman Nyonyintono for 2<sup>nd</sup> appellant*

*Mr. Renato Kania, Mr. Rashid Semambo and Mr. Kenneth Muhangi for the respondent*

**Lumu Richard Kizito vs. Mukumbi Kamyia Henry and the Electoral Commission**

**Court of Appeal (Coram: Kavuma; DCJ, Barishaki and Owiny-Dollo, JJ A)**

**Election Petition Appeal No. 109 of 2016**

**September 27, 2017**

(Arising from High Court Election Petition No. 12 of 2016 (High Court at Kampala, presided over by Joseph Murangira, J.)

***Duty of first appellate Court***—Duty to review the evidence before the trial court and arrives at its own conclusions—Rule 30(1)(a) of the Judicature (Court of Appeal Rules) Direction, SI 13-10.

***Standard of Proof in election petitions***—Grounds for setting aside an election must be proved to the satisfaction of court and on a balance of probabilities—Section 61(3) of the Parliamentary Elections Act No. 17 of 2005—Proof of grounds for setting aside election of a Member of Parliament.

***Eligibility of a candidate***—Eligibility to contest as Member of Parliament—Candidate should be a registered voter.

***Recusal of a judge***—Whether recusal of judge requires the new allocated judge to hear the matter *de novo*—Proceeding with the matter *de novo* is an exercise of discretion which can only be set aside if satisfied that that discretion was not exercised judiciously.

***Evidence***—Evidence of partisan witnesses—Evidence of partisan witnesses to be safely relied upon, it must be corroborated.

***Nominations***—Nominations to be elected Member of Parliament (MP)—Qualifications to be nominated candidate for elections of MP—Article 80 of the Constitution of the Republic of Uganda, 1995 and Section 4(1) of the Parliamentary Elections Act No. 17 of 2005—Candidate not registered in the Constituency he or she is standing as a candidate—Effect thereof on nominations.

***Service and notice of presentation of petition***—Period of service of notice of presentation of petition—Service of process in election petitions is directory rather than mandatory—Failure to effect service—Effect thereof on proceedings—Service out of time—Effect of service out of time.

***Advocates***—Advocates professional Conduct—Advocate appearing as counsel in a matter where he or she is required to give evidence—Regulation 9 of the Advocates (Professional Conduct) Regulations, SI 262-2.

***Costs***—Award of costs in election petitions—Costs at court's discretion.

The appellant and the respondent were both candidates for the position of Member of Parliament for Mityana South Constituency in Mityana District. The 1<sup>st</sup> respondent was gazetted as the winner of the election with 10,661 votes against the appellant's 6,407 votes (representing a margin of 4,254 votes, or a 24.9% lead).

Dissatisfied, the appellant petitioned the High Court to nullify the election on the grounds, *inter alia*, that: (i) the 1<sup>st</sup> respondent was not a registered voter within Mityana South constituency and was therefore not validly nominated; (ii) the 1<sup>st</sup> Respondent did not resign his position as Resident District Commissioner for Luwero District; (iii) the electoral process had not been conducted in accordance with electoral laws and principles; and that (iv) the 1<sup>st</sup> respondent had, personally or through his agents acting with his knowledge, consent, or approval, committed numerous electoral offences.

At first, the petition was assigned to Vincent Okwanga, J., but he later recused himself and adjourned the hearing of the petition *sine die* pending rea-allocation to another judge. The petition was subsequently allocated to Joseph Murangira, J., who decided to hear it afresh (*de novo*).

In a ruling on preliminary objections, Murangira, J., struck out the petition on the grounds that: i) there was late service; and that ii) having expunged 31 of the petitioner's affidavits (as well as 10 of the 1<sup>st</sup> respondent's) for violating the Oaths Act and the Illiterates' Protection Act, the petitioner was left without credible and sufficient evidence (only 4 affidavits in support of the petition remained) on record as would be adequate to discharge the statutory burden of proof compared to the many affidavits and documentary evidence that remained in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**HELD:**

1. It is the duty of the first appellate court to review the evidence on record and reconsider the materials before the trial judge so that it arrives at its own conclusion as to whether the finding of the trial court can be upheld.<sup>117</sup>
2. The election of a Member of Parliament (MP) shall only be set aside on grounds stipulated under section 61 of the Parliamentary Elections Act No. 17 of 2005, if those grounds are proved to the satisfaction of court. The grounds for setting aside the election of an MP have to be proved on the basis of a balance of probabilities.
3. The requirements for eligibility of a candidate to contest for election as a Member of Parliament were provided in Article 80 of the Constitution of the Republic of Uganda, 1995 and section 4 of the Parliamentary Elections Act, No. 17 of 2005.
4. The decision of the replacement of a trial judge to proceed with the matter *de novo* was an exercise of discretion which could only be set aside if satisfied that that discretion had not been exercised judiciously, and not merely on the basis that the

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<sup>117</sup> Cited: Rule 30(1a) of the Judicature (Court of Appeal Rules) Directions; *Kifamunte Henry vs. Uganda*, Supreme Court Criminal Appeal No. 10 of 1997; and *Pandya vs. R* [1957] EA 336.

court of appeal would have exercised the same discretion differently.<sup>118</sup> Therefore, it is not true that only an appellate court can order that a trial be heard *de novo*.

5. It had not been shown that in making his decision to hear the matter *de novo*, the trial judge took any irrelevant circumstances into account or that he failed to consider any relevant circumstances. On the contrary, the trial judge had heard the parties on the matter and considered that the actual hearing of the petition had not yet commenced and that the trial judge had recused himself because of certain criticisms of his previous rulings by counsel for the 1<sup>st</sup> respondent. He had therefore decided to hear the matter *de novo* upon reasonable consideration of the circumstances.
6. In deciding to hear the matter *de novo* and thereby render moot the previous court's rulings, the new trial court did not err. While the appellant lost a procedural advantage from the rendering moot of one of the previous court's rulings, this was not a valid point for stifling the new trial court's discretion since the advantage was born of the 1<sup>st</sup> respondent's failure to meet the previous trial court's timelines for filing affidavits. It was not born of the affidavits being inherently defective because of violation, for example, of the Oaths Act or the Illiterates Protection Act. Thus, there was no miscarriage of justice; only the loss of a procedural advantage that would have weakened the defence. In any case, the new trial court's decision to strike out the petition for non-service (or late service) was not influenced by the affidavits in question. Additionally, the petitioner (appellant) bore the burden to affirmatively prove his case rather than rely on the weakness of the respondent's defence.
7. Once an order or decision is made to hear a matter *de novo*, all materials may be reconsidered and thus affidavits that had previously been expunged could be reconsidered. Additionally, previously made objections would have to be remade before the new trial court. Once the order to proceed *de novo* has been made, all the materials on court record can be reconsidered. The preliminary ruling expunging the said affidavits ceased to have any legal effect. Therefore, the appellant's argument that the trial court relied on expunged affidavits was not acceptable.
8. It was not true that the trial court evaluated the evidence that remained after he expunged most of the appellant's affidavits (with the appellant's concession) leaving only four affidavits, before concluding that the resultant petition was naked. (A false averment by the court that it, itself, later contradicts). The remaining affidavits in support of the petition, which were not expunged, spoke to allegations of non-compliance with electoral laws, and not to the validity of the 1<sup>st</sup> respondent's nomination as counsel for the appellant had argued. Counsel had, additionally, seemed to abandon the issue of noncompliance with electoral laws.

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<sup>118</sup> Followed *Wilson Kyakurugaha vs. Uganda*, Court of Appeal Criminal Appeal No. 51 of 2014 wherein the Court of Appeal itself stated that where it is not practicable or convenient for a single judge to conduct all the proceedings pertaining to a case, the new trial judge should initially determine, after hearing from the parties, whether or not the trial should proceed *de novo* or on the old record. Trial judge's interpretation of Section 20(2) of the Judicature Act, Cap. 13, to permit a hearing of the matter *de novo* also approved. Section 20(2) states that, "Subject to any written law, every proceeding in the High Court shall, so far as is practicable and convenient, be heard and disposed of by single judge..."

9. After more than 30 of the affidavits in support of the appellant's petition were expunged including all annexures thereto, this left it with averments that did not have any documentary proof to support them-including the claims that the 1<sup>st</sup> respondent was not a registered voter in Mityana South Constituency and that he had not resigned from his office as Resident District Commissioner for Luwero District at least 90 days prior to his nomination as a candidate. Two of the four unexpunged affidavits in support of the appellant's petition were sworn by his self-confessed supporters who were therefore partisan witnesses.
10. Although the Court of Appeal did not 'wholly endorse' the approach adopted by the trial court in concluding that the evidence comprised in the unexpunged affidavits was insufficient to support the petition and yet he was only determining preliminary objections rather than the merits of the petition, the Court of Appeal had itself evaluated the evidence on record and reached the same conclusion that the petition could not be evidentiary sustained.<sup>119</sup> The four unexpunged affidavits did not provide credible evidence to support the petition. They did not, at the least, even establish a prima facie case. If they had, a re-trial would have been ordered.
11. The trial court should have struck the petition out for late service; it should not have, however, dismissed it since he had not heard the evidence in the matter.
12. In response to the submission that the trial court denied the appellant the right to make rejoinders to the respondents' affidavits when it made a ruling on the merits and dismissed the petition prematurely, the Court of Appeal determined that the petition was struck out for late service of process and so the right to rejoin did not arise, and that even if it had arisen, there would be nothing to rejoin since a significant proportion of the unexpunged respondents' affidavits in reply had been intended to reply to the affidavits in support of the petition that had already been expunged. Thus, the prayer to rejoin was moot.
13. There was no evidence to corroborate that of two partisan deponents in support of the petition. Hence, the legal standard of proof could not be sustained by their evidence of disparate allegations of noncompliance.
14. The law does not require a parliamentary candidate to be a registered voter in the constituency where they stand. According to Article 80 of the Constitution of the Republic of Uganda, 1995 and section 4 of the Parliamentary Elections Act No. 17 of 2005, it is sufficient that a candidate is a registered voter anywhere in Uganda. If the framers of the law had intended for a parliamentary candidate to be a registered voter in the area where they stand, they would have expressly stated as much. It is not for court to re-write the provisions of the law and purport to introduce new requirements for eligibility to contest through a nuanced interpretation of the existing law.

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<sup>119</sup> Cited later on in the judgment: *Nsubuga Silvest Ssekutu vs. Kalibbala Chrles and Another*, Election Petition Appeal No. 70 of 2016, Court of Appeal.

15. The requirement that a parliamentary hopeful's nomination paper be signed by 10 registered voters from the constituency where they are nominated does not stretch so far as to require that the candidate be a registered voter in that constituency. Article 80 of the Constitution of the Republic of Uganda, 1995 does not leave Parliament any room to create additional requirements for eligibility of parliamentary candidates. Unless an amendment of the Constitution is validly undertaken.
16. Late service of the petition was not a legal and legitimate ground for striking out the Petition; The evidence on record indicated that it was plausible the 1<sup>st</sup> respondent was served on 8<sup>th</sup> April, 2016 but acknowledged service a few days later on 13<sup>th</sup> April, 2016; although it was also possible, on the other hand, that the process server lied about effecting service on 8<sup>th</sup> April, 2016. There was no clear basis for believing the 1<sup>st</sup> respondent over the un-cross-examined process server. Consequently, this was a question that should not have been determined in a preliminary objection.
17. The trial court erred in failing to follow the binding precedent of the Court of Appeal in *Muhindo Rehema vs. Winfred Kizza and the Electoral Commission, Election Petition Appeal No. 29 of 2011* which lays down the principle that service of process in election petitions is directory rather than mandatory and failure to effect service, especially where no injustice or prejudice is caused, will be a mere irregularity that does not vitiate the proceedings. The 1<sup>st</sup> respondent had not been affected by any defect in service and in fact filed his answer to the petition in a timely manner. The trial court should therefore have exercised his discretion to validate the late service "even though no such application was placed before him".
18. Counsel is barred from appearing, as an advocate, in a matter in which he or she is a potential witness according to regulation 9 of the Advocates (Professional Conduct) Regulations, S.I. 267-2.<sup>120</sup> In the present appeal, one of the advocates representing the 1<sup>st</sup> respondent had sworn an affidavit in support of the 1<sup>st</sup> respondent at the lower court and was therefore not supposed to have appeared as counsel even at the appellate stage.
19. The respondents' case in the instant court had been substantially conducted by counsel for the 1<sup>st</sup> respondent. In the circumstances, it would not be fair to award costs to the 2<sup>nd</sup> respondent for the appeal. Similarly, given the conduct of the 1<sup>st</sup> respondent's counsel as noted by the court, he did not deserve an award of costs in the instant appeal.

*Decision of the trial court upheld, but with his order dismissing the petition being substituted with an order striking the petition out. This appears to be an error. The Court of Appeal*

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<sup>120</sup> This Regulation states that, "No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an advocated from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears."



*determined that the petition should not have been struck out, since the High Court should have validated the appellant's alleged late service. On the question of evaluating the merits of the appellant's case based on the unexpunged four affidavits, the Court of Appeal had found that these were insufficient to prove the petitioner's (appellant's) case. The proper result should therefore have been a dismissal.*

*Appeal dismissed;*

*Because the appeal was substantially conducted by counsel for the 1<sup>st</sup> respondent, it would have been unfair to award costs to the 2<sup>nd</sup> respondent in relation to the appeal.*

*Because the 1<sup>st</sup> respondent's counsel flouted the Regulation against counsel appearing in a matter in which he or she is a potential or actual witness, costs would not be awarded there either.<sup>121</sup>*

**Legislation considered:**

Advocates (Professional Conduct) Regulations, S.I. 267-2, regulation 9

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 30

Parliamentary Election Act No. 17 of 2005, sections 4 (1) (c), 61 (1)

**Case cited:**

Ajay Kumar Goshal vs. State of Bihar, Criminal Appeal Nos 119-122 of 2017

Kasirye Zzimula Fred vs. Bazigatirawo Francis Amooti, Election Petition Appeal No 3 of 2016

Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997

Muhindo Rehema vs. Winfred Kizza and the Electoral Commission, Election Petition Appeal No. 29 of 2011

Nsubuga Silvest Ssekutu vs. Kalibbala Charles and Another, Election Petition Appeal No. 70 of 2016

Pandya vs. R [1957] EA 336

Wilson Kyakurugaha vs. Uganda, Court of Appeal Criminal Appeal No. 51 of 2014

Yohanna Nyawen vs. Jauro Mago (2016) LPELR 40825

*Mr. Muyizi Mulindwa and Mr. Luyimbazi Nalukoola for appellant*

*Mr. Joseph Luzige, Mr. Ahmed Kalule and Mr. David Mayinja Tebusweke for 1<sup>st</sup> respondent*

*Mr. Hamidu Lugoloobi for the 2<sup>nd</sup> respondent*

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<sup>121</sup> Regulation 9 of the Advocates (Professional Conduct) Regulations, S.I. 267-2, which states that, This Regulation states that, "No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an advocated from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears."

**Mulimba John vs. Onyango Ismail, the Electoral Commission and the Returning Officer, Electoral Commission**

**Court of Appeal (Coram: Kavuma; DCJ, Barishaki and Mugamba, JJ A)**

**Election Appeal No. 48 of 2016**

**September 28, 2017**

(Arising from Election Petition No.10 of 2016 (High Court of Uganda at Mbale, decision of Andrew Bashaija, J.)

***Election results—Falsification of results—Impact on overall outcome of the election.***

***Electoral offences—Defamation—What amounts to defamation—Proof thereof—Effect.***

***Principle-agent relationship—Nexus between candidate and impugned acts.***

The appellant and 1<sup>st</sup> respondent were among the candidates for the position of Member of Parliament for Samia Bugwe North Constituency. The 1<sup>st</sup> respondent was declared winner, with 16,284 votes compared to the appellant's 15,757 votes. The appellant challenged the results of the election before the High Court, which dismissed the petition, hence this appeal.

**HELD:**

1. Although there were some Declaration of Results forms which were not consistent with the results appearing on their faces, all was not lost since there were referral points such as the tally sheets and the testimonies of the agents. In any case, those documents with the fabricated entries were never considered in tallying the results. Whatever falsification might have occurred did not affect the results of any of the impugned polling stations at all.
2. Defamation is provided under section 73 of the Parliamentary Elections Act, No. 17 of 2005. The exact words used were never brought to the attention of the court. Instead, there was a loose translation. A loose translation was not necessarily a translation. Such a translation was not perfect or completely accurate. It was accuracy which was required to prove a false and defamatory statement. In any case, it was nowhere shown that the personal character of the appellant was ever under attack, since even the insinuation of one being 'academically challenged' did not extend to personal character.
3. The trial court's finding that, on the evidence, there was no nexus between those who might have defaced and torn the appellant's campaign posters and the respondent and his agents, could not be faulted.

*Appeal dismissed.*

*Costs awarded to the respondents in respect of the appeal and the proceedings in the High Court.*

**Legislation considered:**

Parliamentary Elections Act, No. 17 of 2005, section 73

*Mr. Hassan Kamba and Musa Sekaana for the appellant*

*Mr. Okello Oryem for the 1<sup>st</sup> respondent*

*Mr. Edmund Wakida for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents*

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**Michael Mawanda vs. the Electoral Commission and Andrew Martial**

**Court of Appeal (Coram: Buteera, Egonda-Ntende and Owiny-Dollo, JJ A)**

**Election Petition Appeal No.98 of 2016**

**October 3, 2017**

(Arising from Election Petition No.3 of 2016 (High Court of Uganda at Mbarara, decision of Nabisinde, J.)

***Voting materials**—Ballot boxes—Serial numbers of ballot boxes—Electoral commission to give information of serial numbers to candidates—Purpose—Refusal by Returning Officer to give candidate serial numbers of ballot boxes used in the Constituency—Effect thereof.*

***Electoral laws**—Non-compliance thereof—Substantiality test—Proof thereof—Effect on results of the election.*

***Electoral Offences**—False statements—Ingredients—Proof—Effect on the election results.*

***Electoral Offences**—Bribery—Ingredients—Proof—Effect on the election results.*

***Commission of illegal practices**—Ingredients—Proof—Effect on the election results.*

The appellant, 2<sup>nd</sup> respondent and other persons contested for the position of Member of Parliament for Igara County East Constituency. The 2<sup>nd</sup> respondent was declared winner by the Electoral Commission, with 15,983 compared to the appellant's 15,091 votes. The appellant challenged the results of the election before the High Court. In a judgment rendered on 18<sup>th</sup> October 2016, the High Court dismissed the petition. The appellant contended that the elections did not comply with the electoral laws. He also contended that the second respondent participated in acts of bribery and caused material that is defamatory of the appellant to be published.

**HELD:**

1. In terms of section 28A of the Parliamentary Elections Act, No. 17 of 2005, it is mandatory to avail serial numbers of the ballot papers supplied to each polling station and serial numbers of ballot paper seals affixed to and closed in the ballot boxes supplied to polling stations. The 1<sup>st</sup> respondent was obliged to supply this information no later than 24 hours before the polling day. The 1<sup>st</sup> respondent could invite the candidates (independent candidates and political parties or organizations) to a particular venue and a previously notified time, for them to be availed the said materials. Or it could choose to deliver these to the known addresses of the said candidates or organizations. Either way it decided to comply with its obligation, it had to do so in order to fulfil its statutory duties prior to the holding of the election.
2. The justification for section 28A of the Parliamentary Elections Act, No. 17 of 2005 is to ensure that the candidates, political parties and organizations involved in the

election are in a position to police the election process and to be assured in a transparent manner that no malpractices are committed. In the instant case, it was erroneous for the 1<sup>st</sup> respondent to contend, and the trial court to conclude, that as the appellant had not asked for this information, there was no infraction of this obligation. The duty of the court was not to rewrite the law but to point out what the law was. The 1<sup>st</sup> respondent was clearly at fault and this needed to be pointed out, if for no other reason than to avoid a repetition of this breach of a statutory duty.

3. Although the 1<sup>st</sup> respondent did not comply with section 28A (2) of the Parliamentary Elections Act, No. 17 of 2005, the appellant had not shown that this non-compliance had affected the results in any way, let alone in a substantial manner.
4. The offence of uttering false statements is provided under section 73 of the Parliamentary Elections Act, No. 17 of 2005. A petitioner has to set out the statements alleged to be false, malicious or defamatory. Since words derived their meaning from context or background, if such context or background is not provided- or a full statement not provided- their malicious or defamatory effect may be difficult to discover. These particulars also enabled the respondent to know what case they had to defend.<sup>122</sup> Although this had not been done in the instant petition, the court would take it that a cause of action had been somewhat ineptly made out by incorporation or reference to the other affidavits the petitioner caused to be filed and relied upon during the hearing of the case, which contained the exact statements complained of and the substance of the English translation thereof. It was noteworthy that no objection was raised either at the trial nor at the appeal in respect of this point.
5. Section 73 of the Parliamentary Elections Act, No. 17 of 2005 makes it an offence to publish false statements about a candidate with the intent of preventing the election of that candidate. The person making the false statements has to know or have reason to believe that they are false or be reckless as to whether such statements are true or false. In the instant case, it had not been proved that the 2<sup>nd</sup> respondent made the offending flyers. However, it had been proved that he caused the distribution of the libelous flyers prior to the election where both he and the appellant were candidates hence caused publication of the said flyers to voters by his actions, those flyers had been brought to the attention of third parties who would not otherwise have received them were it not for his action.
6. Bribery is prohibited under section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005. In the instant case, some of the allegations of bribery had not been made out, either by reason of inconsistencies in the evidence adduced, or in the failure to demonstrate involvement by the 2<sup>nd</sup> respondent personally or through his agents or with his knowledge and/or authorization. However, from the evidence on record, it was clear that the 2<sup>nd</sup> respondent, through an agent, had committed the illegal act of bribery of a voter on the night of 17<sup>th</sup> February 2016.

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<sup>122</sup> Citing *Rtd. Col. Dr. Kiiza Besigye vs. Electoral Commission and YK Museveni*, Presidential Election No. 1 of 2006 – dictum of Odoki CJ.

7. The commission of an illegal practice, once proved to the satisfaction of the court, was sufficient in itself, under section 61 (1) (c) of the Parliamentary Elections Act, No. 17 of 2005, to set aside the election of a candidate as a Member of Parliament. In the instant case, the 2<sup>nd</sup> respondent had been found to have committed the illegal practice of bribery, contrary to section 61 (1) and of making a false statement concerning the character of a candidate, contrary to section 73 (1). Either of these was sufficient cause to annul the election.

*Appeal allowed, with costs against the 2<sup>nd</sup> respondent.*

*Election of 2<sup>nd</sup> respondent annulled and fresh elections ordered for Igara County East Constituency.*

*Appellant to pay the 1<sup>st</sup> respondent's costs in the appeal and in the High court, in so far as his appeal against the 1<sup>st</sup> respondent had failed.*

**Legislation considered:**

Judicature (Court of Appeal Rules) Directions SI 13-11, rules 30, 4(a), 78(1)

Parliamentary Elections Act, No. 17 of 2005, sections 28A, 61 (1), 68, 73 (1)

Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2, rules 29, 30, 31,36

**Cases cited:**

Ashmore vs. Corp of Lloyd's [1992] 2 All ER 486

Fredrick Zaabwe vs. Orient Bank Ltd Civil Appeal No.4 of 2006

Kizza Besigye vs. Electoral Commission and YK Museveni, Presidential Election No. 1 of 2006

*Mr. Frank Kanduho and Owen Murangira for the appellant*

*Mr. Erick Sabiiti for the 1<sup>st</sup> respondent*

*Mr. Richard Mwebembezi and Ronald Tusingwire for the 2<sup>nd</sup> respondent*

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# Ninsiima Boaz Kasirabo and Electoral Commission vs. Mpuuga David

Court of Appeal (Coram: Kavuma; DCJ, Musoke and Barishaki, JJ A)

Election Petition Appeal No. 55 of 2016

October 10, 2017

(Arising from Election Petition No.9 of 2016 (High Court of Uganda at Masaka, decision of Margaret Tibulya, J.)

***Burden and standard of proof in election petitions—Burden on petitioner—Standard on a balance of probabilities.***

***Electoral offences—Voter intimidation—Proof—Presence of armed men at polling stations.***

***Ballot stuffing and multiple voting—Proof—Effect.***

***Falsification of Declaration of Results forms—Proof thereof—Effect.***

***Electoral laws—Non-compliance with electoral law—Substantiality effect—Proof.***

The appellant, respondent and 4 others contested for the position of Member of Parliament for Kooki Constituency, Rakai District. The appellant was declared winner by the 2<sup>nd</sup> appellant with 12,672 compared to the respondent's 11,776 votes. The respondent challenged the results of the election before the High Court. In a judgment rendered on 29<sup>th</sup> July 2016, the High Court upheld the petition and ordered that fresh elections be conducted.

## HELD:

1. The burden of proof lies on the petitioner to prove the assertions raised in the petition to the satisfaction of the court.
2. The standard of proof required is proof on a balance of probabilities as stated under section 61 (3) of the Parliamentary Elections Act No. 17 of 2005.<sup>123</sup>
3. The position of the law in regards to voter intimidation is stated in section 42 (1) of the Parliamentary Elections Act, No. 17 of 2005. This provision is intended to provide an atmosphere of freedom at or near polling stations during polling and to ensure that voters are not threatened during the polling process.<sup>124</sup> In the instant case, the allegations as to the presence of armed men at polling stations who intimidated voters and chased the respondent's witnesses from polling stations had not been proved to the satisfaction of the court.

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<sup>123</sup> Citing *Paul Mwiru vs. Hon Igeme Nathan Nabeta Samson and 2 Others*, Court of Appeal Election Petition Appeal No.6 of 2011.

<sup>124</sup> Citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001.

4. Section 76 (f) of the Parliamentary Elections Act, No. 17 of 2005 (PEA) creates the offence of ballot stuffing. Although ballot stuffing is not defined under the PEA, it is an election malpractice which involves voting more than once at a polling station or moving to various polling stations casting votes either in the names of people who do not exist at all or those who are dead or absent at the time of voting and yet are recorded to have voted. Ideally, at the end of the polling exercise, the number of votes cast ought to be equal to the number of people who physically turned up to vote.<sup>125</sup> In the instant case, there was no sufficient evidence adduced to prove the allegations relating to ballot stuffing and multiple voting.
5. The issue of falsification of Declaration of Results forms was neither presented nor proved by the respondent.
6. In terms of section 61 (a) of the Parliamentary Elections Act, No. 17 of 2005, an election can only be set aside for non-compliance with the electoral law where that non-compliance has had a substantial effect upon the results. The principle is that an election should not be set aside basing on trivial errors and informalities.<sup>126</sup> In the instant case, the non-compliance with the electoral law that had been proved did not affect the winning majority of the appellant in any substantial way.

*Appeal allowed.*

*Declaration and orders of the High Court nullifying the appellant's election as Member of Parliament for Kooki set aside.*

*Respondent to bear the costs of the appeal and of the proceedings in the High Court.*

#### **Legislation considered**

Parliamentary Elections Act, No. 17 Of 2005, sections 41, 61 (a)

#### **Cases cited:**

Gunn vs. Sharpe [1974] 1 QB 808

Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission, Supreme Court Presidential Election Petition No.1 of 2001

Mbowe vs. Eliuffo [1967] EA 240

Paul Mwiru vs. Hon Igeme Nathan Nabeta Samson and 2 Others, Court of Appeal Election Petition Appeal No.6 of 2011.

Toolit Simon Akecha vs. Oulanyah Jacob L'Okori and Electoral Commission, Court of Appeal Election Petition Appeal No.19 of 2011

*Mr. Frank Kanduho for the first appellant*

*Mr. Kandebe Ntabirweki for the second appellant*

*Mr. Katumba for the respondent*

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<sup>125</sup> *Toolit Simon Akecha vs. Oulanyah Jacob L'Okori and Electoral Commission*, Court of Appeal Election Petition Appeal No.19 of 2011.

<sup>126</sup> Citing *Gunn vs. Sharpe* (1974) 1 QB 808 and *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (itself citing *Mbowe vs. Eliuffo* (1967) EA 240).



**Okello P. Charles Engola Macodwogo and the Electoral Commission vs. Ayena  
Odongo Krispus Charles**

**Court of Appeal (Coram: Kavuma; DCJ, Musoke and Barishaki, JJ A)**

**Consolidated Election Petition Appeals No. 26 and 94 of 2016**

**October 23, 2017**

(Arising from High Court Election Petition No. 8 of 2016 (High Court at Lira, presided over by Naiga Jessica Ayebazibwe, J., judgment dated 28<sup>th</sup> June, 2016).

***Duty of first appellate court***—Duty to re-evaluate the evidence and draw its own inferences of fact before, for sufficient reasons, coming up with its own conclusions—Rule 30 of the Judicature (Court of Appeal Rules) Dictions SI 13-10.

***Burden and standard of proof***—Standard is to the satisfaction on a balance of probabilities—Burden on petitioner to prove all such allegations to the satisfaction of the court.

***Nominations***—Nominations to be elected Member of Parliament (MP)—Qualifications to be nominated candidate for elections of MP—Article 80 of the Constitution of the Republic of Uganda, 1995 and section 4(1) of the Parliamentary Elections Act No. 17 of 2005—Candidate must be in possession of Advanced Level or its equivalence—Verification of qualifications by the National Council for Higher Education—Certificate of equivalence to be issued in consultation with Uganda National Examination Board—Meaning of consultation—Procedure of consultation Fresh certificate of equivalence to be issued at each fresh election—Whether the 1<sup>st</sup> appellant was qualified to be nominated for elections.

***Nominations***—Qualifications for nominations—Interchanging names—Effect on qualifications.

***Burden of proof***—Burden on Petitioner—Shift of Burden—Circumstances under which burden can shift.

***Fraud in election petitions***—Election matters being civil in nature, rules as to pleadings and proving fraud in civil matters also apply to them—Proof of fraud—Effect.

On 18<sup>th</sup> February, 2016, the 1<sup>st</sup> appellant and the respondent contested for the position of Member of Parliament (MP) for Oyam North County Constituency. The 1<sup>st</sup> appellant was declared the winner with 21,785 votes against the respondent's 15,796 votes representing a margin of 5,989 votes, or a 15.94% lead.

Dissatisfied, the respondent filed High Court Election Petition No. 8 of 2016 challenging the outcome of the election on the ground that the 1<sup>st</sup> appellant was, at the time of his election, not qualified to be validly elected as MP because he lacked the requisite academic qualifications. The trial court found in favour of the petitioner and set aside the election of

the 1<sup>st</sup> appellant, ordered for fresh elections to be conducted, and awarded costs of the petition to the respondent as against the appellants in equal proportions.

The appellants appealed, and the respondent cross-appealed. The respondent later chose to represent himself in his individual capacity, at the hearing of the appeal.

**HELD:**

1. As a first appellate court, the Court of Appeal has a duty to re-evaluate the evidence before it and draw inferences of fact before, for sufficient reasons, coming up with its own conclusions. The court is also alive to the fact that it did not see or in any way perceive the witnesses as they testified in the High Court.<sup>127</sup>
2. A person seeking a court order to set aside the election of a Member of Parliament (MP) is required to prove their allegations to the satisfaction of the court. Any ground for setting aside the election of an MP is proved to the satisfaction of the court if it is proved upon a balance of probabilities.
3. A petitioner remains with the duty to adduce credible and cogent evidence to prove his or her case and the level of probability in election matters is higher than that required in ordinary civil suits.<sup>128</sup>
4. The petitioner bears the burden of proof, even with regard to a challenge of the authenticity of a respondent's academic documents.<sup>129</sup> The trial court erred when he stated that the burden of proof lay on the 1<sup>st</sup> appellant since it was his documents that were being questioned in terms of authenticity and validity. Where the petitioner alleges commission of election offences, the burden lies on him or her to prove all such allegations to the satisfaction of the court.
5. Furthermore, findings on criminal offences cannot be based on mere surmise or conjecture but on accurate, succinct and credible evidence.<sup>130</sup>
6. An election should not be overturned on light or trivial matters since it is the expression of the democratic will of the people. The reasons advanced by the respondent for the setting aside of the election were too trivial to overturn the will of the people of Oyam North County Constituency.

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<sup>127</sup> Cited *Kifamunte Henry vs. Uganda*, SCCA No. 1 of 1997 wherein the Supreme Court stated that, "The first appellate court has a duty to review the evidence of the case and to reconsider materials before the trial judge. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

<sup>128</sup> Relies on *Mukasa Anthony Harris vs. Dr. Bayiga Michael Philip Lulume*, Election Petition Appeal No. 18 of 2007 and *Masiko Winfred Komuhangi vs. Babihuga J. Winnie*, Court of Appeal Election Petition Appeal No. 1 of 2002.

<sup>129</sup> Relied on *Mbowe vs. Eliufoo* [1967] EA 240 and *Col (Rtd) Dr. Kiiza Besigye vs. Museveni Yoweri Kaguta*, Supreme Court Presidential Election Petition No. 1 of 2001.

<sup>130</sup> Note: The Respondent had prayed that the forgeries or fraud allegedly committed by the Appellants be referred to the DPP for criminal charges.

7. The minimum academic qualification criterion for parliamentary candidates is a formal education of Advanced Level standard or its equivalent. In proving that one has the requisite academic qualification in the form of a qualification that is equivalent to the Advance Level standard, a parliamentary candidate has to present [to the Electoral Commission] a certificate of equivalence issued by the National Council for Higher Education in consultation with Uganda National Examination Board.
8. Where a candidate possesses an Advanced Level certificate obtained in Uganda, or qualifications 'higher than the prescribed qualification obtained in Uganda,' there is no need for verification of their qualifications by the National Council for Higher Education. The 1<sup>st</sup> appellant had qualifications that were higher than the Advanced Level standard and obtained in Uganda], that is to say a Development Studies and a Public Administration and Management from Kampala International University.
9. Where a candidate presents a qualification that is higher than the minimum qualification required for any post, it is not enough for their opponents to argue that the said qualification was based on forgery or something irregular, and neither is it sufficient for the institution from which the higher qualification was obtained to suggest that they would not have admitted the candidate or awarded the qualification if they had known some fact. The award would have to have been cancelled or withdrawn.
10. Academic certificates presented for the purpose of equating must be valid and authentic.
11. The term consultation, as used in the requirement that the National Council for Higher Education (NCHE) issue certificates of equivalence upon consultation with Uganda National Examination Board (UNEB), means that UNEB should have had a proper opportunity of expressing its views and rendering advice to the NCHE the purpose of ascertaining whether this was done, one has to look at the substance and reality of what occurred.
12. The 1<sup>st</sup> appellant had a certificate of equivalence in relation to two certificates of Air Defence Courses. However, this certificate of equivalence had been issued in 2010 and used to participate in the 2011 elections. It was therefore not valid for use in the 2016 elections unless issued afresh. However, the 1<sup>st</sup> appellant possessed qualifications higher than the minimum standard and which had been obtained in Uganda and did not therefore need to obtain verification from National Council for Higher Education.
13. The allegations of invalidity of the 1<sup>st</sup> appellant's Air Defence Course certificates were mere allegations and nothing more. The certificates in question were never cancelled and continued to be valid. The 1<sup>st</sup> appellant was academically qualified to be nominated and elected Member of Parliament.
14. Interchanging one's names does not affect their qualifications. By adding his father's name (Engola) to his own, and the name 'Macodwogo' as well for political purposes, the 1<sup>st</sup> appellant did not forfeit his rights to his former name 'Okello P. Charles'. It was

also not alleged that 'Okello P. Charles' was a different person from 'Okello P. Charles Engola Macodwogo'. By verifying his name, the 1<sup>st</sup> appellant did not thereby forfeit the rights attached to his former names, rights such as a right to the academic qualifications he obtained in that name.

15. The respondent bore the burden of proof regarding the allegations but this was not discharged. He instead only raised questions of inconsistency and then contended that the burden of proof had automatically shifted to the 1<sup>st</sup> appellant. Mere allegations are not, however, sufficient to shift the burden of proof. For the burden of proof to shift, there must be clear evidence creating doubt as to the authenticity of the document in question which demands explanation from the respondent.<sup>131</sup> On the other hand, the 1<sup>st</sup> appellant had given testimony in cross-examination to explain the discrepancies in his name and had also sworn an affidavit in lieu of verification of his name.<sup>132</sup> The 1<sup>st</sup> appellant was the same person that had acquired all the relevant academic qualifications.
16. Section 4(14) of the Parliamentary Elections Act No. 17 of 2005 only bars the 2<sup>nd</sup> respondent from accepting a statutory declaration where the purpose is to serve as evidence of possession of a required academic qualification.<sup>133</sup> The 2<sup>nd</sup> respondent was therefore not barred from accepting the 1<sup>st</sup> appellant's statutory declaration explaining the variation in his names.
17. Since election matters are civil in nature, the rules as to pleading and proving fraud in civil matters also apply to them, that is to say; particulars of fraud in an election should be specifically pleaded and proved. Fraud must be pleaded specifically.<sup>134</sup> Even after proving it, fraud must be attributed directly or by necessary implication to the transferee. This means that the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act.<sup>135</sup>
18. Fraud must also be proved strictly, the burden of proof being heavier than proof on the balance of probabilities which is generally applied in civil matters.<sup>136</sup> There was evidence in the form of a letter authored by a one Lt. Col. David Basimbwa (Division Commander, Air Defence, Uganda Peoples Defence Forces (UPDF) and relied upon by National Council for Higher Education, for the existence of the institution from which the 1<sup>st</sup> appellant obtained his certificates regarding Air Defence courses. The

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<sup>131</sup> Relied upon *Mashate Magomu Peter vs. Electoral Commission and Another*, Election Petition Appeal 47 of 2016.

<sup>132</sup> Distinguished *Hon. Otada Sam Amooti Owor vs. Taban Idi Amin and the Electoral Commission*, Election Petition Appeal 93 of 2016 on the grounds that within it, there had been no satisfactory explanation for the name discrepancies raised, the Respondent therein had not been a registered voter, and there had not been a statutory declaration to verify the Respondent's name.

<sup>133</sup> Section 4(14) provides that, "The Commission shall not accept for the purposes of this section a statutory declaration or affidavit as evidence of an academic qualification required by this section."

<sup>134</sup> Cited: *Fredrick J.K. Zaabwe vs. Orient Bank Ltd and 5 Others*, Supreme Court Civil Appeal No. 4 of 2006.

<sup>135</sup> Cited: *Kampala Bottlers Ltd vs. Damanico (U) Ltd*, Supreme Court Civil Appeal No. 22 of 1992 ( per Wambuzi, CJ.)

<sup>136</sup> Cited: *Kampala Bottlers Ltd vs. Damanico (U) Ltd*, Supreme Court Civil Appeal No. 22 of 1992, (per Wambuzi, CJ.)

respondent did not adduce cogent evidence to prove the fraud allegations made. He had instead stated that he had carried out an internet search and found the institution not to exist. The court also stated that there was no search report adduced to confirm this.

*Appeal allowed with half costs to the appellants in the Court of Appeal as well as in the High Court because the petition in the High Court was 'not completely unmeritorious'.*

*1<sup>st</sup> appellant declared validly nominated and elected MP for Oyam North Constituency.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 80 (1) (c)

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 30

Parliamentary Election Act No. 17 of 2005, sections 4 (5), 61 (1) (3), 68 (1)

**Cases cited:**

Fredrick J.K. Zaabwe vs. Orient Bank Ltd and 5 Others, Supreme Court Civil Appeal No. 4 of 2006.

John Kiarie Waweru vs. Beth Wambui Mugo and 2 Others [2008] Kenya Law Reports

Kampala Bottlers Limited vs. Damanico (U) Limited, Supreme Court Civil Appeal No. 22 of 1992

Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997

Kizza Besigye vs. Museveni Yoweri Kaguta and Another, Presidential Election Petition No. 1 of 2001

Mashate Magomu Peter vs. Electoral Commission and Another, Election Petition Appeal 47 of 2016

Masiko Winfred Komuhangi vs. Babihuga J. Winnie, Court of Appeal Election Petition Appeal No. 9 of 2002

Mbowe vs. Eliufoo [1967] EA 240

Mukasa Anthony Harris vs. Bayiga Michael Philip Lulume, Election Petition Appeal No. 18 of 2007

Otada Sam Amooti Owor vs. Taban Idi Amin and the Electoral Commission, Election Petition Appeal 93 of 2016

Paul Mwiru vs. Igeme Nathan Nabeta, Court of Appeal Election Petition Appeal No. 6 of 2011

Rollo and Another vs. Minister of Town and Country Planning [1947] 2 All ER 488

*Mr. Muhwezi Ronald, Mr. Mpumwire Abraham, Ms. Akware Carol Aciro and Mr. Abuanga Otim for appellant*

*Mr. Nowmaan Mark and Mr. Mutyaba Ivan for the respondent*

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# Ibaale Daniel Joseph vs. Abdul Katuntu and the Electoral Commission

Court of Appeal (Coram: Kavuma; DCJ, Kasule and Buteera, JJ A)

Election Appeal No. 41 of 2016

October 20, 2017

(Arising from Election Petition No.11 of 2016 (High Court of Uganda at Jinja, decision of Margaret Mutonyi, J.)

**Burden and standard of proof in election petitions**—Burden on petitioner—Standard of proof on balance of probabilities.

**Evidence in election litigation**—Evidence by affidavit—Courts are enjoined to hear and determine election matters expeditiously.

**Electoral offences**—Defamation—Nature—Determination—Proof of defamation.

**Vote recount**—Section 63 (5) if the Parliamentary Elections Act No.17 of 2005—Circumstances for ordering vote recount—Procedure.

**Affidavits**—Validity of affidavits signed by illiterates—Meaning of “mark”—Meaning of “signature”.

**Proof of citizenship**—Non-reliance on evidence of a witness whose citizenship could not be established.

**Electoral Offences**—Sections 23, 73 and 80 Parliamentary Elections Act No.17 of 2005—Proof—Defamation.

The appellant and 1<sup>st</sup> respondent were candidates for the position of Member of Parliament for Bugweri County. The 2<sup>nd</sup> appellant declared the 1<sup>st</sup> respondent as winner. The appellant challenged the results before the High Court. In a decision rendered on 18<sup>th</sup> August 2016, the High Court dismissed the petition hence this appeal.

## HELD:

1. The burden lies on the petitioner to prove his case to the satisfaction of the court.
2. The standard of proof in election matters is on a balance of probabilities.
3. Under the law, evidence in election litigation is by affidavit.
4. Election litigation is unique. Under section 63 (2) of the Parliamentary Elections Act, No. 17 of 2005, the courts are enjoined to hear and determine election matters expeditiously. Litigation is not supposed to go on endlessly and timelines are set for

parties to follow when conducting their respective cases. This is especially so in election litigation.<sup>137</sup> In the instance case, the trial court properly exercised its discretion in rejecting the appellant's attempt to respond to make a further response to the 1<sup>st</sup> respondent's affidavits; having already filed an initial rejoinder, and the 1<sup>st</sup> respondent having filed a sur rejoinder. He should have used the time under the law to prepare his case. It had also been open to him to apply to the instant court to be allowed to introduce the evidence he wanted, which he did not. He also made no attempt to cross-examine the witnesses who had deponed the impugned affidavits.

5. For defamation to stand, the false statements complained of must have been made about and shown to have affected the character of the victim by lowering their esteem in the eyes of voters or fair-minded persons. A candidate is not guilty of making defamatory statements if he or she has reasonable grounds for believing those statements to be true.<sup>138</sup> In the instant case, in so far as there was no evidence that the statements in question were false (among other things, that the appellant left from a lodge to go for his nomination), the court was unable to conclude that they were defamatory. Without showing which statements of the 1<sup>st</sup> respondent related to and defamed the character of the appellant, it could not be found that the 1<sup>st</sup> respondent committed any such offences.
6. In terms of section 63 (5) of the Parliamentary Elections Act, No. 17 of 2005, the High Court is entitled, before coming to a decision on a petition, to order a recount of the votes cast. Section 54 provides instances where a recount is mandatory, including where there is an equality of votes, or where the number of votes separating the candidates is less than 50. Under section 55, a candidate can apply to a Chief Magistrate's Court for a recount.
7. Before a court can order a recount of votes, there has to be sufficient evidence to show that it is necessary. An election cannot be set aside unless it is clear that the anomalies being raised undermined the conduct of a free and fair election.<sup>139</sup> A party can only be entitled to ask for a recount if that party follows the process and procedure, as opposed to just alleging generally that the votes were declared wrongly.<sup>140</sup> In the instant case, in the absence of any evidence from the appellant or their agents justifying the recount, there was no reason to fault the trial court's decision not to order one. It was also noteworthy that the appellant had not applied to the Chief Magistrate's Court as required by law, and did not indicate which particular polling stations necessitated the recount.
8. When an agent signs a Declaration of Results form she or he thereby confirms the truth of what is contained in that form. The agent thereby confirms the principal that

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<sup>137</sup> Citing *Electoral Commission and Another vs. Piro Santos*, Court of Appeal Civil Application No.22 of 2011 (itself citing the Kenyan case of *Muiya vs. Nyangah and Others* [2003] 2 EA 616 C.H.C.K)

<sup>138</sup> Citing *Rtd. Col. Dr. Kiiza Besigye vs. Electoral Commission and YK Museveni*, Presidential Election No. 1 of 2006.

<sup>139</sup> Citing *Ngoma Ngime vs. Electoral Commission and Hon Winnie Byanyima*, Electoral Petition Appeal No.11 of 2002.

<sup>140</sup> Citing *Kamba Saleh Moses vs. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal Number 27 of 2011.

it is the correct result of what transpired at that polling station. The candidate in this instant case was therefore estopped from challenging the contents of the form, in so far as the candidate was the appointing authority of the agent.<sup>141</sup>

9. Section 2 of the Illiterates Protection Act, Cap 78 requires that the signature of an illiterate person be verified by a mark.

10. A 'mark' is a symbol, impression or feature on something usually to identify it or distinguish it from something else.<sup>142</sup>

11. A signature is a person's name or mark written by that person or at that person's direction especially one's handwritten name as one ordinarily wrote it, as at the end of a letter or cheque, to show that they had written it.<sup>143</sup>

12. A signature can be a mark which can be put by a person on a document to show that they own up to it. The essence of an illiterate person appending a mark on a document is to prove that the document has been authored by them or that it belongs to them. In the instant case, there was no satisfactory evidence that the impugned signature did not belong to the deponent or that the affidavit was not read and explained to the deponent. As such, the impugned signature amounted to a mark under section 2 of the Illiterates Protection Act, Cap 78.

13. The trial court could not be faulted for its finding that a witness was unreliable in so far as he had neither a voter's card nor a National Identity Card to prove his citizenship.

*Appeal dismissed.*

*1<sup>st</sup> respondent declared to be the validly elected Member for Bugweri County Constituency.*

*Costs awarded to 1<sup>st</sup> and 2<sup>nd</sup> respondents in instant court and lower court.*

**Legislation considered:**

Illiterates Protection Act, Cap 78, section 2

Parliamentary Elections Act, No. 17 of 2005, sections 23, 63 (2) (3), 50, 54, 55, 73, 80

**Cases cited:**

Edward Francis Babu vs. the Electoral Commission and Erias Lukwago, Election Petition No.10 of 2006

Electoral Commission and Another vs. Piro Santos, Court of Appeal Civil Application No.22 of 2011

Kamba Saleh Moses vs. Namuyangu Jennifer, Court of Appeal Election Petition Appeal No. 27 of 2011

Kizza Besigye vs. Electoral Commission and Yoweri Kaguta Museveni, Presidential Election No. 1 of 2006

Muiya vs. Nyangah and Others [2003] 2 EA 616 (C.H.C.K)

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<sup>141</sup> Citing Edward Francis Babu vs. The Electoral Commission and Erias Lukwago EP No.10 of 2006.

<sup>142</sup> Citing Black's Law Dictionary, 10<sup>th</sup> Edition, at p.1113.

<sup>143</sup> Citing Black's Law Dictionary, 10<sup>th</sup> Edition, at p.1593.



Ngoma Ngime vs. Electoral Commission and Hon Winnie Byanyima, Electoral Petition Appeal No.11 of 2002.

*Mr. Hassan Kamba for the appellant*

*Mr. Medard Ssegona for the 1<sup>st</sup> respondent*

*Mr. Musa Sekaana for the 2<sup>nd</sup> respondent*

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## Mandera Amos vs. Bwowe Ivan

Court of Appeal (Coram: Kavuma; DCJ, Obura and Barishaki, JJ A)

Election Petition Appeal No. 91 of 2016

October 20, 2019

(Arising from Election Petition of 2016 (High Court of Uganda at Masaka, decision of Lawrence Gidudu, J.).

***Burden and standard of proof in election petitions***—*Burden is on the petitioner—Standard is on the balance of probabilities.*

***Academic documents***—*Discrepancy in names on academic certificates—Statutory declaration—Purpose thereof.*

***Notice of presentation of the petition***—*Failure to serve notice—Effect of non-service thereof.*

The appellant, respondent and five others contested for the position of Member of Parliament of Buyamba Constituency, Rakai District. The appellant was declared winner by the Electoral Commission. The respondent challenged the result of the election, on the grounds that the appellant did not possess the requisite academic qualifications. In a decision rendered on 13<sup>th</sup> September 2016, the High Court upheld the petition and ordered that fresh elections be held. The appellant filed an appeal as well as an application for leave to adduce additional evidence; which application was allowed.

### HELD:

1. The standard of proof in election litigation is on a balance of probabilities and not beyond reasonable doubt as is the case for criminal matters.
2. The appellant, alongside additional evidence adduced before the Court of Appeal, relied on a statutory declaration to clarify the discrepancy between the two names 'Nandera' and 'Mandera'. The court was fully aware and ready to take judicial notice of the fact that a statutory declaration was one mode through which discrepancies in names in a document could be clarified<sup>144</sup>. The use of the statutory declaration was sufficient to prove and explain the misspelling of the appellant's name. In the circumstances, the trial court ought to have found that the certificate in question belonged to no other person than the appellant.
3. It was not correct to argue that Uganda National Examination Board (UNEB) could not rely on information provided by schools in preparing academic documents and that it had to rely on its own records. UNEB clearly stated that it used information provided by schools to prepare academic documents. With an affidavit from the school and the

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<sup>144</sup> Citing Sections 2 and 3 of the Statutory Declarations Act, Cap 22.

appellant's teacher proving that he used the name 'Mandera', UNEB correctly used that information to correct the mis-spelt name on the relevant certificate. Since this had been clarified, and since this was the only basis on which the trial court had reached its decision, there was no further justification for the continued denial to the appellant of what rightfully belonged to him.<sup>145</sup>

4. The non-service of the notice of presentation of the petition, by the respondent upon the appellant, did not in any way prejudice the latter because he filed his answer to the petition and the matter was heard and determined. This is in accordance with Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995.

*Appeal allowed.*

*Orders of High Court nullifying the appellant's election as a Member of Parliament for Buyamba Constituency reversed.*

*Costs awarded to the appellant in respect of the appeal and the proceedings in the High Court.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 126 (2) (e)

*Mr. Tebyasa Ambrose and Mr. Evans Ochieng for the appellant*

*Mr. Katumba Chrisestom for respondent*

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<sup>145</sup> Citing Article 126 (2) (e) of the Constitution.

# Mujuni Vicent Kyamadidi vs. Charles Ngabirano and the Electoral Commission

Court of Appeal (Coram: Kavuma; DCJ, Musoke and Barishaki, JJ A)

Election Petition Appeal No. 84 of 2016

October 27, 2017

(Arising from Election Petition No. 2 of 2016 (High Court of Uganda at Mbarara, decision of Dr. Winifred Nabisinde, J.)

**Burden of proof**—Burden of proof and standard of proof in election petitions—Petitioner bears burden of proof—Standard of proof is on the balance of probabilities.

**Electoral offences**—Intimidation and harassment—Evidence—Credibility of a witness—Impeaching a credit of a witness—Section 54 of the Evidence Act, Cap 6.

**Electoral offences**—Use of vehicle to terrorize voters—Alibi—Requirement of corroborating an alibi—Effect of failing to corroborate an alibi.

**Ballot stuffing or multiple voting**—Effect of ballot stuffing on an election—Cancelling the result of the election in those polling stations is a fair and just decision for the candidates.

**Declaration of Results(DR) forms**—Signing of the DR forms by the Presiding Officer—Section 47(5) of the Parliamentary Elections Act, No. 17 of 2005—Effect of a candidates' agents' failure to sign the DR forms.

**Electoral offences**—Bribery—Ingredients of bribery—Standard of proof for bribery—A single act of bribery by or with the knowledge and consent of the candidate or by his agents is sufficient to invalidate an election—Actual act of bribery must be described in sufficient detail.

**Bias**—Effect of bias—Proof of bias—Apprehension that justice will not be done.

**Setting aside an election**—Grounds for setting aside an election—Section 61(a) of the Parliamentary Elections Act, No. 17 of 2005—Petitioner to prove that grounds affected the result in substantial manner—Votes cast in excess of registered voters—Whether the votes cast in excess of registered voters affected the result of the election in a substantial manner.

**Evidence**—Proof of a legal right or liability—Section 101 of the Evidence Act, Cap 6—Burden of proof—Section 102 of the Evidence Act—Stronger evidence need to be proved before court to find the allegation proved on the balance of probabilities—Allegations of dead voters—Effect of proof on outcome of the election.

On the 18<sup>th</sup> day of February 2016, the appellant and the 1<sup>st</sup> respondent were among the 5 candidates who contested for the parliamentary seat of Rwampara Constituency in Mbarara. The 2<sup>nd</sup> respondent declared and gazetted the 1<sup>st</sup> respondent winner of the said election.

The petitioner dissatisfied with the results filed a petition contending that the 1<sup>st</sup> respondent was not validly elected Member of Parliament (MP) for Rwampara Constituency, the petitioner won the election and should be declared winner because there was non-compliance with the provisions of the Parliamentary Elections Act and the said non-compliance affected the results of the election in a substantial manner.

The High Court dismissed the election and confirmed the 1<sup>st</sup> respondent as the directly elected MP with full costs awarded to the 1<sup>st</sup> and 2<sup>nd</sup> respondent. Being dissatisfied with the decision of the trial court, the appellant lodged the instant appeal.

**HELD:**

1. The burden of proof lies on the petitioner to prove the assertions in the election petition and the standard of proof required is on a balance of probabilities.<sup>146</sup> The petitioner has to adduce credible or cogent evidence to prove the allegations to the stated standard of proof.<sup>147</sup>
2. It was trite that in election contests, witnesses, most of them motivated by the desire to secure victory against their opponents, deliberately resort to peddling falsehoods. In the instant case, it had not been proved to the satisfaction of the court that the 1<sup>st</sup> respondent, through his agents, committed the assaults as alleged or at all.
3. Where an alibi is raised, corroboration is required to refute that defence. In the absence of such corroboration, the person will be given the benefit of doubt.<sup>148</sup> In the instant case, since the 1<sup>st</sup> respondent had raised an alibi that the said motor vehicle was in Kampala undergoing repairs, the appellant's evidence had to be corroborated in order to destroy the alibi. The evidence in question was never corroborated. The appellant had not adduced sufficient evidence to prove the allegations of intimidation and terror.
4. Ballot stuffing is a form of electoral fraud whereby a person who is only permitted one vote casts more than one. It can also happen where a person, instead of casting his or her vote in a single booth, casts in multiple booths. Ballot stuffing can take various forms, such as casting votes on behalf of people who did not show up at the polls or for those who were long dead or voting by fictitious characters.<sup>149</sup> In the instant case, while the appellant had proved ballot stuffing to the required standard, since the results in the four affected polling stations were cancelled, this was a just and fair decision as it put all the candidates on the same leveled ground. All the candidates suffered equally and none was disadvantaged over the other. The mere fact that 14 polling stations registered a 100% voter turnout did not, per se, mean that there had

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<sup>146</sup> Citing Section 61 (1) and (3) of the PEA and *Anthony Harris Mukasa vs. Dr. Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No.18 of 2007.

<sup>147</sup> Citing *Masiko Winfred Komuhangi vs. Babihuga J Winnie*, Court of Appeal Election Petition Appeal No.1 of 2002 and *Paul Mwiru vs. Hon Igeme Nathan Nabeta Samson and 2 Others*, Court of Appeal Election Petition Appeal No.6 of 2011.

<sup>148</sup> Citing *Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2006 – dictum of Katureebe JSC.

<sup>149</sup> Citing *Toolit Simon Akecha vs. Oulanyah Jacob L'Okori and Electoral Commission*, Court of Appeal Election Petition Appeal No.19 of 2011.

been multiple voting or ballot stuffing at those stations. No evidence had been adduced as to ballot stuffing or multiple voting at these stations. As such the appellant had failed to prove this allegation, and the court could not fault the results from those stations.

5. Signing of Declaration of Results (DR) forms by the Presiding Officer was mandatory and failure to do so invalidated the result.<sup>150</sup>In the instant case, all the DR forms had been signed by the relevant Presiding Officers as required by section 47 (5) of the Parliamentary Elections Act, No. 17 of 2005. The forms had not been signed by the appellant's agents. There was no cogent explanation provided by the appellant for putting the blame for the failure to sign the DR forms by his agents on the respondents. Mere failure by an agent to sign the DR form in the absence of a valid reason did not invalidate an otherwise valid result at a polling station.<sup>151</sup> The evidence of the appellant's witnesses, to the effect that the appellant's agents had been forced to flee the polling stations, was unreliable as they did not prove to the satisfaction of the court that the people who forced them to flee were the 1<sup>st</sup> respondent's agents.
6. The duty of the Electoral Commission with regard to complaints made to it is stipulated under section 15 (1) of the Electoral Commission Act, Cap 140. Allegations against the integrity of the Electoral Commission have to be backed by independent cogent evidence.<sup>152</sup> In the instant case, there was no evidence on record to show that the 2<sup>nd</sup> respondent connived with the 1<sup>st</sup> respondent and his agents to interfere with the electoral process, as alleged by the appellant. The appellant had failed to prove this claim to the satisfaction of the court.
7. 7. The offence of bribery is defined and criminalized under section 68 (1) of the Parliamentary Elections Act No.17 of 2005. Bribery was an offence committed by a person who gave or promised to give or offered money or valuable inducement to a voter, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, or as a reward to the voter for having voted in a particular way or abstained from voting.<sup>153</sup>
8. The offence of bribery has three ingredients. There has to be evidence that: i) a gift was given to a voter; ii) the gift was given by a candidate or their agent; and iii) it was given with the intention of inducing the person to vote in a particular way.<sup>154</sup>
9. It is now trite law that in election petitions, the petitioner has to adduce cogent evidence to prove his or her case to the satisfaction of the court. It has to be that kind of evidence which is free from contradictions, truthful so as to convince a reasonable

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<sup>150</sup> Citing Section 47 (5) of the PEA; *Joy Kafura Kabatsi vs. Anifa Kawooya*, Supreme Court Election Appeal No.25 of 2011 (dictum of Mulenga JSC).

<sup>151</sup> Citing *John Cossy Odomet vs. Electoral Commission and Louis Opange*, High Court Election Petition No.6 of 2006.

<sup>152</sup> Citing *Toolit Simon Akecha vs. Oulanyah Jacob L'Okori and Electoral Commission*, High Court Election Petition No.1 of 2011 (dictum of Ruby Opio Aweri J (as he then was).

<sup>153</sup> Citing Black's Law Dictionary, 6<sup>th</sup> Edition.

<sup>154</sup> Citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001.

tribunal to give judgment in a party's favour.<sup>155</sup> It is not enough for a deponent to say, for instance, that 'people were being bribed at road junctions'. This has to be stated with precision as to who gave the money, who received it and the purpose has to be to influence their vote. Merely being seen giving money to a person or receiving money from a person cannot not, per se, be evidence of bribery upon which a court can rely.<sup>156</sup>

10. It is essential in allegations of bribery for the party alleging the same to prove, on a balance of probabilities, that the person or persons allegedly being bribed are registered voters.<sup>157</sup>
11. Because a single act of bribery, by or with the knowledge and consent of the candidate or his agents, however, insignificant it might be sufficient to invalidate an election, the petitioner had to prove to the required standard of proof that indeed the respondent or his or her agent bribed voters. It is not enough for the respondent to state that he saw persons in a line being bribed. The actual act of bribery has to be described in sufficient detail for the court to reach a determination that such bribery took place. Questions as to who gave what, to who, at what time and for what purpose have to be answered. In the instant case, the evidence provided was not credible. The appellant failed to prove the allegations of bribery to the satisfaction of the court.

The onus lies on the petitioner to prove to the satisfaction of the court that the alleged irregularities and/or malpractices or non-compliance with the provisions and principles laid down in the relevant laws were committed and that this affected the results of the election in a substantial manner.<sup>158</sup> The test to be applied in determining whether the alleged malpractices or irregularities affected the result of the election in a substantial manner is both quantitative and qualitative.<sup>159</sup>

12. The expression 'non-compliance affected the result of the election in a substantial manner' can only mean that the votes a candidate obtained would have been different in a substantial manner, if it were not for the non-compliance. To succeed, the petitioner does not have to prove that the declared candidate would have lost. It was sufficient to prove that his or her winning majority would have been reduced but such reduction, however, would have to be such that would put the victory in doubt.<sup>160</sup> In the instant case, there was no evidence to the satisfaction of the court that the non-compliance with electoral laws did affect the results in a substantial manner.

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<sup>155</sup> Citing *Masiko Winifred Komuhangi vs. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002, (dictum of Mukasa-Kikonyogo DCJ (as she then was)).

<sup>156</sup> Citing *Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2006 – dictum of Katureebe JSC.

<sup>157</sup> Citing *Paul Mwiru vs. Hon Igeme Nathan Nabeta Samson and 2 Others*, Court of Appeal Election Petition Appeal No.6 of 2011.

<sup>158</sup> Citing *Masiko Winifred Komuhangi vs. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002.

<sup>159</sup> Citing *Amama Mbabazi and Another vs. James Musinguzi Garuga*, Election Petition Appeal No.12 of 2002.

<sup>160</sup> Citing *Col. Rtd. Dr Kiiza Besigye vs. Yoweri Kaguta Museveni & Another*, Presidential Election Petition No.1 of 2001 (dictum of Mulenga JSC).

13. The grounds of non-compliance and illegal practices or offences, as bases for setting aside the election of a Member of Parliament are distinct. Section 1 of the Parliamentary Elections Act, No. 17 of 2005 defines an illegal act to mean an act declared to be an illegal practice under Part XI of the Act. The illegal practices under Part XI include bribery; procuring prohibited persons to vote; publication of false statements as to illness, death or withdrawal of a candidate. In the instant case, the trial court distinguished between alleged acts of non-compliance and illegal practices that the appellant raised.

14. The more serious an allegation or the more serious its consequences if proven, the stronger the evidence has to be before a court to find the allegation proved on the balance of probabilities.<sup>161</sup> In the instant case, it being a serious allegation that votes were cast in respect of dead voters, the affidavit evidence the appellant relied on to prove it was insufficient. He had to offer proof cogent enough to secure judgment in his favour.

*Appeal dismissed.*

*Decision and orders of the trial court upheld.*

*1<sup>st</sup> respondent declared to be the validly elected Member of Parliament for Rwampara County Constituency.*

*Appellant to bear the costs of the appeal and at the trial court.*

**Legislation considered:**

Electoral Commission Act, Cap 140, section 15 (1)

Evidence Act, Cap 6, sections 54, 101(1), 102

Parliamentary Elections Act, No. 17 2005, sections 1, 47 (5), 68 (1)

**Cases cited:**

Amama Mbabazi and Another vs. Musinguzi Garuga James, Supreme Court Election Petition Appeal No. 12 of 2002

Blyth vs. Blyth [1966] AC

Gershom, Sizomu Wambedde vs. Electoral Commission, High Court Parliamentary Election Petition NO. 0006 of 2011

Home Department vs. Rehman [2003] 1 AC

John Cossy Odomelt vs. Electoral Commission and Louis Louts Opange, High Court Election Petition No. 6 of 2006

John Ken Lukyamuzi vs. Attorney General, Constitutional Petition No. 0002 of 2007

Joy Kafura Kabatsi vs. Hanifa Kawooya, Supreme Court Election Appeal No. 25 of 2007

Kifamunte Henry vs. Uganda, Supreme Court Appeal No. 10 of 1997

Kizza Besigye vs. Yoweri Kaguta Museveni and Another, Supreme Court Presidential Election Petition No. 001 of 2001 and No. 01 of 2006

Masiko Winifred Komuhangi vs. Babihuga J. Winnie, Court of Appeal Election Petition No. 9 of 2002

Mbowe vs. Elituffo [1967] EA 240

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<sup>161</sup> Citing *Home Department vs. Rehman* (2003) 1 AC 153.



Mukasa Anthony Harries vs. Bayiga Michael Philip Lulume, Supreme Court Election Petition No. 18 of 2007

Paul Mwiru vs. Igeme Nathan Nabeta and 2 others, Court of Appeal Election Petition No. 6 of 2011

Porter vs. Magil [2002] AC

Selle vs. Associated Motor Boat Co. [1968] EA 123

Sietco vs. Noble Builders (U) Limited, Supreme Court Civil Appeal No. 31 of 1995

Toolit Simon Akecha vs. Oulanyah Jacob L'okori and Electoral Commission, Court of Appeal Election Petition Appeal No. 19 of 2011

**Other legal materials considered:**

Black's Law dictionary, 4<sup>th</sup> and 6<sup>th</sup> Edition.

Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17

*Mr. James Byamukama together with Mr Boniface Ngaruye Ruhindi for appellant*

*Mr. Kanduho Frank for 1<sup>st</sup> respondent*

*Mr. Edwin Tabaro for 2<sup>nd</sup> respondent.*

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**Geoffrey Omara vs. Charles Andiro Gutmoi Abacacon and the Electoral Commission**

**Court of Appeal (Coram: Kasule, Musoke and Barishaki, JJ A)**

**Election Petition Appeal No.106 of 2016 and Election Petition Application No. 42 of 2017**

**October 31, 2017**

(Arising from Election Petition No.6 of 2016 (High Court of Uganda at Lira, decision of Masalu Musene, J.)

**Notice of appeal**—*Striking out a notice of appeal—Circumstances under which a notice of appeal can be struck out—Rule 82 of the Judicature (Court of Appeal Rules) Directions, S.I 13-10—Taking an essential step—Time within which to take essential step—Meaning of “taking an essential step”—Election petitions to be handled expeditiously.*

**Notice of Appeal**—*Nature of notice—time within which to file Notice—Extension of time—Rule 29 of the Parliamentary (Interim Provisions) (Elections Petitions) Rules, SI 141-2—Time of filing other documents accompanying Notice.*

The appellant and 1<sup>st</sup> respondent were candidates for the position of Member of Parliament for Erute County North, Lira District. On 3<sup>rd</sup> March 2016, the 2<sup>nd</sup> respondent gazetted the appellant as winner, with 13,334 votes. By the same gazette, the appellant was stated to have received 13,506 votes. On 15<sup>th</sup> April 2016, the 2<sup>nd</sup> respondent corrected the earlier error and clarified that the appellant had received 12,506 votes. The appellant lodged a petition in the High Court challenging the results as declared. The High Court dismissed the petition hence this appeal.

**HELD:**

1. Under Rule 82 of the Judicature (Court of Appeal Rules) Directions, S.I 13-10, a person served with a notice of appeal can move the court to strike out the notice of appeal, or the appeal itself where: (i) according to the person served with the notice, no appeal lay; and (ii) where the person served claims that the intending appellant had not taken an essential step at all in the proceedings or had taken the same but outside the time prescribed by the rules.<sup>162</sup>
2. Taking an essential step is the performance of an act by a party, whose duty is to perform that fundamentally necessary action demanded by the legal process, so that, subject to the permission by the court, if that action is not performed as by law

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<sup>162</sup> Citing *Peter Mukasa Bakaluba and Another vs. Mary Margaret Nalugo Sekiziyivu*, Court of Appeal Election Petition Application No. 24 of 2011.

prescribed, then whatever legal process has been done before, becomes a nullity, as against the party who has the duty to perform the act.<sup>163</sup>

3. In addition, election matters are by their very nature a unique breed of litigation where time is of great importance. There is need for expediency in handling, hearing and determining election appeals. As such, there is a duty upon the intending appellant to vigilantly pursue his or her appeal.<sup>164</sup>
  
4. In the instant appeal, the High Court's decision was delivered on 13<sup>th</sup> June 2016, and the appellant filed a notice of appeal on 24<sup>th</sup> June 2016, which was endorsed by the Registrar on 29<sup>th</sup> June 2016. In terms of Rule 29 of the Parliamentary (Interim Provisions) (Elections Petitions) Rules, SI 141-2, this notice of appeal was required to be given, in writing, within 7 days of the relevant High Court decision. As such, the filing on 24<sup>th</sup> June was outside the prescribed time. After that, the appellant failed to comply with a number of other essential steps, such as lodging the memorandum of appeal within 7 days after filing the Notice; lodging the Record of Appeal within 30 days after filing the memorandum of appeal; and serving the respondents in time. At no time did the appellant apply to court for extension of time. Even when served with a hearing notice for the appeal, he did not appear to prosecute the same. In the circumstances, the appellant failed to discharge his duties under the relevant law.

*Applications by respondents allowed.*

*Appellant's notice of appeal struck out.*

*Respondents granted costs of the appeal as appellant had no reasonable grounds to pursue the appeal; and even after lodging it, failed to take essential steps towards its execution. 2<sup>nd</sup> respondent also granted costs of his application in instant court.*

*Costs in the High Court awarded to the 1<sup>st</sup> respondent against the petitioner. No costs awarded to 2<sup>nd</sup> respondent, since it was the 2<sup>nd</sup> respondent's error in gazetting the wrong votes which caused the litigation.*

#### **Legislation considered:**

Judicature (Court of Appeal Rules) directions, SI 13-10, rule 82

Parliamentary (Interim Provisions) (Elections Petitions) Rules, SI 141-2, rule 29

#### **Cases cited:**

Electoral Commission and Another vs. Piro Santos, Civil Application No.22 of 2011

Moses Kasibante vs. the Electoral Commission, Court of Appeal Election Petition Application No.7 of 2012

Muiyah vs. Nyangah and Others [2003] 2 EA 616 C.H.C.K)

Peter Mukasa Bakaluba and Another vs. Mary Margaret Nalugo Sekiziyivu, Court of Appeal Election Petition Application No. 24 of 2011

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<sup>163</sup> Citing *Moses Kasibante vs. The Electoral Commission*, Court of Appeal Election Petition Application No.7 of 2012.

<sup>164</sup> Citing *Moses Kasibante vs. The Electoral Commission*, Court of Appeal Election Petition Application No.7 of 2012 and *Electoral Commission and Another vs. Piro Santos*, Civil Application No.22 of 2011 (itself citing the Kenyan case of *Muiyah vs. Nyangah and Others* [2003] 2 EA 616 C.H.C.K)

*Mr. Adams Makmot Kibwanga for 1<sup>st</sup> respondent*  
*Mr. Kato Ali Hassan for 2<sup>nd</sup> respondent*  
*Appellant was neither present nor represented by counsel.*

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**Bwino Fred Kyakulaga and Electoral Commission vs. Badogi Ismail Waguma**

**Court of Appeal (Coram: Owiny-Dollo; DCJ, Kasule and Musoke, JJ A)**

**Election Appeals No. 15 and 20 of 2016**

**November 1, 2017**

(Arising from Election Petition No.11 of 2016 (High Court of Uganda at Jinja, decision of Margaret Mutonyi, J.)

***Burden and standard of proof in election petitions***—Burden on the petitioner—Standard of proof is on the balance of probabilities.

***Affidavits***—Validity thereof—Dealing with defective affidavits.

***Election malpractice***—Presence of candidate agents during tallying—Candidate’s agents being chased away from polling station—Effect thereof.

***Electoral laws***—Non-Compliance with electoral law—Declaration of Results (DR) forms unsigned by agents—Unknown persons signing DR forms—Effect thereof—DR forms signed at 4.00pm.

***Electoral laws***—Non-Compliance with electoral law—Spreading of false propaganda leading to violence, ballot stuffing and multiple voting—Effect thereof.

***Electoral laws***—Non-Compliance with electoral law—Effect in a substantial manner—Proof that non-compliance affected election in substantial manner.

***Costs***—Award thereof—Rule 27 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2.

The 1<sup>st</sup> appellant, respondent and six others contested for the position of Member of Parliament for Kigulu North Constituency. The 2<sup>nd</sup> appellant declared the 1<sup>st</sup> appellant the winner of the election with 17,800 votes compared to the respondent’s 15,651 votes. The respondent challenged the results of the election before the High Court. The trial court upheld the petition, set aside the 1<sup>st</sup> appellant’s election and ordered a by-election to be held.

**HELD:**

1. The burden of proof lies on the petitioner to prove the assertions raised in the petition to the satisfaction of the court.

2. The standard of proof required is proof on a balance of probabilities as stated under section 61 (3) of the Parliamentary Elections Act, No. 17 of 2005.<sup>165</sup>
3. There is a general trend towards taking a liberal approach when dealing with defective affidavits. This is in line with Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995, which requires that substantive justice be administered without undue regard to technicalities.<sup>166</sup> In the instant case, the deponents in question not having been cross-examined in the lower court; the issue of compliance with the Illiterates Protection Act, Cap 78 just having been raised, there was no proof that the deponents were illiterates within the meaning of the law, which would trigger the provisions of section 3 of that Act.
4. According to section 47 (7) of the Parliamentary Elections Act, No. 17 of 2005, the act of chasing away the respondent's agents after apparently offering them money so that the election could be rigged raised suspicion as to the integrity of the election. The results from the polling station in question were rendered unreliable considering that the principle of transparency was compromised at that station.
5. Where it is alleged that a signature on a Declaration of Results (DR) form has been forged, the matter assumes a criminal element and should be subjected to expert investigative assessment, as opposed to a court arrogating to itself the role of a handwriting expert. This is especially so where the court has nothing to compare the signature with.<sup>167</sup> In this case, where the court had a record to compare with, it was clear that the signature on one of the DR forms in question was not that of the person alleged to have signed it.
6. The role of the court was not confined to balancing the rights and merits of the opposing parties. Rather the question was whether a valid election had been held, having regard to the rights of the voters.<sup>168</sup> In the instant case, while the respondent's agents might have been wrongly denied an opportunity to sign the Declaration of Results (DR) forms, there were no complaints as to the validity of the results on those forms. The DR forms contained the same results, and the respondent did not allege different results. The failure to sign, *per se*, did not invalidate the results contained in the forms.
7. Polling materials should be checked at the beginning of the exercise to ensure that everything is in order. However, human errors and mistakes are to be expected in any election. Although perfection is an aspiration in an election, allowance must be made for human errors, and what is paramount is that the ultimate will of the electorate is

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<sup>165</sup> Citing *Paul Mwiru vs. Hon. Igeme Nathan Nabeta Samson and 2 Others*, Court of Appeal Election Petition Appeal No.6 of 2011.

<sup>166</sup> Citing *Kasaala Growers Cooperative Society vs. Kakooza Jonathan and Another*, Supreme Court Civil Application No.19 of 2010 (itself citing with approval *Banco Arabe Espanol vs. Bank of Uganda*, Supreme Court Civil Appeal No.8 of 1998.

<sup>167</sup> Citing *Frederick Nkayi Mbaghadi and Another vs. Frank Wilberforce Nabwiso*, Court of Appeal Election Petition Appeal Nos 14 and 16 of 2011.

<sup>168</sup> *Ibid.*

ascertained and upheld.<sup>169</sup> In the instant case, although there was a mix up in the packing materials for two polling stations (with similar names), there was no dispute as to the results indicated in the eventual DR forms being true accounts of what actually transpired at those stations.

8. Both parties had appointed polling agents and no complaints were raised of instances where any candidates were disadvantaged in any way. There was no complaint that voters were disenfranchised due to the early closure of voting at those polling stations. In these circumstances, it was wrong for the trial court to conclude that the stating of the time as 4.00pm in a number of stations was an indication that the forms had been filled in haste or fabricated.
9. There was evidence that at one of the polling stations had an unruly crowd, full of the 1<sup>st</sup> appellant's supporters, had forced the presiding officer to re-open the ballot box and that all those people, including those who had already cast their votes, voted again. At 7.30pm, the crowd forced the agents to sign the DR forms. There was clearly multiple voting at this station, contrary to section 31 of the Parliamentary Elections Act No.17 of 2015.
10. The legal requirement for substantial effect is provided under section 61 (a) of the Parliamentary Elections Act, No. 17 of 2005, and has been confirmed by jurisprudence in Uganda and elsewhere.<sup>170</sup> It is not sufficient to show that there have been irregularities in the election. It must be proved that the non-compliance or irregularities affected the results of the election in a substantial manner. The principle is that an election should not be set aside basing on trivial errors and informalities.<sup>171</sup> At the same time, in election petitions, it did not matter how many votes one got, but how the votes were obtained. The bottom line should be the free will of the people who participate in the electoral process.
11. In the instant case, there was no contention that the 1<sup>st</sup> appellant obtained a total of 17,800 votes against the respondent's 15,651 votes- a difference of 2,149 votes. This winning margin remained high and there was no doubt in the court's mind that still remained the validly elected Member of Parliament for the constituency even after taking away from him the votes of the polling stations where voting was not properly conducted.
12. Costs were governed by rule 27 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules SI 141-2. However, this Rule was contrary to section 27 of the Civil Procedure Act, Cap 71, a substantive Act which would not be overridden by a subsidiary rule 27. From the record in its entirety, the petition was not entirely unmeritorious. As such, the justice of the case required that each party meet their own costs in this court and the court below.

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<sup>169</sup> Citing *Nadimo vs. Independent Electoral and Boundaries Commission and Others* [2014] 1 EA 355.

<sup>170</sup> Citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (itself citing with approval *Mbowe vs. Eliuffo* (1967) EA240).

<sup>171</sup> Citing *Gunn vs. Sharpe* (1974) 1 QB 808.

*Appeal upheld.*

*Decision and orders of High Court (nullifying the 1<sup>st</sup> appellant's election as the validly elected Member for Kigulu North Constituency and ordering fresh elections) set aside*

*Each party to meet their own costs of the appeal and those at the lower court.*

**Legislation considered:**

Civil Procedure Act, Cap 71, section 27

The Constitution of the Republic of Uganda, 1995, Article 126 (2) (e)

Illiterates Protection Act, Cap 78, section 3

Parliamentary Elections Act, No. 17 of 2005, sections 61 (a), (3), 47 (7)

Parliamentary Elections (Interim Provisions) (Election Petitions) Rules SI 141-2, rule 27

**Cases cited:**

Banco Arabe Espanol vs. Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998

Frederick Nkayi Mbaghadi and Another vs. Frank Wilberforce Nabwiso, Court of Appeal Election Petition Appeal Nos 14 and 16 of 2011

Gunn vs. Sharpe [1974] 1 QB 808

Kasaala Growers Cooperative Society vs. Kakooza Jonathan and Another, Supreme Court Civil Application No.19 of 2010

Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission, Supreme Court Presidential Election Petition No.1 of 2001

Mbowe vs. Eliuffo [1967] EA 240

Nadimo vs. Independent Electoral and Boundaries Commission and Others [2014] 1 EA 355

Paul Mwiru vs. Igeme Nathan Nabeta Samson and 2 Others, Court of Appeal Election Petition Appeal No.6 of 2011

*Mr. Kiryowa Kiwanuka and Mr. Esau Isingoma for the 1<sup>st</sup> appellant*

*Mr. Lule Kennedy Ben for the 2<sup>nd</sup> appellant*

*Mr. Alex Luganda and Mr. Kwemara Kafuuzi for the respondent*

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**Ntende Robert vs. Isabirye Iddi**

**Court of Appeal (Coram: Kavuma, Barishaki and Mugamba, JJ A)**

**Election Petition Appeal No. 74 of 2016**

**November 15, 2017**

(Arising from Election Petition No.74 of 2016 (High Court of Uganda, decision of Margaret Mutonyi, J.)

**Electoral offences**—Bribery—Definition of bribery—Ingredients of bribery—Proof—Effect on election results—Burden of proof on petitioner to adduce cogent evidence without contradictions.

**Evidence**—Evidence in cases of bribery—Photographs as evidence of bribery—Requirement for authentication.

**Principle-agent relationship in election petitions**—Proof of agency relationship—Proof of relationship in cases of bribery.

**Voter**—Meaning of Voter—Section 1 of the Parliamentary Elections Act No. 17 of 2005—Proof of voter—National Identity card as proof of voter—Proof of voter in cases of bribery—Evidence to show that the person bribed was voter.

**Burden and standard of proof in election petitions**—Burden on petitioner—Standard on balance of probabilities—Meaning of ‘proof to the satisfaction of court’.

**Evidence in petitions**—Untranslated material—Effect thereof on evidence—Language of court is English.

**Costs in petitions**—Award thereof—Costs at the discretion of court.

The appellant, respondent and 3 other persons contested for the position of Member of Parliament for Bunya South Constituency in Mayuge District. The appellant was declared winner by the Electoral Commission, with 18,789 votes against the respondent’s 18,366 votes. The respondent challenged the results of the election before the High Court. The High Court, in a decision rendered on 18<sup>th</sup> July 2016, upheld the petition and ordered that fresh elections be conducted hence the instant appeal.

**HELD:**

1. The offence of bribery is provided for under section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005. Bribery is an offence committed by a person who gives or promises to give or offers money or valuable inducement to a voter, in order to

corruptly induce the latter to vote in a particular way or to abstain from voting, or as a reward to the voter for having voted in a particular way or abstained from voting.<sup>172</sup>

2. It was now trite law in electoral petitions that the petitioner has to adduce cogent evidence to prove his or her case to the satisfaction of the court. It has to be that kind of evidence which is free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's favour.<sup>173</sup> In petitions of this nature, witnesses tend to be partisan while giving evidence in support of a candidate of their choice. The court therefore has to take more caution while evaluating it.<sup>174</sup>
3. The offence of bribery has three ingredients. There has to be evidence that: (i) a gift was given to a voter; (ii) the gift was given by a candidate or their agent; and (iii) it was given with the intention of inducing the person to vote for a particular candidate.<sup>175</sup>
4. Where photographs are adduced as evidence of bribery, they have to be authenticated. It is not enough to present photographs showing people receiving gifts and wearing t-shirts with a candidate's picture. It had to be proved that the t-shirts are adorned with the candidate's knowledge and approval and that the photographs are taken at the time and place of the alleged bribe-giving and that it is the candidate or his or her agent(s) who gave those gifts, with the intention of influencing certain voters. It is also critically important to prove that the people bribed were actually registered voters.<sup>176</sup> In the instant case, there was no evidence to show that the women who allegedly received salt and bitenge were registered voters being bribed to influence their pattern of voting.
5. With regard to an ambulance donated to the constituency with words inscribed on it indicated that it was donated by the appellant there was no evidence from any witness, on the record, to show that they voted for the appellant after reading the words inscribed on the ambulance.
6. The petitioner also has to show that the alleged acts are by the candidate or his or her agent. An agent is a person who in most cases is authorized by another to act for that other, or who undertakes to transact some business or manage some affair for another by the authority or on account of the other.<sup>177</sup> In the instant case, it had not been proven which agents of the appellant repaired the boreholes in question.
7. According to section 1 of the Parliamentary Elections Act, No. 17 of 2005, a 'voter' is a person whose name is entered on the voter's register. Under section 1, a voter's

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<sup>172</sup> Citing Black's Law Dictionary, 6<sup>th</sup> Edition.

<sup>173</sup> Citing *Masiko Winifred Komuhangi vs. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002 (dictum of Kikonyogo DCJ).

<sup>174</sup> Citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (dictum of Mulenga JSC).

<sup>175</sup> Citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001.

<sup>176</sup> Citing *Lanyero Sarah Ocheng and Electoral Commission vs. Lanyero Molly*, Court of Appeal Election Petition Appeal No.32 of 2011.

<sup>177</sup> Citing *Hellen Adoa and Another vs. Alice Alaso*, Court of Appeal Election Appeal Nos. 57 and 54 of 2016.

register refers to the National Voter's Register compiled under section 18 of the Electoral Commission Act, Cap 140. As such, a National Identity card is not proof that one is a registered voter.

8. The decision of court has to be based on cogent evidence adduced by the party who seeks judgment in his or her favour. It has to be that kind of evidence which is free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's favour.<sup>178</sup> In the instant case, in relation to allegations of bribery through the donation of an ambulance, the trial court erred in disregarding the need to have the purchase agreement or log book of the said vehicle so as to prove its existence and ownership. There was similarly no evidence on record to prove that the person alleged to have been in charge of the ambulance was an agent of the appellant.
9. In parliamentary election petitions, the burden of proof lies on the petitioner to prove the assertions in the election petition and the standard of proof required is on a balance of probabilities.<sup>179</sup>
10. The expression 'proved to the satisfaction of court' connotes absence of any reasonable doubt; the amount of proof which produces the court's satisfaction has to be that which leaves the court without reasonable doubt.<sup>180</sup> A court cannot be said to be 'satisfied' when it is in a state of reasonable doubt.<sup>181</sup> In the instance case, the trial court had not applied the requisite high standard of proof in evaluating the evidence regarding the allegations of bribery.
11. According to section 88 of the Civil Procedure Act, Cap 71; the language of the court is English, evidence has to be recorded in English and all written applications have to be in English. Section 88 is couched in mandatory terms, and failure to comply with it renders the document unusable. As such, the trial court could not be faulted for expunging an affidavit which was to introduce an untranslated audio CD, since this offended section 88.
12. In terms of section 27 of the Civil Procedure Act, Cap 71, costs are at the discretion of the court. The trial court had declined to grant the respondent costs on the basis that he had had all time to report the proved illegal practices prior to the election, which he had not done. The trial court could not be faulted for exercising its discretion in this manner.

*Appeal upheld.*

*Decision and orders of the High Court set aside.*

*Appellant confirmed as the validly elected Member of Parliament for Bunya South Constituency.*

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<sup>178</sup> Citing *Masiko Winifred Komuhangi vs. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002 (dictum of Kikonyogo DCJ).

<sup>179</sup> Citing Section 61 (1) and (3) of the PEA.

<sup>180</sup> Citing *Col. Rtd. Dr Kiiza Besigye vs. Yoweri Kaguta Museveni & Another*, Presidential Election Petition No.1 of 2001 (dictum of Mulenga JSC).

<sup>181</sup> Citing *Blyth vs. Blyth* (1966) AC 643 (dictum of Lord Denning).

*Respondent to bear the costs of the appeal and costs in the High Court.*

**Legislation considered:**

Civil Procedure Act, Cap 71, sections 27, 88

Parliamentary Elections Act, No. 17 of 2005, sections 1, 61

**Cases cited:**

Blyth vs. Blyth [1966] AC 643

Hellen Adoa and Another vs. Alice Alaso, Court of Appeal, Election Appeal Nos. 57 and 54 of 2016

Kabuusu Moses Wagaba vs. Lwanga Timothy Mutekanga and the Electoral Commission Election, Petition Appeal No. 53 of 2011

Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission, Supreme Court Presidential Election Petition No.1 of 2001

Lanyero Sarah Ocheng and Electoral Commission vs. Lanyero Molly, Court of Appeal Election Petition Appeal No.32 of 2011

Masiko Winifred Komuhangi vs. Winnie J Babihuga, Election Petition Appeal No. 9 of 2002

Otada Sam Amooti Owor vs. Taban Idi Amin, Court of Appeal Election Petition Appeal No.39 of 2016

*Mr. Asuman Nyonyintono, Mr. Waiswa Ramathadan, Ms. Namata Harriet and Mr. Mujuzi Najib for the appellant*

*Mr. Galisonga Julius for the respondent*

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# Odo Tayebwa vs. Gordon Kakuuna Arinda and the Electoral Commission

## Court of Appeal (Coram: Kasule, Buteera and Bamugemereire, JJ A)

### Election Petition Appeal No. 86 of 2016

November 17, 2017

(Arising from Election Petition No. 5 of 2016 (High Court of Uganda at Mbarara, decision of Damalie N Lwanga, J.)

**Burden and standard of Proof in election petitions**—Burden on the petitioner—Standard on the balance of probabilities.

**Affidavits**—Time for filing affidavits—Parties agree on the time frame within which to file affidavits— Effect thereof.

**Filing affidavits to support a reply to petition**—Affidavits to be filed in 10 days—Rule 8(1) of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2—57 affidavits filed 22 and 23 days from the last date stipulated under rule 8 (1)—Whether the 57 affidavits were filed out of time—Witness secured after the expiration of 10 days.

**Scheduling conference notes**—Parties to be bound by the scheduling notes—Documents annexed to the answer and supporting affidavits—Time lines set by parties during scheduling conference as to when affidavits and rejoinders are to be filed—57 affidavits filed 22 and 23 days after the time stipulated under rule 8 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rule, SI 141-2 Rules—Effect thereof.

**Affidavits**—Affidavit with defective and superfluous parts—Discretion of court to sever and reject defective and superfluous parts.

**Evidence in election petitions**—Cross examining a deponent of an affidavit—Effect of failure to cross examine a deponent of an affidavit—Validity of affidavits deponed by illiterate persons purporting to have ‘read and understood’ affidavits.

**Electoral offences**—Bribery—Proof thereof—Effect.

**Illegal practices**—Attacking the character and minimizing the stature and candidature of a candidate—Proof thereof.

**Annulling an election of a Member of Parliament**—Section 61 of the Parliamentary Elections Act No. 17 of 2005—Grounds for annulling an election- Whether in the circumstances the respondent’s election could be annulled.

**Affidavit evidence**—Corroboration of evidence in election petitions—Whether election petition evidence requires corroboration.

**Pleadings**—Drafting pleadings—Petitioner is duty bound to adduce evidence in respect of only those allegations pleaded in the petition.

**Costs**—Award of costs—Costs follow the event unless court for a good cause orders otherwise—Whether the petitioner was entitled to costs.

The appellant and the 1<sup>st</sup> respondent were candidates in parliamentary elections of Bushenyi Ishaka municipality held on February, 18 2016. The 2<sup>nd</sup> respondent who organised the election declared the 1<sup>st</sup> respondent as the winner and subsequently gazetted him as the duly elected Member of Parliament of Bushenyi Ishaka Municipality.

Dissatisfied with the result, the appellant lodged a petition in the High Court alleging illegal practices and electoral offences to have happened in the course of the election and the same to have been carried out contrary to the provisions of the Parliamentary Elections Act. The petition was dismissed hence the instant appeal. The appellant prayed to set aside the judgment of the High Court, substitute the High Court order dismissing the appeal with costs with an order allowing the petition with costs, annulling the election of the 1<sup>st</sup> respondent as the Member of Parliament and order a fresh election.

**HELD:**

1. The burden of proof lay on the petitioner to prove the allegations he alleged in the petition. The appellant had to prove those allegations, or one of them in case of an illegal practice or an electoral offence, to the satisfaction of the court on a balance of probabilities.<sup>182</sup>
2. Given the public importance of elections, the degree of proof in election petitions is relatively higher than in a normal civil action. The term ‘proved to the satisfaction of the court on a balance of probabilities’ places a duty upon the petitioner to prove their case to the level where the court is convinced that the occurrence of a fact to have been more probable than not.<sup>183</sup>
3. Rules 8 (1) (3) (a) and 15 (1) of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2 were intended to ensure a quick trial of an election petition. At the same time, such a trial must resolve the election dispute on merit with the parties to the dispute exercising their right to a fair trial.
4. Thus where, in the normal course of events, the respondent can secure and file the affidavits necessary to support the reply to the petition within the ten days after service of the petition set by rule 8 (1), then the respondent ought to do so. But where this is not possible or where, for example, the witness is secured after the expiry of the said ten days, then rule 15 leaves the door open for one to prepare and lodge an affidavit to be read in open court.

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<sup>182</sup> Citing Section 61 (3) of the PEA.

<sup>183</sup> Citing *Anthony Harris Mukasa vs. Dr. Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No.18 of 2007.

5. It was up to the court to set the time lines which were to ensure justice to all parties to the election petition, bearing in mind the overall constitutional goal that, while an election petition has to be disposed of, Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995 enjoins the court to administer substantive justice without undue regard to technicalities.<sup>184</sup> In the instant case, although the 57 affidavits in question had been filed 22 and 23 days from the last date stipulated by rule 8 (1) Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2, and no leave had been granted by the court, the appellant had not shown any prejudice or inconvenience he had suffered as a result of this delay. The trial judge was thus correct to decline to strike out those affidavits.
6. Once at the stage of scheduling, timelines are set by agreement of all parties to the petition as to when all affidavits and rejoinders to them are to be filed, then a party to the petition needed no leave of court to file the same, unless and until the filing is outside the agreed time. In the instant case, as evidenced by the scheduling notes, the parties had agreed to a timeline beyond that envisaged under the relevant Rules. As such, the appellant and his counsel were estopped from asserting that any affidavit filed within the agreed time was filed out of time.<sup>185</sup>
7. An affidavit is a written statement in the name of a deponent by whom it is voluntarily signed and sworn to or affirmed. It is confined to such statements as the deponent is able to their knowledge to prove, but in certain cases can contain statements of information and belief with the sources and grounds thereof being disclosed.
8. Rules 15 (1) and (2) of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules SI 141-2 provides that all evidence in favour of or against a parliamentary election Petition had to be by way of affidavit read in open court. With leave of court, the deponent to an affidavit before the court can be cross examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn.
9. In proper case, and depending on the circumstances before the court, the court has the discretion to sever and reject those parts of an affidavit that are defective or superfluous and to consider and rely upon the proper parts of the same affidavit apart from or in addition to the affidavit of each of them, some other evidence given on oath through cross-examination and re-examination that is availed to the court.<sup>186</sup> In the instant case, through cross-examination and re-examination, each one of the deponents of each of the impugned affidavits adduced to the court evidence on oath that the court could not disregard. The trial court was correct to have severed the affidavits by striking off those parts to the effect that the deponents who were illiterate had read and understood the affidavits they were responding to.

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<sup>184</sup>Citing *Yowasi Kabiguruka vs. Samuel Byarufu*, Court of Appeal Civil Appeal No. 18 of 2008.

<sup>185</sup> Citing Section 114 of the Evidence Act.

<sup>186</sup> Citing *Col. Rtd. Dr Kiiza Besigye vs. Yoweri Kaguta Museveni & Another*, Presidential Election Petition No.1 of 2001.

10. Only the affidavit of a deponent who does not turn up for cross-examination is liable to be given hardly any consideration.
11. According to section 61 of the Parliamentary Elections Act, No. 17 of 2005. In the case of an electoral offence or an illegal practice, a single electoral offence or illegal practice, once proved under the requisite standard of proof, was a sufficient ground for setting aside an election. In the instant case, the court had to subject each allegation of the commission of an electoral offence or illegal practice to a thorough and high level scrutiny. This was necessary because in an election petition the prize is political power and, as such, witnesses who are invariably partisan could easily resort to telling lies so as to be able to secure victory for their preferred candidate. Therefore, the trial court was correct to find that allegations regarding bribery had not been proved.
12. To prove illegal practice, the petitioner has to show that the statement in question published by the candidate is false, and he had to prove it so as to leave the court certain that it is false. Whilst illegal practice was similar to defamation in nature, it differs in the way it had to be proved. The illegal practice being quasi-criminal, the onus of proof shifts only where a *prima facie* case has been made out.<sup>187</sup> In the instant case, the appellant had not made out how false or reckless the words in the portrait photograph that the respondent was a snake in a ploughed field, and a traitor to Forum for Democratic Change were in the peculiar circumstances. As such, this illegal practice had not been proved.
13. In electoral petitions, evidence does not invariably require corroboration. However, the evidence adduced must be strong enough to prove the alleged facts. It must be of such a standard as to satisfy the court on a balance of probabilities.<sup>188</sup> In the instant case, with regard to the allegations of bribery, it was clear that the court did not necessarily require corroboration of the evidence, but found the evidence of the particular single witness in question to be insufficient. Court thus looked for other credible evidence, if any, to support the bribery allegation and failed to find any. In the instant case, it had it had not been shown that there were any malpractices which had substantially affected the outcome of the election.
14. Section 27 of the Civil Procedure Act, Cap 71 provides that the costs of an action would follow the event unless the court, for good cause, orders otherwise. In the instant case, no such good cause existed to warrant setting aside the award of costs since the court had found that no affidavits had been filed out of time, and since the incidents of violence and intimidation had not been proved to the satisfaction of the court.

*Appeal dismissed.*

*Judgment of High Court upheld.*

*Appellant to pay the costs of both respondents for the appeal and in the High Court.*

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<sup>187</sup> Citing *Col. Rtd. Dr Kiiza Besigye vs. Yoweri Kaguta Museveni & Another*, Presidential Election Petition No.1 of 2001 (dictum of Mulenga JSC.).

<sup>188</sup> Citing *Aligawesa Philip vs. Byandala Abraham James and Another*, Election Appeal No.24 of 2011.



**Legislation considered:**

Civil Procedure Act, Cap 71, section 27

Civil Procedure Rules, SI71-1, Order 12

The Constitution of the Republic of Uganda 1995, Article 126 (2) (e)

Parliamentary Elections Act, No. 17 of 2005, section 61 (3)

Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2, rules 8 (1), 15 and 17

**Cases cited:**

Achieng Sarah Opendi and Electoral Commission vs. Ochwo Nyakecho Kezia, Court of Appeal Election Petition No. 39 of 2011

Algawesa Philip vs. Byandala Abraham James and Another, Election Petition Appeal No. 24 of 2011

Kamba Saleh Moses vs. Namuyangu Jenifer, Election Petition Appeal No. 27 of 2011

Kizza Besigye vs. Museveni Yoweri Kaguta and Electoral Commission, Election Petition No.1 of 2001

Matisko Winfred Komuhangi vs. Babihuga, Election Petition Appeal No. 9 of 2002

Muhindo Rehema vs. Winfred Kiiza and Another, Court of Appeal, Election Petition No. 29 of 2011

Mukasa Anthony Hariss vs. Bayiga Micheal Philip Lulume, Election Appeal No. 18 of 2007

Paddy Kabagambe and Another vs. Bwambale Bihande Yokasi and Another, Fort portal Election Petition No. 11 of 2006

Sitenda Sebalu vs. Sam K Njuba, Election Appeal No. 26 of 2007

Yona Kanyomozi vs. Motor Mart (U) Limited, Supreme Court Civil Application No. 8 of 1989

Yowasi Kabiguruka vs. Samuel Byarufu, Court of Appeal Civil Appeal No. 18 of 2008

*Mr. Ngaruye Ruhindi Boniface and Mr. Collins Nuwagaba appeared for the appellant*

*Mr. Alexander Kibandama and Mr. Ronald Tusingwire were for the 1<sup>st</sup> respondent*

*Mr. Edwin Tabaro and Mr. Justus Karuhanga for 2<sup>nd</sup> respondent*

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**Nabukeera Hussein Hanifa vs. Kusasira Peace K Mubiru and Electoral Commission**

**Court of Appeal (Coram: Owiny-Dollo; DCJ, Kavuma and Mugamba, JJ A)**

**Election Petition Appeal No. 72 of 2016**

**November 20, 2017**

(Arising from Election Petition No.13 of 2016 (High Court of Uganda at Jinja, decision of Benjamin Kabiito, J.)

***Burden and standard of proof in election petitions***—Burden on petitioner—Standard on balance of probabilities—Meaning of ‘proof to the satisfaction of court’—Rationale.

***Advocates***—Conduct of advocates during court proceedings—Advocate interfering with witnesses of the adverse party to recant evidence—Advocates deterred from intimidating and inducing witnesses—Rule 19 of the Advocates (Professional Conduct) Regulations, SI 267-2.

***Duty of the court in an election petition***—Duty to pass a definite and clearly ascertained decision- Duty of court in regards to treatment of expunged affidavits.

***Affidavits***—Affidavits in rejoinder—Contents of an affidavit in rejoinder—An affidavit in rejoinder cannot be permitted to introduce new matters of fact that were never raised in reply or in supplement—Rationale.

***Registered voter***—Proof of being a registered voter—A registered voter is a person whose name is appearing on the voters’ register—Section 1 of the section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005.

***Electoral offences***—Bribery—Ingredients of the offence of bribery in election petitions—Proof of a single act of bribery to the required standard—Effect thereof.

***Setting aside an election***—Grounds thereof—Non-compliance with electoral laws—Non-compliance must have affected the result of the election in a substantial manner—Section 661(1)(a) and section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005.

***Declaration of Results (DR) forms***—Once candidates’ agents sign DR Forms without compliant—Effect thereof on results of the election.

The appellant, 1<sup>st</sup> respondent 3 other persons contested for the position of Woman Member of Parliament for Mukono District. The 1<sup>st</sup> respondent was declared winner by the 2<sup>nd</sup> respondent. The appellant challenged the results of the election before the High Court. The High Court, in a decision rendered on 12<sup>th</sup> August 2016, dismissed the petition.

The appellate appealed to the Court of Appeal arguing that the trial court erred in placing a higher burden of proof on the petitioner than what is required by law. The appellant faulted the trial court for relying on *Col Rtd Besigye Kizza vs. Museveni Yoweri Kaguta, Presidential Election Petition No.1 of 2006* to interpret section 61 of the section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005. The appellant complained about the affidavit evidence of three witnesses that was allegedly recanted. He argued that affidavit evidence could only be recanted by a proper affidavit deponed in compliance with the law. He stated that the three affidavits could not stand because they were involuntary and were not signed before the Commissioner for Oaths. It was also submitted for the appellant that the trial court in resolving the issue of bribery at Namuganaga Secondary School relied on evidence that he had expunged off the record. The court appeared to have expunged the affidavits but later referred to them. Furthermore, the appellant faulted the trial court for relying on the affidavit in rejoinder of the 1<sup>st</sup> respondent and yet he had ruled that the witnesses who had not offered affidavits in support of the petition could not rejoin.

The trial court was also faulted for rejecting evidence of some witnesses on the ground that they were not registered voters. The witnesses had deponed affidavits stating that they were registered voters and had attached their National Identity cards as evidence of being registered voters. The trial court was also faulted for holding that the 1<sup>st</sup> respondent did not commit acts of voter bribery. The appellant argued that the election was not free and fair and that the results declared did not reflect the free will of the people of Mukono. He added that the non-compliance affected the results in substantial manner

**HELD:**

1. Section 61 (1) and (3) of the section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005 requires that grounds have to be proved first to the satisfaction of court and second on a balance of probabilities. The balance of probabilities in election petitions is higher than that in ordinary civil suits though not beyond reasonable doubt. Elections petitions are of critical importance to the public and raising mere suspicion is not enough. The phrase 'proved to the satisfaction of court' connotes absence of 'reasonable doubt' but does not mean that the matter is to be proved beyond reasonable doubt. It means that no court can be satisfied if they are in a state of reasonable doubt.<sup>189</sup> In the instant case the requisite high standard was applied.
2. Rule 19 of the Advocates (Professional Conduct) Regulations SI 267-2 deters advocates from intimidating and inducing a witness who has been called or is likely to be called by the opposite party. In the instant case, the witnesses were approached by the 1<sup>st</sup> respondent's lawyers who coerced them to change their testimonies by recanting earlier affidavits in support of the petition. Such action by counsel was not befitting professional integrity. Questionable affidavits could not be said to have recanted the witnesses' earlier evidence properly deponed and affirmed as truthful by the said witnesses in their affidavits in rejoinder

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<sup>189</sup> Citing *Blyth vs. Blyth* (1966) AC 643 (dictum of Lord Denning); *Kamba Saleh Moses vs. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal Number 27 of 2011 and *Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (dictum of Odoki CJ).

3. It is the duty of the court to pass a definite and clearly ascertained decision. In the instant case, the court appeared to have expunged the affidavits but later referred to them. This was an error, since the said affidavits did not meet the requirements of proper affidavits, they were inadmissible and could not form part of the record.
4. An affidavit in rejoinder cannot be permitted to introduce new matters or issues of fact that were never raised by the affidavit in reply or those supplementing it. To do so would tantamount to reopening the applicant's case with entirely new causes or fresh issues of fact which the respondent would not have had the opportunity to answer.
5. The conclusive proof of a registered voter is by evidence of a person's name appearing on the National Voters' Register. Witnesses stating to be registered voters and attaching their National Identity Cards was not the required proof.
6. Proof of a single act of bribery to the required standard by or with knowledge and consent or approval of a candidate is sufficient to invalidate an election.
7. The ingredients the petitioner needs to prove bribery are; (i) the 1<sup>st</sup> respondent or his or her agents gave out money or gifts, (ii) the giving was to a person who was a registered voter, (iii) the giving was with the intent to influence the voter to vote or refrain from voting. In the instant case, the 1<sup>st</sup> respondent committed bribery personally or through his or her agent with his or her knowledge, consent and approval.
8. To succeed in setting aside an election under section 61(1)(a) of the section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005, the petitioner must prove that there was non-compliance with electoral laws and that the non-compliance affected the result of the election in a substantial manner. The petitioner or appellant did not bring to court any evidence as to the effect of cancellation of the results of some polling stations upon the overall outcome. The non-compliance therefore, did not affect the overall results in a substantial manner.
9. Once candidates' agents sign Declaration of Results (DR) Forms without complaint, it is conclusive evidence that the election was free and fair. In the instant case, the polling agents duly signed the DR forms and raised no complaints. Therefore, there was no evidence to support the allegations of false entries on the DR forms and the alleged tampering with polling materials.

*Appeal dismissed.*

*Elections for the Woman Member of Parliament for Mukono District and subsequent declaration upheld.*

*Respondent entitled to ½ of the costs of the appeal and full costs in the High Court.*

**Legislation considered:**

Advocates (Professional Conduct) Regulations, SI 267-2, rule 19

Parliamentary Elections Act, No. 17 of 2005, section 61 (1) (a) and (3)

**Case cited:**

Blyth vs. Blyth [1966] AC 643

Kamba Saleh Moses vs. Namuyangu Jennifer, Court of Appeal Election Petition Appeal No. 27 of 2011

Kizza Besigye vs. Museveni Yoweri Kaguta, Presidential Election Petition No. 1 of 2006

Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission, Supreme Court Presidential Election Petition No.1 of 2001

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# Muyanja Simon Lutaaya vs. Kenneth Lubogo and the Electoral Commission

Court of Appeal (Coram: Owiny-Dollo; DCJ, Kavuma and Buteera, JJ A)

Election Petition Appeal No. 82 of 2016

November 22, 2017

(Arising from Election Petition No.10 of 2016 (High Court of Uganda at Jinja, decision of Margaret Mutonyi, J.)

**Affidavits**—*Admissibility of affidavits—Credibility of deponents.*

**Affidavits**—*Adducing of affidavits late—Election petitions to be determined expeditiously—Cross-examination of deponents.*

**Evidence**—*Witnesses—Examination of witnesses—Duty of court to call witnesses—Duty is discretionary.*

**Electoral offences**—*Bribery—Ingredients of bribery—Proof—Effect.*

The appellant, 1<sup>st</sup> respondent and 3 others contested for the position of Member of Parliament for Bulamogi County Constituency, in Kaliro District. The 1<sup>st</sup> respondent was declared winner by the 2<sup>nd</sup> appellant, with 19,179 compared to the appellant's 16,546 votes. The appellant challenged the results of the election before the High Court. In its judgment, the High Court dismissed the petition.

## HELD:

1. Given the importance of affidavits in election petitions, the identity and integrity of deponents of such affidavits is a matter of keen interest to the court, given that an election can only be set aside if it is proved to the satisfaction of the court. Indeed, the identity and integrity of a deponent goes to the root of the substance and probative value of his or her affidavit, and this cannot be regarded as a mere technicality in any way.<sup>190</sup>
2. It is not prohibited for a trial court to compare signatures or handwriting in the absence of expert evidence; but court has to exercise great caution because of the lack of expertise in the matter.<sup>191</sup> In the instant case, the matter was an obvious one to the court. The trial court was correct to expunge the 23 affidavits in question in so far as the identity of the deponents was in doubt as signatures on affidavits differed from identity cards, or signatures on one document and a thumb print on another.

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<sup>190</sup> Citing *Makula International Ltd vs. Cardinal Nsubuga Wamala* (1982) HCB 1 and *Kalazani Charles vs. Musoke Paul Sebulime*, High Court Election Petition No.17 of 2016.

<sup>191</sup> Citing *Hon. Kipoi Tonny Nsubuga vs. Ronny Waluku Wataka and 2 Others*, Election Petition Appeal No.7 of 2011.

3. Evidence in election petitions is adduced mainly by way of affidavits. This is the essence of rule 15 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2. This is meant to advance expeditious disposal of petitions without forgetting to do justice to the parties. The essence of timely disposition is emphasized by section 63 (2) of the Parliamentary Elections Act, No. 17 of 2005 which requires the court to hear and determine election petitions expeditiously and envisages that the court can, for that purpose, suspend any other matter pending before it.<sup>192</sup>
4. It is improper for a petitioner to file an affidavit in support of his or her allegations with his or her final submissions. This offers the opposite party no opportunity to cross examine the deponents if he or she so wished. Final submissions are mere summations of evidence already tendered in court, and not an avenue to introduce new matters.<sup>193</sup> In the instant case, the trial court was correct to strike out affidavits which had been filed out of time, without the leave of court, and which would have been prejudicial to the respondents who would have had no opportunity to respond to those affidavits.
5. In terms of section 64 (1)(b) of the Parliamentary Elections Act, No. 17 of 2005 and rule 15 (1) of the Parliamentary Elections (Interim Provisions) Rules, SI 141-1, the court is empowered to call, examine or re-examine witnesses if the court thinks that, that might assist it to arrive at an appropriate decision. This power is discretionary, and not mandatory. In the instant case, there was no reason to fault the trial court which, in exercise of its discretion, had not found it necessary or even proper to call a witness from MTN (with respect to particular call logs) on the facts and circumstances of the case.
6. The offence of bribery is provided under section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005. It has three ingredients. There has to be evidence that: i) a gift was given to a voter; ii) the gift was given by a candidate or their agent; and iii) it was given with the intention of inducing the person to vote for the candidate.<sup>194</sup>
7. Where allegations of bribery are made in an election petition, it is essential for the petitioner to prove to the satisfaction of the court all elements of the illegal practice of bribery on a balance of probabilities.<sup>195</sup> The commission of bribery, once proved to the satisfaction of the court, is sufficient in itself to set aside the election of a candidate as a Member of Parliament.<sup>196</sup> In the instant case, the evidence adduced with regard to the allegations of bribery was not sufficient to annul an election.

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<sup>192</sup> Citing *Col. Rtd. Dr Kiiza Besigye vs. Yoweri Kaguta Museveni & Another*, Presidential Election Petition No.1 of 2001 (dictum of Mulenga JSC) and *Ernest Kiiza vs. Kabakumba Labwoni Masiko*, Election Petition Appeal No.44 of 2016.

<sup>193</sup> Citing *Esrom William Alenyo vs. The Electoral Commission and Another*, Election Petition No.9 of 2007.

<sup>194</sup> Citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (dictum of Odoki CJ).

<sup>195</sup> Citing *Anthony Harris Mukasa vs. Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No.18 of 2007.

<sup>196</sup> Citing Section 61 (c) of the PEA and *Kirunda Kivejinja Ali vs. Abdu Katuntu*, Election Petition Appeal No.24 of 2006.

*Appeal dismissed.*

*Appellant to pay respondents' costs in the appeal and in the High Court.*

**Legislation considered:**

Parliamentary Elections Act, No. 17 of 2005, sections 64 (1) (b), 68 (1)

Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2, rule 15

**Cases cited:**

Anthony Harris Mukasa vs. Michael Philip Lulume Bayiga, Supreme Court Election Petition Appeal No.18 of 2007

Ernest Kiiza vs. Kabakumba Labwoni Masiko, Election Petition Appeal No. 44 of 2016

Esrom William Alenyo vs. the Electoral Commission and Another, Election Petition No.9 of 2007

Kalazani Charles vs. Musoke Paul Sebulime, High Court Election Petition No. 17 of 2016

Kizza Besigye vs. Yoweri Kaguta Museveni & Another, Presidential Election Petition No.1 of 2001

Kipoi Tonny Nsubuga vs. Ronny Waluku Wataka and 2 Others, Election Petition Appeal No.7 of 2011

Kirunda Kivejinja Ali vs. Abdu Katuntu, Election Petition Appeal No. 24 of 2006

Makula International Limited vs. Cardinal Nsubuga Wamala [1982] HCB 11

*Mr. John Matovu, Mr. Medard Lubega Segoona, Mr. Asuman Nyonyintono, Ms. Christina Katumba for the appellant*

*Mr. Musa Ssekaana and Mr. Hassan Kamba for the first respondent*

*Mr. Musa Ssekaana for the second respondent*

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**Ninsiima Grace vs. Azairwe Dorothy Nshaija Kabaraitnya and the Electoral Commission**

**Court of Appeal (Coram: Kakuru, Kiryabwire and Egonda-Ntende, JJ A)**

**Election Petition Appeal No. 5 of 2016**

**November 29, 2017**

(Arising from Election Petition No.5 of 2016 (High Court of Uganda at Fort Portal, decision of EK Kabanda, J.)

***Burden of proof and standard of proof***—*Burden of proof on petitioner—Standard of proof is on balance of probabilities.*

***Academic qualifications***—*Disparity in names—Burden of proof—Addition of husband’s name upon marriage—Inter change of order of names—Effect on academic qualifications—Statutory declaration—Purpose thereof—Necessity of deed poll.*

***Filing election petitions***—*Time for filing petitions—Filing where the petitioners only raised discrepancies after an adverse result.*

The appellant, 1<sup>st</sup> respondent and another person contested for the position of Woman Member of Parliament for Kamwenge District. The 1<sup>st</sup> respondent was declared winner by the Electoral Commission, with 104,932 votes to the appellant’s 11,897 votes. The appellant challenged the results of the election before the High Court. The High Court, in a decision rendered on 27<sup>th</sup> May 2016, dismissed the petition.

**HELD:**

1. Burden of proof lies on the petitioner to prove the assertions in their petition.<sup>197</sup>
2. Standard of proof required is proof on a balance of probabilities.<sup>198</sup> Though the standard of proof is set by the statute to be on a balance of probabilities, given the public importance of an election petition, the facts in the petition must be proved to the satisfaction of the court. A petitioner has to prove credible and/or cogent evidence to prove the allegations to the stated standard of proof.<sup>199</sup>
3. The relevant law in relation to academic qualifications is that under Article 80 (1) (c) of the Constitution of the Republic of Uganda, 1995 and section 4 (1) (c) of the Parliamentary Elections Act, No. 17 of 2005. Ultimately, the burden of proof lay on the petitioner to prove to the satisfaction of the court that the respondent lacked the requisite academic qualifications, a minimum of A’ level, because the academic

<sup>197</sup> Citing *Peter Mugema Vs. Peter Abedi Mudiobole*, Election Petition Appeal No. 30 of 2011.

<sup>198</sup> Citing *Peter Mugema vs. Peter Abedi Mudiobole*, Election Petition Appeal No. 30 of 2011 (itself referring to Section 61 (1) and (3) of the Parliamentary Elections Act.

<sup>199</sup> Citing *Peter Mugema vs. Peter Abedi Mudiobole*, Election Petition Appeal No. 30 of 2011

certificate she possessed in this regard belonged to someone else. In the instant case, the evidence adduced by the appellant was insufficient to satisfactorily discharge the burden of proof which rested upon her.

4. The respondent had sworn a statutory declaration explaining that the addition of one name had been to add her father's name, and another being the adoption of her husband's name upon marriage. The addition of the latter did not amount to a *change* of name but was rather an *adoption* of her husband's name. Similarly, the addition of her father's name was not a change of name but a simple addition.
5. Interchanging names, that is to say, writing names in a different order, could not affect one's qualifications.<sup>200</sup>
6. The law governing registration of births and deaths was to the effect that where one had not registered their birth, a deed poll was unnecessary as this applied where a name had been entered in the register.
7. The instant case was distinguishable from the situation in *Otada Sam Amooti Owor vs. Taban Idi Amin*<sup>201</sup> where the disparity in the respondent's name, Taban Idi Amin-Idi Taban Amin-Idi Taban Amin Tampo was held to amount to a change of name which required that such change ought to have been done in accordance with the law. In the instant case, the disparity in the respondent's name was not a change of name but a simple addition of her father's name. In the circumstances, therefore, the appellant had failed to discharge her evidentiary burden.
8. The court expressed concern on the filing of election petitions where the petitioners only raised discrepancies after an adverse result and not before the election was held. It was also disheartening to file an election petition when there was a clear explanation for the basis and/or cause of action for the election petition.

*Appeal dismissed.*

*Appellant to bear the costs of the respondent in the appeal and in the lower court.*

#### **Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 80(1) (c)  
Parliamentary Elections Act, No. 17 of 2005, sections 4 (1) (c), 61

#### **Cases cited:**

Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission Supreme Court  
Presidential Election Petition No.1 of 2001  
Mutembuli Yusuf vs. Nagwomu Moses Musamba, Court of Appeal Election Petition Appeal  
No. 43 of 2016

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<sup>200</sup> Citing *Mutembuli Yusuf vs. Nagwomu Moses Musamba*, Court of Appeal Election Petition No. 43 of 2016 (itself citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001).

<sup>201</sup> EPA No.93 of 2016.

Otada Sam Amooti Owor vs. Taban Idi Amin, Court of Appeal Election Petition Appeal No.93 of 2016

Peter Mugema vs. Peter Abedi Mudiobole, Court of Appeal Election Petition Appeal No. 30 of 2011

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# Kubeketerya James vs. Waira Kyewalabye and Electoral Commission

## Court of appeal (Coram: Kasule, Kakuru and Kiryabwire, JJ A)

### Election Petition Appeal No. 97 of 2016

December 1, 2017

(Arising from Election Petition No.8 of 2016 (High Court of Uganda at Kampala, decision of Lydia Mugambe, J.)

***Filing and prosecuting election petitions—Timelines—Time for filing memorandum and record of appeal—Election petitions to be handled expeditiously—Filling out of time.***

The appellant and 1<sup>st</sup> respondent were among the candidates for the position of Member of Parliament for Bunya County East Constituency, in Mayuge District. The 1<sup>st</sup> respondent was declared winner of the election. The appellant challenged the results before the High Court, which dismissed the petition hence this appeal.

#### **HELD:**

1. Under rule 30 (b) of the Parliamentary Elections Act (Interim Provisions) Rules SI 142-2, the memorandum of appeal should be filed within 7 days after the notice is given. In the instant case, the appellant filed the memorandum of appeal 8 days out of time.
2. In terms of rule 31 of the Parliamentary Elections Act (Interim Provisions) Rules SI 142-2, the record of appeal should be filed within 30 days after filing the memorandum of appeal. The appellant did not comply with this either.
3. The rules of procedure were made to enable the expeditious disposal of election related matters. As such the luxury provided by rule 83 of the Judicature (Court of Appeal Rules) Directions, SI 13-10, which permits the court to take into account the time taken in preparing record of proceedings, and availing a certified copy of the lower court judgment was not available to the appellant.<sup>202</sup> Rule 83 was only applicable in respect of Local Council elections and not in Parliamentary election petitions.<sup>203</sup>
4. Election petitions have to be handled expeditiously. The rules and timelines for filing proceedings are couched in mandatory terms. They have to be strictly interpreted and adhered to.

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<sup>202</sup> Citing *Peter Mukasa Bakaluba and Another vs. Mary Margaret Nalugo Sekiziyivu*, Court of Appeal Election Petition Application No. 24 of 2011; *Electoral Commission and Another vs. Piro Santos Eruga*, Civil Application No.22 of 2011 and *Kasibante Moses vs. Katongole Singh Marwaha*, Court of Appeal Election Petition Application No.8 of 2012.

<sup>203</sup> Citing *Wanyama Gilbert Mackmot vs. Hisa Albert and Electoral Commission*, Court of Appeal Election Petition No. 99 of 2016.

*Notice of appeal struck out.*

*No appeal lay in the Court of Appeal in respect of High Court Petition No.8 of 2016.*

*Judgment of High Court stands unchallenged.*

*Even if the notice of appeal had not been struck out, the court would still have dismissed it as all the grounds of appeal had no merit whatsoever.*

*No order as to costs.*

**Legislation considered:**

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 83

Parliamentary Elections Act (Interim Provisions) (Election Petitions) Rules, SI 141-2, rules 30 (b) and 31

**Cases cited:**

Electoral Commission and Another vs. Piro Santos Eruga, Civil Application No.22 of 2011

Kasibante Moses vs. Katongole Singh Marwaha, Court of Appeal Election Petition Application No. 8 of 2012

Peter Mukasa Bakaluba and Another vs. Mary Margaret Nalugo Sekiziyivu, Court of Appeal Election Petition Application No. 24 of 2011

Wanyama Gilbert Mackmot vs. Hisa Albert and Electoral Commission, Court of Appeal Election Petition No. 99 of 2016

*Mr. Mujuruzi Jamil and Mr. Sekaana Musa for the appellant*

*Mr. Kennedy Lule for the 2<sup>nd</sup> respondent*

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# Achieng Sarah Opendi and Electoral Commission vs. Ayo Jacinta

## Court of Appeal (Coram: Owiny-Dollo; DCJ, Kavuma and Buteera, JJ A)

### Election Appeals No. 59 and 61 of 2016

December 14, 2017

(Arising from Election Petition No.16 of 2016 (High Court of Uganda at Mbale, decision of Margret C Oguli Oumo, J.)

***Burden and standard of proof in election petitions***—*Burden on petitioner—Standard of proof is on the balance of probabilities.*

***Election Results***—*Review of election results—Procedure—Role of court.*

***Electoral laws***—*Non-compliance with electoral laws—Effect thereof—Substantiality test as a result of non-compliance.*

The 1<sup>st</sup> appellant, the respondent and four others were candidates for elections for Woman Member of Parliament for Tororo District held 18<sup>th</sup> February 2016. The 1<sup>st</sup> appellant was declared winner of the election, by the 2<sup>nd</sup> appellant, with 62,215 votes. The respondent was first runner-up with 59,806 votes.

The respondent challenged the election on grounds that; (i) the elections were marred by irregularities and illegalities, and non-compliance with electoral laws- thereby falling below the standard of free and fair elections (ii) that the 1<sup>st</sup> appellant committed acts of bribery personally and by her agents with her knowledge and consent or approval before and during the election (iii) that the failure to comply with the electoral laws and Constitution affected the results in a substantial manner.

The trial court; (i) nullified the 1<sup>st</sup> appellant's election (ii) ordered for fresh elections under different officials (iii) ordered the 1<sup>st</sup> and 2<sup>nd</sup> appellants to meet the costs of the petition.

#### **HELD:**

1. The Burden of proof lies on the petitioner to prove the assertions in his or her petition.<sup>204</sup>
2. The Standard of proof required is proof on a balance of probabilities.<sup>205</sup> Though the standard of proof is set Statute to be on a balance of probabilities, given the public importance of an election petition, the facts in the petition must be proved to the

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<sup>204</sup> Citing *Peter Mugema vs. Peter Abedi Mudiobole*, Election Petition Appeal No. 30 of 2011.

<sup>205</sup> Citing *Peter Mugema vs. Peter Abedi Mudiobole*, Election Petition Appeal No. 30 of 2011 (itself referring to Section 61 (1) and (3) of the Parliamentary Elections Act, and *Anthony Harris Mukasa vs. Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No.18 of 2007.

satisfaction of the court.<sup>206</sup> In the circumstances, the respondent had failed to prove what she alleged.

3. The role of the court is not confined to balancing the rights and merits of the opposing parties. Rather, it must answer the question as to whether a valid election was held, having regard to the rights of the voters in that constituency;<sup>207</sup> This may include scrutinizing relevant forms (such as Declaration of Results (DR) forms).<sup>208</sup>

This approach, based on a concern to achieve ‘substantial justice’ may also involve taking into account votes which might otherwise not have been counted on the ground of minor technical irregularities (such as unsigned DR forms), the purpose of section 12 of the Electoral Commission Act, Cap 140 and Article 68 (4) of the Constitution of the Republic of Uganda, 1995 being not to disenfranchise but to safeguard votes against fraudulent manipulation.<sup>209</sup> In the circumstances, DR forms (which had not been signed by the presiding officers, but signed by candidates’ agents- and not contested by any of the candidates or their agents) should not have been invalidated, but rather should have been included in the tallying of results.

4. Non-compliance with electoral laws *per se* is not enough to overturn an election. The non-compliance must be so significant as to substantially affect the results of the election;<sup>210</sup>
5. The test of ‘substantial effect’ may be both a qualitative and a quantitative one.<sup>211</sup> In this case, the delay of 24 hours in transmission of the results had not been proved. As such it could not be held to have had a substantial effect on the results. Such errors that had in fact been established were not such as to affect the results in a substantial manner, as the respondent would still lose by over 1,708 votes. The nullification of the 1<sup>st</sup> appellant’s election had, therefore, been erroneous.

*Judgment and orders of the High Court quashed and set aside.*

*1<sup>st</sup> appellant declared to be the duly elected Woman Member of Parliament for Tororo District. Costs to appellants in the Court of Appeal and High Court.*

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<sup>206</sup> Citing *Peter Mugema vs. Peter Abedi Mudiobole*, Election Petition Appeal No. 30 of 2011 (itself citing *Masiko Winifred Komuhangi vs. Winnie J Babihuga*, Supreme Court Election Petition Appeal No. 9 of 2002).

<sup>207</sup> Citing *Frederick Nkayi Mbaghadi and Another vs. Frank Wilberforce Nabwiso*, Court of Appeal Election Petition Appeal Nos. 14 and 16 of 2011.

<sup>208</sup> Citing *Frederick Nkayi Mbaghadi and Another vs. Frank Wilberforce Nabwiso*, Court of Appeal Election Petition Appeal Nos 14 and 16 of 2011 (itself citing *John Baptist Kakooza vs. The Electoral Commission*).

<sup>209</sup> Citing *Frederick Nkayi Mbaghadi and Another vs. Frank Wilberforce Nabwiso*, Court of Appeal Election Petition Appeal Nos 14 and 16 of 2011 (itself citing *Baxter vs. Baxter* [1950] ALL ER 458; *Komuhangi vs. Babihuga T Winnie*, Election Petition Appeal No.9 of 2002 and *Anifa Kawooya Bangirana and Another and Anifa Kawooya and Electoral Commission vs. Joy Kabatsi*, Election Petition Appeal Nos. 3 and 4 of 2007.

<sup>210</sup> Citing *Rehema Mulindo vs. Winifred Kiiza and the Electoral Commission*, Election Petition No. 29 of 2011 (itself citing Section 61 (1) PEA and *Kiiza Besigye vs. Museveni-* dictum of Odoki CJ) and *Achieng Sarah Opendi and Another vs. Ochwo Nyakecho Kezia*, Election Petition Appeal No. 39 of 2011.

<sup>211</sup> Citing *Rehema Mulindo vs. Winifred Kiiza and the Electoral Commission*, Election Petition No. 29 of 2011 (itself citing *Kiiza Besigye vs. Museveni*).

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 68 (4)  
Electoral Commission Act, Cap 140, section 12

**Cases cited:**

Achieng Sarah Opendi and Another vs. Ochwo Nyakecho Kezia, Election Petition Appeal No. 39 of 2011  
Anifa Kawooya and Electoral Commission vs. Joy Kabatsi, Election Petition Appeal Nos. 3 and 4 of 2007  
Anthony Harris Mukasa vs. Michael Philip Lulume Bayiga, Supreme Court Election Petition Appeal No.18 of 2007  
Baxter vs. Baxter [1950] ALL ER 458  
Frederick Nkayi Mbaghadi and Another vs. Frank Wilberforce Nabwiso, Court of Appeal Election Petition Appeal Nos. 14 and 16 of 2011  
John Baptist Kakooza vs. the Electoral Commission and Another, Election Petition Appeal No. 11 of 2007  
Kizza Besigye vs. Y.K Museveni, Presidential Election Petition No. 1 of 2006  
Komuhangi vs. Babihuga T Winnie, Election Petition Appeal No.9 of 2002  
Masiko Winifred Komuhangi vs. Winnie J Babihuga, Supreme Court Election Petition Appeal No. 9 of 2002.  
Peter Mugema vs. Peter Abedi Mudiobole, Election Petition Appeal No. 30 of 2011  
Rehema Mulindo vs. Winifred Kiiza and the Electoral Commission, Election Petition No. 29 of 2011

*Mr. Arinaitwe Rajab and Mr. Mujuruzi Jamiru for 1<sup>st</sup> appellant*  
*Mr. Joseph Kyazze and Mr. Nasser Sserunjogi for 2<sup>nd</sup> appellant*  
*Mr. Oscar Kihika and Mr. Bazira Anthony for respondent*

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**Ben Martin Wanda vs. the Electoral Commission and Michael Werikhe Kafabusa**

**Court of Appeal (Coram: Kiryabwire, Musoke and Mugamba, JJ A)**

**Election Petition Appeal No. 81 of 2016 (Consolidated Applications Nos.12, 21 and 23 of 2017)**

**December 18, 2017**

(Arising from Election Petition No.15 of 2016 (High Court of Uganda at Mbale, decision of Margaret Oumo Oguli, J.)

***Filing the record of appeal—Extension of time for filing record—Leave to extend time—Reasons grant of leave to extend time for filing record—Mistake by counsel—Whether sufficient reason for extension of time.***

***Admission of evidence in election petitions—Evidence is by affidavit and witnesses.***

***Conducting campaigns—Use of Government resources by candidate during campaigns—Effect thereof.***

***Electoral offences—Bribery—What amounts to bribery—Proof thereof—Burden to prove bribery—Effect.***

The appellant, 2<sup>nd</sup> respondent and four other persons contested for the position of Member of Parliament for Bungokho South Constituency in Mbale District. The 2<sup>nd</sup> respondent was declared winner by the 1<sup>st</sup> respondent, with 24,046 votes against the appellant's 18,083 votes. The appellant challenged the results of the election before the High Court. In a decision rendered on 19<sup>th</sup> August 2016, the High Court dismissed the petition, hence the instant appeal.

**HELD:**

1. Under rule 5 of the Judicature (Court of Appeal Rules) Directions, SI 13-10, the court can, for sufficient reason, extend the time limited by those rules for the doing of an act authorized or required by those rules.
2. Under rule 31 of the Parliamentary Elections (Interim Provisions) (Election Petition) Rules SI 141-2, the appellant is required to lodge a record of appeal within 30 days after filing the memorandum of appeal. In the instant case, although the record of appeal was filed about 4-5 months after obtaining the record, this delay was attributable to his former counsel and not to the appellant. Far from sitting on his rights, the appellant went as far as personally going to the court to enquire into the availability of the record, and also later hired the services of new counsel who filed the record of appeal- albeit out of time.

3. Jurisprudence has established that mistake by a counsel through negligence amounts to sufficient cause, which will not be visited upon the appellant.<sup>212</sup>
4. The admission of evidence in election petitions is regulated by the Parliamentary Elections (Interim Provisions) (Election Petition) Rules SI 141-2. Rule 15 envisages two modes of adducing evidence in an election petition; affidavit evidence and examination of witnesses, the latter at the court's own motion. In the instant case, the appellant was attempting to turn himself into a witness by tendering documents himself; which offended rule 15, in so far as the said documents had neither been attached to the affidavit in support of the petition nor to any supplementary affidavit sworn not introduced by any other witnesses.
5. According to section 25 (2) of the Parliamentary Elections Act, No. 17 of 2005, where a candidate is a Minister or holds another political office, he or she has, during the campaign period, to restrict the use of the official facilities ordinarily attached to their office to the execution of his or her official duties. In the instant case, the two issues of use of public resources, particularly launching a water project and use of a Government vehicle, were only pleaded through a rejoinder, and the trial court had been right not to entertain those allegations, in so far as they had been brought out of time.
6. The burden of proof lies on the petitioner invoking bribery to prove that the money or gift was given to a voter.<sup>213</sup> It is absolutely necessary to prove to the satisfaction of the court that the people bribed were registered voters. In the instant case, as the trial court correctly found, the witnesses who alleged bribery should have each attached a voter's card or produced a voter's register to the affidavits which they swore in support of the petition. In the circumstances, there was no cogent evidence to show that those allegedly bribed were registered voters.
7. In election matters, it is necessary to exercise caution while each allegation of bribery and to subject it to high level of scrutiny as well as being alive to the fact that in election petitions, in which the prize is political power, witnesses may easily resort to telling lies in their evidence, in order to secure judicial victory for their preferred candidate. In the instant case, the trial court was correct to reject, in the absence of corroboration the evidence of a particular witness, in so far as it was highly improbable that that one individual could have witnessed all three of the alleged activities on the same day at different locations.

*Appeal dismissed.*

*Decision and orders of the trial judge upheld.*

*2<sup>nd</sup> respondent confirmed as the validly and lawfully elected Member of Parliament for Bungokho South Constituency.*

*Appellant to bear the costs of the appeal and at the trial court.*

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<sup>212</sup> Citing *Nicholas Roussos vs. Gulam Hussein Habib Virani and Another*, Civil Appeal No.9 of 1993.

<sup>213</sup> Citing *Kamba Saleh Moses vs. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal No.27 of 2011.

**Legislation considered:**

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 5

Parliamentary Elections Act, No. 17 of 2005, section 25 (2)

Parliamentary Elections (Interim Provisions) (Election Petition) Rules SI 141-2, rules 15, 31

**Cases cited:**

Kamba Saleh Moses vs. Namuyangu Jennifer, Court of Appeal Election Petition Appeal No.27 of 2011

Nicholas Roussos vs. Gulam Hussein Habib Virani and Another, Civil Appeal No.9 of 1993

*Mr. Alex Luganda for the appellant*

*Mr. Joseph Kyazze for the 1<sup>st</sup> respondent*

*Mr. Ambrose Tebyasa, Mr. Evans Ochieng, Mr. Geoffrey Odur, Mr. Luyimbazi Nalikoola for the 2<sup>nd</sup> respondent*

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**Aisha Kabanda Nalule vs. Lydia Daphine Mirembe, Electoral Commission and the  
Returning Officer Butambala District**

**Court of Appeal (Coram: Kavuma; DCJ, Kasule and Kiryabwire, JJ A)**

**Election Petition Appeal No. 90 of 2016**

**December 19, 2017**

(Arising from Election Petition No.17 of 2016 (High Court of Uganda at Kampala, decision of  
Vicent Okwanga, J.)

***Electoral offences—Bribery—Meaning of bribery in elections—Proof of bribery—When court  
may annul an election due to bribery.***

***Evidence—Witnesses contradicting each other—Effect thereof.***

***Affidavits—Striking out affidavits—Affidavits not commissioned—Effect thereof.***

***Costs—Award of costs—Importance of electoral litigation—Costs should not deter litigation.***

The appellant, 1<sup>st</sup> respondent and another candidate contested for the position of Woman Member of Parliament for Butambala District. The 1<sup>st</sup> respondent was declared winner by the 2<sup>nd</sup> respondent with 14,760 votes compared to the appellant's 14,693 votes, the third candidate obtaining 3,381 votes. The appellant challenged the results of the election before the High Court. The High Court dismissed the petition hence the instant appeal.

**HELD:**

1. The offence of bribery is criminalized under section 68 (1) of the Parliamentary Elections Act, No. 17 of 2005
2. Where witnesses called by a party contradict each other, none of them can be believed.<sup>214</sup>
3. A court of law cannot annul an election on mere alleged voter bribery and non-compliance by the Electoral Commission and speculation without cogent evidence to prove the said allegations.<sup>215</sup> In the instant case, given the various contradictions apparent in the evidence adduced by the petitioner, there was no cause to fault the trial court's finding that the allegations of bribery had not been established.
4. There was no reason to fault the trial court's decision to strike out affidavits which were not dated or not commissioned.

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<sup>214</sup> Citing *Matsiko Winfred Komuhangi vs. Babihuga T Winnie*, Election Petition Appeal No.9 of 2002.

<sup>215</sup> Citing *Amama Mbabazi vs. Yoweri Kaguta Museveni and 2 Others*, Presidential Election Petition No.1 of 2016.

5. Electoral litigation is a matter of great national importance in which courts have to carefully consider the question of awarding costs. Costs need not deter aggrieved parties with a cause from seeking redress from the court.<sup>216</sup> In the instant case, where the vote margin between the two main contestants, the parties to the instant appeal was only 67 votes, it would be inappropriate to condemn either party to costs.

*Appeal dismissed.*

*Decision and orders of High Court upheld.*

*1<sup>st</sup> respondent confirmed as validly elected Woman Member of Parliament for Butambala District.*

*Each party to bear own costs in the Court of Appeal and in the High Court.*

*Appeal against 3<sup>rd</sup> respondent was withdrawn.*

**Legislation considered:**

Parliamentary Elections Act, No. 17 of 2005, section 68 (1)

**Cases cited:**

Amama Mbabazi vs. Yoweri Kaguta Museveni and 2 Others, Presidential Election Petition No.1 of 2016

Kadama Mwogezaddembe vs. Gagawala Wambuzi, Election Petition No.1 of 2001

Matsiko Winfred Komuhangi vs. Babihuga T Winnie, Election Petition Appeal No.9 of 2002

*Mr. Kanduho Frank for the appellant*

*Mr. Geoffrey Kandebe Ntambirweki for the 1<sup>st</sup> and 2<sup>nd</sup> respondents*

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<sup>216</sup> Citing with approval the dictum of Bamwine PJ in *Kadama Mwogezaddembe vs. Gagawala Wambuzi*, Election Petition No.1 of 2001.

**Woboya Vincent vs. Ssasaga Isaias Jonny**

**Court of Appeal (Coram: Owiny-Dollo; DCJ, Kavuma and Kiryabwire, JJ A)**

**Election Petition Appeal No. 11 of 2016**

**December 29, 2017**

(Arising from Election Petition No. 9 of 2016 (High Court of Uganda at Mbale, decision of Andrew K Bashaija, J.))

*Resignation of public office before nomination—Intension of resignation—Public officer to resign at least 30 days before nomination day—Meaning of retirement and resignation—Effect of resignation and retirement—Procedure for resignation and retirement—Application to retire—Whether appellant followed right procedure—Effect of payment of salary after retirement.*

The appellant, respondent and 3 other persons contested for the position of Member of Parliament for Budadiri County East Constituency. The appellant was declared winner by the Electoral Commission. The respondent challenged the results of the election before the High Court. The High Court, in a decision rendered on 15<sup>th</sup> June 2016, dismissed the petition hence this appeal.

**HELD:**

1. Under Article 80 (4) of the Constitution of the Republic of Uganda, 1995 and section 4 (4) of the Parliamentary Elections Act, No. 17 of 2005, a public officer or any person employed in any Government Department or Agency who wishes to stand as a Member of Parliament was required to resign at least 30 days before nomination day. It appears to the court that the intention of the framers of the Constitution and the legislature is to ensure that those who vied for parliamentary office should not at the same time hold public office and use it to influence the outcome of any election.
2. From a consideration of the definitions of 'retire' and 'resign' provided by the Black's Law Dictionary 8<sup>th</sup> Edition, 2004, it is clear that the net effect of resignation and retirement is practically the same, regarding the legislative intention referenced above. As such, to insist that a prospective Member of Parliament can only resign but not voluntarily retire and yet the effect of both routes is the same, will be too narrow an interpretation and will create an absurdity.
3. It was incorrect for the trial court to consider that the retirement was improper for failure to give the required statutory 6 months' notice prior to early retirement. Under the section L-c (1), (2) and (4) of the Uganda Public Service Standing Orders, 2010, it is open to the Permanent Secretary, at his or her absolute discretion, to waive the requirement for 6 months' notice before retirement.

4. It was incorrect for the trial court to conclude that the retirement was illegal in so far as there was no evidence that the appellant made his application to retire to a Pensions Authority. Although it was true that the appellant's letter applying for early retirement was not on record, the record contained a letter signed on behalf of the Permanent Secretary, which referred to an earlier letter from the appellant and which granted the request for early retirement. In the circumstances, this was sufficient evidence of compliance with the law and the respondent had not adduced any contrary evidence.
  
5. Regarding the evidence of a salary paid after the retirement, the court was inclined to take judicial notice of the fact that salaries of public servants were paid in arrears, in which case the relevant salary entry would have been for the appellant's last month of service. In the absence of any evidence to the contrary, the trial court erred in concluding that this constituted post-retirement payment. In any case, even if the appellant did have money paid to his account after his retirement, jurisprudence had established that such monies should be recovered by the Auditor General, and therefore the issue of salary could not be a ground for nullifying an election.<sup>217</sup>

*Appeal upheld.*

*Declaration and orders of the High Court set aside.*

*Appellant confirmed as having been qualified for nomination and as having been validly elected Member of Parliament for Budadiri East Constituency.*

*Appellant entitled to costs of the appeal and of the proceedings in the High Court.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 80

Parliamentary Elections Act, No. 17 of 2005, section 4

Uganda Public Service Standing Orders, 2010, section L-c (1), (2) and (4)

**Case cited:**

Okeyoh Peter vs. Abbot George, Election Petition No.8 of 2011

**Other legal materials referred to:**

Black's Law Dictionary (8<sup>th</sup> Edition, 2004)

*Mr. Komakech Geofrey for the appellant*

*Mr. Isaac Nabende for 1<sup>st</sup> respondent*

*Mr. Jude Mwasa and Mr. Mwenyi Joseph for the 2<sup>nd</sup> respondent*

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<sup>217</sup> Citing Okeyoh Peter vs. Abbot George, Election Petition No.8 of 2011.

## Mulindwa Isaac Ssozi vs. Lugudde Katwe Elizabeth

Court of Appeal (Coram: Owiny-Dollo; DCJ, Kavuma and Buteera, JJ A)

Election Petition Appeal No. 14 of 2016

December 29, 2017

(Arising from Election Petition No.12 of 2016 (High Court of Uganda at Jinja, decision of Margaret Mutonyi J.)

**Academic qualifications**—Order of names on academic qualifications of a candidate—Change of name from Hassan Mulindwa to Isaac Ssozi Mulindwa—Order of name has no effect on a candidate's academic qualifications.

**Evidence**—Burden of proof in election petitions—Petitioner bears the burden of proof in proving the allegations in the petition.

**Nomination**—Qualification for nomination of Member of Parliament—Academic qualifications for nomination—Candidates qualification higher than the minimum qualification required for nomination—Allegation that the higher qualification was based on a forgery or other irregularity—Proof of allegation.

The appellant, the respondent and seven (7) others were candidates for the post of the directly elected Member of Parliament for Lugazi Municipality Constituency during the February 18<sup>th</sup> 2016, general elections. The appellant was returned and gazetted by the Electoral Commission as the winner of the said elections.

The respondent being dissatisfied with the outcome of the said election petitioned the High Court challenging the results of the election. The learned trial court found that the appellant had not committed any election offences but that the appellant did not possess the requisite minimum qualifications to contest for the office of Member of Parliament. The court set-aside the election and ordered for a fresh election be conducted.

The appellant being dissatisfied with the outcome of the trial court's decision preferred an appeal on grounds that the trial court erred in law and fact when it:-

- (1) found that the academic papers did not belong the appellant.
- (2) held that the appellant was not validly nominated.
- (3) engaged in assumptions, speculations and conjecture in its conclusions;
- (4) failed to evaluate evidence.

The appellant had changed his name from Mulindwa Hassan to Isaac Ssozi Mulindwa and presented a deed poll to explain that the person who presented the academic documents were in the name Mulindwa Hassan was the same person as Isaac Ssozi Mulindwa who presented himself for nomination and that that person was the appellant.



The issue in contention was whether the appellant had relevant qualifications to be nominated as Member of Parliament.

**HELD:**

1. The position of the law in regards to academic qualifications is stated in Article 80 (1) (c) of the Constitution of the Republic of Uganda 1995.<sup>218</sup> Where a candidate had changed his or her names, it was not enough for a petitioner to show a discrepancy between those names and the names on their academic certificates. The petitioner had to adduce more evidence to prove to the satisfaction of the court that the person who sat and obtained certain academic qualifications was not the same person who was nominated for an election.<sup>219</sup>
2. The burden of proof in any election petition lay on the petitioner.<sup>220</sup> As such, the burden of proving that the academic qualifications which the appellant produced for nomination belonged to someone else who lived in the village as alleged by the petitioner (respondent on appeal) was on him. The petitioner did not produce the alleged owner of those qualifications. From the evidence on record- including her own words- the petitioner did not know that alleged other person. This was a serious flaw on her part.
3. For his part, the appellant had adduced additional evidence on appeal, including affidavits from a person who studied with him at university; from the Academic Registrar of Makerere University and from the Principal Examinations Officer in charge of scripts and records at the Uganda National Examinations Board.
4. Where a candidate presented a qualification which was higher than the minimum required for nomination for any post, it was not enough for their opponents to argue that the same higher qualification was based on a forgery or something irregular. Nor was it sufficient for a spokesperson of the institution in which the higher qualification was obtained to suggest that had the institution known that fact it would not have admitted that candidate or awarded the said qualification. Those who made such allegations had to do more than simply allege. They needed to show that as a result of those allegations, the awarding institution of the higher qualification or any other equivalent to A<sup>1</sup> level or some other classification subsequently cancelled or withdrew the award of the disputed qualification.<sup>221</sup> This had not been done by the respondent in the instant case. In the circumstances, the High Court had no sufficient reason for nullifying his election.

*Appeal allowed.*

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<sup>218</sup> Citing *Paul Mwiru vs. Hon Igeme Nathan Nabeta Samson and 2 Others*, Court of Appeal Election Petition Appeal No.6 of 2011.

<sup>219</sup> Citing *Mutembuli Yusuf vs. Nagwomu Moses Musamba*, Court of Appeal Election Petition No. 43 of 2016 (itself citing *Col (Rtd) Dr Kizza Besigye vs. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001).

<sup>220</sup> *Anthony Harris Mukasa vs. Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No.18 of 2007.

<sup>221</sup> Citing *Joy Kafura Kabatsi vs. Hanifa Kawooya*, Supreme Court Election Appeal No.25 of 2011.

*Decision and orders of the High Court set aside.*

*Appellant declared the duly elected Member of Parliament for Lugazi Municipality Constituency.*

*Respondent to bear the costs of the appeal and in the High Court.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 80

Parliamentary Elections Act, No. 17 of 2005, sections 4 (1) (c), 61

**Cases cited:**

Joy Kabatsi vs. Anifa Kawooya and the Electoral Commission, Election Appeal No.25 of 2007

Kizza Besigye vs. Museveni Yoweri Kaguta, Election Petition No.1 of 2001

Mukasa Anthony Harris vs. Bayiga Michael Philip Lulume, Election Appeal No,18 of 2007

Mutembuli Yusuf vs. Nagwomu Moses Musamba, Election Petition No.43 of 2016

Paul Mwiru vs. Igembe Nabeta Samson, Election No.6 of 2011

*Mr. Mulalira Faisal Umaru, Ambrose Tebyasa and Kasozi Ronald for the appellant*

*Mr. Sserunjogi Brian Alfred, Ms. Justice Nakajubi Mufumbya and Ms. Nsereko Saudha for the respondent*

**Igeme Nathan Samson Nabeta and the Electoral Commission vs. Mwiru Paul**

**Court of Appeal (Coram: Kavuma; DCJ, Buteera and Mugamba, JJ A)**

**Election Petition Appeal Nos.45 and 46 of 2016**

**January 12, 2018**

(Arising from Election Petition No.3 of 2016 (High Court of Uganda at Jinja, decision of Lydia Mugambe, J).

**Conflict of interest**—Relative of candidate serving as Presiding Officer—Whether there was conflict of interest—Whether relative was a credible witness.

**Possession of Declaration of Results (DR) forms after polling**—Presiding officer and the candidates or their representatives sign and retain a copy of DR Forms.

**Election materials**—Tamper proof envelope—Opening thereof—Returning Officer to open envelope.

**Electoral laws**—Non-compliance thereof—Substantiality effect.

**Remedies**—Scope of remedies—Declaration of alternative winner.

The 1<sup>st</sup> appellant and respondent contested for the position of Member of Parliament (MP) for Jinja Municipality East Constituency. The 1<sup>st</sup> appellant was declared winner by the 2<sup>nd</sup> appellant. The respondent challenged the result of the election.

The High Court upheld the petition, and made the following declarations and orders:-

- (1) that the 1<sup>st</sup> respondent was not validly or duly elected MP for Jinja Municipality East Constituency;
- (2) that the 1<sup>st</sup> respondent's said election was accordingly nullified;
- (3) that the 1<sup>st</sup> respondent should vacate the MP seat under section 63 (6) (b) (i) of the Parliamentary Elections Act;
- (4) that the petitioner was the validly and duly elected direct MP for Jinja Municipality East Constituency and was thereby declared as such; and
- (5) costs for the petitioner were to be paid equally by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**HELD:**

1. The 1<sup>st</sup> appellant brought this appeal as a result of a dissatisfaction. In terms of section 48 of the Evidence Act, Cap 6, it was wrong for the trial court, to infer from a calendar distributed as a memento at the funeral of the late Nabeta that the Presiding Officer at a particular polling station was related to the late, and therefore to the 1<sup>st</sup> appellant. In the absence of other evidence, this conclusion could not be sustained. In any case, even if this relationship existed, it would not, in itself, make the said person an incredible witness, as the trial court had concluded. The implication of that position would be that relatives of candidates could not serve as electoral officers, or that such

witnesses would be automatically presumed untruthful when giving evidence. A relative to a candidate could be a credible witness.

2. It was also wrong for the trial court to conclude that the electoral officer had a conflict of interest. A conflict of interest was a real or seeming incompatibility between one's private interests and one's public or fiduciary duties.<sup>222</sup> It was often founded on the existence of a fiduciary relationship. This kind of relationship could not be seen to exist in the circumstances of the current case. A relative of a candidate serving in the electoral process did not automatically taint the election. For instance, the person in question, despite being an employee of the 2<sup>nd</sup> appellant and a key player in the election with knowledge of what actually transpired, came to court as a witness for the 1<sup>st</sup> appellant with evidence supporting the 1<sup>st</sup> appellant's case. With his position, he would be expected to be an impartial witness for the 2<sup>nd</sup> appellant. His evidence was not partial. The trial court erred in this respect.
3. According to Article 68 (4) of the Constitution of the Republic of Uganda, 1995, and section 47 (4) and (5) of the Parliamentary Elections Act, No.17 of 2005, after the close of the poll, the Presiding Officer and the candidates or their representatives sign and retain a copy of the Declaration of Results (DR). There is no need for the Returning Officer to take back all the copies of the DR forms after they are signed. He is only required to retain other copies for the tamper proof envelope, public display, report book and the ballot box.
4. According to section 53 (1) of the Parliamentary Elections Act, No.17 of 2005, the tamper proof envelope must be opened by the Returning Officer, and no one else. In the instant case, given the admission by the returning officer that he is not the one who opened the envelope, the envelope was not opened in accordance with the law.
5. The trial court was correct to find that the non-compliance with electoral law had had a substantial effect on the results of the election. In the circumstances, the 1<sup>st</sup> appellant was wrongly declared winner of the elections.
6. Given the existence of all the irregularities in the electoral process at a particular polling station, the court's view was that the results of the election had been tainted. The 2<sup>nd</sup> appellant failed to comply with the law in conducting elections for that polling station, hence putting the results of the station in doubt. The court could not be seen to refer to such results to ascertain the true results of that polling station. Needless to say, this affected the results of the entire constituency.

*Appeal dismissed in substantial part.*

*Seat for directly elected Member of Parliament for Jinja East Constituency declared vacant.*

*2<sup>nd</sup> appellant ordered to hold fresh elections for Member of Parliament for Jinja East Constituency.*

*Respondent entitled to costs of the appeal and in the lower court.*

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<sup>222</sup> Citing Black's Law Dictionary 8<sup>th</sup> Edition.

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 68 (4)

Evidence Act, Cap 6, section 48

Parliamentary Elections Act, No. 17 of 2005, sections 47 (4), (5), 53 (1), 63 (6) (b) (i)

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**Kalemba Christopher and Electoral Commission vs. Lubega Drake Francis**

**Court of Appeal (Coram: Owiny-Dollo; DCJ, Kavuma and Buteera, JJ A)**

**Election Petition Appeal No. 32 of 2016**

**January 19, 2018**

(Arising from Election Petition No.11 of 2016 (High Court of Uganda at Masaka, decision of Margaret Tibulya J.)

***Burden and standard of proof***—Burden on the petitioner—Standard of proof is on the balance of probabilities.

***Nominations***—Qualifications for nominations to be elected Member of Parliament—Article 80(1) (c) of the Constitution of the Republic of Uganda, 1995 and section 4(1) (c) of the Parliamentary Elections Act No. 17 of 2005—Nominated Candidate possesses an ordinary certificate attained without having three (3) credit Units at Uganda Certificate of Education—Whether such a candidate qualifies for election as Member of Parliament.

***Electoral Offences***—Bribery—Proof thereof—Annulling an election—An election cannot be annulled on mere allegations of bribery or non-compliance.

***Electoral laws***—Non-compliance with electoral law—Failure to resign as Resident District Commissioner before nomination—Effect thereof.

***Nominations***—Nomination of a Public Officer for Election as Member of Parliament—Requirement to resign a public office 90 days before nomination day —Section 4(4) of the Parliamentary Elections Act, No.17 of 2005—Procedure of resigning from a public office—Article 252 of the Constitution of the Republic of Uganda, 1995—Whether the 1<sup>st</sup> appellant's resignation letter was sufficient evidence of resignation.

The 1<sup>st</sup> appellant, the respondent and other candidates contested for Member of Parliament (MP) for Kakuuko County Constituency in parliamentary elections held on 18<sup>th</sup> February, 2016. The 1<sup>st</sup> appellant was returned the winner. The respondent filed a petition against the appellants challenging the results of the election and seeking nullification of the same. The court nullified the 1<sup>st</sup> appellant's election and ordered a fresh one to be held. The appellants were dissatisfied with the decision and appealed.

Counsel for the appellant submitted that the trial court's decision to set aside the election was premised on three grounds *to wit*;

- 1) the 1<sup>st</sup> appellant had not resigned his job as Resident District Commissioner Lwengo District before nomination for elections
- 2) the 1<sup>st</sup> appellant did not possess the relevant academic qualifications to enable him contest in the election, and
- 3) the 1<sup>st</sup> appellant committed an illegal practice (bribery) during the campaigns.

The following issues were raised for resolution:-

- (1) whether the trial court was right to hold that the 2<sup>nd</sup> appellant personally or by his knowledge, consent and/or approval committed the election offences and indulged in the illegal practices complained of in the petition,
- (2) whether the trial court was right to hold that at the time of nominations and the elections of the appellant did not possess the minimum academic qualifications of Advanced Level or its equivalent for being MP.
- (3) whether the trial court has jurisdiction to the election petition and grant prayers as put to her by the respondent despite the fact that the 1<sup>st</sup> appellant had earlier received a complaint relating to the qualifications of the appellant (respondent in the trial court) and disposed it off, and
- (4) whether the trial court properly evaluated the evidence on court record and came to the right conclusion.

On the issue of non-resignation, counsel submitted that the 1<sup>st</sup> appellant tendered in his resignation letter to the Secretary to the President on May 28<sup>th</sup> 2015, ninety days before nominations took place. His resignation was accepted by letter the Secretary Office of the President dated July, 15<sup>th</sup> 2015. He argued that although the letter of resignation did not have a receiving stamp, the letter from the Secretary-Office of the President acknowledged receipt of the same.

On the allegations of bribery, it was argued that the evidence given was hearsay and further that the respondents petition did not spell out the instances of non-compliance with the laws and principles governing elections. The respondent only raised allegations of illegal practices and nomination without requisite academic qualifications.

The 2<sup>nd</sup> appellant associated with the submissions of the 1<sup>st</sup> appellant and added that at the time of nominations, none of the qualifications of the 1<sup>st</sup> appellant had been withdrawn or cancelled by the awarding institution and as such was valid.

Counsel for the respondent argued that the 1<sup>st</sup> appellant was supposed to resign even before the National Resistance Movement nominations but tendered his resignation in May and there was no acknowledgement of receipt of the said letter. Despite the reply from the Secretary of the President allowing the resignation, the 1<sup>st</sup> appellant continued to work and also received benefits including the use of the Government vehicle.

On the allegation of bribery, it was submitted that the appellant bribed voters at Kyappagonya with UGX 200,000/= and iron sheets to construct a *boda* stage in February 2016 which was contrary to section 68(1) of the Parliamentary Elections Act No. 17 of 2005.

On academic qualifications, the 1<sup>st</sup> appellant argued that he obtained five passes at Uganda Certificate of Education (UCE) and proceeded to acquire a Diploma that qualified him for nomination for election as Member of Parliament. That it was an error on the part of the trial court to apply SI No. 35 of 2007 on a certificate obtained in 1981. Therefore, it was an error to invalidate the qualifications of the 1<sup>st</sup> appellant without consulting with Uganda National Examinations Board or National Council for Higher Education as required by section 45 (3) of the Universities and other Tertiary Institutions Act 7, 2001.

The respondent on the other hand argued that the 1<sup>st</sup> appellant obtained only one credit instead of the required minimum three at ordinary level and therefore could not have been admitted at any university using the same Ordinary Certificate. That rule 2 and Part 3 of the Universities and other Tertiary Institutions Regulations require one to have attained three credits at the same sitting for UCE to be admitted on an ordinary Certificate programme at a university, which the appellant did not score.

**HELD:**

1. The burden of proof in election petitions lies on the petitioner.<sup>223</sup> The standard of proof is slightly above the balance of probabilities.<sup>224</sup>
2. The requirement regarding academic qualifications was stated in Article 80 (1) (c) of the Constitution of the Republic of Uganda, 1995 and section 4 (1) (c) of the Parliamentary Elections Act, No.17 of 2005. Under these provisions, a person was qualified to be Member of Parliament if they had a minimum of Advanced Level education or its equivalent.
3. Once it is clearly established as a fact that a candidate possesses the requisite minimum academic qualifications by the lawfully mandated body, in the instant case Uganda National Examination Board, then in the event that a party is desirous of cancelling or impeaching such qualification, this cannot be done through an election petition but rather through an ordinary suit against the awarding body. For a court to conduct such an enquiry in the context of an election petition would be tantamount to usurping the powers that were explicitly set out for an institution in an Act of Parliament.<sup>225</sup> The fact that, in the instant case, the appellant did not obtain the 3 required credits in UCE and should not have been admitted for a Diploma was not for the court- as an election appeal court- to determine. The trial court erred in finding that the 1<sup>st</sup> appellant lacked the requisite academic qualifications. The instant case could be distinguished from that of *Mathias Nsubuga vs. Muyanja Mbabali*<sup>226</sup> in so far as the issue in this case was not one of obtaining a fraudulent certificate but rather one of failing to obtain at least 3 credits at Uganda Certificate of Education so as to qualify for a Diploma.
4. The offence of bribery is provided under section 68 (1) of the P Parliamentary Elections Act, No.17 of 2005. In *Amama Mbabazi vs. Yoweri Kaguta Museveni and 2 Others*<sup>227</sup> the Supreme Court had held that a court of law could not annul an election on mere alleged voter bribery and non-compliance without cogent evidence to prove the said allegations. The court was bound to follow this decision in the instant case because the allegations of bribery had not been proved to the satisfaction of the court.

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<sup>223</sup> Citing Section 61 of the PEA and *Dr Kiiza Besigye vs. YK Museveni & Another*, Presidential Election Petition No.1 of 2001.

<sup>224</sup> Citing *Matsiko Winfred Kyomuhangi vs. J Babihuga*, Election Petition No.9 of 2002.

<sup>225</sup> Citing *National Council for Higher Education vs. Anifa Kawooya Bangirana*, Constitutional Petition Appeal No. 4 of 2011.

<sup>226</sup> Election Petition No.6 of 2011.

<sup>227</sup> Election Petition No.1 of 2016.



5. The law governing appointment of a Resident District Commissioner is in Article 203 (1) of the Constitution of the Republic of Uganda, 1995. The procedure for resignation by public officers was stipulated under Article 252 of the Constitution of the Republic of Uganda, 1995. Under Article 252 (2), resignation takes effect once received by the person or authority to whom it was addressed.
6. Section 4 (4) of the Parliamentary Elections Act, No.17 of 2005 provides that a public officer who wishes to stand for election as a Member of Parliament has to, in the case of a general election, resign their office at least 90 days before the nomination day.
7. Resignation means the formal renouncement or relinquishment of office, made with the intent of relinquishing the office, and accompanied by an act of relinquishment.<sup>228</sup> The acceptance of a tender of resignation from a public office occurs where the public employer or its designated agent initiates some type of affirmative action, preferably in writing, which clearly indicates to the employee that the tender of resignation is accepted by the employer.<sup>229</sup> The requirement to resign at least 90 days prior to the nomination is mandatory.<sup>230</sup>
8. Although it was true that the 1<sup>st</sup> appellant's resignation letter did not indicate whether it was received for instance by a stamp marking receipt, this did not, *per se*, mean that there was no resignation at all. There was a letter on record from the Secretary, Office of the President, accepting the 1<sup>st</sup> appellant's resignation. The absence of a received stamp from the President's Office was, therefore, only a minor irregularity in the circumstances of this case.
9. The trial court erred in finding that the delay between the resignation letter that is to say 8<sup>th</sup> May 2015 and its acceptance 15<sup>th</sup> July 2015 raised suspicion. The 1<sup>st</sup> appellant, for his part, wrote a letter of resignation, and could not determine when a reply to it had to be made. The delay in its acceptance could not be visited on him., Therefore, the 1<sup>st</sup> appellant duly resigned his office at least 90 days before nominations, in accordance with the law.<sup>231</sup>

*Appeal upheld.*

*Judgment and orders of trial court set aside.*

*1<sup>st</sup> appellant held to be the duly elected MP for Kakuuto County Constituency.*

*Respondent to pay costs to both appellants for the appeal and in the lower court.*

#### **Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 80 (1) (c) and 252

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<sup>228</sup> Citing Black's Law Dictionary, 5<sup>th</sup> Edition (1979).

<sup>229</sup> Citing *Davis vs. Marion County Engineer* (1991) 60 Ohio St. 3d 53.

<sup>230</sup> Citing *Darlington Sakwa and Another vs. the Electoral Commission and 44 Others, Constitutional Petition No.8 of 2006.*

<sup>231</sup> NB: The court did not address the allegation that the 1<sup>st</sup> appellant had continued to receive salary as RDC four months after his purported resignation. The court only noted the 1<sup>st</sup> appellants claim that the pay slips in question were forgeries, and that the account reflected on those slips was not his. Aside from taking note of this, the court did not make a specific finding or comment on this point.

Parliamentary Elections Act, No. 17 of 2005, sections 4 (1) (1) (c), 68 (1)  
Universities and other Tertiary Institutions Act No 7 of 2001, section 45 (2) (f)  
Universities and Other Tertiary Institutions Regulations, 2005, rule 2

**Cases cited:**

Abdul Katuntu vs. Kirunda Kivejinja Ali, Election Petition No. 7 of 2006  
Amama Mbabazi vs. Yoweri Kaguta Museveni and 2 Others, Election Petition No.1 of 2016  
Darlington Sakwa and Another vs. the Electoral Commission and 44 Others, Constitutional Petition No. 8 of 2006  
Davis vs. Marion County Engineer (1991) 60 Ohio St. 3d 53  
Gole Nicholas Davis vs. Loi Kageni Kiryapawo, Supreme Court Election Appeal No. 019 of 2007  
Joy Kabatsi Kafura vs. Anifa Kawooya Bangirana and Another, Supreme Court Election Petition Appeal No. 25 of 2007  
Kampala University vs. National Council for Higher Education, Miscellaneous Cause No. 053 of 2014  
Kipoi Tonny Nsubuga vs. Ronny Waluku Wataka and Others, Election Appeal No. 007 of 2011  
Kizza Besigye vs. YK Museveni and Another, Presidential Election Petition No. 1 of 2001  
Matsiko Winfred Kyomuhangi vs. J Babihuga, Election Petition No. 9 of 2002  
Muyanja Mbabaali vs. Birekerawo Mathias Nsubuga, Election Petition No. 36 of 2011  
National Council for Higher Education vs. Anifa Kawooya Bangirana, Constitutional Petition Appeal No. 4 of 2011

*Mr. Justine Ssemuyaba represented the 1<sup>st</sup> appellant,*

*Mr. Lawrence Tumwesigye for 2<sup>nd</sup> appellant*

*Mr. Jude Mbabali and Mr. Ssemwanga Fredrick for respondent*

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## Sembatya Edward Ndawula vs. Alfred Muwanga

Court of Appeal (Coram: Owiny-Dollo; DCJ, Kavuma and Buteera, JJ A)

Election Petition Appeal No. 34 of 2016

January 19, 2018

(Arising from Election Petition No.20 of 2016 (High Court of Uganda at Masaka, decision of Henry Kaweesa Isabirye, J.)

***Nominations—Qualifications for nominations to be elected Member of Parliament—Verification of qualifications by National Council for Higher Education (NHCE)—Role of NCHE—Verification of academic documents—Presentation of qualification higher than minimum qualification—Role of courts vis-a-vis that of Parliament—Discrepancies in names—Statutory declaration—Purpose thereof—Allegations of forgery of academic qualifications—Registration of change of name.***

The appellant, respondent and 4 others contested for the position of Member of Parliament for Katikamu South Constituency. The appellant was declared winner by the Electoral Commission. The respondent challenged the results of the election before the High Court. In a judgment rendered on 28<sup>th</sup> June 2016, the High Court upheld the petition.

### HELD:

1. In terms of section 4 (13) of the Parliamentary Elections Act, No. 17 of 2005, where a candidate has an A' level certificate obtained in Uganda or qualifications higher than the prescribed qualification obtained in Uganda, there is no need for verification of their qualifications by the National Council for Higher Education
2. In terms of section 5 (K) of the Universities and Other Tertiary Institutions Act 7 of 2001, which established the National Council for Higher Education (NCHE), one of the functions of that body relates to determining the equivalence of qualifications obtained from outside Uganda with those awarded by Ugandan institutions of higher education for recognition in Uganda. In the instant case, the appellant's Finance Officer's Diploma, awarded by the Uganda Management Institute did not need to be equated by NCHE.
3. It is improper for courts of law to usurp powers which were explicitly set out for an institution in an Act of Parliament. Courts can only intervene where the institution in exercise of its powers fails to observe the correct procedures or to observe the provisions of the Constitution. The aggrieved party will then proceed to the appropriate court for redress. In the instant case, the NCHE had to be left to perform its functions in consultation with the relevant bodies.<sup>232</sup>

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<sup>232</sup> Citing *National Council for Higher Education vs. Anifa Kawooya Bangirana*, Constitutional Petition Appeal No. 4 of 2011.

4. Where a candidate presents a qualification which is higher than the minimum required for nomination for any post, it is not enough for his or her opponents to argue that the same higher qualification is based on a forgery or something irregular. Nor is it sufficient for a spokesperson of the institution in which the higher qualification was obtained to suggest that had the institution known that fact, they would not have admitted that candidate or awarded the said qualification. Those who make such allegations have to do more than simply allege. They need to show that as a result of those allegations, the awarding institution of the higher qualification or any other equivalent to A' level or some other classification, subsequently cancelled or withdrew the award of the disputed qualification.<sup>233</sup>
5. In the instant case, at the time the appellant studied for the Diploma, the duration of the programme was 9 months. It was wrong for the trial court to conduct a deep probe into the requisite duration of such a course, and to conclude that it was not equivalent to A' level education in so far as it was not conducted over 2 years. This duty was by law preserved for another body.
6. A statutory declaration was an appropriate mode for clarifying any discrepancies in names.<sup>234</sup>
7. For one to register a change of name, one should have, in the first place, registered it under the Births and Deaths Registration Act.<sup>235</sup>

*Appeal allowed.*

*Declaration and orders of the High Court nullifying the appellant's election as Member of Parliament for Katikamu South Constituency set aside.*

*Respondent to bear the costs of the appeal and of the proceedings in the High Court.*

**Legislation considered:**

Births and Deaths Registration Act, Cap 309, section 12 (2)

Parliamentary Elections Act, No. 17 of 2005, section 4

Universities and Other Tertiary Institutions Act No. 7 of 2001, section 5

**Cases cited:**

Joy Kafura Kabatsi vs. Anifa Kawooya Bangirana and Another, Supreme Court Election Appeal No. 25 of 2007

Mandera Amos vs. Bwowe Ivan, Election Petition Appeal No.91 of 2016

National Council for Higher Education vs. Anifa Kawooya Bangirana, Constitutional Petition Appeal No. 4 of 2011

Namujju Doniozo Cissy and Electoral Commission vs. Martin Kizito Sserwanga, Election Petition Appeal No. 62 of 2016

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<sup>233</sup> Citing *Joy Kafura Kabatsi vs. Anifa Kawooya Bangirana and Another*, Supreme Court Election Appeal No.25 of 2007.

<sup>234</sup> Citing *Mandera Amos vs. Bwowe Ivan*, Election Petition Appeal No.91 of 2016.

<sup>235</sup> Citing Section 12 (2) of the Births and Deaths Registration Act, Cap 309 and *Namujju Doniozo Cissy and Electoral Commission vs. Martin Kizito Sserwanga*, Election Petition Appeal No. 62 of 2016

*Mr. Katumba Chrisestom and Mr. Mpenje Nathan for appellant  
Mr. Bakole Simon and Mr. Mpata Khalid for respondent*

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## Suubi Kinyamatma Juliet vs. Sentongo Robinah Nakasirye

Court of Appeal (Coram: Owiny-Dollo; DCJ, Kavuma and Barishaki, JJ A)

Election Petition Appeal No. 92 of 2016

February 1, 2018

(Arising from Election Petition No.7 of 2016 (High Court of Uganda at Masaka, decision of Lawrence Gidudu, J.)

**Affidavits**—Commissioning affidavits—Affidavit commissioned by advocate whose practicing certificate has not been renewed—Effect on evidence—Whether it is curable under Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995—Effect of non-renewal of certificate—Protection of litigants.

**Electoral offences**—Ballot stuffing—Meaning thereof—Evidence of ballot stuffing—Proof—Effect.

**Electoral offences**—Intimidation of voters—Proof thereof—Effect on elections—Presence of armed men during elections.

The appellant, respondent and two other persons contested for the position of Woman Member of Parliament for Rakai District. The appellant was declared winner by the Electoral Commission. The respondent challenged the results of the election before the High Court. The High Court upheld the petition hence this appeal.

### HELD:

1. The essence of section 14A of the Advocates (Amendment) Act, 2002 is to protect innocent litigants from unscrupulous advocates. Section 14A(1)(b)(2) makes provision for a victim of such an advocate to be given time to make good any defects arising from such an event. To the court, this means that the matter in question should not proceed with defective pleadings but time will be given to the innocent litigant to rectify the error. In the instant case, the affidavit in support of the petition had not been duly commissioned, in so far as one of the advocates who commissioned it had not renewed his practicing certificate for the year 2016. The petitioner, having realized that the affidavits had been commissioned by an advocate who had no practicing certificate for the year, ought to have proceeded under section 14A(1)(b)(2) to make good the defect.
2. It was wrong for the trial court to hold as it did that the defect in the affidavit could be cured or overlooked under the terms of Article 126 (2)(e) of the Constitution of the Republic of Uganda, 1995. The effect of non-renewal of a practicing certificate is that the advocate in question ceased and stopped to act as an advocate.<sup>236</sup> As such, the

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<sup>236</sup> Citing *Returning Officer, Iganga and Chairman Interim Electoral Commission vs. Haji Muluya Mustaphar*, Court of Appeal Civil Appeal No.13 of 1997.

failure to properly commission the affidavit, was not a mere technicality within the meaning of Article 126 (2) (e).<sup>237</sup> As such the purported commissioning of the affidavit in support as not an irregularity that could be cured under Article 126 (2)(e). The petition in question, from which this appeal arose, was illegally filed in court in contravention of section 60 of the Parliamentary Elections (Elections Petitions) Act, No. 17 of 2005 and rules 3(c) and 4(8) of the Parliamentary Elections (Interim Provisions) Rules, SI 141-2 and it therefore collapsed with the collapse of the affidavit in support filed alongside with the petition. The petition was not supported by any evidence as required by law. The petition was therefore fatally defective and as such there was no petition in law before the trial court.

3. Section 76 (f) of the Parliamentary Elections Act, No. 17 of 2005 creates the offence of ballot stuffing. Ballot stuffing is an election malpractice which involves voting more than once at a polling station or moving to various polling stations casting votes either in the names of people who did not exist at all or those who are dead or absent at the time of voting and yet are recorded to have voted. Ideally, at the end of the polling exercise, the number of votes cast ought to be equal to the number of people who physically turned up to vote.<sup>238</sup> In the instant case, the evidence on record was partisan and often with serious inconsistencies and was not sufficient to support the conclusion that there was ballot stuffing.
4. The position of the law in regards to intimidation of voter is stated in section 42 (1) of the Parliamentary Elections Act, No. 17 of 2005. The evidence on record in the instant case fell short of that upon which the court could find that an armed person (s) had intimidated voters. For instance, the alleged armed persons had not been directly linked to the appellant. In any case, the Court took judicial notice of the fact that the elections for the Woman Member of Parliament (MP) took place on the same day as that of the President, and those of directly elected MPs. It would therefore, in the court's view, be unfair to link such acts to the appellant without sufficient credible evidence to prove it as a fact.

*Appeal allowed.*

*Declaration and orders of the High Court nullifying election of appellant as validly elected Woman Member of Parliament of Rakai set aside.*

*Each party to bear their own costs.*

**Legislation considered:**

Advocates (Amendment) Act, 2002, section 14A (1) (b) (2)

The Constitution of the Republic of Uganda, 1995, Article 126 (2) (e)

Parliamentary Elections Act, No. 17 Of 2005, sections 42 (1), 60, 76 (f)

Parliamentary Elections (Election Petitions) (Interim Provisions) Rules, SI 141-2, rules 3 (c) and 4 (8)

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<sup>237</sup> Citing *Musoke Emmanuel vs. Kyabaggu Richard and Electoral Commission*, COA Election Petition Appeal No.67 of 2016.

<sup>238</sup> Citing *Toolit Simon Akecha vs. Oulanyah Jacob L'Okori and Electoral Commission*, Court of Appeal Election Petition Appeal No.19 of 2011.

**Cases cited:**

Musoke Emmanuel vs. Kyabaggu Richard and Electoral Commission, Court of Appeal Election Petition Appeal No.67 of 2016

Oolit Simon Akecha vs. Oulanyah Jacob L'Okori and Electoral Commission, Court of Appeal Election Petition Appeal No.19 of 2011

Returning Officer, Iganga and Chairman Interim Electoral Commission vs. Haji Muluya Mustaphar, Court of Appeal Civil Appeal No. 13 of 1997

*Mr. Kandebe Ntambirweki for cross-appellant*

*Mr. Richard Komaketch Latigo for the appellant*

*Mr. Medard Lubega Ssegona for the respondent*

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**Mugema Peter vs. Mudiobole Abedi Nasser**

**Court of Appeal (Coram: Kavuma; DCJ, Barishaki and Bamugemereire, JJ A)**

**Election Petition Appeal No. 16 of 2016**

**March 22, 2018**

(Arising from High Court Election Petition No. 13 of 2016 High Court at Jinja, presided over by Margaret Mutonyi, J., and dated 17<sup>th</sup> June, 2016.)

***Duty of the first appellate court—Duty to re-appraise evidence on record.***

***Record of Appeal—Time lines of filing a record of appeal—Computing the time within which to file the record of proceedings—Rule 83 of the Judicature (Court of Appeal Rules) Directions, SI 13-10—Duty of transferring the record of appeal to the party who applied for it lies on the registrar.***

***Evidence—Affidavit evidence by illiterate persons—Procedure of writing affidavits on behalf of an illiterate—Contents of the jurat affidavit—Section 3 of the Illiterates Protection Act, Cap 78***

***Evidence—Expert Evidence—Hand writing expert—Comparing and determining the uniformity of signatures—Role of handwriting experts.***

***Agency—Agency relationship in elections—Determining existence of agency relationship—National Resistance Movement (NRM) Chairperson and belonging to the same party—How does one become a flag bearer of a party.***

***Electoral offences—Bribery—Proof thereof—Prohibition of fundraising and giving donations during elections—Candidate offering 300,000 as offertory during a cross over night prayer—The offertory not to be treated as a bribe but qualified as practice of religion—Article 29(1) of the 1995 Constitution of the Republic of Uganda, 1995.***

The appellant and respondent contested for the position of Member of Parliament for Iganga Municipality Constituency. The 2<sup>nd</sup> respondent declared the 1<sup>st</sup> respondent as winner of the election and gazette in March 2016.

Being dissatisfied with the outcome of the election, the respondent petitioned the High Court alleging that the appellant committed illegalities of bribery and giving out donations. It nullified and set aside the election. The appellant being aggrieved, filed the instant appeal.

On appeal, the appellant argued that the appellant took the necessary steps to prosecute the appeal and that failure to file the record of appeal within time allowed was because of the failure of the court to provide the same within the time allowed to file it. That the burden of proof in cases of bribery lay on the petitioner. The court having found that all the twenty-

three affidavits deponed by illiterates were bad in law as they did not comply with section 3 of the illiterates Protection Act, Cap 78, the trial court should not have relied on them.

The appellate also submitted that the trial court erred in holding that the National Resistance Movement chairperson who was responsible for pursuing political interests of that party, automatically placed him under in the principal agent relationship as far as elections were concerned. Regarding the allegation that the appellant had given a bribe of UGX 300,000/= as offortory, it was submitted for appellant that the evidence relied upon was in the category of the twenty-four affidavits that had been nullified.

**HELD:**

1. A first appellate court has the duty to re-appraise the evidence on record from the trial court and make its own findings of fact on the issues before it, bearing in mind the fact that it did not have the advantage of seeing the witnesses testify.<sup>239</sup>
2. While timelines in election litigation are ‘very crucial,’ the court should take into account the unique circumstances of each case.
3. An appellant cannot be expected to do anything beyond making ‘countless’ requests for the record of proceedings, and the best way to do this is to write letters. Letters written in pursuance of a record of proceedings are proof of diligence of an appellant in pursuing their appeal. In this case, the appellant’s counsel had written two letters respectively requesting for and reminding the Registry about their request for a typed and certified record of proceedings.
4. The Court Registry’s delay in furnishing the appellant and his counsel with a certified copy of the record of proceedings could not be used against them unless it was shown that the letter informing them that the record was ready had itself been written in and dated June 2016. The letter so informing them had been written on 3<sup>rd</sup> August, although it mentioned that the record had been certified on 22<sup>nd</sup> June. Counsel for the appellant exercised sufficient diligence in the pursuit of the record of proceedings, and had no way of accessing this record without being informed or notified that it was ready. This notification was done in August.
5. The duty to transfer the record of proceedings to the appellant lies upon the registrar referred to under rule 83(2) of the Judicature (Court of Appeal Rules) Directions, S.I. 13-10 and lies emphasis upon the phrase “preparation and delivery”.<sup>240</sup> In practice, however, diligent litigants should not sit and wait for the registrar to deliver the record of proceedings to them; continued letters written to remind the Registrar and

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<sup>239</sup> Cited Rule 30 of the Judicature (Court of Appeal Rules) Directions, S.I. 13-10. Also relied on: 1) *Pandya vs. R* [1957] EA 336; 2) *Okeno vs. Republic* [1972] EA 32; 3) *Kifamunte Henry vs. Uganda*, Supreme Court Criminal Appeal No. 10 of 1997; and 4) *Mugema Peter vs. Mudhiobole Abed Nasser*, EPA No. 30 of 2011.

<sup>240</sup> Rule 83(2) of the Judicature (Court of Appeal Rules) Directions, S.I. 13-10 provides that, “Where an application for a copy of the proceedings in the High Court has been made within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the High Court as having been required for the preparation and delivery to the appellant of that copy.”

sometimes physical trips to the Registry to check on whether the record is ready, are therefore in order.

6. It is trite that in election matters, evidence is given by way of affidavits.
7. Laws governing the preparation of affidavit evidence are intended to preserve its sanctity as a specie of evidence. Therefore, 'it is important that the law is strictly complied with to avoid defeating the spirit of that law.
8. Where an affidavit is drafted and prepared by a third party, usually counsel for an illiterate person, that affidavit must also contain the true and full name of the drafter and that drafter's true and full address in accordance to section 3 of the Illiterates Protection Act, Cap. 78.<sup>241</sup> This is distinct from indicating who the translator is. Preparation and translation of affidavits are two different things and one cannot be held to suffice for the other.'
9. The law on affidavit evidence should be adhered to without hoping that one who violates it may find refuge under Article 126(2) (e) of the Constitution of the Republic of Uganda, 1995.<sup>242</sup> In the instant cases, without proof that the impugned affidavits, numbering 23, were drafted at the instruction of the deponents, the court was unable to find that the failure to adhere to section 3 of the Illiterates Protection Act, Cap. 78 (the requirement of indicating the name and address of the drafter or writer of an affidavit written for a third party illiterate) was a matter of form only and not substance.
10. Having found that the impugned affidavits had not been administered in the right manner, the trial court should not have relied upon them. All 23 impugned affidavits should therefore, have been expunged from the record. The court suggested that where a deponent's affidavit is struck off the record and the court is left with their oral evidence only, that oral evidence should be corroborated by other evidence.<sup>243</sup> In this case, a deponent's affidavit was struck off the record and the evidence that corroborated it, comprising other deponents' affidavits, was also subsequently found to be invalid on appeal. Therefore, that deponent's oral evidence was of no value anymore.
11. Comparing and determining the uniformity or similarity of signatures is a preserve of the handwriting experts or persons well acquainted with the concerned person's signature. The trial court had therefore correctly avoided assuming this role to

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<sup>241</sup> Section 3 of the Illiterates Protection Act, Cap. 78 provides that, "Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her." (Emphasis by Court)

<sup>242</sup> Article 126 (2e) of the Constitution provides that, "In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles, substantive justice shall be administered without undue regard to technicalities."

<sup>243</sup> Cited *Peter Mugema vs. Mudhiobole Abedi Nasser*, Election Petition Appeal No. 30 of 2011.

independently compare the signatures of the translator of various impugned affidavits as they appeared on those different affidavits.

12. An agency relationship is not assumed. It is a matter of fact requiring proof of its existence. Therefore, the mere fact that a one Ngobi Yaziid was the National Resistance Movement Party Chairperson in the relevant electoral area and was thus responsible for pursuing the political interests of the Party in that area did not automatically make him an agent of the appellant in the impugned elections. According to *Kiiza Besigye vs. the Electoral Commission and Another, Presidential Election Petition No. 1 of 2006* having a leadership position within an electoral candidate's political party does not automatically make one an agent of that candidate. For the agency relationship to exist, the electoral candidate should have given the agent authority to act on his or her behalf, under his or her instructions, and with his or her consent. Therefore, an agency relationship had not been proved to have existed between Ngobi and the appellant so as to impute the illegal actions of the former onto the latter.
13. The prohibition of fundraising and the giving out of donations during an electoral campaign period must be read, interpreted, and applied subject to the Constitution of the Republic of Uganda, 1995 and especially Article 29 (1)(c) thereof on the freedom to practice any religion and to manifest such practice, including the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with the Constitution. There was no proof that the UGX 300,000/- given by the appellant as offertory was a bribe and not merely a religious practice. In fact, the respondent had also given 'offertory' in the same amount at the same occasion and the appellant had stated then that he hoped the respondent would not use the act against him.
14. Although the law, under section 63 (4) (b) of the Parliamentary Elections Act No. 17 of 2005 empowers a court hearing a petition to- at his or her discretion- declare a person other than the one that was declared by the Electoral Commission, as the validly elected Member of Parliament for a particular constituency, there was no justification under the particular and peculiar circumstances of this case to declare the respondent as the elected Member of Parliament for Iganga Municipality Constituency.
15. The trial court had not given any reason for granting a certificate of costs for two counsel, and neither had the petition been a complex matter.

*Appeal allowed. Judgment and orders of the High Court set aside.*

*Appellant's election upheld.*

*Respondent ordered to pay the appellant's costs in the High Court as well as the Court of Appeal.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Articles 29 (1) (c), 126 (2) (c)

Illiterates Protection Act, Cap. 78, section 3

Judicature (Court of Appeal Rules) Directions, SI 13-10, rules 30, 83(2)

Parliamentary Election Act No. 17 of 2005, sections 4 (5), 63 (4) (b), 68 (1)

**Cases cited:**

Commissioner General, Uganda Revenue Authority vs. Meera Investments Ltd, Civil Appeal No. 22 of 2007

Fred Bwino Kyakulaga vs. Badogi Ismail Waguma, Election Petition Application No. 26 of 2016

Kasaala Growers Cooperative Society vs. Kakooza Jonathan and Kalemera Edson, Supreme Court Civil Appeal No. 19 of 2010

Kizza Besigye vs. Museveni Yoweri Kaguta and Another, Presidential Election Petition No. 1 of 2001

Peter Mugema vs. Mudiobole Abedi Nasser, Election Petition Appeal No. 30 of 2011

*Mr. Kiryowa Kiwanuka, Mr. Elton Mugabi and Mr. Usaama Sebuufu for appellant*

*Mr. Alex Ruganda, Mr. Asuman Nyonyintono and Ms. Berna Mutamba for respondent*

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**Betty Muzanira Bamukwatsa vs. Masiko Winnifred Komuhangi, the Returning Officer, Rukungiri and the Electoral Commission**

**Court of Appeal (Coram: Owiny-Dollo; DCJ, Kavuma and Mugamba, JJ A)**

**Election Petition Appeal No. 65 of 2016**

**March 22, 2018**

(Arising from High Court Election Petition No. 3 of 2016 (High Court of Uganda at Kabale, decision of Wilson Kwesiga, J. dated 8<sup>th</sup> August, 2016).

***Duty of first appellate court***—Court is required to re-evaluate evidence and come to its own conclusions—Rule 30 of the Judicature (Court of Appeal Rules) Directions, SI 13-1.

***Burden and standard of proof in election petitions***—Petitioner bears the burden of proof Standard of proof is to the satisfaction of court on a balance of probabilities.

***Memorandum of Appeal***—Framing grounds of appeal—Grounds of appeal must be framed distinctly, concisely, and without argument or narrative—Rule 86(1) of the Judicature (Court of Appeal Rules) Directions SI 13-10.

***Affidavit in support of the petition***—Affidavit in support of the petition filed after the petition has been filed—Effect thereof.

***Affidavits in election petitions***—Contents of an affidavit—Omission by a petitioner to disclose the source of information in an affidavit—Effect on the petition.

***Evidence***—Cross examination of witnesses—Failure to cross examine witnesses by both parties—Effect thereof.

***Evidence***—Corroboration of evidence in election petitions—Evidence of a partisan witness requires some corroboration.

***Elections for Member of Parliament***—Declaring the winner of an election—Procedure to be followed by the Returning Officer before declaring winner of an election—Section 53 (1) of the Parliamentary Elections Act No. 17 of 2005—Basis of declaring a candidate winner of an election.

***Alteration of Results***—Alteration of a returning officer's transmitted results by the Electoral Commission—Section 58 of the Parliamentary Elections Act No. 17 of 2005.

***Setting a side or annulling election of a Member of Parliament***—Reasons thereof—Whether the non-compliance in the instant case affected the result of the election in a substantial manner.

**Declaration of Results DR Forms**—Doubtful entries contained within a DR Forms—Effect on the election—Total number of votes exceeding the total votes cast—Discrepancies in the DR forms—Forms with glaring discrepancies cannot be relied upon—Unsigned DR forms—Unsigned form cannot be used to declare results except in exceptional circumstances.

**Electoral offences**—Illegal donations and fundraising during elections—Section 68(7) of the Parliamentary Elections Act No. 17 of 2005—Making a donation of 50,000 to a church and to a fellowship—Whether there was cogent evidence to prove illegal donations and fundraising.

The appellant and the 1<sup>st</sup> respondent contested in the election for Woman Member of Parliament for Rukungiri District on 18<sup>th</sup> February, 2016.

According to the Return Form transmitted to by the 2<sup>nd</sup> respondent returning officer to the 3<sup>rd</sup> respondent, the 1<sup>st</sup> respondent polled 58,994 votes while the appellant polled 54,966 votes, representing a margin of 4,028 votes. This Return Form was, however, transmitted without the inclusion or tallying of 5,413 votes. In the gazetted results, the 3<sup>rd</sup> respondent claimed to have rectified this error by adding results that had been omitted by the returning officer, and therefore reported that the 1<sup>st</sup> respondent, who remained the successful candidate, had polled 61,561 votes against the appellant's 57,812 representing a new margin of 3,749 votes. The 1<sup>st</sup> respondent was therefore gazetted as the successful candidate.

The appellant challenged the 1<sup>st</sup> respondent's victory on the grounds that: (i) there was non-compliance with electoral laws and principles, which substantially affected the result; and (ii) the 1<sup>st</sup> respondent committed the illegal practice of giving out donations during campaigns.

The trial court dismissed the appellant's petition with costs.

**HELD:**

1. The Court of Appeal as the first appellant court is required to re-evaluate the entire evidence that was before the trial court and come to its own conclusions, taking into account the fact that it did not see or perceive the witnesses as they testified in the trial court.<sup>244</sup>
2. The petitioner bears the burden of proof.
3. The standard of proof is to the satisfaction of court on a balance of probabilities.<sup>245</sup>
4. The grounds of appeal must be framed distinctly, concisely and without argument or narrative, but while specifying the points alleged to have been wrongly decided and

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<sup>244</sup> Reference made to *Kifamunte Henry vs. Uganda*, Supreme Court Criminal Appeal No. 10 of 1997, and *Selle and Another vs. Associated Motor Boat Company Ltd and Others*, [1968] EA 123.

<sup>245</sup> P. 4 of judgment. Reference made to Section 61(3) of the Parliamentary Elections Act. This Section provides that, "Any ground specified in subsection (1) shall be proved on the basis of a balance of probabilities." While Section 61(1) reads in part, "The election of a candidate as a member of parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court..."

Reference also made to *Mbaghadi Fredrick Nkayi & Another vs. Dr. Nabwiso Frank Wilberforce*, Election Petition Appeals No. 14 and 16 of 2011.

the order that is proposed for the court to make. The grounds framed in very general terms as to offend this rule will be struck out.

5. Evaluation of evidence should be systematic and specific with regard to each issue and allegation; a generalized, omnibus consideration of evidence is to be avoided. A trial court should weigh and consider particular evidence in respect of each allegation and then make up its mind as to whether the relevant burden of proof has been discharged to the requisite standard or not.<sup>246</sup>
6. The trial court did not specifically address the complaints regarding each Declaration of Results Form despite the fact that they were tendered in evidence and counsel had made submissions thereon. It also mixed up the affidavit evidence of several, different witnesses, and failed to consider the admission made by one of the 1<sup>st</sup> respondent's witnesses to the effect that their affidavit had been full of lies. Additionally, it ignored the uncontroverted evidence of five witnesses and this was a grave error. These errors were mostly born of the trial courts 's omnibus consideration of the evidence. According to *Nakate Lilian Seguja and the Electoral Commission vs. Nabukenya Brenda*<sup>247</sup> where a trial court failed to evaluate particular pieces of evidence and kept silent about it within its judgment or ruling, it is to be assumed that it found the same to be cogent, and consequently ought to have been persuaded by it.
7. The trial court's conclusion fell short of the analysis required in evaluation of evidence. The trial court ought to have specifically addressed the complaints in respect of each Declaration of Results Form. It is imperative to demonstrate how one, as a judicial officer, arrives at a conclusion, in this case one to the effect that existing irregularities did not substantially affect the election.
8. The trial court erred when it disregarded considerable affidavit evidence simply because it was filed after the petition. Considering the court's decision in *Bantalib Issa Taligola vs. Wasugirya Bob Fred and the Electoral Commission*,<sup>248</sup> time is of the essence when it comes to the filing of election petitions and therefore, subsequent affidavit evidence may be adduced to prove an allegation made by the petitioner.
9. Omission to disclose a petitioner's source of information contained within their affidavit is not fatal. The trial court must do substantive justice without permitting such technicalities to unnecessarily get in the way. In any case, the petitioner had in time provided the source of her information in the form of affidavits sworn by other witnesses.
10. Failure to cross-examine witnesses by both parties means that the court is left with affidavit evidence that is full of accusations and counter accusations and this leads

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<sup>246</sup> *Paul Mwiru vs. Igeme Nathan and Others*, Election Petition Appeal No. 6 of 2011 relied upon for the principle that omnibus considerations of evidence are improper.

<sup>247</sup> Election Petition Appeals No. 17 and 21 of 2016.

<sup>248</sup> Election Petition Appeal No. 11 of 2006.



inevitably to a conclusion that a petitioner has not discharged their burden of proof to the required standard.<sup>249</sup>

11. Where evidence is given by way of multiple affidavits, it is not enough to only seek to controvert some or a few of them and leave others unchallenged.<sup>250</sup>
12. The evidence of a partisan witness, i.e. a supporter of a particular candidate, requires some corroboration.
13. Before declaring the winner of an election, a Returning Officer should receive, consider, and add all results from all the polling stations within their jurisdiction; they should not declare a winner on the basis of partial or provisional results except where there is a case of missing or cancelled results.<sup>251</sup>
14. A Returning Officer must declare a winner based on final rather than partial or provisional results and transmit the said final results using a Return Form to the 3<sup>rd</sup> respondent without room for any new or additional tallying to be done unilaterally at the head office of the 3<sup>rd</sup> respondent because the law does not envisage such an action. A Return Form is not a mere working document; it is a conclusive document.
15. If the tallying centre was getting chaotic, the Returning Officer should have postponed tallying to the next day by having recourse to section 57 (1) of the Parliamentary Elections Act No. 17 of 2005.<sup>252</sup> The failure by the 2<sup>nd</sup> respondent returning officer to tally 5,413 votes was an act of non-compliance with electoral law and the Constitution, and failure to tally votes disenfranchises the affected voters and breaches their right to vote.<sup>253</sup>
16. The 3<sup>rd</sup> respondent does not have the power to alter the results transmitted to it by a returning officer by way of a Return Form, and to therefore gazette its own computed results. The Return Form, which contains the result of the election, is a statutory form

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<sup>249</sup> Reliance had on *Kintu Alex Brandon vs. Electoral Commission and Walyomu Moses*, Election Petition Appeal No. 64 of 2016.

<sup>250</sup> *Tubo Christine Nakwang vs. Akello Rose Lilly*, Election Petition Appeal No. 80 of 2016, cited to show that where affidavit evidence is neither rebutted nor subjected to cross-examination, it may be believed.

<sup>251</sup> While Section 53(2) of the Parliamentary Elections Act permits a returning officer to commence tallying of results where they have not received all results from all the relevant polling (in the presence of the candidates or their agents and a police officer not below the rank of Inspector of Police), *this Section cannot be read to mean that the returning officer can consider a few results, pending receipt of other results and proceed to declare the winning candidate based on provisional results.*

<sup>252</sup> Section 57(1) reads, "Where counting, tallying or recounting of votes is interrupted by a riot or violence or any other cause, the presiding officer or returning officer shall adjourn the counting, tallying or recounting to the next day or to any other time of the same day and shall immediately inform— a) in the case of the presiding officer, the returning officer; or b) in the case of the returning officer, the Commission, of that fact."

<sup>253</sup> Reference had to *Apollo Kantinti vs. Sitenda Sebalu and Others*, Election Petition Appeals No. 31 and 33 of 2016 (decided by the Court of Appeal). In this case, the Court of Appeal stated that, "The right to vote entails not only casting a ballot paper for a candidate of one's choice, but also and equally important, knowledge that that vote will be treated equally as all the other votes cast in the election, before a candidate is declared a winner thereof... The process of voting must therefore be looked at as a whole inclusive of the phase of casting the votes to the counting of the votes up to the declaration of the results."

created by section 58 of the Parliamentary Elections Act No. 17 of 2005 and its content cannot be altered or wantonly disregarded by the Electoral Commission as was the case here. A Return Form can only be altered by an order of court. In the instant case, the 3<sup>rd</sup> respondent's alteration of the Return Form under the guise of correcting errors and ascertaining results, and in the absence of the candidates and their agents raised concerns regarding fairness and transparency. The above alteration also amounted to usurpation of judicial powers granted to courts of law to hear election-related disputes under the Parliamentary Elections Act.

17. The Returning Officer's neglect to tally a substantial number of votes i.e. (5,413), went to the root of the electoral exercise and substantially affected the outcome of the election, partly because this number of excluded votes was much larger than the margin of 4,028 votes by which the 1<sup>st</sup> respondent prevailed over the appellant as per the Returning Officer's Return Form. Additionally, this neglect to tally 5,413 votes disenfranchised the neglected voters and allowed the 3<sup>rd</sup> respondent to tally the excluded votes in an opaque fashion under the guise of correcting an error.
18. The court found that because of serious and minor discrepancies in the results of five polling stations, 1,867 votes had to be excluded from the tally sheet. This was in addition to consideration of the 2,250 voters that had been disenfranchised by the Returning Officer's decision to declare final results and a winner of the election without tallying results from some polling stations. Collectively therefore, the final result had been substantially affected.
19. Doubtful entries contained within Declaration of Results Form render the result therein recorded unreliable because these forms are a safeguard against fraud and other impropriety in the electoral process. The filling of these forms is not a mere formality but a matter of substance.<sup>254</sup>
20. In respect of four polling stations, the recorded total number of votes cast exceeded the total number of voters. Moreover, the court noted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents gave no explanation for these glaring discrepancies and made no attempt to demonstrate any exceptional circumstances meriting reliance on the same. As a principle, Declaration of Results Forms with glaring discrepancies cannot be relied upon. Results from these four polling stations ought to have been excluded.<sup>255</sup>
21. In respect of one polling station, the total number of votes recorded was less than the number of voters who voted that day, by three votes. Although this discrepancy was minor, the court determined that inclusion of this polling station's results in the tally sheet was an error. There were alterations on some Declaration of Results Forms which signified that they had been falsified and that the results they contained were unreliable and should have been rejected when tallying.

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<sup>254</sup> Reliance had on *Nyakecho Annet & the Electoral Commission vs. Ekanya Geoffrey*, Election Petition Appeals No. 28 and 30 of 2016 (Court of Appeal).

<sup>255</sup> *Mbaghadi Fredrick Nkayi & Another vs. Dr. Nabwiso Frank Wilberforce*, Election Petition Appeals No. 14 and 16 of 2011.

22. A Declaration of Results Form must be signed by the presiding officer, amongst others, and an unsigned form cannot be used to declare results except in exceptional circumstances.<sup>256</sup> No exceptional circumstances were demonstrated to have existed, either before the trial court or on appeal.
23. It is imperative to enter all the relevant information on a Declaration of Results (DR) Form in order to provide safeguards against fraud. In the absence of such safeguards the results of the polling stations contained in the relevant DR Forms should be excluded from the results tally sheet. In the instant case, no entries had been made on the DR Form with respect to invalid votes, ballot papers issued, spoilt ballot papers, and unused ballot papers.<sup>257</sup>
24. Contrary to section 68 (7) of the Parliamentary Elections Act No. 17 of 2005, the 1<sup>st</sup> respondent had made a donation of 50,000 Uganda Shillings to a Church and another donation of UGX 100,000/- to a Fellowship, all during the period of campaigning.<sup>258</sup>
25. There was no cogent evidence that the 1<sup>st</sup> respondent had participated in a fundraising, because there was a serious contradiction between the appellant's testimony and that of her witness. Therefore, the burden of proof on this allegation had not been discharged by the appellant. The appellant had also not adduced sufficient evidence of an alleged donation made at 3 other locations (churches).<sup>259</sup>
26. Where it is alleged that a party breached the law through an agent, the agency relationship between that party and the alleged agent must be proved.

*Appeal largely succeeded.*

*Results from four polling stations wherein the total number of votes recorded exceeded the total number of voters, excluded.*

*Election of the 1<sup>st</sup> respondent nullified.*

*Electoral Commission directed to hold a bye-election.*

*Appellant awarded costs in the Court of Appeal and the High Court, to be met equally by both (sic) respondents.*

#### **Legislation considered:**

Judicature (Court of Appeal Rules) Directions, SI 13-11, rules 30 and 86 (1)

<sup>256</sup> Reliance had on *Nyakecho Annet and the Electoral Commission vs. Ekanya Geoffrey*, Election Petition Appeals No. 28 and 30 of 2016 (Court of Appeal); *Rehema Muhindo vs. Winred Kizza and Another*, Election Petition Appeal 29 of 2011; *Kakooza John Baptist vs. Electoral Commission and Anthony Yiga*, Election Petition Appeal No. 7 of 2007 and *Fredrick Mbagadhi vs. Frank Nabwiso*, Election Petition Appeals No. 14 and 16 of 2011.

<sup>257</sup> Relied on *Rehema Muhindo v. Winnie Kiiza*.

<sup>258</sup> Section 68(7) provides that, "A candidate or an agent of a candidate shall not carry on fundraising or giving of donations during the period of campaigning."

<sup>259</sup> Some of the evidence adduced comprised that of a partisan witness who was a confessed supporter of the Appellant and two other witnesses who were visitors of the Church that had also come to solicit votes on that day. The Court indicated that the evidence of other ordinary people who were present at the church should have been adduced. Regarding another alleged donation, the evidence from either side was not fully subjected to cross-examination and this resulted in a stalemate of non-definitive accusations and counter accusations, which similarly meant that the Appellant had not discharged their burden of proof.

Parliamentary Elections Act No. 17 of 2005, sections 53 (1), 57 (1), 58, 68 (7)

**Cases cited:**

Banatalib Issa Taligola vs. Wasugirya Bob Fred and the Electoral Commission, Election Petition Appeal No. 11 of 2006

Kakooza John Baptist vs. Electoral Commission and Anthony Yiga, Election Petition Appeal No. 11 of 2007

Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997

Kintu Alex Brandon vs. Electoral Commission and Walyomu Moses, Election Petition Appeal No. 64 of 2016

Mbaghadi Fredrick Nkayi and Another vs. Nabwiso Frank Wilberforce, Election Petition Appeals Nos. 14 and 16 of 2011

Nakate Lilian Seguja and the Electoral Commission vs. Nabukenya Brenda, Election Petition Appeals No. 17 and 21 of 2016

Nyakecho Annet and the Electoral Commission vs. Ekanya Geoffrey, Election Petition Appeals No. 28 and 30 of 2016

Paul Mwiru vs. Igeme Nathan and Others, Election Petition Appeal No. 6 of 2011

Tube Christine Nakwang vs. Akello Rose Lilly, Election Petition Appeal No. 80 of 2016

Rehema Muhindo vs. Winfred Kizza and Another, Election Petition Appeal No. 29 of 2011

Selle and Another vs. Associated Motor Boat Company Limited and Others [1968] EA 123

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**George Patrick Kassaja vs. Fredrick Ngobi Gume and the Electoral Commission**

**Court of Appeal (Coram: Owiny-Dollo; DCJ, Kasule and Musoke, JJ A)**

**Election Petition Appeal No. 68 of 2016**

**March 28, 2018**

(Arising from High Court Election Petition No. 7 of 2016 (High Court at Jinja, presided over by Benjamin Kabiito, J., dated 24<sup>th</sup> June, 2016).

***Duty of first appellate court***—*Duty to reconsider the evidence and all the materials before the trial court and make its own conclusions.*

***Burden and standard of proof in election matters***—*Standard of proof is on a balance of probabilities—Burden of proof on the petitioner to prove his case to the satisfaction of the court.*

***Affidavits***—*Irregularities as to identification of the deponents—Courts not to condone outright irregularities, especially those that affect the identification of the deponent.*

***Nominations***—*Qualifications to be nominated Member of Parliament (MP)—A person convicted of an offence of moral turpitude within seven years preceding the election—Section 4 (2) (f) of the Parliamentary Elections Act No. 17 of 2005—Conviction of contempt of court—Whether the offence of contempt of court amounts to an offence of moral turpitude—Conduct to qualify as moral turpitude.*

***Electoral offences***—*Bribery—Proof of bribery—Ingredients of the offence of bribery—Cogent and satisfactory evidence has to be adduced to prove bribery—Failure by the complainant to report allegations of bribery to the police—Effect thereof.*

***Agents***—*Agents signing Declaration of Results (DR) forms—Failure to make complaints of bribery—Effect of thereof—Signed DR Forms is proof that the agents are satisfied with what transpired at the time of voting.*

***Registered voter***—*Proof of a registered voter—Voter slips and National Identity card as proof of being a registered vote.*

***Costs***—*Award of costs—Costs follow the event Award of costs is a matter of judicial discretion—Section 27 of the Civil Procedure Act, Cap. 71 and rule 27 of the Parliamentary Elections Interim Provisions (Election Petition) Rules, SI 141-2—Whether the appellant was entitled to costs.*

The appellant and 3 others vied for the position of Member of Parliament for Bulamoji North West Constituency in Kaliro District in an election held on 18<sup>th</sup> February, 2016. The 1<sup>st</sup> respondent was returned as the winner and the results and published in the National gazette.

The results were challenged by the appellant contending that the same did not reflect the will of the voters of the constituency as they were held in violation of the of the electoral laws, there were illegal practices committed by the 1<sup>st</sup> respondent and his agent with his consent, knowledge or approval and that the 1<sup>st</sup> respondent was not qualified to be a member of parliament.

The trial court found in favor of the 1<sup>st</sup> respondent and dismissed the petition with costs to the respondent.

The appellant aggrieved by that decision appealed. The appellants case on appeal was that the trial court erred in rejecting the affidavits on grounds that for some, the deponents signed yet in their National Identity Cards, it was evidenced they were incapable of signing, for others that the deponents were not voters and for one that the name of the deponent was different from that which appeared to be in the bottom of the affidavit. It was also contended that the 1<sup>st</sup> respondent did not qualify to be nominated because he had been convicted of an offence involving moral turpitude. The 1<sup>st</sup> respondent was charged with contempt of court and he paid a fine for the same and the main suit was withdrawn. Further that the 1<sup>st</sup> respondent was guilty of bribery through giving out money and jelly that bore his name and portrait.

#### **HELD:**

1. Being a first and last appellate court with regard to most election matters, the Court of Appeal has the duty to re-hear the case and reconsider the evidence and all the materials placed before the trial court and make its own conclusions while bearing in mind the fact that it did not see the witnesses testify.<sup>260</sup>
2. In election matters, the standard of proof is on a balance of probabilities and the burden of proof lies on the petitioner to prove his case to the satisfaction of the court.
3. Evidence in election matters is adduced by way of affidavits according to rule 15 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, SI 141-2.<sup>261</sup>
4. While courts should take a liberal approach to affidavit evidence, they will not condone outright irregularities, especially those that affect the proper identification of the deponent. Affidavit evidence is, by its nature, very delicate and despite the pressure under which election cases are organized, some mistakes cannot be ignored or held to be inconsequential. The impugned affidavits had been correctly rejected because of their serious irregularities. Some affidavits were signed and yet the deponents' Identity Cards showed that they were incapable of signing. Regarding others, the deponents were not voters while regarding one, the name of the deponent was different from the one that appeared at the foot of the affidavit.

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<sup>260</sup> Cited: Rule 30(1) of the Judicature Court (Court of Appeal Rules) Directions, S.I. 13-10; *Pandya vs. R* [1957] EA 336; *Okeno vs. Republic* [1972] EA 32; *Kifamunte Henry vs. Uganda*, SCCA No. 10 of 1997; and *Mugema Peter vs. Mudhiobole Abed Nasser*, EPA No. 30 of 2011, Court of Appeal

<sup>261</sup> This Rule states that, "Subject to this rule, all evidence at the trial, in favour of or against the petition shall be by way of affidavit read in open court."

5. It is of paramount importance that affidavits are carefully drafted, especially because they are the principle source of evidence in election matters.
6. A person is not qualified for election as a Member of Parliament (MP) if that person has, within 7 years immediately preceding the election, been convicted by a competent court of a crime involving dishonesty or moral turpitude. For conduct to qualify as moral turpitude, it must be extreme and so heinous as to shock the moral sense of the community. The 1<sup>st</sup> respondent's conviction of contempt of court, for which he paid a fine, did not, by any stretch of the imagination amount to an offence involving moral turpitude and to hold otherwise would make every offence one involving moral turpitude. All convicts would be disqualified from vying for the position of MP.
7. It is not enough to merely harbour suspicion over another's involvement in something as grave as bribery. Cogent and satisfactory evidence had not been adduced to prove that the 1<sup>st</sup> Respondent participated in bribery, on a balance of probabilities.
8. The elements of the electoral offence of bribery (offering gifts) are that: (i) a gift was given to a voter; (ii) the gift was given by a candidate or their agent; and that (iii) the gift was given to induce the person to vote for the candidate.<sup>262</sup>
9. The affidavits filed in relation to the allegation of bribery did not contain proof of the deponents being voters. The mere production or attachment of a National Identity Card (ID) does not prove the status of being a voter. Conclusive proof that a person is a registered voter is by evidence that their name is on the National Voters' Register and not by voter slips or mere production of a National ID.<sup>263</sup>
10. The witnesses that sought to prove the bribery allegation admitted that they had received the bribe and this therefore made them accomplices. Furthermore, the said witnesses did not give the court any reason as to why they should be treated as truthful witnesses whose testimony could be relied upon in establishing the allegation of voter bribery.
11. Neither the appellant nor his witnesses made any complaint regarding the alleged bribery or any police report for that matter. This demonstrated that the appellant was perhaps not serious about the said bribery alleged to have affected the outcome of the election. The appellant's agents signed the Declaration of Results Forms and did not file any complaint of dissatisfaction or of bribery.
12. It is trite that signed Declaration of Results Forms (DR) are proof that the agents were satisfied with what transpired at the time of voting.<sup>264</sup> Consequently, the candidate whose agents sign a DR Form is estopped from challenging the contents of the form

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<sup>262</sup> Cited: *Kizza Besigye vs. Kaguta Museveni*, Supreme Court Presidential Election Petition No. 1 of 2001, specifically the opinion of Odoki, CJ.

<sup>263</sup> Section 1 of the Parliamentary Elections Act cited for the definition of 'registered voter' which is, "A person whose name is entered on the voters' register."

<sup>264</sup> Cited: *Babu Edward Francis vs. The Electoral Commission & Erias Lukwago*, Election Petition No. 10 of 2006.

because he or she is the appointing authority of his or her agents. The appellant had failed to prove the allegation of bribery.

13. Ordinarily, costs follow the event and the award of costs is a matter of judicial discretion. This discretion must, however, be exercised judiciously and not arbitrarily. This is in accordance with section 27 of the Civil Procedure Act, Cap 71 and rule 27 of the Parliamentary Elections (Interim Provisions) (Election Petition) Rules, SI 141-2.<sup>265</sup>

14. The appellant had raised serious issues, especially with regard to bribery, although he failed to prove those allegations to the required standard that is slightly above proof on a balance of probabilities. Therefore, it was in the interest of justice that each party bore its own costs in both the Court of Appeal and the High Court.

*The election was not conducted in violation of electoral laws.*

*Appeal dismissed.*

*Each party to meet own costs in the Court of Appeal and the High Court.*

**Legislation considered:**

Civil Procedure Act, Cap 71, section 27

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 30

Parliamentary Election Act No. 17 of 2005, section 4 (1) (c)

Parliamentary Elections (Interim Provisions) (Election Petition) Rules, SI 141-2, rules 15, 27

**Other legal materials referred to:**

Halsbury's Laws of England (4<sup>th</sup> Edition, Volume 15, page 695)

*Mr. Edwin Tabaro and Mr. Tony Tumukunde for appellant*

*Mr. John Matovu for 1<sup>st</sup> respondent*

*Mr. Henry Ddungu for the 2<sup>nd</sup> respondent*

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<sup>265</sup> Section 27 of the Civil Procedure Act, Cap. 71, provides as follows, "Subject to any such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of an incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary direction for the purpose aforesaid." On the other hand, Rule 27 of the Parliamentary Elections (Election Petition) Rules, S.I. 141-2, provides that, "All costs of and incidental to the presentation of the petition and the proceedings subsequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the court may determine."



## Ocen Peter and Electoral Commission vs. Ebil Fred

Court of Appeal (Coram: Owiny-Dollo; DCJ, Musoke and Barishaki, JJ A)

Election Appeal No. 83 of 2016

May 31, 2018

(Arising from Election Petition No.1 of 2016 (High Court of Uganda at Lira, decision of Wilson Masalu Musene J.).

**Burden and standard of proof in election petitions**—*Burden on the petitioner—Standard of proof on a balance of probabilities—Why standard is higher in election petitions than in ordinary cases.*

**Electoral offences**—*Sectarian statements—Ingredients of sectarianism—Proof—Need for corroborative evidence—Effect thereof.*

**Electoral offences**—*Electoral violence—Ingredients—Proof—Need for corroborative evidence.*

**Electoral offences**—*Defamation—Ingredients—Proof—Effect on results.*

**Affidavit evidence**—*Failure to cross examine deponents—Whether cross examination is mandatory.*

**Principal-agent relationship**—*Establishment—Importance of establishing the relationship—Acts of agents.*

**Electoral offences**—*Proof of commission—Effect of not pleading particular offences.*

**Competence of election petitions**—*Citing a wrong law does not necessarily invalidate pleadings.*

**Filing election petitions**—*Filing thereof—Who can file an election petition—Scope of reliefs sought in election petitions.*

**Costs**—*Award of costs in election petitions—Discretion to award costs—Public importance of election petitions.*

The 1<sup>st</sup> appellant, the respondent and two others were candidates for the position of Member of Parliament for Kole South Constituency, Kole District. The 2<sup>nd</sup> appellant declared the 1<sup>st</sup> appellant as winner with 15,784 votes to the respondent's 5,867 votes. Another candidate, David Alula was declared to have obtained 12,714 votes, while the fourth candidate obtained 503 votes. The respondent challenged the results before the High Court. In a decision rendered on 12<sup>th</sup> August 2016, the petition was upheld and the 2<sup>nd</sup> appellant ordered to conduct fresh elections.

## HELD:

1. The burden of proof in election matters lies squarely on the petitioner to prove all the allegations. The burden never shifts to the respondent.<sup>266</sup>
2. Standard of proof required is proof on a balance of probabilities and the burden lies on the petitioner to prove his case to the satisfaction of the court.<sup>267</sup> The standard of proof is higher in election matters than that required in ordinary suits because of the public importance and seriousness of the allegations normally contained in the petitions.<sup>268</sup>
3. Section 22 (6) of the Parliamentary Elections Act, No. 17 of 2005 prohibits the making of false, malicious, sectarian, divisive and mudslinging statements against a fellow candidate.
4. Election petitions are highly partisan and supporters are likely to go to any lengths to seek to establish adverse claims against their opponents. Therefore, it is important to look for cogent, independent and credible evidence to corroborate claims to satisfy court that the allegations made by the petitioner are true.<sup>269</sup>
5. The trial court misdirected itself by referring to section 23 (1) of the Parliamentary Elections Act, No. 17 of 2005 (PEA); which refers to use of symbols and colours, in a petition where the impugned conduct consisted of words rather than symbols or colours. A verbal sectarian campaign, which the trial court erroneously found the 1<sup>st</sup> appellant guilty of, would fit under section 24 (a) of the PEA, which had not been pleaded at all in the trial court.
6. The ingredients for the electoral offence of sectarianism under section 23 (1) of the Parliamentary Elections Act, No. 17 of 2005 are that: a) the respondent had used a symbol or colour with tribal, religious or other sectarian connotation; and b) that the symbol, colour or other sectarian connotation had been the basis of their candidature or campaign.<sup>270</sup> In the instant case, there was no evidence that the 1<sup>st</sup> appellant had used a *symbol or colour* which had sectarian connotations. As such, the electoral offence under section 23 (1) had not been proven.
7. Where allegations of electoral violence are made, it is imperative to look for independent evidence to corroborate those allegations.<sup>271</sup>Section 80 (1) (a) of the

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<sup>266</sup> Citing *Peter Mugema vs. Mudi Obole Abed Nasser*, Election Petition Appeal No. 30 of 2011.

<sup>267</sup> Citing Section 61 (1) and (3) of the PEA.

<sup>268</sup> Citing *Rtd. Col. Dr Kiiza Besigye vs. YK Museveni & Another*, Presidential Election Petition No.1 of 2001; *Mukasa Anthony Harris vs. Dr Bayiga Michael Phillip Lulume*, Supreme Court Election Petition Appeal No.18 of 2007 and *Masiko Winfred Komuhangi vs. Babihuga J Winnie*, Court of Appeal Election Petition Appeal No.1 of 2002.

<sup>269</sup> Citing *Kabuuso Moses Wagabo vs. Lawrence Timothy Mutekaya*, Election Petition No. 15 of 2011.

<sup>270</sup> Citing *Amongin Jane Francis Okili vs. Lucy Akello and Electoral Commission*, High Court Election Petition No.1 of 2014.

<sup>271</sup> Citing *Uganda Journalists Safety Committee and Others vs. Attorney General*, Constitutional Petition No.7 of 1997; *Banatib Issa Taligola vs. Electoral Commission and Wasugirya Bob Fred*, Election Petition No. 15 of 2006 (dictum of Yorokamu Bamwine J.); *Karokora vs. Electoral Commission and Kagonyera*, Election Petition No.2 of

Parliamentary Elections Act, No. 17 of 2005 requires proof of agency, because such an offence could only be committed by a person directly or through another person. In the instant case, from a re-examination of the 10 affidavits upon which the trial court relied to reach a finding that this offence had been established, it appeared that they all fell short of proving the allegations against the 1<sup>st</sup> appellant. None of the instances cited pointed to the fact that the 1<sup>st</sup> appellant either knew of the malpractices or that they were committed, and approved or condoned by him. He could not, therefore, be made responsible for the actions of the police, and the unnamed supporters, gangs and un-proven agents, or even his sons.

8. The offence of defamation is established under section 73 (1) and (2) of the Parliamentary Elections Act, No. 17 of 2005. 'Character', as referenced in section 73 (1), can be taken to refer to 'the inherent complex of attributes that determine a person's moral and ethical actions and reactions of a person of a specified kind such as referring to capability, friendliness, a person of good repute and may include describing a person's qualifications and dependability to help the potential future employer make a decision either to employ a person or not'.<sup>272</sup>
9. For the offence of defamation to suffice, the statement in question has to be false or, if true, has to have been said in bad faith with the intention of damaging the good image or reputation of a candidate. The words complained of also has to be specific words attacking the personal character of a candidate.<sup>273</sup>
10. A petitioner must set out the statements alleged to be false, malicious or defamatory. Since words derive meaning from context or background, if such context or background is not provided, or a full statement not provided, their malicious or defamatory effect may be difficult to discover. These particulars also allow the respondent to know what case they have to defend.<sup>274</sup>
11. For defamation to stand, the following elements have to be proved under section 73 (1) of the Parliamentary Elections Act, No. 17 of 2005: a) there had to be words, either spoken or written; b) those words had to be pleaded verbatim; c) the words complained of have to have been published; d) the words had to attack the personal character of the candidate knowing they were either false or true; e) the words had to be uttered recklessly and f) the intention must have been to prevent the election of a candidate.<sup>275</sup> In the instant case, the respondent should have adduced evidence to show the effect that because of the specified words complained of, the electorate, who held him in high esteem, shunned him. Further that the electorate, or a very good proportion of it, lost all the respect they had for him after the said words.

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2001 (dictum of Musoke-Kibuuka J.) and *Paul Mwiru vs. Igeme Nathan Samson Nabeta, Electoral Commission and National Council for Higher Education* (dictum of Monica Mugenyi J.).

<sup>272</sup> Citing the *Advanced Learner's Dictionary*.

<sup>273</sup> Citing *Rtd. Col. Dr. Kiiza Besigye vs. Electoral Commission and YK Museveni*, Presidential Election No. 1 of 2006.

<sup>274</sup> Citing *Rtd. Col. Dr. Kiiza Besigye vs. Electoral Commission and YK Museveni*, Presidential Election No. 1 of 2006 – dictum of Odoki CJ.

<sup>275</sup> Citing *Amongin Jane Francis Okili vs. Lucy Akello and Electoral Commission*, High Court Election Petition No.1 of 2014.

12. From the record of appeal, there was no evidence of defamation adduced. This was due to a failure by the respondent to quote the words which were said to have been uttered verbatim. The trial court's finding that electoral offences had been committed under sections 23 (1) and 73 of the Parliamentary Elections Act, No. 17 of 2005 was thus erroneous.
13. Evidence of affidavits whose deponents are not cross-examined is of the weakest kind. There must be an opportunity for counsel to cross-examine the witness and where the right is not exercised, it is taken as if the witness has been cross-examined.<sup>276</sup>
14. The trial court erred when it found that the bare denials of the 1<sup>st</sup> appellant could not stand because he failed to cross-examine two witnesses whose evidence was found to be uncontroverted. Cross-examination was not mandatory. The 1<sup>st</sup> appellant did not have to file an affidavit to supplement his general denial evidence considering that the burden was on the appellant at all material times to prove that the 1<sup>st</sup> appellant committed electoral offences which substantially affected the outcome of the election.
15. Under sections 61 (1) and 80 of the Parliamentary Elections Act, No. 17 of 2005, it was not enough to show that the persons traumatizing and intimidating candidates in the constituency were agents of the 1<sup>st</sup> appellant. It was incumbent on the respondent to prove that the 1<sup>st</sup> appellant knew of, and consented to, such violence.
16. The trial court erred by implying that the fact that the 1<sup>st</sup> appellant did not expressly deny that one of the persons accused of such actions was his son, meant an admission that that person was operating, if at all, with his consent and approval. Not specifically resolved by the Court in this case.
17. The trial court erred in finding that the 1<sup>st</sup> appellant had committed this offence, in the absence of cogent evidence in this regard. In particular, the annexure referred to in the relevant affidavit was never in fact presented to the court. In any case, it was only a warning from the 2<sup>nd</sup> appellant to the 1<sup>st</sup> appellant. The investigations which were commenced by the Inspectorate General of Police were never concluded and simply remained an allegation. The respondent ought to have appealed, in terms of section 15 of the Electoral Commission Act, Cap 140, against the decision of the 2<sup>nd</sup> appellant in this regard, if he had been dissatisfied with the way the Commission handled that issue.
18. Citing a wrong law did not necessarily invalidate the pleadings. The use of the acronym 'PEA' instead of 'Parliamentary Elections Act' could not have misled any reasonable person or advocate. However, the respondent did not plead the relevant and material particulars in the petition; such as ingredients of the electoral offences, or that they were committed by the 1<sup>st</sup> appellant or with his knowledge, consent or approval

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<sup>276</sup> Citing *Ngoma Ngime vs. Electoral Commission and Hon Winnie Byanyima*, High Court Electoral Petition No.1 of 2001.

contrary to Order 6, Rules 1 and 3 of the Civil Procedure Rules, SI 71-1. The petition was therefore incompetent.

19. Under section 60 (2) of the Parliamentary Elections Act, No. 17 of 2005, an election petition can be filed: a) by a candidate who lost an election; and b) a registered voter in the constituency supported by the signatures of not less than 500 voters.
20. The scope of possible reliefs is set out under section 63 (4) and (6) of the Parliamentary Elections Act, No. 17 of 2005. The suggestion that there was a runner-up who should have been pronounced as having been validly elected was untenable.<sup>277</sup> The reliefs the respondent sought in the petition before the High Court did not include a declaration of any other person as having been validly elected other than the appellant.
21. Ordinarily, costs follow the event. However, since the petition in the High Court was not completely unmeritorious; the only problem being that insufficient evidence was availed to the court as against the appellants, in order to promote reconciliation among the parties, it was appropriate to order that each party bear their own costs of the appeal and in the trial court.

*Appeal allowed.*

*1<sup>st</sup> appellant confirmed as duly elected Member of Parliament for Kole South Constituency. Each party to bear its own costs of the appeal and those at the High Court.*

**Legislation considered:**

Civil Procedure Rules, SI 71-1, Order 6, Rules 1 and 3

Electoral Commission, Cap 140, section 15

Parliamentary Elections Act, No. 17 of 2005, sections 22 (6), 23 (1), 24 (a), 60 (2), 61 (1), 63 (4), (5), 73 (1) and (2), 80 (1) (a)

**Cases cited:**

Amongin Jane Francis Okili vs. Lucy Akello and Electoral Commission, High Court Election Petition No.1 of 2014

Banatalib Issa Taligola vs. Electoral Commission and Wasugirya Bob Fred, Election Petition No. 11 of 2006

Kabuuso Moses Wagabo vs. Lawrence Timothy Mutekaya, Election Petition No. 15 of 2011

Karokora vs. Electoral Commission and Kagonyera, Election Petition No.2 of 2001

Kizza Besigye vs. YK Museveni and Another, Presidential Election Petition No.1 of 2001

Kizza Besigye vs. Electoral Commission and YK Museveni, Presidential Election No. 1 of 2006

Masiko Winfred Komuhangi vs. Babihuga J. Winnie, Court of Appeal Election Petition Appeal No.1 of 2002

Mukasa Anthony Harris vs. Dr Bayiga Michael Phillip Lulume, Supreme Court Election Petition Appeal No.18 of 2007

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<sup>277</sup> Citing *Ngoma Ngime vs. Electoral Commission and Hon Winnie Byanyima*, High Court Electoral Petition No.1 of 2001.

Ngoma Ngime vs. Electoral Commission and Hon Winnie Byanyima, High Court Electoral Petition No.11 of 2002

Paul Mwiru vs. Igeme Nathan Samson Nabeta, Electoral Commission and National Council for Higher Education, Election Petition Appeal No. 6 of 2011

Peter Mugema vs. Mudiobole Abed Nasser, Election Petition Appeal No. 30 of 2011

Uganda Journalists Safety Committee and Others vs. Attorney General, Constitutional Petition No.7 of 1997

*Mr. Nesta Byamugisha and Mr. Abwang Atim Aaron for appellant*

*Mr. Kamba Hassan for respondent*

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**Ikiror Kevin vs. Orot Ismail**

**Court of Appeal (Coram: Owiny-Doll; DCJ, Kasule and Obura, JJ A)**

**Election Appeal No. 105 of 2016**

**March 1, 2019**

(Arising from Election Petition No. 8 of 2016 (High Court of Uganda at Soroti, decision of Batema, J.)

***Election petitions**—Definition of a petition—Who can file a petition—Section 60 of the Parliamentary Election Petitions Act No.17 of 2005.*

***Standard of proof in election petitions**—Standard of proof is on the balance of probabilities.*

***Filing and prosecuting election petitions**—Timelines—Setting aside an election—Time for within which to serve documents—Petitions to be heard and determined expeditiously—Right of appeal—Time within which to lodge an election petition appeal—Determination of appeal—Effect of lodging appeal out of time—Extension of time—Competence of an appeal—Effect of appeal lodged under wrong law.*

The respondent was among the candidates for the position of Member of Parliament for Kanyum County. He was declared winner. The appellant, a registered female voter in that constituency, challenged the results of the election before the High Court, more than six months after the respondent was gazetted as winner, on the ground that he did not have the requisite academic qualifications.

The High Court dismissed the petition, for being filed outside the legally stipulated time period.

**HELD:**

1. The standard of proof is on the balance of probabilities, hence in the instant case, the grounds of the petition were proved on a balance of probabilities.
2. Section 1 (1) of the Parliamentary Elections Act, No. 17 of 2005 defines an election petition as one which is filed in accordance with section 60. Section 60 provides that election petitions are to be filed in the High Court either by a candidate who lost an election or by a registered voter in the constituency supported by at least 500 voters' signatures.
3. One of the grounds for setting aside an election, under section 61 (1) of the Parliamentary Elections Act, No. 17 of 2005, is that the candidate at the time of the election was not qualified or was disqualified for election as Member of Parliament.
4. Under section 60 (3) of the Parliamentary Elections Act, No. 17 of 2005, the election petition has to be filed in court within 30 days after the day on which the result of the

election was published by the Electoral Commission in the gazette. The petition has to be served upon the respondent within 7 days of its being filed. The court has to proceed to hear and determine the petition expeditiously and can, for that purpose, suspend any other matter pending before it.

5. At the conclusion of the hearing, the court can determine and declare that the respondent has been duly elected; that some other candidate is the one duly elected; or that the respondent is not duly elected, the seat is thus vacant and that a re-election has to be held.
6. The High Court has to determine a matter within six months of its being lodged in court.
7. A person aggrieved by the decision of the High Court has a right to appeal to the Court of Appeal, through lodging a notice of appeal within 7 days of the decision. The Court of Appeal has to hear and determine the appeal within 6 months from the date the appeal was filed. The decision of the Court of Appeal is final.
8. The entire Part X of the Parliamentary Elections Act (PEA), No. 17 of 2005 (Sections 60 to 67) is characterized by strictness as to time of lodging and prosecution of an election petition, including an appeal, if any. This strictness has been emphasized by persuasive jurisprudence from the High Court of Kenya.<sup>278</sup> The provisions of Part X of the PEA has to be interpreted and applied with this aspect of strictness as to timelines being of material significance.
9. If the appellant had pursued the petition under Part X of the Parliamentary Elections Act, No. 17 of 2005, the latest date for the filing would have been 3<sup>rd</sup> April 2016. She would also have had to have her petition supported by the signatures of not less than 500 voters registered in the Constituency. The appellant therefore had sought to present her petition based on Articles 80; dealing with qualifications for a Member of Parliament and 86 dealing with jurisdiction to determine election petitions of the Constitution, together with section 86. She had presented the petition on 22<sup>nd</sup> September 2016. In terms of section 60 (3) her petition was lodged out of time, and was therefore null and void.
10. The Parliamentary Elections Act of 2005; including sections 1, and 60-67 of the Act operationalizes Article 86 of the Constitution of the Republic of Uganda, 1995.
11. Section 86 of the Parliamentary Elections Act(PEA), No. 17 of 2005 deals with questions of Membership of Parliament. While this Section also operationalizes Articles 80 and 86 of the Constitution of the Republic of Uganda, 1995, it has certain provisions which excludes some of its own very provisions from applying to election petitions whose adjudication is a preserve of Part X of the PEA.

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<sup>278</sup> Citing the Kenyan case of *Muiya vs. Nyagah and Others* [2003] 2 EA 616 at p.621



12. The import of section 86 (3) and (4) of the Parliamentary Elections Act, No. 17 of 2005 is that only after there has been compliance with Part X of PEA can the Attorney General or any petitioner with the support of the signature of at least 50 registered voters within the constituency carry out what is required by section 86 (3) and (4) of the Act.
13. It is also significant, that the decision of the High Court determining the question referred to it under section 86 (3) and (4) of the Parliamentary Elections Act, No. 17 of 2005 is appealable to the Court of Appeal, and from the Court of Appeal to the Supreme Court under section 86 (5). This is very different from the case of election petitions covered by Part X of the PEA, where the right of appeal from the High Court only stops at the Court of Appeal according to section 66 (3).
14. A petition relating to the determination of whether or not one had been validly elected a Member of Parliament through a general or by-election can only be brought in accordance with the provisions of Part X of the Parliamentary Elections Act, No. 17 of 2005. By contrast, under sections 86 (3) and (4), the Attorney General or a petitioner can pursue a petition involving a question as to membership of someone to Parliament on grounds other than those which one has to rely upon when lodging a petition under Part X. In the latter case, time is less of the essence compared to the determination of an election petition.
15. The appeal before the Court of Appeal, and the petition before the trial court, brought under Articles 80 and 86 of the Constitution of the Republic of Uganda, 1995 and section 86 of the Parliamentary Elections Act (PEA), No. 17 of 2005, was not competent in so far as section 86 (3) mandatorily requires the appellant to first comply and to be subject to the provisions of the PEA in relation to election petitions. In the circumstances, the petition had been filed under the wrong law and had therefore been more than five months out of time.

*Appeal dismissed.*

*Costs awarded to the respondent in respect of the appeal and the proceedings in the High Court.*

*Allegations of criminality; forgery and impersonation had been made in the lower court and at appeal. Due to the incompetence of the petition and appeal, the courts had not been able to establish the authenticity of these allegations. The best that could be done in the circumstances was to refer the proceedings of the appeal and the trial court to Director of Public Prosecutions to cause appropriate criminal investigations to be made, to enable the said Director of Public Prosecutions to decide whether criminal prosecution of anyone should be carried out.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Article 86  
Parliamentary Elections Act No. 17 of 2005, sections 1 (1), 60 (3), 60 to 67, 61 (1), 66 (3), 80, 86 (3) (4)

**Case cited:**

Muiya vs. Nyagah and Others [2003] 2 EA 616 at page 621

*Mr. Ambrose Tebyasa and Mr. Luyimbaazi Nalukoola for appellant*

*Mr. Richard Okalany for respondent*

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**Simon Peter Kinyera vs. the Electoral Commission and Taban Idi Amin**

**Court of Appeal (Coram: Owiny-Dollo; DCJ, Kakuru and Madrama, JJ A)**

**Election Petition Appeal No. 3 of 2018**

**January 6, 2020**

(Arising from High Court Election Petition No. 1 of 2017 (High Court of Uganda at Masindi, decided by Rugadya Atwooki, J. on 12<sup>th</sup> July, 2018)

**Duty of first appellate court**—Duty to subject evidence on record to a fresh scrutiny and come to its own conclusions—Rule 30 of the Judicature (Court of Appeal Rules) Directions, SI 13-10.

**Burden and standard of proof**—Petitioner has burden of proving his or her petition including petitioner's and his or her supporting signatories' status as registered voters of a relevant electoral area—Section 61 of the Parliamentary Elections Act No. 17 of 2005.

**Court precedents**—Court's own precedent—Court is bound by its own decisions and may depart therefrom only on exceptional grounds—Exceptional grounds when a court may depart from its own decision.

**Cause of action in an election petition**—Election Petition must disclose a cause of action and not be barred by law—Effect thereof—Order 7 Rule 11(a) and (d) of the Civil Procedure Rules SI 71-1—Establishing a cause of action in election petitions—Section 60 (2) (b) of Parliamentary Elections Act No. 17 of 2005.

**Registered voter**—Proof of a registered voter in election petitions—Proof is by production of a voter card or by an extract of the National Voters Register which has the registration of the voter—Section 1 of the Parliamentary Elections Act No. 17 of 2005.

**Court orders**—Violation or disobeying court order—Violation of an interim order of court prohibiting nomination of the National Resistance Movement party candidate for the by-election—obligation to obey court orders—Effect of breach of this obligation—Whether the trial court in the instant case violated the court order.

The appellant challenged the nomination and successful election of the 2<sup>nd</sup> respondent as Member of Parliament for Kibanda North Constituency, Kiryandongo District. The appellant petitioned the High Court under section 60 (2)(b) of the Parliamentary Elections Act No. 17 of 2005 as a registered voter of Kibanda North Constituency. The petition was supported with signatures of 500 voters registered in the constituency. The petitioner sought *inter alia* setting aside the election of the 2<sup>nd</sup> respondent, a declaration that the 2<sup>nd</sup> respondent was not validly nominated and elected. It was contended for the petitioner that the Electoral Commission erred when he failed to nullify the nomination and subsequent election of the 2<sup>nd</sup> respondent thereby condoning the illegality of violation of the interim order of court prohibiting nomination of the National Resistance Movement party candidate for the by-election. More so that the second respondent had no requisite academic qualifications.

The respondents objected to the petition contending that it was incompetent on ground that the petitioner and the persons who signed the petition were not registered voters and as such the petition had had no *locus standi* to lodge the petition. The trial court dismissed the petition based on a preliminary objection that he did not have locus standi since the persons who signed the petition in its support were not registered voters hence the instant appeal.

**HELD:**

1. The duty of the first appellate court is to subject the evidence on record to a fresh scrutiny and come to its own conclusions bearing in mind the fact that it did not hear or see any of the witnesses testify.<sup>279</sup>
2. The petitioner bears the burden of proving his or her petition. This also applies to proving a petitioner's and their supporting signatories' status as registered voters of a relevant electoral area, even though the 1<sup>st</sup> respondent had custody and possession of the National Voters' Register. In the instant case, the petitioner was required to obtain extracts thereunder to prove that they and their signatories who did not have voter cards were in fact registered voters in Kibanda County North Constituency, Kiryandongo District.<sup>280</sup> It is incumbent upon a petitioner to produce credible and cogent evidence to prove their allegations instead of relying on the weaknesses of the respondents' case.<sup>281</sup>
3. The court is bound by its own decisions and may depart therefrom only on exceptional grounds.<sup>282</sup> There were no present exceptional grounds to depart from the precedent in *Otada Sam Amooti Owor vs. Taban Idi Amin and the Electoral Commission*<sup>283</sup> wherein it was held that proof of being a registered voter is by way of adducing either a voter card, or an extract of the National Voters' Register; and that a National Identity Card, on its own, is insufficient for the purpose. This precedent was neither contrary to statute nor to any precedent of the Supreme Court.
4. An election petition must disclose a cause of action and not be barred by law, or else it will be struck out in accordance with Order 7 Rule 11(a) and (d) of the Civil Procedure

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<sup>279</sup> Court cited Rule 30(1) of the Judicature (Court of Appeal Rules) Directions, S.I. 13-10, which provides that, "(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may-a) reappraise the evidence and draw inferences of fact; and b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner." The Court also cited *Peters vs. Sunday Post Limited*, [1958] 1 EA 424 and in particular Sir Kenneth O'Connor's dictum where he said, "An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion." And *Kifamunte Henry vs. Uganda*, Supreme Court Criminal Appeal No. 10 of 1997 where the Supreme Court stated that, "The [first] appellate court must then make up its own mind not disregarding the judgment [appealed from] but weighing and considering it."

<sup>280</sup> Reference made to *Odo Tayebwa vs. Bassajjabalaba Nasser and the Electoral Commission*, Election Petition Appeal No. 13 of 2011.

<sup>281</sup> This affirmed the precedent in *Matsiko Winfred Komuhangi vs. Babihuga T. Winnie*, Election Petition Appeal No. 9 of 2002.

<sup>282</sup> Court considered the case of *Young vs. Bristol Aeroplane Co Ltd*, [1944] 2 All ER 293.

<sup>283</sup> Election Petition Appeal No. 93 of 2016

Rules, SI 71-1. *Major General David Tinyefunza vs. Attorney General*<sup>284</sup> and *Ismail Serugo vs. Kampala City Council and the Attorney General*<sup>285</sup> were applied to define a cause of action generally as a bundle of facts collectively necessary for the plaintiff or Petitioner to support his or her right to judgment from the court.

5. In deciding whether or not a petition discloses a cause of action, regard is ordinarily had to the petition itself as a pleading, and by assuming that the assertions therein are true. In the instant case, the appellant's petition disclosed a cause of action because it established the appellant's locus standi by stating that he was a registered voter in the relevant constituency and that his petition was supported by the signatures of not less than 500 voters registered within the same constituency, in line with section 60 (2) (b) of the Parliamentary Elections Act No. 17 of 2005.
6. *Proof of being a registered voter is by production of a voter card or by an extract of the National Voters Register which has the registration of the voter.* Mere production of a National Identity Card (ID) is insufficient because Section 66 of the Registration of Persons Act, 2015 did not substitute National IDs for the National Voters' Register, a special document prepared by the electoral commission. Instead, National IDs are used to cross check and confirm particulars in the voters' register before a voter may be allowed to vote.<sup>286</sup> Because the appellant had not attached his voter's card or the extract of the relevant page of the voters' register, and because only 69 of the 500 supporting signatories had voter cards while the other 431 did not attach relevant extracts of the national voters' register containing their names, the Appellant had not proved that he satisfied the criteria under section 60(2b) of the Parliamentary Elections Act No. 17 of 2005.<sup>287</sup>
7. Courts protect their own orders from disregard. Every person in respect of whom a court is made has a plain and unqualified obligation to obey it unless and until it is discharged, even though he or she considers it null or irregular. Breach of this obligation may result in the offending party being punished for contempt of court or by refusing to entertain any application made by the offending party to the court until they have purged themselves of their contempt.<sup>288</sup> In the instant case, no violation of a court order took place because the relevant court order, which would have barred the 2<sup>nd</sup> respondent's nomination, had been vacated by Rugadya Atwooki, J. three days before the 2<sup>nd</sup> respondent's nomination.

*Appellant's petition had been rightly dismissed due to absence of proper proof that the appellant and 431 of his 500 supporting signatories were registered voters within Kibanda North County Constituency, Kiryandongo District.*

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<sup>284</sup> Constitutional Appeal No. 1 of 1997.

<sup>285</sup> Constitutional Appeal No. 2 of 1998.

<sup>286</sup> *Hon. Otada Sam Amooti Owor vs. Taban Idi Amin and the Electoral Commission*, Election Petition Appeal No. 93 of 2016 affirmed and followed.

<sup>287</sup> Section 60(2b) of the Parliamentary Elections Act provides that, "An election petition may be filed by...a registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the constituency in a manner prescribed by the regulations."

<sup>288</sup> Court cited with approval the precedents in *Hadikson vs. Hadickson* [(1952] 2 All ER 567; dicta of Romer, LJ quoted) and *Makula International vs. Cardinal Nsubuga* [(1982) HCB 11].

*No illegality had been brought to the attention of court given that the court order alleged to have been violated had been vacated three days before the impugned nomination of the 2<sup>nd</sup> respondent.*

*Appeal dismissed with costs.*

**Legislation considered:**

Civil Procedure Rules, SI 71-1, Order 7 Rule 11 (a) and (d)

Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 30

Parliamentary Elections Act No. 17 of 2005, sections 1, 60(2)(b), 61

Registration of Persons Act, No. 4 of 2015, section 66

**Cases cited:**

David Tinyefunza vs. Attorney General, Constitutional Appeal No. 1 of 1997

Hadikson vs. Hadickson [1952] 2 All ER 567

Ismail Serugo vs. Kampala City Council and the Attorney General, Constitutional Appeal No. 2 of 1998

Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997

Makula International vs. Cardinal Nsubuga [1982] HCB 11

Matsiko Winfred Komuhangi vs. Babihuga T. Winnie, Election Petition Appeal No. 9 of 2002.

Odo Tayebwa vs. Bassajjabalaba Nasser and the Electoral Commission, Election Petition Appeal No. 13 of 2011

Otada Sam Amooti Owor vs. Taban Idi Amin and the Electoral Commission, Election Petition Appeal No. 93 of 2016

Peters vs. Sunday Post Limited [1958] 1 EA 424

Young vs. Bristol Aeroplane Co Limited [1944] 2 All ER 293

*Mr. Alex Candia for appellant*

*Mr. Caleb Alaka for 2<sup>nd</sup> respondent*

*Mr. Eric Sabiti for 1<sup>st</sup> respondent*

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**Kevina Taaka V. Wanaha Wandera vs. Macho Geoffrey, the Independent Electoral Commission and the National Council for Higher Education**

**Court of Appeal (Coram: Owiny-Dollo; DCJ, Kakuru and Madrama, JJ A)**

**Election Petition Appeal No. 35 of 2016**

**March 20, 2020**

(Arising from High Court Election Petition 14 of 2016 (High Court of Uganda at Mbale, decided by P. Basaza Wasswa, J. on 5<sup>th</sup> July, 2016)

***Duty of first appellate court***—*First appellate court is required to re-appraise the evidence of the trial court and come to its own conclusion—Rule 30 of the Judicature (Court of Appeal Rules) Directions SI 13-10.*

***Nominations***—*Nomination to be elected Member of Parliament—Section 4 of the Parliamentary Elections Act No. 17 of 2005—Need for National Council for Higher Education to consult with Uganda National Examination Board in equating qualifications—Errors on a certificate equating academic qualifications of a candidate—Slight errors due to typographical mistake on academic documents does not vitiate the documents’ authenticity.*

***Setting aside or annulling an election***—*Election can only be set aside or annulled for non-compliance with electoral laws—Nomination of a candidate before 9:00am—Section 13 of Parliamentary Elections Act (PEA) No. 17 of 2005—Effect on the nomination of the candidate—Candidate nominated in the Commissions Offices instead of the tent in the compound of the same offices that were gazetted as the place for nomination—Section 9 (1) and (2) of PEA—Effect on the nomination of a candidate.*

***Electoral offences***—*Bribery—Section 68 of Parliamentary Elections Act No. 17 of 2005—Proof thereof—Effect of bribery on elections.*

***Nominations***—*Nomination to be elected Member of Parliament—Requirement of a candidate to resign a public office—Article 80 (4) of the Constitution of the Republic of Uganda, 1995 and section 80 (4) of the Parliamentary Elections Act No. 17 of 2005—Procedure of resignation—Article 252—Resignation letter addressed to the Secretary to the President instead of the Secretary, Office of the President—A wrong address or an error in the name of the office—Article 126(2)(e).*

The appellant, the 1<sup>st</sup> respondent and four others were nominated and participated in elections for Busia Municipality. The elections were conducted by the 2<sup>nd</sup> respondent on 18<sup>th</sup> February 2016. The 2<sup>nd</sup> respondent declared the 1<sup>st</sup> respondent winner of the election. Being dissatisfied with the outcome of the election, the appellant and two others instituted Election Petition No. 018 of 2016 against the respondents seeking for declarations *inter alia* that the 1<sup>st</sup> respondent was not validly elected Member of Parliament, the election be annulled or set-

aside and a new election be organized etc. The trial court dismissed the petition hence the instant appeal.

The appellant contended that the 1<sup>st</sup> respondent did not fulfill the academic requirements required to be nominated as candidate for Member of Parliament. It was alleged that the 1<sup>st</sup> respondent did not possess a Uganda Advanced Certificate of Education (UACE) qualification at the time of nomination and he did not submit a certificate issued by the 3<sup>rd</sup> respondent equating his other qualification to UACE. The appellant also contended that the 1<sup>st</sup> respondent did not resign his public employment as Resident District Commissioner prior to his nomination as required under Article 80 (4) of the Constitution of the Republic of Uganda, 1995 and section 4 (4) of the Parliamentary Elections Act No. 17 of 2005. Further that the 1<sup>st</sup> respondent committed illegal acts such as bribery, making false statements against the character of the appellant, and undue influence, either personally or through his agents.

**HELD:**

1. The first appellant court is required to re-appraise the evidence of the trial court and come to its own conclusion.<sup>289</sup> This is in accordance to rule 30 of the Judicature (Court of Appeal Rules) Directions, SI 13-10.
2. The appellant failed to prove, on a balance of probabilities, that the 1<sup>st</sup> respondent did not possess the requisite academic qualifications. On the other hand, the court was satisfied that the 3<sup>rd</sup> respondent had properly and in consultation with Uganda National Examination Board, equated the 1<sup>st</sup> Respondent's academic documents to the Uganda Advanced Certificate of Education qualification. Furthermore, the slight errors (such as a date of birth that read 1978 instead of 1973 due to a typographical mistake) on the face of the 1<sup>st</sup> respondent's academic documents did not vitiate the documents' authenticity.
3. No evidence of the allegedly 'many inconsistencies' in the 1<sup>st</sup> respondent's nomination papers was adduced save for the lone and insignificant typographical error regarding the 1<sup>st</sup> respondent's date of birth. The 1<sup>st</sup> respondent had been nominated at 9.25 am and not 8.25 am as alleged by the appellant. Consequently, his nomination had been done within the gazetted time that had to commence at 9.00 am.<sup>290</sup> Even if the 1<sup>st</sup> respondent had been nominated before 9.00 am, this would not invalidate the nomination since it was not one of the vitiating elements provided for under section 13 of the Parliamentary Elections Act No. 17 of 2005.
4. The offices of the 2<sup>nd</sup> respondent are a public place within an Electoral District, and so it did not matter that the 1<sup>st</sup> respondent was nominated from within the 2<sup>nd</sup> respondent's offices and not a tent in the compound of those same offices, (the supposedly gazetted place for nomination).<sup>291</sup> No evidence was adduced to

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<sup>289</sup> Reliance had on *Fr. Narcensio Begumisa and Others vs. Eric Tibebaaga*, Supreme Court Civil Appeal No. 17 of 2002 and *Uganda Breweries vs. Uganda Railways Corporation*, Supreme Court Civil Appeal No. 6 of 2001.

<sup>290</sup> Section 9(2) of the Parliamentary Elections Act set the time for nomination as 9.00 am to 5.00 pm, on each of the two, set nomination days.

<sup>291</sup> Section 9(1&2) of the Parliamentary Elections Act provided that: "(1) The Commission shall issue a notice in the *Gazette* appointing two days during which the nomination of candidates is to take place indicating—a) the



substantiate the appellant's serious allegation that his agents were denied Declaration of Results Forms and denied access to polling stations and tally centres. No evidence was adduced to even show that complaints regarding these allegations had been lodged with either the Police or the 2<sup>nd</sup> respondent.

5. No evidence was adduced to substantiate the allegations that there were no voters' registers and that non-registered voters were allowed to vote in favour of the 1<sup>st</sup> respondent. The court thus held that there was no evidence of non-compliance with electoral laws as contained within the above allegations.
6. The appellant failed to adduce cogent evidence to prove that the electoral offences of bribery, making false statements against the character of the appellant, and undue influence, had been committed by the 1<sup>st</sup> respondent. In the instant case, the Court of Appeal agreed with the trial court's analysis of the evidence and her conclusions that: (i) the averments of the appellant and his witnesses were weak and unsubstantiated, especially in the absence of any prior reports lodged with the Police or the 2<sup>nd</sup> respondent or of any reports of property damage and medical reports indicating injuries from harassment; (ii) the averments of the appellant and his witnesses lacked specificity and were generalized, blanket statements; (iii) a person alleging bribery should prove that the people allegedly bribed were registered voters at the time and that the motive was to influence them to vote for the briber or to refrain from voting for their opponents; (iv) there were several contradictions within the evidence given by the appellant's witnesses; (v) the appellant failed to prove relationships of agency between the 1<sup>st</sup> respondent and the persons alleged to be his agents; and (vi) the 1<sup>st</sup> respondent's averments in rebuttal to the appellant's allegations were neither challenged by affidavits in rejoinder nor through cross-examination.
7. Article 252 of the Constitution of the Republic of Uganda, 1995 provides that a Public Officer may resign from office by writing. The resignation is deemed to take effect when the writing signifying the resignation is received and signed by the person or authority to whom it is addressed or by a person authorized to receive it. The 1<sup>st</sup> respondent's resignation letter was addressed to the Secretary to the President instead of the Secretary, Office of the President. A wrong address or an error in the name of the office is a mere technicality that could not vitiate nomination of a candidate in a general election. Article 126 (2) (e) of the Constitution applied to overlook this minor, technical error.

*Appeal dismissed with costs.*

**Legislation considered:**

The Constitution of the Republic of Uganda, 1995, Articles 80 (4), 126 (2) (e) and 252  
Judicature (Court of Appeal Rules) Directions, SI 13-10, rule 30

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place and times fixed for the nomination of candidates; and b) the hours on each nomination day, during which nominations are to take place. (2) Every place fixed under paragraph (a) of subsection (1) for the nomination of candidates shall be a public place such as a courthouse, city or town hall, community centre or other public or private building in a central place in the electoral district or the place that is most convenient for the majority of voters in the electoral district."

Parliamentary Elections Act No. 17 of 2005, sections 4 (4), 9 (1), (2), 13, 68, 73 and 80

**Cases cited:**

Fr. Narcensio Begumisa and Others vs. Eric Tibebaaga, Supreme Court Civil Appeal No. 17 of 2002

Uganda Breweries vs. Uganda Railways Corporation, Supreme Court Civil Appeal No. 6 of 2001

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This Case Digest provides easy access to information on the 2016 Parliamentary election petition decisions of the Court of Appeal of Uganda—the highest court in such matters. The publication, contains a subject index and individual case digests arranged chronologically according to the date of judgment, for ease of reference.

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ISBN: 978-9970-61-794-4

ISBN 978-9970-617-94-4



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