Enhancing Electoral Justice in Uganda's Parliamentary Elections:

The Search for Dependable Precedent

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TABLE OF CONTENTS

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FOREWORD

Under Uganda's political dispensation of the 1995 constitution, there have been regular elections at the presidential and parliamentary levels. These have been invariably accompanied by court disputes over fairness and failure to observe the relevant electoral laws. A lot of attention has been focused on disputes at the presidential level. This is for various reasons, amongst which is the fact that a presidential election determines the leadership of the country. It is of interest to the public generally. A parliamentary election dispute is of immediate concern to the people of the constituency.

In the context of transparency of the judicial process and the need to develop a dependable elections jurisprudence, greater attention ought to paid to parliamentary election disputes. This is because most of these are adjudicated to finality by judges of the High Court. The few which are appealed are determined by the Court of Appeal and, by law, this is the final appellate court. A significant difference from presidential election petitions that dictates that more attention be paid to parliamentary election disputes is that there can be only one presidential petition after a general election. Further, the dispute at that level is presided over by one court whose decision is final. The justices of this court are advantaged to consider the same facts, listen to the same arguments, have equal access to precedent cited by counsel, or can, at their initiative, access the court's own jurisprudence plus the jurisprudence of similar courts elsewhere. The justices can consult each other before coming to a final verdict.

On the hand, a judge of the High Court travels a lonely journey unaware of other ongoing disputes involving similar facts and law which could call for reasonably similar results. Past decisions of the court can be of assistance, although not binding on the judge. The immediate solace is a precedent from the final appellate court, the Court of Appeal.

Although some of the decisions of the Court of Appeal can be accessed from various reporting channels, so far there has been no comprehensive collection accompanied by an analysis as to the extent to which a dependable election jurisprudence is emerging. This commentary and analysis by two renowned jurists has gone a long way in providing an easy mode of providing access to and determining in what areas there exist settled principles. The authors have collected and reviewed a total of 74

decisions of the Court of Appeal. The 74 are out of the total of 82 appeals that were lodged that year, four having been withdrawn, and one undecided at the time of the study. They have clustered the decisions in various fact situations falling under the provisions of the law that were the basis of disputes. These include procedural and evidence issues such as burden and standard of proof, as well as substantive grounds for annulling an election. The meticulous comparative commentary and critique of the electoral judicial process will be of great assistance to the courts, counsel and other stakeholders interested in a dependable electoral jurisprudence.

E.F. Ssempebwa
February 2021

ABBREVIATIONS AND ACRONYMS

SC	Supreme Court
(SC)	Senior Counsel
COA	Court of Appeal
DR form	Declaration of Results form
EC	Electoral Commission
EPA	Election Petition Appeal
FDC	Forum for Democratic Change
HC	High Court
MP	Member of Parliament
NCHE	National Council for Higher Education
PEA	Parliamentary Elections Act
PLE	Primary Leaving Examinations
UACE	Uganda Advanced Certificate of Education
UCE	Uganda Certificate of Education
UMI	Uganda Management Institute
UNEB	Uganda National Examinations Board
UOTIA	Universities and Other Tertiary Institutions Act.
UPPSO	Uganda Public Service Standing Orders

TABLE OF CASES

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Betty Muzanira Bamukwatsa v. Masiko Winnifred Komuhangi, The Returning Officer, Rukungiri & The Electoral Commission, Election Petition Appeal No. 65 of 2016.

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Kintu Alex Brandon v. EC and Walyomu Moses, Election Petition Appeal No.64 of 2016.

Kinyamatama Suubi Juliet v. Sentongo Robinah Nakasirye, Election Petition Appeal No.92 of 2016.

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Kyakulaga Bwino Fred and EC v. Waguma Badogi Ismail, Election Petition Appeal Nos.15 and 20 of 2016.

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Mandera Amos v. Bwowe Ivan, Election Petition Appeal No.91 of 2016.

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Mugisha Vincent v. Kajara Aston Peterson, Mulamira Barbara and The Electoral Commission, High Court Parliamentary Election Petition No. 4 of 2016.

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Mulindwa Isaac Ssozi v. Lugudde Katwe Elizabeth, Election Petition Appeal No.14 of 2016.

Musoke Emmanuel v. Kyabaggu Richard and Electoral Commission, COA Election Petition Appeal No.67 of 2016.

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Nabeta Igeme Nathan Samson v. EC and Mwiru Paul, Election Petition Appeal Nos.45 and 46 of 2016.

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INTRODUCTION

Article 77 of the Constitution provides for a general election of members of Parliament after every five years. The latest elections were conducted on 14 January 2021. In recognition of courts as the constitutionally mandated arbiters of electoral disputes, citizens have in the past resorted to courts as dispute resolution fora (post-2001, 2006, 2001 and 2016). Disputes have been rooted in allegations of violations of diverse aspects of electoral laws, procedures and processes. It is expected that a similar trend will follow from the just concluded 2021 election cycle.

The Constitution (Article 86(1) and Article 86(2)) and the Parliamentary Elections Act 17 of 2005 (PEA) mandate the High Court and the Court of Appeal to resolve disputes arising out of parliamentary elections and questions as to whether the seat of a Member of Parliament (MP) has become vacant or not, for example owing to their having voluntarily left the political party on whose ticket they stood and got elected to Parliament before the last 12 months of their term as a Member of Parliament (Article 83(1)(g) and (2a) of the Constitution, and the decision in *Theodore Ssekikubo and Others v. The Attorney General and Others (*SC) Constitutional Appeal No. 1 of 2015). A person dissatisfied with electoral results declared by the Electoral Commission (EC) may file an election petition in the High Court (Section 60 PEA). And one aggrieved by the determination of the High Court may appeal to the Court of Appeal (Section 66 PEA). The decision of the Court of Appeal is final (Section 66(3) of the Parliamentary Elections Act as amended in 2010).

Article 61(1) of the Constitution and Section 15 of the Electoral Commission Act also empower the Electoral Commission to hear and determine complaints in respect of the electoral process (before and during polling). The decisions of the Electoral Commission are thereafter appealable to the High Court, whose decisions on the matter are final (Section 15(2) and (4) of the Electoral Commission Act).

This report presents an analysis of decisions of the Court of Appeal in election disputes arising out of the 2016 parliamentary elections. The research was undertaken with the aim of providing easily accessible information on

jurisprudence coming out of Uganda's courts relating to parliamentary election petitions based on the latest parliamentary election disputes.

Whereas decisions of the Supreme Court arising from presidential election petitions have received wide publicity, scrutiny and interrogation by various scholars, judgments handed down by both the Court of Appeal and the High Court on parliamentary election disputes have not received similar attention. Yet it is the two courts which handle the bulk of electoral disputes. The research has therefore filled a hitherto existing gap in the documentation of the legal reasoning behind court decisions in parliamentary election disputes.

Furthermore, there has hitherto been no attempt at providing a platform at which High Court judges can learn from each other so as to facilitate further electoral justice. Yet, although a High Court judge is not legally bound by the decision of a fellow High Court judge, such a decision is of high persuasive authority, as long as it has not been appealed against and reversed by the Court of Appeal. To this end, emerging jurisprudence has not been critiqued to ascertain consistency (or lack of it) and possible best practices adopted by the varying judicial officers that could be useful to other members of the bench in dispensing electoral justice. In addition, no platform has been availed to critique decisions of the Court of Appeal for the benefit of both the judges of the High Court and the Court of Appeal. Further still, there is no available documented record of decisions reduced into an easy-to-comprehend case digest of emerging electoral justice jurisprudence from the Court of Appeal as the final court in parliamentary election dispute resolution. This defeats the legal doctrine of *stare decisis* ("Let the decision stand") which obliges a court in the common law legal system to, while determining a case with similar issues, be guided by precedent. A precedent is a principle or rule established in a previous legal case that is either binding on or persuasive for a court. Inherent in this principle is the expectation that courts will decide cases according to consistent principled rules, so that similar facts will yield similar and predictable outcomes.

It is hoped that the clarity and best practices evolved from the study will form the basis of discussions and dialogue at meetings of judges, legal practitioners and academics, thus offering platforms to individuals and

institutions engaged in electoral justice to critically review and interrogate upcoming jurisprudence. The platforms would guide improved adjudication of parliamentary election petitions and serve as a point of reference for judicial officers and legal practitioners handling election petitions. The platforms will specifically build the capacity of judicial officers and enhance their knowledge and judicial craft in preparation for their adjudicatory role in handling electoral disputes likely to arise from the 2021 elections. The project will also inform ongoing electoral reform initiatives and discourse.

As indicated earlier on, a person aggrieved by the determination of the High Court may appeal to the Court of Appeal.

A total number of 82 parliamentary election petition appeals were filed in the Court of Appeal post the 2016 parliamentary elections. Of these, four were withdrawn while judgment in one case was yet to be delivered by the time this report was authored. We, unfortunately, failed to gain access to three appeal decisions. Consequently, this report is based on an analysis of 74 cases.

Although this report focuses on appeals that arose from parliamentary election petition appeals, there are some important local government election petition appeals that enunciated principles relevant to parliamentary election petitions as well. For instance, the decision in *Ouma Adea v. Hasubi Deogratias Njoki & Oundo Sowedi,* EPA No.51 of 2016 addresses the consequences of a conviction under the Anti-Corruption Act irrespective of pending appeals against such a conviction. Similarly, although *Bantalib Issa Taligola v. Wasugirya Bob Fred,* EPA 11 of 2006 arose out of local government elections, the Court of Appeal decision has important considerations regarding the filing of additional affidavits supporting a petition. This decision was followed by the majority in *Betty Muzanira v. Winfred Masiko Komuhangi & 2 Others,* EPA No.65 of 2016.

Additionally, the Local Government Act authorises the Electoral Commission to apply the laws governing the conduct of parliamentary and presidential elections. It may therefore be profitable to consider a few selected local government petitions that have a bearing on parliamentary election petitions.

1.0 LOCUS TO PRESENT PETITION

The following principles have been laid down by the Court of Appeal with regard to who can bring an election petition.

1.1 In terms of Section 60 of the PEA, a petition challenging the results of a parliamentary election could be presented either by a candidate who lost an election,[1] or by a registered voter[2] in the relevant constituency. A petition presented by a registered voter must be supported by 500 signatures of voters registered in that constituency.[3]

1.1.1 Petition by a candidate

In *Okabe v. Opio and EC*[4], the EC returned Okabe (appellant) as the validly elected Member of Parliament for Serere county. Following this, Opio (1st respondent) challenged the election of Okabe in the High Court on the following two grounds:

(i) Okabe did not have the requisite minimum academic qualifications to be elected as a Member of Parliament; and

(ii) The elections were conducted in non-compliance with the provisions of the electoral law since the EC deliberately omitted Opio's identity, photograph and party symbol on the ballot paper, which disenfranchised his supporters.

The High Court held that although Opio was duly nominated, his omission from the ballot paper was a gross violation of the electoral law by the election officials and this should lead to setting aside of the election.

Regarding the issue of academic qualifications, the High Court held that Okabe did not have the requisite minimum academic qualifications.

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1 According to *Ongole James Michael v. the Electoral Commission and Another,* High Court Election Petition No. 8 of 2006, such a candidate must, themselves, have been a valid candidate having been validly nominated and in possession of the requisite qualifications.

2 In *Hon. Otada Sam Amooti Owor v. Taban Amin and the Electoral Commission,* Election Petition Appeal No. 93 of 2016, the Court of Appeal held that proof that one is a registered voter may be adduced by presenting a voter's card or an extract of the National Voters' Register; on its own, a national identity card is insufficient.

3 *Okabe v. Opio and EC*, citing *Sam Kuteesa and 2 Others v. The Attorney General*; Constitutional Petition No. 46 of 2001.

4 *Okabe v. Opio*, *ibid.*

Dissatisfied with the High Court decision, Okabe appealed to the Court of Appeal.

According to the evidence adduced, the 1st respondent was *not* nominated by the Returning Officer of the constituency. Rather, he was purportedly nominated by the Electoral Commission itself in exercise of powers under Section 15 (1) of the Electoral Commission Act.

From the evidence on record, there was no indication that the EC actually sat as a commission when purporting to exercise this power. All that was apparent was an endorsement on a document, apparently by the EC Chairperson, purporting to nominate the 1st respondent as candidate. There were no minutes indicating that any meeting took place.

The Court of Appeal (COA) held: In reaching the decision to nominate the respondent as a candidate, the EC was bound to follow the procedure set out under Section 8 of the Election Commission Act – which required the EC to sit as a commission (with a quorum of five members) and take a decision by consensus, or where consensus cannot be obtained, by a majority vote. In the circumstances of the case, it could not be said that the 1st respondent was nominated by the Commission.

Decision: The COA restated Section 60 of the PEA which lists the categories of people who could bring a petition challenging the election of a Member of Parliament. It was the finding of the COA that the 1st respondent was neither nominated by the Returning Officer nor by the Electoral Commission as a candidate for parliamentary elections. It was noted that the 1st respondent did not petition as a voter but as a candidate. Court then said:

> He petitioned as a candidate which we have found he was never nominated to be. He therefore, did not qualify to petition under Section 60 of the PEA. In so far as he had brought the petition as a candidate, which we have found he was not, he did not qualify to present the particular petition. There was therefore no proper petition before the trial judge to handle.

The court then concluded: "Our finding that there was no proper petition before the trial court wholly disposes of the instant appeal."

Comment: The appeal was determined on the basis that the EC did not comply with the procedure for nominating the respondent as a candidate. The Court of Appeal did not re-evaluate the evidence on which the trial court based its decision to make a finding that the appellant did not possess the requisite academic qualifications which would warrant overturning the election of the appellant.

There is no doubt that the failure of the EC to comply with the law disenfranchised the would-be voters of the 1st respondent. We note that there is no evidence that the party 'irregularly' nominated had anything to do with the irregularity.

We also note, among other things, that a person on whose academic qualifications a court of law (the High Court) had cast doubt remained the duly elected Member of Parliament because at the Court of Appeal this finding was not re-evaluated for the court to arrive at its own conclusion as a first appellate court.

Question: Did the decision of the Court of Appeal serve electoral justice?

1.1.2 Petition by a registered voter

In *Namujju Dionizia Cissy v. Martin Kizito Sserwanga*,[5] a petition supported by 469 signatures was declared incompetent.

[5] Election Petition Appeal No. 62 of 2016.

2. 0 GROUNDS FOR SETTING ASIDE AN ELECTION

The grounds for setting aside a parliamentary election are stipulated within Section 61 (1) of the Parliamentary Elections Act (PEA),[6] that is to say: i) non-compliance with electoral laws which has a substantial effect on the results; ii) that another person won the election; iii) commission of illegal practices or offences; and iv) lack of qualifications by the declared winner.[7]

A Member of Parliament may be removed from office following a petition filed in the High Court and after proof of the grounds contained in Section 61(1) of the PEA.[8]

The grounds of non-compliance and illegal practices or offences, as bases for setting aside the election of an MP, are distinct.[9] Section 1 of the PEA 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 of the PEA include bribery, procuring prohibited persons to vote, and publication of false statements as to illness, death or withdrawal of a candidate.[10]

The Court of Appeal has elaborated upon these grounds, as discussed below.

2.1 Eligibility to Contest

According to Article 80 (1) of Constitution and Section 4 (1) of the PEA, to be eligible to contest in a parliamentary election, a person must be: i) a citizen of Uganda; ii) a registered voter;[11] and iii) must have completed a minimum formal education of Advanced level or its equivalent.[12]

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6 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.'*

7 *Acire Christopher v.Reagan Okumu and the Electoral Commission,* Election Petition Appeal No. 9 of 2016 .

8 *Hon. Ssekikubo Theodore v. Nkalubo Patrick,* High Court Civil Revision No.003 of 2016.

9 *Kyamadidi Mujuni Vincent v. Ngabirano Charles and EC,* Election Petition Appeal No.84 of 2016.

10 ibid.

11 In *Hon. Otada Sam Amooti Owor v. Taban Amin and the Electoral Commission* (Election Petition Appeal No. 93 of 2016), the Court of Appeal held that proof that one is a registered voter may be adduced by presenting a voter's card or an extract of the national voters' register; on its own, a national ID card is insufficient.

12 *Acen Christine Ayo v. Abongo Elizabeth,* Election Petition Appeal No.58 of 2016.

2.1.1 Discrepancy in names on documents

2.1.1.1 A statutory declaration was one mode through which discrepancies in names in a document could be clarified.[13]

In *Mandera v. Bwowe,*[14] the main dispute revolved around the validity of the 'O' level certificate presented by the appellant in support of his candidature as MP for Buyamba Constituency. The certificate bore the names of *Nandera* Amos while the appellant was nominated as *Mandera* Amos.

The High Court held in favour of the petitioner, Bwowe Ivan, and set aside Mandera Amos's election as Member of Parliament for Buyamba.

Mandera appealed against the High Court decision and 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 additional evidence was in the form of the corrected O level certificate issued to him by Uganda National Examinations Board with his right name 'Mandera' instead of 'Nandera'.

Held: The use of the statutory declaration is sufficient to prove and explain a misspelling of a candidate's name.

2.1.1.2 The Uganda National Examinations Board (UNEB) need not exclusively rely on its own records when verifying any discrepancies in names and in preparing academic documents. It can rely, in this respect, upon information provided by schools.[15]

In the above mentioned case of *Mandera v. Bwowe,* UNEB relied on the affidavit from the school and the appellant's teacher to prove that he used the name 'Mandera'. UNEB correctly used that information to correct the misspelt name on the relevant certificate.

Decision: Since the discrepancy had been clarified, and since this was the only basis on which the trial judge had reached his decision,

[13] *Mandera v. Bwowe, EPA 91 of 2016*, citing Sections 2 and 3 of the Statutory Declarations Act, Cap. 22 and *Sembatya Ndawula Edward v. Muwanga Alfred,* Election Petition Appeal No.34 of 2016.

[14] *Mandera v. Bwowe, ibid.*.

[15] *Mandera v. Bwowe.*

there was no further justification for continuing to deny the appellant what rightfully belonged to him. In the circumstances, the trial judge ought to have found that the certificate in question belonged to no other person than the appellant.

2.1.1.3 The varied decisions of the courts on name discrepancies on voters' registers, nomination papers and academic documents are existent because each case has its peculiar circumstances.[16]

2.1.1.4 Burden of proof in name discrepancies on academic documents

Ultimately, the burden of proof lies 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 certificate(s) belongs to someone else.[17]

In *Baleke v. EC and Kakooza,*[18] it was incumbent on the appellant to prove his allegations that the differing names (on the nomination form and certificates) did not refer to the same person. For his part, the 2nd respondent (Kakooza) had adduced uncontroverted evidence to show that the impugned names all related to him. As such there was no ground to fault the trial judge's finding that this ground was not proved.

2.1.1.5 Adoption of husband's name and use of father's name

In *Ninsiima v. Azairwe and EC,*[19] 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. It was held that the addition of the latter did not amount to a *change* of name but was rather

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16 *Okello P Charles Engola Macodwogo and the Electoral Commission v. Ayena Odongo Krispus Charles*, citing *Mukundane Vincent and Ahaisibwe Gordians v. The Electoral Commission and Another,* Election Petition No. 4 of 2010 [The petitioner failed to indicate that beyond name discrepancies between a nomination paper and a declaration form plus voter ID card, there was another voter with the same name as the respondent]; *Tinka Noreen v. Bigirwenkya M. Beatrice and the Electoral Commission,* Election Civil Appeal No. 7 of 2011 [The swearing of a deed poll to effect a name change did not make the respondent forfeit all the rights attached to her former name and it was not alleged that the person bearing the old name was not the same as the person bearing the new name; and *Mutembuli Yusuf v. Nagwomu Moses Musamba and the Electoral Commission,* Election Petition Appeal No. 43 of 2016) [Writing the same name in a different order does not affect one's qualification. It must be proved that the persons with the different names are not one and the same].

17 *Ninsiima v. Azairwe and EC*, Election Petition Appeal No.5 of 2016.

18 Election Petition Appeal No.4 of 2016.

19 *Ninsima v. Azairwe and EC, op cit.*

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. The evidence adduced by the appellant was insufficient to satisfactorily discharge the burden of proof which rested upon her to prove that the respondent was not the owner of the academic documents she presented for nomination as a candidate.

2.1.1.6 Effect of interchanging names

Interchanging names, that is to say, writing names in a different order, could not affect one's qualifications.[20]

2.1.1.7 Requirement for a deed poll: When is registration of change of name required?

For one to register a change of name, one should have, in the first place, registered it under the Births and Deaths Registration Act.[21] This provision was incorporated as Section 36 in the Registration of Persons Act 2015 which repealed the Births and Deaths Registration Act.[22]

2.1.1.8 The law governing the 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.[23]

Ninsiima v. Azairwe and EC[24] was distinguishable from the situation in *Hon. Otada Sam Amooti Owor v. Taban Idi Amin*[25] 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.

20 *Ninsima v. Azairwe and EC, ibid,*, citing Mutembuli *Yusuf v. Nagwomu Moses Musamba*, Court of Appeal Election Petition No. 43 of 2016 (itself citing Col. (Rtd) *Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No. 1 of 2001).

21 *Sembatya Ndawula v. Muwanga*, citing Section 12 (2) of the Births and Deaths Registration Act Cap. 309 and *Namujju Doniozo Cissy and Electoral Commission v. Martin Kizito Sserwang*a.

22 *Sembatya Ndawula v. Muwanga*, citing Section 12 (2) of the Births and Deaths Registration Act Cap. 309 and *Namujju Doniozo Cissy and Electoral Commission v. Martin Kizito Sserwanga*.

23 *Ninsiima v. Azairwe and EC*.

24 *ibid*.

25 Election Petition Appeal No.93 of 2016.

The courts take a strict approach where the disparity is between the candidate's name on the nomination paper and the name on the voter's roll. While a disparity between the name on the academic documents and the name on the nomination paper or voter's roll may be explained by way of a statutory declaration, a disparity between the name on the nomination paper and that on the voter's roll is not envisaged as it would suggest that a candidate has unlawfully changed name.

The name on the voter's roll can only be changed in accordance with the procedure laid out in the Registration of Persons Act 2015.

2.1.2 Requirement for a candidate to be a registered voter: Proof of registration

a) The requirements for eligibility of a candidate to contest an election as a Member of Parliament were provided in Article 80 of the Constitution and Section 4 of the PEA.[26]

b) In terms of Article 80 (1) of the Constitution and Sections 1 (1) and 4 (1) of the PEA, among other things, a candidate must be a registered voter.[27]

c) By the terms of Section 1 (1) of the PEA, conclusive proof of being a registered voter was by evidence of the person's name appearing in the National Voters' Register, and not by possession of a national identity card.[28] By virtue of Section 66 of the Registration of Persons Act, 2015, the national identity card was only used to cross-check and confirm particulars in the voters' register before a voter could be allowed to vote. The national identification card did not replace or do away with the voters' register, which was a special document prepared by the Electoral Commission.[29]

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[26] *Lumu Richard Kizito v. Makumbi Kamya Henry and EC,* Election Petition Appeal No. 109 of 2016.

[27] *Wakayima and EC v. Sebunya*, Election Petition Appeal Nos. 50 and 102 of 2016.

[28] The decision in *Lanyero Sarah Ochieng and Another v. Lanyero Molly* (Election Petition Appeal No. 32 of 2011) also laid down the principle that conclusive proof of being a registered voter is demonstrated by evidence of one's details being contained within the voters' register; voter's cards and other election documents are not sufficient. However, in *Simon Peter Kinyera v. the Electoral Commission and Taban Idi Amin* (Election Petition Appeal No. 3 of 2018) the Court of Appeal stated that the petitioner ought to have presented voter's cards or extracts of the voter's register to prove that certain persons were registered voters.

[29] *Lumu Richard Kizito v. Makumbi Kamya Henry and EC ibid.*, citing *Hon. Otada Sam Amooti Owor v. Taban Idi Amin*; Election Petition Appeal No.93 of 2016.

In *Wakayima and EC v. Sebunya,*[30] the 1st appellant's national identity card bore the name 'Musoke' as surname and 'Hannington Nsereko' as the given names. It was the same names that appeared in the National Voters' Register for Nansana Municipality Constituency. However, he was nominated as 'Wakayima' as surname and 'Musoke Nsereko' as the other names.

Held: In the circumstances, he was not a registered voter and, as such, was not qualified for nomination and election as a Member of Parliament 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 No.4 of 2015.

Principle: Irregular change of name can lead to disqualification as a candidate if the name in the register and NIRA differs from that name offered for nomination.

Comment: No hard and fast rule can be made on when a person is deemed to have changed his or her name irregularly to be disqualified for not being a registered voter, but the precedents reported above suggest that a name registered under the Registration of Persons Act cannot be changed casually. A deed poll is required. Where the person was not registered under the Registration of Persons Act when he added another name they are not required to swear a deed poll.

2.1.2.1 Candidate must be a registered voter: They need not be registered in the constituency

In *Lumu v. Makumbi and EC*[31] the petitioner did not complain that the 1st respondent was not a registered voter, but rather that he was not a registered voter in Mityana South Constituency.

Held: This aspect of the petition was misconceived and had no merit as it was founded on an erroneous understanding of the legal requirements of eligibility for nomination. It was sufficient, in this regard, that the candidate was a registered voter. It was not required that they be a registered voter in the constituency where they contested. If this had been the intention of the framers of the

[30] *Lumu Richard Kizito v. Makumbi Kamya Henry and EC,ibid.*
[31] Election Petition Appeal No.109 of 2016.

law, they would have stated so expressly. It was not for the court to rewrite the provisions of the law and purport to introduce new requirements for eligibility to contest through a nuanced interpretation of the existing law.

2.1.3 Academic qualifications

2.1.3.1 The requirement regarding academic qualifications is set out in Article 80 (1) (c) of the Constitution and Section 4 (1) (c), (5), (6) and (9) of the PEA No.17 of 2005.[32]

2.1.3.2 Once it was clearly established as a fact that a candidate possessed the requisite minimum academic qualifications by the lawfully mandated body – in the instant case UNEB – then in the event that a party was desirous of cancelling or impeaching such qualification, this could not 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 prescribed for an institution in an Act of Parliament.[33]

In the above mentioned case of *Kalemba and EC v. Lubega,* the respondent adduced evidence that the 1st appellant obtained only one credit at O level (Uganda Certificate of Education [UCE]). The respondent submitted that the Universities and Other Tertiary Institutions Regulations require one to have attained a minimum of three credits at the same sitting to be admitted for an Ordinary Certificate Programme at a university. The respondent argued that therefore the 1st appellant could not have been (validly) admitted to Kampala University using the same O level certificate. The respondent therefore argued that although the 1st appellant was a holder of a certificate in Social Work and Social Administration and of a degree in Public Administration from Kampala University, which qualifications are higher than

[32] *Kalemba and EC v. Lubega Drake Francis* (Election Petition Appeal No.32 of 2016); *Watongola v. Salaamu Musumba* (Election Petition Appeal No.27 of 2016); *Baleke Peter v. EC and Kakooza Joseph* (Election Petition Appeal No.4 of 2016); Mulindwa *Isaac Ssozi v. Lugudde Katwe Elizabeth* (Election Petition Appeal No.14 of 2016); *Sematimba Peter Simon and NCHE v. Sekigozi Stephen* (Election Petition Appeal Nos. 8 and 10 of 2016).

[33] *Kalemba and EC v. Lubega*, citing *National Council for Higher Education v Anifa Kawooya Bangirana*, Constitutional Appeal No. 4 of 2011.

the required minimum of A' level certificate, these qualifications were invalid, considering that he did not attain the requisite three credits for his Ordinary level certificate.

The issue in the instant case was that the appellant did not obtain the three required credits at UCE and should not have been admitted for a diploma was not for the court – as an election appeal court – to determine. The trial judge erred in finding that the 1st appellant lacked the requisite academic qualifications.

The instant case could be distinguished from that of *Mathias Nsubuga v. Muyanja Mbabali*[34] 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 three credits at UCE so as to qualify for a diploma.

In *Acen v. Abongo,*[35] the election of the appellant as MP was nullified on the ground that she lacked the requisite academic qualifications. The decision of the High Court was hinged on the ground that the appellant did not pass her Primary Leaving Examinations (PLE) and was thus ineligible to be admitted to secondary school. It was the finding of the trial judge that any qualification subsequent to primary education were null. Such were the results/qualifications she attained on completion of the UCE and the post-secondary diplomas from Nsamizi.

Court of Appeal decision: It was not in dispute that the appellant failed her PLE. However, at the time she sat her PLE (1996- 2001), i.e. before the passage of the Education (Pre-Primary, Primary and Post-Primary) Act No.13 of 2008, there was no legal requirement that one had to pass PLE in order to join secondary school.[36] It follows that the trial judge erred when she nullified the appellant's UCE results and diplomas.

2.1.3.3 Legal burden of proof vis-á-vis evidential burden of proof (with regard to academic qualifications)

In line with Section 101 of the Evidence Act, Cap. 6 the burden of proof lay with the petitioner to prove allegations that the respondent did not possess the requisite qualifications.

[34] Election Petition No. 6 of 2011.

[35] Election Petition Appeal No.8 of 2016.

[36] Citing *Tom Butime v. David Muhumuza & Electoral Commission*; Court of Appeal Election Petition Appeal No. 11 of 2011.

However, once the petitioner adduces evidence which raises doubt in the eyes of the court as to the authenticity of academic qualifications held by the successful candidate in a parliamentary election, then the burden to prove authenticity shifts to the party relying on the qualifications.

Principle: Courts should not substitute themselves into a regulatory body or certificate awarding body to nullify academic qualifications.

2.1.3.4 Doubt regarding authenticity of a candidate's documents shifts burden

This is in line with Section 106 of the Evidence Act which 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.

In *Mulindwa Isaac Ssozi v. Lugudde Katwe Elizabeth*[37] Lugudde, who was the petitioner at the High Court, alleged that Mulindwa did not have the required academic qualifications to stand for the post of Member of Parliament but relied on the academic papers of another person called Mulindwa Hassan who, she claimed, was living somewhere in the village.

The High Court held that the appellant did not possess the requisite minimum qualifications to contest for Member of Parliament and set aside the declaration by the EC that Mulindwa was winner of the election.

Mulindwa appealed against the decision of the High Court. Counsel for the appellant submitted that in the High Court, the petitioner in cross-examination had admitted that she did not know and had never seen Mulindwa Hassan whom she alleged was the owner of the academic documents that the appellant used for his nomination. Counsel contended that the respondent, having alleged that the papers belonged to the Hassan Mulindwa who was not the appellant, had a duty to produce evidence to prove the allegation.

[37] Election Petition Appeal No.14 of 2016.

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.[38]

Held: The Court of Appeal held that the burden of proof in any election petition lay on the petitioner.[39] 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 demands an explanation from the respondent.

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 her. 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.

Where a candidate had changed their 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. [40]

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 had to be clear evidence creating doubt as to the authenticity of the document in question, which demanded an explanation from the respondent. This would be in line with Section 106 of the Evidence Act which provides that in civil proceedings, when any fact is especially

[38] See also *Mashate Magomu Peter v. EC and Sizomu Gershom Rabbi Wambedde*, Election Petition Appeal No.47 of 2016.

[39] *Anthony Harris Mukasa v. Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No. 18 of 2007.

[40] *Mulindwa Isaac Ssozi v. Luggude Katwe Elizabeth* citing *Mutembuli Yusuf v. Nagwomu Moses Musamba,* Court of Appeal Election Petition Appeal No. 43 of 2016 (itself citing *Col. (Rtd) Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No. 1 of 2001.

within the knowledge of any person, the burden of proving that fact is upon that person.

In the instant case, the appellant ought to have taken extra steps to prove his allegations.

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 they 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 level or some other classification subsequently cancelled or withdrew the award of the disputed qualification.[41] 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.

In *Watongola v. Salaamu Musumba,*[42] from the record, the assembled evidence created doubt as to the authenticity of the impugned certificate (a Certificate in Public Administration from Busoga University) which the appellant presented for nomination as a candidate. The awarding university itself claimed to have conducted an investigation and found the certificate to be a forgery.

Held: The burden of proof lay with the petitioner under Section 101 of the Evidence Act, Cap. 6 to prove allegations that the respondent did not possess the requisite qualifications. However, 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.

Once an allegation was made challenging the qualifications of a candidate/Member of Parliament, then the burden shifted to the

[41] Citing *Joy Kafura Kabatsi v. Anifa Kawooya Bangirana*, Supreme Court Election Appeal No.25 of 2011.

[42] Election Petition Appeal No.27 of 2016.

party who claimed to have the qualifications to prove that he or she did.[43]

In the case of *Watongola v. Salaamu Musumba* (supra), the appellant did not discharge that burden.

Where the authenticity of a candidate's certificates is questioned, the burden is upon that candidate to show that he or she has authentic certificates.[44]

In *Wakayima Musoke Nsereko and EC v. Sebunya Kasule Robert,*[45] the 1st 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 1st appellant's academic qualifications. The burden of proof lay with the 1st appellant to prove that his academic credentials were genuine. He failed to discharge the burden of proving that the questioned certificates were authentic.

Furthermore, his national identity card bore the name 'Musoke' as surname and 'Hannington Nsereko' as the given names. It was the same names that appeared in the National Voters' Register for Nansana Municipality Constituency. However, he was nominated as Wakayiman as surname and Musoke Nsereko as the other names.

It was held that in the circumstances, he was not a registered voter and as such was not qualified for nomination and election as Member of Parliament 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 requirement of Section 36 of the Registration of Persons Act.[46]

It was further held that the variation in the names was not minor. The Electoral Commission should have done more than it did during the nomination of the 1st appellant, and should have rejected his nomination.

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43 *Wakayima Musoke Nsereko and EC v. Sebunya Kasule Robert*, citing *Abdul Balingira Nakendo v. Patrick Mwondah*, Supreme Court Election Appeal No. 9 of 2006 – dictum of Katureebe JSC.

44 *Wakayima Musoke Nsereko and EC v. Seunya Kasule Robert*, *ibid*.

45 *ibid*.

46 Any person above the age of 18 years who wishes to change their name shall cause to be published in the Gazette a notice to that effect and then apply for amendment of the register to reflect the change of name.

In *Sematimba Peter Simon and NCHE v. Sekigozi Stephen,*[47] the burden of proof generally lay with the appellant. However, where the authenticity of the 1st appellant's qualification was challenged, the burden then lay on him to prove that his qualifications were authentic.

2.1.3.5 Equating of academic documents is not a once-in-a-lifetime exercise[48]

Equating of academic documents had to be done each time an election was conducted.[49]

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.[50]

It was not the case that once the relevant academic body (UNEB or NCHE) issued a certificate for one election, that certificate was valid for further elections. Equating of academic papers was not a once-in-a-lifetime exercise unless the requisite law was amended.[51]

Where an institution such as UNEB or the NCHE issued a certificate, there was a basic presumption that the academic certificates on which it based its decision were genuine and duly issued by the academic institutions named therein. If it were proved that those certificates on which the NCHE based its decision to issue its own were not genuine, then it would follow that the NCHE certificates would be a nullity as the person would not have the necessary qualifications.[52]

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47 Citing *Abdul Balingira Nakendo v. Patrick Mwondah*, Supreme Court Election Petition Appeal No. 9 of 2006 – dictum of Katureebe JSC.

48 *Baleke v. EC and Kakooza*, citing *Paul Mwiru v. Hon. Igeme Nathan Nabeta Samson and 2 Others,* Court of Appeal Election Petition Appeal No.6 of 2011 (dictum of Byamugisha, JA).

49 *Okello P Charles Engola Macodwogo and the Electoral Commission v. Ayena Odongo Krispus Charles*. In the Okello Charles case the Court of Appeal noted that although the 1st appellant had a certificate of equivalence in relation to two Certificates of Air Defence Courses, 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. [Citing *Paul Mwiru v. Hon. Igeme Nathan Nabeta* (Court of Appeal Election Petition Appeal No. 6 of 2011). However, the 1st appellant possessed qualifications higher than the minimum standard and which had been obtained in Uganda (a BA and an MA from Kampala International University) and did not therefore need to obtain verification from NCHE.

50 *Waligo Aisha Nuluyati v. Ssekindi Aisha and the Electoral Commission*, citing Paul Mwiru v. Hon. Igeme Nathan Nabeta (Court of Appeal Election Petition Appeal No. 6 of 2011).

51 *Baleke v. EC and Kakooza*, citing *Paul Mwiru v. Hon Igeme Nathan Nabeta Samson and 2 Others,* Court of Appeal Election Petition Appeal No.6 of 2011 (dictum of Byamugisha JA).

52 *Sembatya Ndawula Edward v. Muwanga Alfred,* Election Petition Appeal No.34 of 2016.

2.1.3.6 The PEA did not provide the procedure for applying for a certificate of equivalence.[53] Section 100 of the Act empowered the Minister to make regulations in that regard, which had not been made. However, the Univeristy and Other Tertiary Institutions Act (UOTIA) empowered the NCHE to regulate its own operations, which it had done through Rules made in 2007.[54]

2.1.3.7 NCHE has no authority to verify qualifications obtained in Uganda

The NCHE mandate is limited to foreign qualifications or where a person alleges that their other qualification is higher than the prescribed qualification.

In terms of Section 4(13) of the PEA, where a candidate has an A level certificate obtained in Uganda or qualifications higher than the prescribed qualification obtained in Uganda, there was no need for verification of their qualifications by the NCHE.

In *Sembatya Ndawula v. Muwanga,*[55] the appellant presented a diploma awarded by Uganda Management Institute (UMI), a recognised institution under the Universities and Other Tertiary Institutions Act. The validity or authenticity of the diploma was not disputed. The controversy revolved around the equating process.

Held: The Court of Appeal held that the appellant's Finance Officer's Diploma awarded by the UMI did not need to be equated by the NCHE.

In terms of Section 5 (k) of the UOTIA, which established the NCHE, one of the functions of that body is to determine the equivalence of *qualifications obtained from outside Uganda* with those awarded by Ugandan institutions of higher education for recognition in Uganda.

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[53] According to *Paul Mwiru v. Hon. Igeme Nathan Nabeta Samson and Others,* Election Petition Appeal No. 6 of 2011, the National Council for Higher Education (NCHE) is required to consult the Uganda National Examinations Board (UNEB) in the process of equating academic qualifications/certifications.

[54] *Sematimba Peter Simon and NCHE v. Sekigozi Stephen,* Election Petition Appeal Nos.8 and 10 of 2016.

[55] Election Petition Appeal No.34 of 2016.

The court also held that it is only UNEB that has the mandate to equate any award to the Uganda Advanced Certificate of Education (UACE) and not the NCHE.

It would be improper for courts of law to usurp powers which were explicitly prescribed for an institution in an Act of Parliament. Courts could only intervene where the institution in exercise of its powers failed to observe the correct procedures or to observe the provisions of the Constitution. The aggrieved party would then proceed to the appropriate court for redress. The NCHE had to be left to perform its functions in consultation with the relevant bodies.[56]

In the case of *Sembatya Ndawula v. Muwanga,*[57] at the time the appellant studied for the diploma, the duration of the programme was nine months. It was wrong for the trial judge 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 two years. This duty was by law preserved for another body.

In addition, 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 they 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 level or some other classification subsequently cancelled or withdrew the award of the disputed qualification.[58]

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[56] *Sembatya Ndawula v. Muwanga*, citing *National Council for Higher Education v. Anifa Kawooya Bangirana,* Constitutional Appeal No. 4 of 2011.

[57] *Sembatya Ndawula v. Muwanga*, *ibid.*

[58] Citing *Joy Kafura Kabatsi v. Anifa Kawooya Bangirana and Another*, Supreme Court Election Appeal No. 25 of 2007.

In *Acen Christine Ayo v. Abongo Elizabeth,*[59] the Court of Appeal held that the NCHE was correct to refuse to verify the appellant's diplomas, since they were higher qualifications than the Uganda Advanced Certificate of Education (UACE) (A level).

Courts can investigate the decisions of administrative bodies, such as the NCHE, even if their powers are expressly stipulated by statute. This does not constitute usurpation of the power of those bodies.

The NCHE was 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 were valid. But where qualifications presented for equating were challenged, the court was obliged to enquire into the validity of the same, and not the equating. In the event that the court found that the decision taken by the NCHE was irrationally made or was not based on proper diligence, the court has the power, and obligation, to so declare.[60]

Having faulted the NCHE for not being diligent in authenticating and validating the 1st appellant's diploma, the trial judge's declaration was consistent with the power of court stipulated in *Nakendo.* However, the trial judge erred in law and in fact when she went ahead to further hold and declare that the certificate of equivalence issued by the NCHE was illegal, invalid, null and void.

In the lower court, the 1st respondent, the 1st appellant on appeal, had produced his original diploma certificate and a former classmate had sworn 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 place to have certified the 1st appellant's certificate but that was

[59] Citing S.4 (13) of the PEA. 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.'

[60] *Sematimba and NCHE v. Sekigozi*, citing *Gole Nicholas Davis v. Loi Kageni Kiryapawo*, Supreme Court Election Petition Appeal No. 19 of 2007 (dictum of Katureebe JSC) and *Abdul Balingira Nakendo v. Patrick Mwondah*, Supreme Court Election Petition Appeal No. 9 of 2006 – dictum of Katureebe JSC.

impossible in the circumstances. In addition, the respondent did not lead any evidence on his part to prove that the 1st appellant's qualification was recalled by the awarding institution.[61] Failure by the respondent to prove fraud in the acquisition of the 1st appellant's documents left them intact, valid and presentable.

The argument that the graduation photographs presented by the 1st respondent's classmate were not reliable – because they did not show where they were taken or what course the 1st appellant was graduating in – did not have merit: '… because one cannot expect a photograph to reveal all the details that counsel for the respondent was asking for.' The classmate was also never cross-examined, which meant that her evidence was not being challenged.

2.1.3.8 Forgery of academic documents is criminal in nature, and the standard of proof required in this regard is 'beyond reasonable doubt'– a higher standard than for other election irregularities.[62]

In *Acen Christine Ayo v. Abongo Elizabeth,*[63] at the time the elections took place and at the time the petition was heard the allegation that the documents presented for nomination by the appellant were forged was still under investigation by the police and the investigations had not been concluded.

Held: 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.

Comment: In view of the strict timelines for electoral disputes, the principle that academic qualifications can only be impeached through an ordinary suit and cannot be subject to a judicial enquiry in the context of electoral litigation presents a significant challenge. Would there be room, for instance, for a court to conduct such an enquiry – in the context of electoral litigation – along the lines indicated in **Principles 2.1.3.2 and 2.1.3.6**, that is to say, an

[61] Citing *Joy Kabatsi v. Anifa Kawooya Bangirana and the Electoral Commission,* Supreme Court Election Petition Appeal No. 25 of 2008.

[62] *Sematimba and NCHE v. Sekigozi*, citing S. 5 (1) (b) of the PEA which 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.'

[63] Election Petition Appeal No.58 of 2016.

enquiry into process and legality, as opposed to the substantive nature of the decision of the awarding body or institution? The other complication is that outside the electoral legal framework, an individual who disputes academic documents possessed by a candidate may not have *locus standi* to initiate a civil action.

Comment: A court enquiry into the process of equating foreign academic qualifications would canvas existence or non-existence of rules or guidelines to guide the NCHE; it would also canvass existence of a specific body within the NCHE to carry out this mandate and observance of principles of natural justice. These are questions which can be competently addressed in an election petition. The precedent that a separate suit is required needs to be revisited because a petition is as good as a suit, especially when a suit is defined by section 2(x) of the Civil Procedure Act Cap. 71 as *'a civil proceeding commenced in any manner prescribed'*.

2.1.4 Resignation (or retirement) from public service, and proof thereof

2.1.4.1 Under Article 80 (4) of the Constitution, and Section 4(4) of the PEA, a public officer or any person employed in any government department or agency who wished to stand as an MP was required to *resign* at least 90 days before nomination day.[64] The intention of the framers of the Constitution and the legislature was 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.[65]

2.1.4.2 Article 80(4) of the Constitution of the Republic of Uganda, 1995, was intended to harmonise the campaign field, and do away with a group that would use public resources for their campaigns against all the other candidates who were not so well placed.[66]

2.1.4.3 Article 80(4), which was inserted by the Constitution (Amendment) Act, 2005, stated that

[64] *Woboya Vincent v. Ssasaga Isaias Jonny,* Election Petition Appeal No.11 of 2016 *and Kalemba Christopher and EC v. Lubega Drake Francis*, Election Petition Appeal No.104 of 2016.

[65] *Woboya Vincent v. Ssasaga Isaias Jonny, ibid.*

[66] *Emorut Simon Peter v. Akurut Violet Adome and the Electoral Commission,* High Court Parliamentary Election Petition No.002 of 2016.

> [u]nder the multiparty political system, a public officer or a person employed in any governmental department or agency of the government or an employee of a local government or anybody in which the government has controlling interest, who wishes to stand in a general election as a member of Parliament shall resign his or her office at least ninety days before nomination day." Articles 80(4) and 257 of the Constitution, when read separately, appeared to be in conflict. Article 257(2b) excludes, amongst other offices, the office of a member of any commission established by the Constitution. Additionally, Article 257(4) provided that, "[f]or the purposes of this Constitution, a person shall not be considered as holding a public office by reason only of the fact that that person is in receipt of a pension or similar allowance in respect of service under the Government.

Article 257 was inserted into the Constitution before Article 80(4). A close reading of Article 257 showed that the said Article was subject to other provisions of the Constitution. Therefore, when the legislators amended the constitution in 2005, they included the commissioners, who were part of government and drawing salary, into the category that had to resign.[67] This position was overruled on appeal by the Court of Appeal in the said matter of *Akurut Violet Adome and the Electoral Commission vs. Simon Emorut*, EPP 40 of 2016. The Court of Appeal held that commissioners of the Uganda Human Rights Commission (UHRC) are exempt from the requirements of Article 80(4) in view of the clear wording of the provisions of Article 257.

2.1.4.4 Section 4(19) of the PEA was also relevant, in so far as it provided that "[i]n this section, 'public service' and 'public officer' have the meanings assigned to them by Article 257 of the Constitution; and 'public officer' shall for the avoidance of doubt, include an employee of any Commission established by the Constitution."[68]

67 *ibid*.

68 *ibid*. The 1st Respondent, a member of the Uganda Human Rights Commission – being a commission established by the Constitution - had to resign at least 90 days before their nomination for the position of Member of Parliament, pursuant to Article 80(4) of the Constitution of the Republic of Uganda, 1995, and Sections 4(4) and 4(19) of the Parliamentary Elections Act, 2005.

2.1.4.5 The procedure for resignation by public officers is stipulated under Article 252 of the Constitution. Under Article 252 (2), resignation takes effect once received by the person or authority to whom it is addressed.

2.1.4.6 Resignation meant the formal renouncement or relinquishment of office, made with the intent of relinquishing the office, and accompanied by an act of relinquishment.[69]

2.1.4.7 In *Kalemba and EC v. Lubega,* the acceptance of a tender of resignation from a public office occurred where the public employer or its designated agent initiated some type of affirmative action, preferably in writing, which clearly indicated to the employee that the tender of resignation was accepted by the employer.[70]

2.1.4.8 The requirement to resign at least 90 days prior to the nomination is mandatory.[71]

2.1.4.9 Although it was true in *Kalemba and EC v. Lubega* (supra) that the 1st 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 1st 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.

The learned judge erred in finding that the delay between the resignation letter (8 May 2015) and its acceptance (15 July 2015) raised suspicion. The 1st 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 1st appellant duly resigned his office at least 90 days before nominations, in accordance with the law.

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69 *Kalemba Christopher and EC v. Lubega Drake Francis,* citing Black's Law Dictionary, 5th Edition (1979).

70 *Kalemba Christopher and EC v. Lubega Drake Francis, ibid.*, citing *Davis v. Marion County Engineer* (1991) 60 Ohio St. 3d 53.

71 *Kalemba Christopher and EC v. Lubega Drake Francis, ibid.,* citing *Darlington Sakwa and Another v. The Electoral Commission and 44 Others*, Constitutional Petition No. 8 of 2006.

2.1.4.10 From a consideration of the definitions of 'retire' and 'resign' provided by Black's Law Dictionary (8th Edition, 2004) it was clear that the net effect of resignation and retirement was practically the same – regarding the legislative intention referenced above.[72]

2.1.4.11 To insist that a prospective MP can only resign but not voluntarily retire and yet the effect of both routes is the same would be too narrow an interpretation and would create an absurdity.[73]

2.1.4.12 In the case of *Woboya v. Ssasaga* (supra), it was incorrect for the trial judge to consider that the retirement was improper for failure to give the required statutory six months' notice prior to early retirement. Under the requisite law – Section L-c (1), (2) and (4) of the Uganda Public Service Standing Orders, 2010 (UPSSO) – it was open to the Permanent Secretary, at their absolute discretion, to waive the requirement for six months' notice before retirement.

2.1.4.13 In addition, it was incorrect for the trial judge 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.[74]

2.1.4.14 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 judge 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, the jurisprudence of the court had established that such monies should be recovered by the

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72 *Woboya v. Ssasaga.*
73 *ibid.*
74 *ibid.*

Auditor General, and therefore the issue of salary could not be a ground for nullifying an election.[75]

Comment: While the clarification provided in **Principle 2.1.4.11** is critical, under what circumstances could the payment of salary post-retirement indicate that retirement had happened *de jure* and not *de facto?* Would the judicial notice indicated extend, for instance, to a situation where salary was paid for up to 6 months or more following post-retirement? Relatedly, was the option for recovery of such post-retirement salary by the Auditor General a sufficient bar to a finding that retirement had not in fact occurred as required under the law?

2.1.5 Participation by cultural/traditional leaders in partisan politics

The relevant law was Article 246 (6) of the Constitution, read together with Section 5 (2) (c) of the PEA.[76]

In the case of *Mashate Magomu v. EC and Sizomu Wambedde,*[77] based on a perusal of the Constitution of the 'Abayudaya', the trial judge had correctly concluded that it was a religious organisation rather than a cultural/traditional institution.

2.2 Non-Compliance with Electoral Law and the 'Substantiality of Effect' Test

As a general rule, with regard to compliance with electoral law, the law on parliamentary elections is not limited to the Parliamentary Elections Act but extends to orders of court which have the force of law in governing elections.[78]

In the sub-sections which follow, certain forms of non-compliance with electoral law are identified, along with the court's views regarding the question of 'substantial effect'.

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75 *Woboya v. Ssasaga*, citing *Okeyoh Peter v. Abbot George*, Election Petition No. 8 of 2011.

76 *Mashate Magomu Peter v. EC and Sizomu Wambedde,* Election Petition Appel No.47 of 2016.

77 *ibid*.

78 *Acire v. Okumu and EC*. In the instant case, there had been an order by the High Court requiring the appellant to be registered as flag bearer for the Forum for Democratic Change (FDC). Although this order fell to be implemented by the 2nd respondent, it had been stayed by the Court of Appeal. There was nothing from the Court of Appeal to indicate that that stay had lapsed. In those circumstances, the 2nd respondent could not be faulted for not implementing the High Court order.

2.2.1 Forms of non-compliance

2.2.1.1 Presence of candidate at polling station

2.2.1.1.1 *Relationship between Article 68 (3) of the Constitution and Section 53 of the PEA:*

Article 68 (3) of the Constitution entitles the candidates in person, or through their agents, to be present at the polling station throughout voting, counting of votes and ascertaining of the results.[79]

2.2.1.1.2 Section 47 (3) of the PEA entitles a candidate to be present in person or through their 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 was for the purposes of safeguarding the candidate's interests with regard to all stages of the counting, tallying or recounting processes.[80]

2.2.1.1.3 Under Section 48 of the PEA, a candidate, their agent or any voter present was entitled to raise any objection during the counting of the votes, which had to be duly recorded by the Presiding Officer.[81]

In *Amoru and EC v. Okello Okello,*[82] none of the respondent's agents recorded any complaints or raised any objections. Rather, they signed declaration of results (DR) forms confirming the results from the various polling stations. It was not sufficient for them to depose 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. DR forms contain a provision for registration of complaints and where agents have not taken advantage of the same, they are generally estopped from raising the complaints subsequently though this is not a hard and fast rule.

79 *Akuguzibwe v. Muhumuza, Mulimira and EC* 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.'

80 *Amoru Paul and EC v. Okello Okello, John Baptist,* Election Petition Appeals Nos.39 and 95 of 2016.

81 *ibid*.

82 *ibid*.

Comment: Where the responsibility to record an objection to the counting of a vote is placed on the Presiding Officer, it is unreasonable for a court to require a higher standard of proof instead of the ordinary proof on a balance of probabilities.

Article 68 (3) of the Constitution relates only to events at *polling stations* and not *tallying centres*.[83]

2.2.1.1.4 Presence of candidates during tallying of results not mandatory

The law applicable to tallying of results is Section 53 of the PEA. Under the terms of that provision, the law does not make it mandatory for tallying to be done in the presence of the candidate or their agents. It is the discretion of the candidates and/or their agents to be or not to be present at the tallying centre.[84]

Comment: Is the distinction made between the presence of a candidate at tallying centres and polling stations consistent with the constitutional notions of electoral justice and transparency? Perhaps it was intended to cover common scenarios where candidates and their agents, sensing imminent defeat, boycott the tallying process and the declaration of winner is made in their absence.

2.2.1.2 Handling of declaration of results (DR) forms

The procedure for handling DR forms is set out in Section 50 (1) and (2) of the PEA. Under those provisions, each Presiding Officer must fill several DR forms. Of these: i) one copy is attached to the report book; ii) one is retained for display at the polling station; iii) one sealed copy is enclosed in an envelope and sent to the Returning Officer; iv) a copy is given to each of the candidates' agents; and v) one copy is deposited and sealed in the ballot box.[85]

83 *Akuguzibwe v. Muhumuza, Mulimira and EC.*

84 *ibid.* 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.'

85 *Amoru and EC v. Okello Okello*.

Comment: The Electoral Commission needs to pre-print the DRF in advance so that it is not left to the Presiding Officer to record the names of candidates as well as the results, as this creates room for foul play and errors which then become potential grounds to challenge an election.

2.2.1.3 Sealing of ballot boxes

The ballot box containing the results must be sealed in the presence of the candidates or their agents.

2.2.1.4 Non-receipt of results from a polling station

In *Amoru and EC v. Okello Okello,*[86] the Returning Officer did not receive the DR forms for a particular polling station. The High Court set aside the election of the 1st appellant as MP. This was partly on the basis of non-receipt of results from one of the polling stations.

On appeal one of the issues was whether the learned trial judge erred in law and fact when he held that the exclusion of results from one of the polling stations was unlawful and affected the results in a substantial manner.

Held: The Court of Appeal held that although it was not certain where and at what point the results disappeared and who was responsible, the disappearance amounted to non-compliance with the law.

2.2.1.5 Use of DR form presented by one of the parties

In *Amoru and EC v. Okello Okello*, it was also held that the Returning Officer could have used a DR form for that station, presented by the respondent. His failure to do so was an irregularity which resulted in failure to include the results of that station in the final tally for the constituency.

The primary test in this case remains the quantitative test of substantiality; that the non-inclusion of the results from one polling station must have substantially affected the outcome. This means the number of registered voters at the excluded

86 *ibid.*

polling station must be higher than the winning margin between the successful candidate and the runner-up in the election.

2.2.1.6 Illegal use of government resources

The relevant law in this regard is Section 25 (2) of the PEA, which is to the effect that where a candidate was a Minister or held another political office, they had, during the campaign period, to restrict the use of the official facilities ordinarily attached to their office to the execution of their official duties.[87]

2.2.1.7 Excess or unaccounted for ballot papers

2.2.1.7.1 Section 27 of the PEA required 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.

Section 27 of the PEA was 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.[88]

In *Amoru and EC v. Okello Okello* (supra), although at some polling stations the number of ballot papers issued had been mis-stated, 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 Electoral Commission, as it is human to err.

The Presiding Officer had tallied the actual ballots cast, as was his duty under Section 53 of the PEA, read together with Article 68 (2) of the Constitution. None of the candidates' agents raised any objection or concern regarding the declared results.

87 *Wanda Ben Martin v. EC and Werikhe Micheal Kafabusa,* Election Petition Appeal No.81 of 2016.

88 *Amoru and EC v. Okello Okello.*

However, in *Betty Muzanira v. Winnifred Masiko & EC* (supra), the Court of Appeal ruled that in cases where entries in a DR form do not make numerical sense, the result of that polling station must be excluded from the final tally sheet.

2.2.1.7.2 However, the critical legal question remains whether any of the excess ballot papers had been cast in favour of any candidate.

2.2.1.8 Determination of invalid votes

2.2.1.8.1 The position of the law in this regard is provided for under Section 49 of the PEA, which stipulates the circumstances under which a cast vote would be deemed invalid.[89] These include where: i) the ballot paper is torn into two or more parts; ii) a voter marked the ballot paper with a mark other than the authorised mark of choice; and where iii) a voter marked a ballot paper using an authorised mark of choice but in such a way that their choice cannot be reasonably ascertained.

2.2.1.8.2 Section 47 (3) of the PEA entitled a candidate to be present in person or through their 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 was for the purposes of safeguarding the candidate's interests with regard to all stages of the counting, tallying or recounting processes.

2.2.1.8.3 Under Section 48 of the PEA, a candidate, their agent or any voter present was entitled to raise any objection during the counting of the votes, which had to be duly recorded by the Presiding Officer.

2.2.1.9 Unsigned DR forms: Signing by the Presiding Officer is mandatory

2.2.1.9.1 It is trite law that the signing of DR forms by the Presiding Officer was mandatory and failure to do so invalidates the result.[90]

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[89] *Ibid*.

[90] *Amoru and EC v. Okello Okello*, citing Section 47 (5) of the PEA; *Joy Kafura Kabatsi v. Anifa Kawooya Bangirana*, Supreme Court Election Petition Appeal No. 25 of 2011 (dictum of Mulenga JSC) and *Kakooza John Baptist v. Electoral Commission and Another*, Supreme Court Election Petition Appeal No. 11 of 200 (dictum of Katureebe JSC).

2.2.1.9.2 DR forms which were not signed could not be relied on in tallying results.[91]

2.2.1.9.3 A DR form had to be signed by the Presiding Officer, amongst others, and an unsigned form could not be used to declare results except in exceptional circumstances.[92]

Comment: The omission to sign might be deliberate and yet the system relies on the integrity of Presiding Officers to perform their duty diligently. Where this happens, a recount is the best option.

2.2.1.10 Unfilled DR forms

It was imperative to enter all the relevant information on a 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 had to be excluded from the results tally sheet.[93]

2.2.1.11 DR forms not signed by agents

The law in this regard was as stated in Section 47 (7) of the PEA. Under Section 47 (a) candidates or their agents shall sign the declaration form before the announcement of the results by the Presiding Officer. 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.[94]

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91 *Amoru and EC v. Okello Okello*, *ibid.*, citing *Kakooza John Baptist v. Electoral Commission and Another*, Supreme Court Election Petition Appeal No. 11 of 2007.

92 *Betty Muzanira Bamukwatsa v. Masiko Winnifred Komuhangi and 2 Others.*

93 *ibid.*

94 *Kyakulaga Bwino Fred and EC v. Waguma Badogi Ismail,* Election Petition Appeal No.15 and 20 of 2016

2.2.1.11.1 Principle: 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.[95]

2.2.1.12 Role of court vs. role of handwriting expert

Where it is alleged that a signature on a 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.[96]

In *Tamale Julius Konde v. Ssenkubuge Isaac*[97] where the petitioner challenged the election of the respondent as chairperson, the main ground was that the electoral commission colluded with the respondent to enter false results in the DR forms and altered results. The court analysed the evidence on this allegation as follows:

> Under section 151 (1) (a) of the Local Government Act, any person who forges or fraudulently defaces or destroys any document relating to the holding of an election, alters any document or delivers to the returning officer any document, knowing it to be forged commits an offence and is liable to on conviction to a fine not exceeding 15 currency points or imprisonment not exceeding three years or both.

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[95] *Kyamadidi v. Ngabirano and EC* citing *John Cossy Odomel v. Electoral Commission and Louis Opange*, High Court Election Petition No.6 of 2006. In the instant case, the forms had not been signed by the appellant's agents. According to the Court of Appeal, 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. 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 1st respondent's agents. In the circumstances, the failure of the appellant's agents to sign the DR forms could not invalidate the results of the election. Once the Presiding Officers had signed the DR forms, the requirements of the law under Section 47 (5) of the PEA had been fulfilled.

[96] *Kyakulaga and EC v. Waguma*, citing *Frederick Nkayi Mbaghadi and Another v. Frank Wilberforce Nabwiso*, Court of Appeal Election Petition Appeal Nos. 14 and 16 of 2011.

[97] Election Petition No. 6 of 2016 Civil Division

B. (Nat-Z) at SJ polling station

According to NA (anonymised), the petitioner's polling agent, she was at the station on 9.3.2016 from 6.30 a.m. till counting of votes ended at 6.30 p.m. It was NA's evidence that the petitioner polled 47 votes while the 1st respondent polled 81 votes. It was her evidence that the DR form was filled, which she signed as agent and the Presiding Officer gave her a copy, annexure NJ 3 to her affidavit. It was further her evidence that she was shown a certified copy of the DR form that showed the 1st respondent polled 196 votes and the signature on this form is not hers. An examination of NJ3 shows the petitioner polled 47 votes while the 1st respondent polled 196 votes. This DR form is not the one NA refers to in her affidavit.

Counsel for the petitioner in his submissions sought to refer me to annexure E1 to the affidavit in support of the petitioner. In the interests of a fair hearing, I will examine this DR form that is alleged to be the correct form according to the petitioner. It shows the first respondent polled 81, the petitioner polled 47 while KP polled 20. E2, which is the certified DR form, shows the petitioner polled 47 while the 1st respondent polled 196.

A key difference between the two DR forms is that E1 has details of the total number of valid votes while E2, the certified DR form, does not have this information and only captures the total number of females and males who voted as 176. This latter figure is incorrect because when all votes against each candidate is counted, the total number of votes is 276. The two DR forms however bear the same serial number 22458. E1 is signed by agents and the Presiding Officer but the time is not indicated.

Under section 136 of the Local Government Act, the Presiding Officer is obliged to fill the necessary number of copies of the DR form which is then signed by the agents and Presiding Officer who shall thereafter announce the results (section 136 (4)).

Going by the certified copy, the fact that the 2nd respondent factored the results of this DR form in the final tally, even when the figures did not add up, is a relevant fact.

At the same time, E1 relied upon by the petitioner is relevant to the extent it shows DR forms with the same serial number were filled with different results yet the DR forms are expected to be filled by the Presiding Officer with the same results.

The Returning Officer HS DW2 conceded she relied on the certified copy because it was in the tamper-proof envelope delivered to her. She conceded efforts by herself to verify this DR with the copy supposed to be enclosed in the ballot box was fruitless because it was missing.

DW2 conceded that while the DR form presented by the 1st respondent tallied with the form in the tamper-proof envelope, the petitioner's DR form differed much as it had the same serial number.

It is apparent there was mismanagement of the process of entering results on the DR forms because DR forms with the same serial numbers had different results when only the Presiding Officer has custody of these forms until the moment they are filled, signed, given to agents and a copy sealed in the ballot box and tamper-proof envelope.

In summary, the fact that E2 the certified results has more votes than the voters; the existence of E1 with the same serial number; and the missing DR from the sealed ballot box is evidence of mismanagement of the electoral process by the Presiding Officer at the level of entering results where different agents were given different results.

The petitioner had relied on a handwriting expert to prove forgeries etc. but the court declined to rely on the lone expert for the reason it did not have the benefit of hearing from another expert in order to arrive at a fair decision on the alleged forgeries having regard to expert evidence.

2.2.1.13 Rights of opposing parties vs. ultimate will of the electorate

2.2.1.13.1 The role of the court is not confined to balancing the rights and merits of the opposing parties. Rather the question is whether

a valid election has been held, having regard to the rights of the voters.[98]

In *Kyakulaga and EC v. Waguma*[99] one of the anomalies identified was that at one of the polling stations the respondent's agents were wrongly denied an opportunity to sign the DR forms. However, 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 court held that failure to sign, *per se*, did not invalidate the results contained in the forms.

However it was further held that although there was no direct evidence to prove that when the agents left the polling station, the election was rigged, the act of chasing away agents after apparently offering them money so that the election could be rigged raised suspicion as to the integrity of the election. It was held that the results from the polling station were rendered unreliable considering that the principle of transparency was compromised at the polling station. The Court of Appeal declined to nullify the election on grounds that there was no corroboration for the allegation of chasing away the respondent's agents.

2.2.1.14 Sanctity of polling materials

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 ascertained and upheld.[100]

In *Kyakulaga and EC v. Waguma* (supra) 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

98 *Kyakulaga and EC v. Waguma, Election Petition Appeals Nos.15 and 20 of 2016* citing *Frederick Nkayi Mbaghadi and Another v. Frank Wilberforce Nabwiso*, Court of Appeal Election Petition Appeal Nos. 14 and 16 of 2011.

99 *Kyakulaga and EC v. Waguma, Election Petition Appeals Nos.15 and 20 of 2016, ibid.*

100 *Kyakulaga and EC v. Waguma, ibid*., citing *Nadimo v. Independent Electoral and Boundaries Commission and Others* [2014] 1 EA 355.

in the eventual DR forms being true accounts of what actually transpired at those stations.

2.2.1.15 DR forms signed at 4.00 pm

In the above mentioned case of *Kyakulaga and EC v. Waguma*, the DR forms of several polling stations stated the time of signing as 4 pm. However, both parties had appointed polling agents and no agent testified that voting closed before 4 pm. The Court of Appeal held that since no complaints were raised of any candidate being 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 judge to conclude that the stating of the time as 4.00 pm in a number of stations was an indication that the forms had been filled in haste or fabricated.

2.2.1.16 Effect of doubtful entries and uncertified alterations on DR forms

2.2.1.16.1 Doubtful entries contained within a DR form rendered the result therein recorded unreliable because these forms were a safeguard against fraud and other impropriety in the electoral process. The filling of these forms was not a mere formality but a matter of substance.[101]

2.2.1.16.2 As a principle, DR forms with glaring discrepancies could not be relied upon.[102]

2.2.1.16.3 Corrections *per se* on DR forms were not usually a critical issue. They ordinarily implied that a mistake was made and that the Presiding or Returning Officer corrected the error. It became a grave issue when the results did not add up and where there was proof of other irregularities like ballot stuffing and multiple voting.[103]

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101 *Betty Muzanira Bamukwatsa v. Masiko Winnifred Komuhangi and 2 Others.*

102 *ibid.*

103 *Mugisha Vicent v. Kajara Aston Peterson, Mulamira Barbara and The Electoral Commission*, citing *Ngoma Ngime v. the Electoral Commission and Another* (High Court Election Petition No. 11 of 2012). In the instant case, the court noted that there were no major inconsistencies between the tally sheet and the DR forms. The tally sheet also showed that results from all polling stations were entered. Furthermore, all the DR forms exhibited by the 2nd respondent were signed by Presiding Officers. Therefore, the irregularity of alteration of DR forms had not been proved to the required standard.

2.2.1.17 Possession of DR forms after polling

2.2.1.17.1 In terms of Article 68 (4) of the Constitution, and Section 47 (4) and (5) of the PEA, 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.[104]

2.2.1.17.2 There was no need for the Returning Officer to take back all the copies of the DR form after they were signed. He was only required to retain other copies for the tamper-proof envelope, public display, report book and the ballot box.[105]

2.2.1.18 Opening of tamper-proof envelope

In terms of section 53 (1) of the PEA, the tamper-proof envelope is to be opened by the Returning Officer, and no one else.

In *Nabeta v. EC and Mwiru* (supra), given the admission by the Returning Officer that he was not the one who opened the envelope, it was held that the envelope was not opened in accordance with the law.

2.2.1.19 Failure to sign DR forms: Presiding Officers vs. candidates' agents

Section 47 (5) of the PEA provides that the Presiding Officer and the candidates or their agents, if any, shall sign and retain a copy of a declaration stating the polling station and the number of votes cast in favour of each candidate.

2.2.1.19.1 Signing of DR forms by the Presiding Officer is mandatory and failure to do so invalidates the result.[106]

2.2.1.19.2 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.[107]

In *Kyamadidi v. Ngabirano and EC*, all the DR forms had been signed by the relevant Presiding Officers as required by Section 47 (5) of the PEA. The forms had not been signed by the

104 *Nabeta Igeme Nathan v. EC and Mwiru Paul,* Election Petition Appeal Nos. 45 and 46 of 2016.

105 *ibid*.

106 *Kyamadidi v. Ngabirano and EC* , citing Section 47 (5) of the PEA, and *Joy Kafura Kabatsi v. Anifa Kawooya Bangirana*, Supreme Court Election Petition Appeal No. 25 of 2011 (dictum of Mulenga, JSC).

107 *Kyamadidi v. Ngabirano, ibid*.

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.

Held: 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 1st respondent's agents. In the circumstances, the failure of the appellant's agents to sign the DR forms could not invalidate the results of the election. Once the Presiding Officers had signed the DR forms, the requirements of the law under Section 47 (5) of the PEA had been fulfilled.

2.2.1.20 Reliance on uncertified DR forms

2.2.1.20.1 DR 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 sought to prove.[108]

2.2.1.20.2 The position of the law is that documents had 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.[109]

2.2.1.20.3 The exception in Section 64 (1) of the Evidence Act refers to a scenario where the party seeking to rely on uncertified DR forms gave notice to the party in possession of the originals requesting certification and they refused or failed to do as requested. On proving this, the court would accept the uncertified copies of the DR forms.[110]

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108 *Mashate Magomu v. EC and Sizomu Wambedde*, citing *Kakooza John Baptist v. EC and Anthony Yiga,* Supreme Court Election Petition Appeal No.11 of 2007.

109 *Mashate Magomu v. EC and Sizomu Wambedde, ibid.*

110 *ibid.*

2.2.1.20.4 In *Tamale Julius Konde v. Ssenkubuge* (supra) where the petitioner relied on uncertified DR forms, the court observed that these would be treated as evidence the election was not conducted in a fair manner. To quote the judge:

> Counsel for the 1st Respondent submitted that the DR forms relied upon by the Petitioner are not certified as required by section 73 and 76 of the Evidence Act. Section 76 permits certified copies to be produced as proof of the contents of the public documents.
>
> Obviously, the 2nd Respondent could not certify two different sets of results and this explains the non-certification of the DR forms relied upon by the Petitioner for the polling stations of Bukasa (NAT-Z), Kirinya main (N-Z), Kito A (M-NAM), Kito A Mandela college (L-NAK).
>
> The fact that the DR forms in the tamperproof envelope delivered by the presiding officers did not have same results as those given to the Petitioner's agents regardless they all had the same serial numbers is overwhelming evidence the presiding officers deliberately filled DR forms with different results to influence the outcome of the election .
>
> In these circumstances, it is unreasonable to expect the Petitioner to secure certified copies of his DR forms when the final result of the election was based on different data captured from questionable DR forms.
>
> Moreover, this court had the opportunity to look at the original impugned DR forms and therefore the question of certifying them does not arise. The Petitioner relied upon primary evidence of DR forms given to his agents while the 1st Respondent relied upon primary evidence of DR forms delivered in the tamper proof envelope to the returning officer and whose copies were certified correct by the returning officer.

Counsel for the 1st Respondent's submission that the court should disregard uncertified public documents lacks merit because it can be argued that since the 2nd Respondent denied the DR forms presented by the Petitioner, they were no longer public documents but ordinary documents tendered to demonstrate the election was not conducted in a fair manner.

In conclusion, the following facts emerged from my analysis of evidence:

1. Presiding officers for Bukasa, Kirinya, Kito A and Kito Mandela issued different sets of results of the candidate's agents and the returning officer entered results that were obviously disputed owing to the existence of original DR forms with same serial numbers but different results. This leads me to conclude the results were altered during the process of recording results on the DR forms which is done manually by the presiding officer. The alteration of results is an offence contrary to section 151 (1) (a) of the Local Government Act;

2. The returning officer entered wrong results for Bweyogerere and Hassan Tourabi in the system to the detriment of the Petitioner;

3. The DR forms for all the four polling stations (Bukasa, Kirinya, Kito A and Kito Mandela) were missing from the ballot boxes of all the stations contrary to section 136 (1) (d) of the Local Government Act Cap. 243.

These findings lead me to the conclusion that the election of chairperson Bweyogerere Kira Division held on 9. 3.2016 was not conducted in accordance with the electoral laws and principles of a fair elections.

2.2.1.20.5 In *Mashate Magomu v. EC and Sizomu Wambedde* (supra), the appellant attached receipts showing payments made to the Electoral Commission for certification. There was no notice

or letter requesting 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 Commission. He could not be covered under Section 64 (1) of the Evidence Act. Therefore, the trial judge properly rejected the uncertified DR forms.

Comment: DR forms (declaration of results forms) are under the direct control of Presiding Officers and the basis for tallying of results from all polling centres. The Returning Officer declares a winner based on the tally of the DR forms. Because DR forms are an integral part of elections, Section 75 of the PEA criminalises failure by Presiding Officers to furnish election returns and, on conviction, a Presiding Office may be fined a sum not exceeding twenty-four currency points or sentenced to imprisonment not exceeding one year or both. Section 76(a) makes it an offence for 'any person' to forge or fraudulently deface or destroy any document relating to the holding of an election or to alter any such document or to deliver to the Returning Officer any document, knowing it to be forged. On conviction, such person is liable to a fine not exceeding one hundred twenty currency points or imprisonment not exceeding five years or both.

In a bid to promote transparency, polling agents of candidates are required to endorse the final results by signing the form. The challenge with this requirement is that signatures of these polling agents are not standard, which leaves room for them to allege forgery. [See: *Tamale Konde v. Ssenkubuge* (supra)].

The fact that the Presiding Officer must fill the form by hand means genuine alterations are permissible, yet some are deliberate alterations. It is also possible for results of candidates to be interchanged. The process of transfer of the DR form in a tamper-proof envelope is fraught with uncertainties because the envelope might arrive with genuine DR forms then candidates arrive at the tally centre with DR forms with the same serial number but with different results. In other words, the capture of results of ballots counted at a polling station is a manual

process executed by individuals prone to errors or deliberate malpractice and which process can be manipulated by other actors such as polling agents and their candidates to suit their interests. Until this process is digitised, electoral disputes are a permanent feature of the election cycle.

2.2.1.21 Refusal by a Returning Officer to give a candidate serial numbers of ballot boxes used in the constituency

2.2.1.21.1 Availing serial numbers prior to the election is mandatory – Section 28A PEA.

2.2.1.21.2 In terms of Section 28A of the PEA, the availing of the 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 is mandatory.[111]

2.2.1.21.3 The Electoral Commission was obliged to supply this information no later than 24 hours before the polling day. The Commission could invite the candidates (independent candidates and political parties or organisations) to a particular venue at a previously notified time, for them to be availed the said materials. In *Mawanda v. EC and Andrew Martial*, referred to above, court pointed out that alternatively, the Commission could choose to deliver materials to the known addresses of the said candidates or organisations.[112]

2.2.1.21.4 Either way, if the EC 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.[113]

2.2.1.21.5 The justification for Section 28A PEA is to ensure that the candidates, political parties and organisations involved in the election were in a position to police the election process and to be assured in a transparent manner that no malpractices are committed.[114]

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111 *Mawanda v. EC and Andrew Martial, Election Petition Appeal No.98 of 2016.*
112 *Mawanda v. EC and Andrew Martial, ibid.*
113 *ibid.*
114 *ibid.*

2.2.1.21.6 The duty under Section 28A (2) is mandatory. In *Mawanda v. EC and Andrew Martial*(supra*)* the Court of Appeal held that the appellant did not show whether the non-compliance affected the results of the elections in any way, let alone in a substantial manner. He suggested that it made possible vote stuffing. This remained a suggestion without proof to conclude so. In the result, the court held that non-compliance with Section 28 A (2) of the PEA did not affect the results in a substantial manner.

It was erroneous for the 1st respondent to contend, and the trial judge 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 1st 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.

2.2.1.22 Control and use of ballot papers

2.2.1.22.1 Section 12 (1) (b) of the Electoral Commission Act empowered the EC to design, print, distribute and control the use of ballot papers.[115]

2.2.1.22.2 Section 52 of the PEA enjoined the Returning Officer to keep all election materials safely until they were destroyed in accordance with the directions of the commission.[116]

2.2.1.22.3 In the case of *Chemoiko v. Soyekwo*, it was undisputed that 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). The explanation by the Returning Officer was unsatisfactory. The Court of Appeal held that 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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115 *Chemoiko Chebrot Stephen v. Soyekwo Kenneth and EC,* Election Petition Appeal No.56 of 2016.

116 *ibid*.

2.2.1.23 Excess, unused and unexplained ballot papers

2.2.1.23.1 The legal position regarding validity of votes is stipulated under Sections 47 (1) and (4), and 50 (3) of the PEA. Section 47 (1) provides that:

[v]otes 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 this Act.

Section 47 (4) states: *At the commencement of the counting, the presiding officer shall, in the presence and full view of all present, open the ballot box and empty its contents onto the polling table, and with the assistance of polling assistants proceed to count the votes separating the votes polled by each candidate.*

2.2.1.23.2 The critical factor in vote counting is the number of votes cast in favour of each candidate.[117]

In *Adoa Hellen and EC v. Alaso Alice,* the trial judge made a finding that the total number of ballot papers at the end of the day exceeded the ballot papers that had been issued. He also made a finding that there was nevertheless no alteration of results. However the judge nullified the election. Having found that there was no alteration of results, the Court of Appeal held that it was erroneous for the trial judge to nullify the entire election. His 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, the court held that 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.

2.2.1.24 Ballot stuffing and multiple voting

Voting more than once is an offence under Section 31 (4) of the PEA. Therefore the petitioner has a higher burden than in the case of an election irregularity which the petioner failed to discharge.[118]

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117 *Adoa Hellen and EC v. Alaso Alice,* Election Appeal Nos.57 and 54 of 2016.

118 *Mugisha Vicent v. Kajara Aston Peterson*, Fort Portal Election Petition No. 4 of 2016.

2.2.1.25 Use of DR forms as a means of verifying allegation of excess ballot papers

2.2.1.25.1 The law relating to distribution of election materials is stipulated under Section 27 of the PEA.

Section 27 PEA provides that "[w]ithin forty-eight hours before polling day, every returning officer shall furnish each presiding officer in the district with—

a) a sufficient number of ballot papers to cover the number of voters likely to vote at the polling station for which the presiding officer is responsible;

b) a statement showing the number of ballot papers supplied under paragraph (a)with the serial numbers indicated in the statement; and

c) any other necessary materials for the voters to mark the ballot papers and complete the voting process."

2.2.1.25.2 The proper means of verifying ballot stuffing was by reference to the forms alongside which ballot papers were issued to each polling station, which included serial numbers.[119]

2.2.1.25.3 It was not proper to infer ballot stuffing or multiple voting from DR forms produced in court.[120]

2.2.1.25.4 In the case of *Adoa Hellen and EC V Alaso Alice* (supra), the trial judge should have relied on the provisions of Section 27 (b) of the PEA 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.

2.2.1.26 Time within which to declare results

The results of a parliamentary election had to be declared within 48 hours of polling as required by Section 18 (4)(b) of the PEA.[121]

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119 *Adoa Hellen and EC v. Alaso Alice*.

120 *Adoa Hellen and EC v. Alaso Alice, ibid.*, citing *Dr Kizza Besigye v. YK Museveni & Another,* Presidential Election Petition No. 1 of 2001 (dictum of Odoki CJ).

121 *Mugisha Vincent v. Kajara Aston Peterson, Mulamira Barbara and The Electoral Commission*. In the instant case, the Returning Officer had issued final results of the election outside the required time period. The court held that this was a grave breach of the Parliamentary Elections Act, 2005, although the Act did not attach sanctions for the said breach.

2.2.1.27 Declaration of the winner on the basis of partial or provisional results

2.2.1.27.1 Before declaring the winner of an election, a Returning Officer had to receive, consider and add all results from all the polling stations within their jurisdiction.[122]

2.2.1.27.2 In the *Betty Muzanira* case, court could not declare a winner on the basis of partial or provisional results except where there was a case of missing or cancelled results.[123]

2.2.1.27.3 In the above mentioned case, while Section 53(2) of the PEA permitted a Returning Officer to commence tallying of results where they had not received all results from all the relevant polling stations (in the presence of the candidates or their agents and a police officer not below the rank of Inspector of Police), the Section could not be read to mean that the Returning Officer could consider a few results, pending receipt of other results and proceed to declare the winning candidate based on provisional results.

2.2.1.27.4 Thus, in the instant case, the failure by the 2nd 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 disenfranchised the affected voters and breached their right to vote.

2.2.1.28 Alteration of a Returning Officer's transmitted results by the Electoral Commission

2.2.1.28.1 The Electoral Commission did 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 contained the result of the election, was a statutory form created by Section 58 of the Parliamentary Elections Act and its content could not be altered or wantonly disregarded by the Electoral Commission. A return form could only be altered by order of court.[124]

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122 *Betty Muzanira Bamukwatsa v. Masiko Winnifred Komuhangi and 2 Others*, citing Section 53(1) of the Parliamentary Elections Act.

123 *Betty Muzanira Bamukwatsa v. Masiko Winnifred Komuhangi and 2 Others, ibid.*

124 *ibid.*

2.2.1.28.2 Any alteration by the Electoral Commission of the return form amounted to usurpation of judicial powers granted to courts of law to hear election-related disputes under the Parliamentary Elections Act.[125]

2.2.1.29 Time of nomination

Nomination before 9.00 am would not invalidate the nomination since it was not one of the vitiating elements provided for under Section 13 of the PEA.[126]

2.2.1.30 Place of nomination

The offices of the Electoral Commission were a public place within an electoral district, and so it did not matter that a candidate was nominated from within the Electoral Commission's offices and not a tent in the compound of those same offices (the supposedly gazetted place for nomination).[127]

2.2.1.31 Non-validly nominated candidate allowed to pose as candidate

2.2.1.31.1 No election in which a person not validly nominated is allowed to blatantly masquerade as a candidate can pass the test for elections conducted in compliance with the principles governing a free and fair election as prescribed by law.[128]

2.2.1.31.2 Where the Electoral Commission discovers that, either by mistake or complicity of its officials, a person who was not validly nominated has been included on the ballot paper, the Electoral Commission must exercise its power and call the election off.[129]

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125 *ibid*.

126 *Hon. Kevina Taaka Wanaha Wandera v. Macho Geoffrey, The Independent Electoral Commission and the National Council for Higher Education,* Election Petition Appeal No. 35 of 2016.

127 *ibid*.

128 *Arumadri Drazu v. Etuuka Joackino and EC*, Election Petition Appeal No.37 of 2016.

129 *ibid*.

2.2.1.32 Inclusion of non-validly nominated candidate on the ballot paper invalidates the election

No election in which a person not validly nominated is allowed to blatantly masquerade as a candidate can pass the test for elections conducted in compliance with the principles governing a free and fair election as prescribed by law. On discovering that either by mistake or complicity of its officials Etuuka was included on the ballot paper, the Electoral Commission should have exercised its power and called off the election.[130]

2.2.1.33 Relative of candidate as Presiding Officer

2.2.1.33.1 In terms of Section 48 of the Evidence Act, it was wrong for the trial judge 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 deceased, and therefore to the 1st appellant. In the absence of other evidence, this conclusion could not be sustained.[131]

2.2.1.33.2 In any case, even if this relationship existed, it would not, in itself, make the said person a partisan witness, as the trial judge 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.

2.2.1.33.3 It was also wrong for the trial judge to conclude that the said 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. 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.

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130 *ibid.*

131 *Igeme Nathan Samson Nabeta and Another v. Mwiru Paul*, Election Petition Appeals 45 and 46 of 2016.

2.2.1.33.4 For instance, the person in question, despite being an employee of the Electoral Commission and a key player in the election with knowledge of what actually transpired, came to court as a witness for the 1st appellant with evidence supporting the 1st appellant's case. With his position, he would be expected to be an impartial witness for the 2nd appellant. His evidence was not partial. The trial judge erred in this respect.

Comment: Is there room to consider the effect of perception as an element of electoral justice and legitimacy? Taking into account the notion of the neutral observer, would such an observer perhaps question the propriety of an election conducted in such circumstances?

2.2.2 Effect of non-compliance: The 'substantial effect' test

2.2.2.1 Non-compliance with electoral law *per se* is not enough to overturn an election. The non-compliance had to be so significant as to substantially affect the results of the election.[132]

2.2.2.2 In terms of Section 61 (a) of the PEA, an election could only be set aside for non-compliance with electoral law where that non-compliance had had a substantial effect upon the results.[133]

2.2.2.3 In terms of Section 61 (a) of the PEA, 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 non-compliance and the failure affected the result of the election in a substantial manner." This position had been confirmed by the jurisprudence of the Uganda Supreme Court. [134]

In *Akuguzibwe v. Muhumuza,*[135] the non-compliance identified by the trial judge related to two out of 91 polling stations. This did not justify nullifying the election, as this would have

132 *Opendi v. EC and Ayo*, citing *Rehema Mulindo v. Winifred Kiiza and the Electoral Commission,* Election Petition No. 29 of 2011 (itself citing Section 61 (1) PEA and *Besigye v. Museveni* – dictum of Odoki CJ) and *Achieng Sarah Opendi and Another v. Ochwo Nyakecho Kezia,* Election Petition Appeal No. 39 of 2011.

133 *Kasirabo Ninsiima Boaz and EC v. Mpuuga David,* Election Petition Appeal No.55 of 2016.

134 *Akuguzibwe v. Muhumuza, Mulimira and EC.*

135 *ibid.*

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." In addition, in finding some irregularities at the two polling stations, the trial judge 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.

Comment: The COA reiterated the principle that the will of the people was paramount and the irregularities at two polling stations did not affect the final outcome of the election.

2.2.2.4 The test of 'substantial effect' may be both a qualitative and a quantitative one.[136]

The quantitative approach takes a numerical approach to determining whether the non-compliance significantly affected the results. In assessing the effect of non-compliance, the court had to consider *the effect of each category of non-compliance individually and also to assess the effect of the non-compliance as against the entire process of the election.* Court had to evaluate the whole process of the election.[137]

2.2.2.5 The position of the law was that an election should not be nullified unless the irregularities or non-compliance with electoral law affected the results of the election in a substantial manner.[138]

In *Amoru and EC v. Okello Okello,*[139] the difference between the appellant and the respondent was 464 and the 1st appellant was declared the validly elected Member of Parliament. Evidence was adduced to the effect that results for one of the polling stations were not tallied in the final result of the election for Member of Parliament. The first appellant had obtained 230 votes at that

136 *Opendi v EC and Ayo*, citing *Rehema Mulindo v. Winifred Kiiza and the Electoral Commission*, Election Petition No. 29 of 2011 (itself citing *Besigye v. Museveni*). [See also: *Chemoiko v. Soyekwo and EC.*]

137 *Opendi v. EC and Ayo.*

138 *Amoru and EC v. Okello Okello*.

139 *ibid*.

polling station whereas the respondent had polled 254 votes. Based on the irregularity, the High Court had made a finding that the exclusion of 254 votes belonging to the petitioner where the difference in the final tally was 464 votes affected the results in a substantial manner.

At the Court of Appeal it was observed that there was no evidence that the irregularity had been repeated at other polling stations in the constituency. The court held *inter alia* that:

> We do not agree with the reasoning of the trial Judge because he failed to take into account the fact that the 1st appellant had obtained 230 votes at the same polling station so the difference was only 24 votes between the two candidates. It is these 24 votes win at the station which the respondent (petitioner at the High Court) was deprived of and not 254. This did not affect the results of the constituency in a substantial manner.

An election should not be set aside basing on trivial errors and informalities.[140]

2.2.2.6 The legal requirement for substantial effect is provided for under Section 61 (a) of the PEA, and has been confirmed by jurisprudence in Uganda and elsewhere.

2.2.2.7 It was not sufficient to show that there have been irregularities in the election. It had to be proved that the non-compliance/ irregularities affected the results of the election in a substantial manner. The principle was that an election should not be set aside basing on trivial errors and informalities.[141]

In *Kyakulaga and EC v. Waguma,*[142] the 1st appellant obtained a total of 17,800 votes against the respondent's 15,651 votes – a difference of 2,149 votes. Court held that since even after taking away from him the votes of the polling stations where voting was

140 *Kasirabo Ninsiima Boaz and EC v. Mpuuga David*, Election Petition Appeal No.55 of 2016. In this case, the non-compliance with electoral law that had been proved did not affect the winning majority of the appellant in any substantial way.

141 *Kyakulaga and EC v. Waguma.*

142 *ibid*.

not properly conducted, the winning margin remained high, there was no doubt in the court's mind that he still remained the validly elected Member of Parliament for the constituency. Court further stated that in election petitions, it did not matter how many votes one got, but how the votes were obtained. The bottom line had to be the free will of the people who participate in the electoral process.

2.2.2.8 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 they *substantially and materially* affected the outcome of the electoral process. She failed to discharge this burden.[143]

In *Adoa and EC v. Alaso*,[144] at the High Court, the respondent, Alaso, alleged that the following irregularities had occurred:

(i) Excess unused ballot papers, unexplained ballot papers and alteration of results which affected the results in a substantial manner;

(ii) Harassment and arrest of supporters of the respondent by military personnel.

(iii) Bribery.

(iv) Donation of an ambulance by the appellant.

(v) Validity of the elections due to non-compliance with the law and commission of electoral offences by the appellant.

The High Court judge nullified the election of Adoa as Woman Member of Parliament for Serere district and ordered the EC to organise a fresh election.

Whereas the Court of Appeal came to the same conclusion as that of the High Court – that the total number of ballot papers exceeded the ballot papers that had been issued – it was the decision of the appellate court that the said irregularity did not have effect on the actual votes cast.

143 *Adoa and EC v. Alaso.*
144 *ibid.*

Court further held that there was no evidence adduced to suggest that at the time of voting there were any ballot papers already in the ballot boxes at the polling stations.

In addition, court further observed that where a specific irregularity had been established then adjustments should be made and if the successful candidate still retained victory, the irregularity could not be said to have affected the results in a substantial manner. In this case the excess ballot papers were neither cast nor taken into consideration in determining the poll results. That even if the 14,457 questionable votes were wrongfully given to the 1st appellant in order to bolster her results and that court had to take them away, the appellant would still be in the lead.

We note that the 1st appellant got 48,726 votes. The respondent got 32,651 votes. If an adjustment (subtracting the 14,457 excess ballots from the winner) as suggested by the Court of Appeal was to be made, the 1st appellant still remained the winner with 34,269 votes and with a margin of 1,618 votes.

Comment: In both the *Adoa and EC v. Alaso* and the *Kyakulaga and EC v. Waguma* cases, the fact that the margin between the candidate announced as winner and the complainant (petitioner at the HC) remained wide even after factoring in the proven irregularity was used by the Court of Appeal to come to a finding that the irregularity did not have a substantial effect on the result.

In *Mulimba v. Onyango, EC and Returning Officer EC*[145], although there were some DR forms which were not consistent with the results appearing on their faces, the COA held that 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. That whatever falsification might have occurred did not affect the results of any of the impugned polling stations at all.

In *Wakayima and EC v. Sebunya,*[146] the 1st appellant and others stood for the election of MP Nansana municipality, Wakiso

145 Election Petition Appeal No.14 of 2016.

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

district. The 1st appellant was declared winner with 25,053 votes. The respondent was runner-up with 23,415 votes. During the tallying process, the DR forms for the 24 polling stations were missing from the respective tamper-proof envelopes and sealed black boxes. The Returning Officer of Wakiso district cancelled the results from the 24 affected polling stations and their results were not included in the final tally.

The trial judge 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 DR forms) affected the outcome of the election in a substantial manner.

2.2.2.9 The onus lay 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.[147]

2.2.2.10 The appellant had to prove to the satisfaction of the court that the alleged irregularities affected the results of the election in a substantial manner.[148]

2.2.2.11 The test to be applied in determining whether the alleged malpractices or irregularities affected the result of the election in a substantial manner was both quantitative and qualitative.[149]

2.2.2.12 The expression 'non-compliance affected the result of the election in a substantial manner' could 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 did not have to prove that the declared candidate would have lost. It was sufficient to prove that his winning majority would have been reduced but such reduction, however, would have to be such that it would put the victory in doubt.[150]

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147 *Kyamadidi v. Ngabirano and EC*, citing *Masiko Winifred Komuhangi v. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002.

148 *ibid.*

149 *Kyamadidi v. Ngabirano and EC,ibid.*, citing *Amama Mbabazi and Another v. James Musinguzi Garuga*, Election Petition Appeal No. 12 of 2002.

150 *Kyamadidi v. Ngabirano and EC, ibid.*

2.2.2.13 It was not sufficient to show that there had been irregularities in the election. It had to be proved that the non-compliance/ irregularities affected the results of the election in a substantial manner. The principle was that an election should not be set aside basing on trivial errors and informalities.[151]

The test to be applied in determining whether the alleged malpractices or irregularities affected the result of the election in a substantial manner was both quantitative and qualitative.[152]

In *Chemoiko v. Soyekwo and EC*[153], 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 1st respondent. It would be speculative to presume so. It appeared that all candidates suffered equally as there was no evidence that one 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.

The argument by the appellant that if the Chief Magistrate had allowed a recount of all polling stations, it would have been discovered that even more ballot papers were missing was speculative. If the appellant had been dissatisfied with the Chief Magistrate's decision to allow a recount for only two polling stations, he ought to have taken the appropriate steps to challenge the decision. Given that those steps were not taken, this argument was speculative.

2.2.3 Inferences regarding non-compliance and effect on results

Where a specific irregularity has been proved and the number of votes affected by that irregularity has been established, then adjustments must 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.[154]

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151 *Chemoiko v. Soyekwo and EC*, citing *Gunn v. Sharpe* (1974) 2 ALL ER 1058.
152 *ibid.*
153 *ibid.*
154 *Adoa and EC v. Alaso.*

In *Adoa and EC v. Alaso* (supra), 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.

In addition, even if the 14,457 ballot papers in issue were deemed to have been wrongfully given to the 1st appellant in order to bolster her results, the appellant would still be in the lead by 333 votes.

In any case, since the trial judge had not found evidence of tampering with results, and since the candidate's agents had signed the DR forms and thus authenticated the results, he should not have held that there was complete non-compliance with the electoral laws and process.

2.2.4 Use of sampling in the course of evaluating effect

Sampling was 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 were aimed at finding out the prevalence of a phenomenon, problem or issue, by taking a snapshot. There were many methods of sampling such as simple random, stratified, cluster and systematic sampling.[155]

In *Adoa and EC v. Alaso Alice* (supra) the trial judge appeared to have applied the simple random method. However, before applying this method, he should have addressed his mind to the criteria for selecting the samples; the number of DR forms; and their spread in the constituency. He did not take this necessary initial step. In the circumstances, sampling five out of the 203 DR forms that were available on court record, as the trial judge had done, was not sufficient to determine the effect that they could have had on the election.

2.2.5 The distinction between non-compliance with electoral law and illegal practices/offences

2.2.5.1 The grounds for non-compliance and illegal practices or offences, as bases for setting aside the election of an MP were distinct.[156]

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155 *ibid.*

156 *Kyamadidi v. Ngabirano and EC.*

2.2.5.2 Section 1 of the PEA defined 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 of the PEA included bribery; procuring prohibited persons to vote; publication of false statements as to illness, death or withdrawal of a candidate.[157]

2.2.5.3 In the instant case, there was no failure by the trial judge to distinguish between alleged acts of non-compliance and illegal practices that the appellant raised.[158]

2.3 Electoral Offences and Illegal Practices

2.3.1 Burden and standard of proof for electoral offences

It is now well established that the standard of proof for an electoral offence is slightly higher than balance of probabilities. The authority of *Odo Tayebwa v. Basajjabalaba*[159] gives the key elements of bribery, namely:

- A gift is given.
- The gift is given by a candidate or his agent.
- The gift is given to induce the person to vote for the candidate.

This high standard set for the offence of bribery applies to all electoral offences on account of their being criminal in nature although the standard is not beyond reasonable doubt. This means there must be some corroboration of the alleged offence. In *Achieng Sarah Opendi v. Ochwo Nyakecho*[160] cited by counsel for the appellant, where the only evidence on record of bribery was that of one witness, the Court of Appeal reasoned that such allegations of bribery needed other 'evidence' as corroboration.

2.3.2 Uttering false statements/defamation

2.3.2.1 This is established under Section 73 (1) and (2) of the Parliamentary Elections Act.

2.3.2.2 A petitioner must set out the statements alleged to be false, malicious or defamatory. Since words derived their meaning

157 *ibid.*
158 *ibid.*
159 Election Petition Appeal No. 13 of 2011.
160 Election Petition Appeal No. 39 of 2011.

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.[161]

2.3.2.3 In *Acire v. Okumu and EC,*[162] 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 Lango to English, by an authorised translator. The failure in this regard rendered the claims unsustainable.

2.3.2.4 In *Mawanda v. EC and Andrew Martial,* although this had not been done in that 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 or at the appeal in respect of this point.

2.3.2.5 Section 73 of the PEA makes it an offence to publish false statements about a candidate with the intent of preventing the election of that candidate. The person making those false statements has to know or have reason to believe that they were false or be reckless as to whether such statements were true or false.[163]

In *Mawanda Michael v. EC and Andrew Martial,*(supra) it had not been proved that the 2nd respondent made the offending flyers. However, it had been proved that he caused the distribution of the flyers prior to the election where both he and the appellant were candidates. From the facts, it was evident that the 2nd respondent

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161 *Mawanda Michael v. EC and Andrew Martial,* Election Petition Appeal No.98 of 2016, citing *Rtd Col. Dr Kizza Besigye v. Electoral Commission and Yoweri Kaguta Museveni*, Presidential Election No. 1 of 2006 – dictum of Odoki CJ. See also *Acire Christopher v. Regan Okumu & EC,* Election Petition Appeal No. 9 of 2016.

162 Citing *Rtd Col. Dr Kizza Besigye v. Electoral Commission and YK Museveni;* Presidential Election No. 1 of 2006 – dictum of Odoki CJ.

163 *ibid.*.

had hired a *boda boda* to ferry the person who distributed the libelous flyers around the constituency. In the court's view, this was sufficient to conclude that he had *caused* the publication of the said flyers to the 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.

2.3.2.6 In terms of Section 73 (2), however, it remains open to the appellant to pursue separate or further legal action in defamation.[164]

2.3.2.7 The false statements complained of must be 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.[165]

2.3.2.8 Without showing which statements of the 1st respondent related to and defamed the character of the appellant, it could not be found that the 1st respondent committed any such offences.[166]

2.3.2.9 A candidate is not guilty of making defamatory statements if he had reasonable grounds for believing those statements to be true.[167]

In *Ibaale v. Katuntu & EC,*[168] 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.

2.3.2.10 'Character', as referenced in Section 73 (1), could be taken to refer to 'the inherent complex of attributes that determines 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'.[169]

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164 *Acire Christopher v. Regan Okumu & EC,* Election Petition Appeal No. 9 of 2016.

165 *Ibaale Daniel Joseph v. Katuntu Abdul & EC*, Election Petition Appeal No.41 of 2016.

166 *ibid.*

167 *Ibaale Daniel Joseph v. Katuntu Abdul & EC, ibid*, citing *Rtd Col. Dr Kizza Besigye v. Electoral Commission and YK Museveni*, Presidential Election No. 1 of 2006.

168 *ibid*.

169 *Ocen Peter & EC v. Ebil Fred,* Election Petition Appeal No.83 of 2016, citing the Advanced Learners' Dictionary.

2.3.2. 11 For the offence to be established, 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.[170]

2.3.2.12 The words complained of also have to be specific words attacking the personal character of a candidate.[171]

2.3.2.13 The following elements have to be proved under Section 73 (1) of the Parliamentary Elections Act: 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.[172]

2.3.2.14 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. From the record of appeal, there was no such evidence adduced. This was due to a failure by the respondent to quote the words which were said to have been uttered verbatim. The trial judge's finding that electoral offences had been committed under Sections 23 (1) and 73 of the PEA was thus erroneous.[173]

2.3.2.15 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.[174]

In *Mulimba v. Onyango, EC and Returning Officer EC*[175] court observed that the exact words used were never brought to the

170 *ibid.*

171 *Ocen Peter & EC v. Ebil Fred, ibid*, citing *Rtd Col. Dr Kizza Besigye v. Electoral Commission and YK Museveni*, Presidential Election No. 1 of 2006.

172 *Ocen Peter & EC v. Ebil Fred, ibid*, citing *Amongin Jane Francis Okili v. Lucy Akello and Electoral Commission*, High Court Election Petition No. 1 of 2014.

173 *Ocen & EC v. Ebil, ibid.*

174 *Mulimba v. Onyango, EC and Returning Officer EC.*

175 *ibid.*

attention of the court. Instead there was a loose translation. 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.

2.3.3 Bribery

2.3.3.1 The offence of bribery is provided under Section 68 (1) of the PEA.[176]

2.3.3.2 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.[177]

2.3.3.3 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. [178]

2.3.3.4 Clear and unequivocal proof is required before a case of bribery would be held to have been established. Mere suspicion is not

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176 *Amoru and E v. Okello Okello*; *Mawanda v. EC and Andrew Martial*; *Muyanja v. Lubogo and EC*; *Chemoiko v. Soyekwo and EC*; *Isodo v. Amongin; Ntende v. Isabirye; Kyamadidi v. Ngabirano and EC; Nakwang v. Akello; Aisha Kabanda v. Mirembe, EC and Returning Officer; Kalemba and EC v. Lubega; Isodo v. Amongin; Adoa and EC v. Alaso; Kiiza v. Kabakumba Masiko. Cf Odo Tayebwa v. Arinda and EC and Kintu v. EC and Walyomu* also making reference to Section 61 of the PEA. See also *Waligo Aisha Nuluyati v. Ssekindi Aisha and the Electoral Commission*.

177 *Isodo v. Amongin*, citing Black Law Dictionary, 6th Edition. See also *Hon. Kevina Taaka Wanaha Wandera v. Macho Geoffrey, The Independent Electoral Commission and the National Council for Higher Education*; *Amoru & EC v. Okello*; and *Ntende Robert v. Isabirye Iddi*, Election petition Appeal No.74 of 2016.

178 *Isodo v. Amongin, ibid,* citing *Col. (Rtd) Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001. See also: *Tuunde Mary v. Hon Kunihira Grace and The Electoral Commission*, *Hon. George Patrick Kassaja v. Frederick Ngobi Gume and The Electoral Commission*, citing *Kizza Besigye v. Kaguta Museveni*, Supreme Court Presidential Election Petition No. 1 of 2001, specifically the opinion of Odoki, CJ. See also *Mugisha Vicent v. Kajara Aston Peterson, Mulamira Barbara and The Electoral Commission*; *Onega Robert v. Hashim Sulaiman and The Electoral Commission*; *Muyanja v. Lubogo and EC*, citing *Col. (Rtd) Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (dictum of Odoki CJ) and *Kiiza v. Kabakumba Masiko*.

sufficient, and the confession of the person alleged to have been bribed is not conclusive. [179]

2.3.3.5 Bribery is a grave illegal practice and had to 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. [180]

2.3.3.6 Where allegations of bribery were made in an election petition, it was essential for the petitioner to prove to the satisfaction of the court all elements of the illegal practice of bribery beyond a mere balance of probabilities. [181]

2.3.3.7 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, is a sufficient ground for setting aside an election.[182]

2.3.3.8 The evidence adduced with regard to the allegations of bribery must be cogent if court is to consider it sufficient to annul an election.[183]

2.3.3.9 In *Amoru and EC v. Okello Okello* (supra), it was held *inter alia* that 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 was political power, witnesses who are invariably partisan might resort to telling lies in their evidence, in order to secure judicial victory for their preferred candidate.[184]

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179 *Amoru & EC v. Okello Okello*, citing Halsbury's Laws of England, 4th Edition, Volume 15, Paragraph 695. See also *Isodo v. Amongin*, citing *Kikulukubyu Faisal v. Muhammad Muwanga Kivumbi,* EPA No.44 of 2011 and *Anthony Harris Mukasa v. Dr Michael Lulume Mayiga,* SCEPA No.18 of 2007).

180 *Amoru & EC v. Okello Okello*, citing *Bakaluba Peter Mukasa v. Nambooze Betty Bakireke,* Supreme Court Election Petition Appeal No. 4 of 2009.

181 *Muyanja v. Lubogo & EC,* citing *Anthony Harris Mukasa v. Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No. 18 of 2007.

182 *Odo Tayebwa v. Arinda Gordon Kakuuna and EC*, Election Petition Appeal No.86 of 2016. See also *Muyanja v. Lubogo & EC.*

183 *Muyanja v Lubogo & EC.*

184 Citing *Kamba Saleh Moses v. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal No. 27 of 2011. See also: *Odo Tayebwa v. Arinda and EC*, where the Court of Appeal held that having reviewed the evidence on record, the trial judge was correct to find that allegations regarding bribery had not been proved.

2.3.3.10 In the aforementioned case of *Amoru & EC v. Okello Okello,* in terms of Section 133 of the Evidence Act, no particular number of witnesses is required to prove any particular fact,[185] it was not safe for the trial judge to rely, with regard to the bribery allegation, upon the evidence of one witness. This was especially so since he disregarded, without valid reasons, the evidence of another witness which controverted those allegations. The trial judge ought to have looked for independent evidence from an independent witness to corroborate the evidence in question. There was no such evidence on record.

2.3.3.11 It was a well-known principle in law that there is no specific number of witnesses is required to prove a given fact. Even one credible witness can prove a case.[186]

2.3.3.12 The court does not require a multiplicity of incidents of bribery to annul an election.[187]

2.3.3.13 The offence of bribery was criminalised under Section 68 (1) of the PEA.[188]

2.3.3.14 Where witnesses called by a party contradicted each other, none of them could be believed. [189]

2.3.3.15 A court of law cannot annul an election on mere alleged voter bribery and non-compliance by the respondent and speculation without cogent evidence to prove the said allegations.[190]

2.3.3. 16 Election petitions are highly partisan and supporters are likely to go to any lengths to establish adverse claims. Therefore, it is

185 Citing *Wadada Rogers v. Sasaga Isaiah Jonny and Electoral Commission,* Court of Appeal Election Petition No. 31 of 2011.

186 *Nakwang v. Akello*, citing *Kikulukubyu Faisal v. Muhammad Muwanga Kivumbi*, Court of Appeal EPA No.44 of 2011. See also *Isodo v. Amongin* , citing *Kikulukubyu Faisal v. Muhammad Muwanga Kivumbi*, EPA No.44 of 2011 and *Anthony Harris Mukasa v. Dr Michael Lulume Mayiga*, Supreme Court Election Petition Appeal No.18 of 2007.

187 *Nakwang v. Akello*, citing *Col. (Rtd) Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No. 1 of 2001.

188 *Aisha Kabanda Nalule v. Mirembe Lydia Daphne*, *EC and Returning Officer*, Election Petition Appeal No. 90 of 2016.

189 *Aisha Kabanda Nalule v. Mirembe Lydia Daphne, EC and Returning Officer*, citing *Matsiko Winifred Komuhangi v. Babihuga T Winnie*, Court of Appeal Election Petition Appeal No. 9 of 2002.

190 *Aisha Kabanda v. Mirembe, EC and Returning Officer* and *Kalemba and EC v. Lubega*, both citing *Amama Mbabazi v. Yoweri Kaguta Museveni and 2 Others*, Presidential Election Petition No.1 of 2016.

important to look for cogent, independent and credible evidence to corroborate claims to satisfy court that the allegations made by the petitioner are true. [191]

2.3.3.17 In *Isodo v. Amongin*[192] there was no cogent evidence to establish that the various items donated (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 (12 December 2015 – February 2016).

2.3.3.18 In *Hellen Adoa and EC v. Alaso Alice* (supra) the Court of Appeal was of the view that 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.

2.3.3.19 Furthermore, the Court of Appeal held that 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.[193] 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 Halcyon Secondary School and Hellen Adowa'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').

2.3.3. 20 In addition, the respondent had not provided sufficient evidence to show that the deponent was the 1st appellant's agent, for the purposes of establishing the electoral offence of bribery. With regard to bribery claims relating to the donation of an ambulance, from the evidence on record, the 1st appellant

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191 *Isodo v Amongin,* citing *Kabuusu Moses Wagabo v. Lwanga Timothy Mutekanga and Electoral Commission,* Election Petition No. 15 of 2011.

192 *Isodo v. Amongin, ibid*.

193 Citing *Uganda Breweries Limited v. Uganda Railways Corporation*, Supreme Court Civil Appeal No. 6 of 2001.

had donated the same outside the campaign period, and its possession had changed from herself to the Ministry of Health on 1st December 2015. The vehicle was registered in the names of the District Local Government on 29 January 2016, and delivered, at the request of the CAO, to the district on 1 February 2016, with a public handover ceremony on 2 February 2016. The 1st appellant could not be deemed to have been responsible for the delivery of the vehicle to the district on 2 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 1st appellant.

2.3.3. 21 While it is true that it is not easy to prove bribery, especially when it was done secretly, given the dire consequences it carried 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.[194]

2.3.3.22 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.[195]

2.3.3.23 In the case of *Kiiza v. Kabakumba Masiko,*[196] the persons who had received the items in question (football jerseys) were not known. Evidence that they were registered voters was not adduced.

2.3.3.24 Furthermore, the Court in *Kabakumba Masiko* (supra) held that the quality of evidence adduced had to be considered with complete thoroughness commensurate to the gravity of the matter and the consequences which followed by virtue of Section 68 (1).

2.3.3. 25 The general position of the law is that no particular number of witnesses was required to prove any particular fact.[197]

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194 *Kiiza v. Kabakumba Masiko.*

195 *ibid.*

196 *Kiiza v. Kabakumba Masiko*, citing *Kwijuka Geofrey v. Electoral Commission and Another*; Election Petition No. 7 of 2011.

197 *Kiiza v. Kabakumba Masiko*, citing *Kikulukunyu Faisal v. Muhammad Muwanga Kivumbi*, Election Petition Appeal No. 44 of 2011.

2.3.3.26 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 were usually supporters of either party.[198]

2.3.3.27 In the *Kabakumba Masiko* 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.[199] It is trite law that the evidence of partisan witnesses must, as a general rule, be corroborated.

2.3.3.28 The actual act of bribery must be described in sufficient detail for the court to reach a determination that indeed such bribery took place.[200]

2.3.3.29 Because a single act of bribery, by or with the knowledge and consent of the candidate or his agents, however insignificant it might be, was sufficient to invalidate an election, the petitioner had to prove to the required standard of proof that indeed the respondent or his agent bribed voters. It was not enough for the respondent to state that he saw persons in a line being bribed. The actual act of bribery had 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 had to be answered.[201]

In the case of *Kyamadidi v. Ngabirano & EC,*[202] the Court of Appeal observed that the evidence provided was not credible. The appellant had failed to prove the allegations of bribery to the satisfaction of the court.

In the case of *Kiiza v. Kabakumba Masiko* (supra), 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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198 *Kiiza v. Kabakumba Masiko*, citing *Col. (Rtd) Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No. 1 of 2001 – dictum of Oder JSC.

199 Citing *Kamba Saleh Moses v. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal No. 27 of 2011.

200 *Kiiza v. Kabakumba Masiko, ibid.*

201 *Kyamadidi Mujuni Vincent v. Ngabirano Charles & EC*, Election Petition Appeal No.84 of 2016.

202 *ibid.*

2.3.3.30 It is now trite law that in election petitions, the petitioner has to adduce cogent evidence to prove their 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.[203]

2.3.3.31 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 had to be to influence their vote. Merely being seen giving money to a person or receiving money from a person cannot, *per se*, be evidence of bribery upon which a court can rely.[204]

2.3.3.32 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 were registered voters. [205]

2.3.3. 33 In terms of Section 1 of the PEA, a 'voter' was a person whose name was entered on the voters' register. Under Section 1, a voters' register referred to the National Voters' Register compiled under Section 18 of the Electoral Commission Act. As such, a national identity card was not proof that one was a registered voter.[206] The argument that certain bribes (such as an ambulance donated to a constituency) targeted all voters is not tenable. In cases of bribery during elections, it must be shown that the person(s) bribed were registered voters. [207]

2.3.3.34 It is not enough, in this regard, to swear an affidavit that one was a registered voter or even to quote the voter's card. It is necessary to produce a copy of the voter's register showing the name of the bribed person with or without their photograph.[208]

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203 *Ntende v. Isabirye*, citing *Masiko Winifred Komuhangi v. Winnie J Babihuga*, Court of Appeal Election Petition Appeal No. 9 of 2002 – dictum of Mukasa-Kikonyogo DCJ (as she then was).

204 *Kyamadidi v. Ngabirano*, citing *Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission,* Supreme Court Presidential Election Petition No. 1 of 2006 – dictum of Katureebe JSC.

205 *Kyamadidi v. Ngabirano*, citing *Paul Mwiru v. Hon Igeme Nathan Nabeta Samson and 2 Others,* Court of Appeal Election Petition Appeal No. 6 of 2011.

206 *Ntende v. Isabirye*.

207 *ibid*, citing *Kabuusu Moses Wagaba v. Lwanga Timothy Mutekanga & The Electoral Commission*, Election Petition Appeal No. 53 of 2011.

208 *Ntende v. Isabirye*, citing *Hon. Otada Sam Amooti Owor v. Taban Idi Amin,* Court of Appeal Election petition Appeal No.93 of 2016.

2.3.3.35 In *Kyamadidi v. Ngabirano and EC* (supra) it was absolutely necessary to prove to the satisfaction of the court that the people bribed were registered voters.

2.3.3.36 In *Kyamadidi v. Ngabirano,* mentioned above, the Court of Appeal also observed that as the trial judge 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. The burden of proof lay on the petitioner invoking bribery to prove that the money or gift was given to a voter.[209] This standard of proof that a bribe recipient is a registered voter is quite onerous and impractical. Firstly, the Electoral Commission has not issued voter cards and appears to have stopped issuance of the same. Secondly, obtaining an entire voter's register to prove that a bribe recipient is a registered voter appears to be striving to achieve proof beyond reasonable doubt. Third, the Supreme Court, in *Mukasa Anthony Harris v. Dr Bayiga Michael*, EPA 18 of 2007, did not endorse that approach and held that bribery had been proved where the deponents adducing evidence stated their voter registration numbers in their affidavits.Where photographs are adduced as evidence of bribery, they have to be authenticated. It was not enough, for instance, to present photographs showing people receiving gifts and wearing T-shirts with a candidate's picture. It has to be proved that the T-shirts were donned with the candidate's knowledge and approval and that the photographs were taken at the time and place of the alleged bribe-giving and that it was the candidate or their 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.[210]

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209 *Wanda v. EC Werikhe*, citing *Kamba Saleh Moses v. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal No. 27 of 2011.

210 *Ntende v. Isabirye*, citing *Lanyero Sarah Ocheng and Electoral Commission v. Lanyero Molly,* Court of Appeal Election Petition Appeal No. 32 of 2011.

In *Ntende v. Isabirye,*[211] 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.

2.3.3.37 The petitioner also has to show that the acts of bribery were by the candidate or their agent. An agent is a person who in most cases was authorised by another to act for that other, or who undertook to transact some business or manage some affair for another by the authority or on account of the other.[212] A charitable donation might be unobjectionable as long as no election was in prospect; but if an election was imminent, the danger of the gift/donation being regarded as bribery is increased.[213] The prohibition of fundraising and the giving out of donations during an electoral campaign period has to be read, interpreted and applied subject to the Constitution and especially Article 29 (1c) 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.[214]

In *Kintu v. EC and Walyomu,*[215] court observed that from the evidence on record, the court was satisfied that the 2nd 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 2nd respondent had contributed UGX 50,000 at a certain fundraising function for a school, this was a case of oaths against oaths, with neither

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211 Election Petition Appeal No.74 of 2016.

212 *Ntende v. Isabirye*, citing *Hellen Adoa and Another v. Alice Alaso,* Court of Appeal Election Appeal Nos. 57 and 54 of 2016.

213 *Chemoiko v. Soyyekwo & EC*, citing *Odo Tayebwa v. Bassajabalaba Nasser and The Electoral Commission,* Court of Appeal Election Appeal No. 13 of 2011.

214 *Mugema Peter v. Mudiobole Abedi Nasser*. In the instant case, the Court of Appeal noted that 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.

215 *Kintu Alex Brandon v. EC and Walyomu Moses*, Election Petition Appeal No.64 of 2016.

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. It is to be noted that while making of illegal donations is a species of voter bribery, it is a separate illegal practice different from actual handing out of money to voters. Illegal donations include contributing to fundraisings during the campaign period, *inter alia*.

2.3.4 Harassment and intimidation

2.3.4.1 The position of the law in this regard was stated in Section 42 (1) of the PEA.[216]

2.3.4.2 This provision was 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.[217]

In *Kasirabo and EC v. Mpuuga,*[218] the allegations as to the presence of armed men at polling stations who intimidated voters and chased the respondent's witnesses away from polling stations had not been proved to the satisfaction of the court.

Similarly, in *Kinyamatama v. Sentongo,*[219] the Court of Appeal was of the view that the evidence on record 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, court took judicial notice of the fact that the elections for the Woman 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.

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216 *Kasirabo and EC v. Mpuuga*; *Kinyamatama v. Sentongo*.

217 *Kasirabo and EC v. Mpuuga*, citing *Col. (Rtd) Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001. In *Kasirabo and EC v. Mpuuga*, the allegations as to the presence of armed men at polling stations who intimidated voters and chased the respondent's witnesses away from polling stations had not been proved to the satisfaction of the court.

218 Election Petition Appeal No.55 of 2016.

219 *Kinyamatama Suubi Juliet v. Sentongo Robinah Nakasirye*, Election Petition Appeal No.92 of 2016.

2.3.4.3 The presence of police at a polling station is not necessarily evidence of intimidation.[220]

2.3.4.4 It must be established that there was generalised violence and intimidation.[221]

In *Hellen Adoa & EC v. Alaso Alice* (supra), court observed that the arrest of one of the respondent's campaigners was an isolated case and a one-off incident, which did not amount to generalised 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 judge to conclude that there had been harassment and intimation of the respondent's supporters throughout the district.

2.3.4.5 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.[222]

2.3.4.6 In the *Kyamadidi*[223] case, from the evidence on record, it had not been proved to the satisfaction of the court that the 1st respondent, through his agents, committed the assaults as alleged or at all.

2.3.5 Sectarian statements

2.3.5.1 Section 22 (6) of the PEA prohibits the making of false, malicious, sectarian, divisive and mudslinging statements against a fellow candidate.

2.3.5.2 The ingredients for the electoral offence of sectarianism under Section 23 (1) of the PEA were 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.[224]

220 *Mugisha Vincent v. Kajara Aston Peterson, Mulamira Barbara and The Electoral Commission.*
221 *Hellen Adoa and EC v. Alaso Alice.*
222 *Kyamadidi v. Ngabirano & EC.*
223 *ibid*.
224 *Ocen & EC v. Ebil*, citing *Amongin Jane Francis Okili v. Lucy Akello and Electoral Commission*, High Court Election Petition No. 1 of 2014.

In *Ocen & EC v. Ebil*[225] there was no evidence that the 1st appellant had used a *symbol or colour* which had sectarian connotations. As such, the electoral offence under Section 23 (1) had not been proven.

In the same case**,** the Court of Appeal also held that the trial judge misdirected himself by referring to Section 23 (1) of the 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 judge erroneously found the 1st appellant guilty of, would fit under Section 24 (a) of the PEA, which had not been pleaded at all in the lower court.

2.3.6 Electoral violence

2.3.6.1 Where allegations of electoral violence are made, it is imperative to look for independent evidence to corroborate those allegations.[226]

2.3.6.2 In particular, Section 80 (1) (a) of the PEA requires proof of agency, because such an offence can only be committed by a person directly or through another person.

In *Ocen & EC v. Ebil* (supra), court observed that from a re-examination of the 10 affidavits upon which the trial judge relied to reach a finding that this offence had been established, it appeared that they all fell short of proving the allegations against the 1st appellant. None of the instances cited pointed to the fact that the 1st 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 unproven agents, or even his sons.

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225 *ibid*.

226 *ibid*, citing *Uganda Journalists Safety Committee and Others v. Attorney General*, Constitutional Petition No. 7 of 1997; *Bantalib Issa Taligola v. Electoral Commission and Wasugirya Bob Fred*, Election Petition No. 15 of 2006 –- dictum of Yorokamu Bamwine J; *Karokora v. Electoral Commission and Kagonyera*, Election Petition No. 2 of 2001 –- dictum of Musoke-Kibuuka J; and *Paul Mwiru v. Igeme Nathan Samson Nabeta, Electoral Commission and National Council for Higher Education*, Election Petition No. 3 of 2011 –- dictum of Monica Mugyenyi J.

2.3.7 Use of vehicle to terrorise voters

Where an alibi was raised, corroboration was required to refute that defence. In the absence of such corroboration, the person would be given the benefit of doubt.[227]

In the *Kyamadidi* case (supra), since the 1st 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.

2.3.8 Ballot stuffing/multiple voting

2.3.8.1 Section 76 (f) of the PEA created the offence of ballot stuffing.[228]

2.3.8.2 Ballot stuffing is a form of electoral fraud whereby a person who was permitted only one vote cast more than one. It could also happen where a person, instead of casting their vote in a single booth, cast in multiple booths. Ballot stuffing could 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. [229]

In *Kinyamatama v. Sentongo,*[230] court observed that 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 levelled ground. All the candidates suffered equally and none was disadvantaged over the other. At the same time, the mere fact that 14 polling stations registered a 100% voter turnout did not, per se, mean that there had been multiple voting or ballot stuffing at those stations. No evidence had been adduced as to ballot stuffing

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227 *Kyamadidi v. Ngabirano*, citing *Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission,* Supreme Court Presidential Election Petition No. 1 of 2006 – dictum of Katureebe JSC.

228 *Kinyamatama v. Sentongo*; *Kasirabo & EC v. Mpunga,* Election Petition Appeal No.92 of 2016.

229 *Kinyamatama v. Sentongo*, citing *Toolit Simon Akecha v. Oulanyah Jacob L'Okori and Electoral Commission*, Court of Appeal Election Petition Appeal No. 19 of 2011.

230 *Kinyamatama v. Sentongo, ibid.*

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.

2.3.8.3 Ballot stuffing is an election malpractice which involved 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 were dead or absent at the time of voting and yet were 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.[231]

In *Kinyamatama's* 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.

Voting more than once was an offence under S.31 of the PEA and, therefore, the petitioner has a higher burden than in the case of an election irregularity.[232]

2.3.9 Attacking the character and minimising the stature and candidature of a candidate

To prove this illegal practice, the petitioner has to show that the statement in question published by the candidate was false, and he/she must prove it so as to leave the court certain that it was false. Whilst the illegal practice is similar to defamation in nature, it differs in the way it has to be proved. The illegal practice being quasi-criminal, the onus of proof would shift only where a prima facie case had been made out.[233]

In the case of *Odo Tayebwa v. Arinda & EC,*[234] 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 FDC) were in the peculiar circumstances of the instant case. As such, this illegal practice had not been proved.

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231 *ibid,* citing *Toolit Simon Akecha v. Oulanyah Jacob L'Okori and Electoral Commission,* Court of Appeal Election Petition Appeal No.19 of 2011. See also *Kiraso & EC v. Mpuga*.

232 *Mugisha Vincent v. Kajara Aston Peterson, Mulamira Barbara and The Electoral Commission*.

233 *Odo Tayebwa v. Arinda & EC*, citing *Col. (Rtd) Dr Kizza Besigye v. Yoweri Kaguta Museveni & Another*, Presidential Election Petition No. 1 of 2001 – dictum of Mulenga JSC.

234 *ibid*.

2.3.10 Corroboration in electoral matters

2.3.10.1 In electoral petitions, evidence did not invariably require corroboration. However, the evidence adduced had to be strong enough to prove the alleged facts. In the case of *Odo Tayebwa* (supra), the court held that the evidence had to be of such a standard as to satisfy the court on a balance of probabilities.[235]

2.3.10.2 In *Odo Tayebwa* referred to above, court further noted that with regard to the allegations of bribery, it was clear that the judge did not necessarily require corroboration of the evidence, but found the evidence of the particular single witnesses in question to be insufficient. She thus looked for other credible evidence, if any, to support the bribery allegation and she failed to find any. The court could not fault her for adopting this approach.

2.3.11 Effect of not pleading particular offences

In *Ocen and EC v. Ebil,*[236] the trial judge erred in finding that the 1st 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 Electoral Commission to the 1st 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 – against the decision of the Electoral Commission in this regard, if he had been dissatisfied with the way the commission handled that issue.

2.3.12 The importance of establishing a principal-agent relationship

2.3.12.1 Section 1 (1) PEA states that an "agent" by reference to a candidate includes a representative and polling agent of a candidate.

235 Citing *Aligawesa Philip v. Byandala Abraham James and Another*, Election Appeal No. 24 of 2011.

236 Election Petition Appeal No.83 of 2016.

2.3.12.2 Section 61 (1) (c) PEA provides that the election of a candidate as a Member of Parliament shall be set aside if it is proved to the satisfaction of the court that an illegal practice or any other offence under the Act was committed by the candidate personally or with their knowledge and consent or approval.

2.3.12.3 Section 80 (1) PEA creates the offence of undue influence. It provides that where a person directly or indirectly in person or through any other person either (i) makes use or threatens to use force or violence or (ii) inflicts or threatens to inflict in person or through any other person harm against any other person in order to induce or compel that person to vote or refrain from voting commits an offence of undue influence.

2.3.12.4 Under the relevant law – Sections 61 (1) and 80 of the PEA – it is not enough to show that the persons traumatising and intimidating candidates in the constituency were agents of the 1st appellant. It was incumbent on the respondent to prove that the 1st appellant knew of, and consented to, such violence.

In *Ocen and EC v. Ebil (*supra*)* the Court of Appeal observed that the trial judge erred by implying that the fact that the 1st 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.

2.3.12.5 There is no precise rule as to what constitutes evidence of being an agent. Every instance in which it is shown that either with the knowledge of the candidate or the candidate himself a person acted in furthering the election for him, or trying to get votes for him, was evidence that the person so acting was authorised to act as his agent. It is thus any person whom the candidate put in his place to do a portion of his task, namely to procure his election as a Member of Parliament. Such a person was one for whose acts he would be liable.[237]

In *Kiiza v. Kabakumba Masiko*[238] court observed that it was not enough to show that the persons constructing wells were agents of the appellant. It was incumbent upon the respondent to

[237] *Kiiza v. Kabakumba Masiko*, citing *Odo Tayebwa v. Nasser Basajabalaba and Another*, Election Appeal No. 13 of 2001 – dictum of Mpagi-Bahigeine DCJ.

[238] *ibid.*

prove that the appellant authorised, knew of and/or sanctioned the construction, inscription and subsequent erasure of the inscriptions on the wells – which she failed to do.

2.3.12.6 There had to be a sufficient nexus between the person given the bribe and either the candidate or his known agent who had to be proved to have been acting with the appellant's knowledge or with his approval. It is only then that the requirements of Section 68 would be met (i.e. bribery).[239]

2.3.12.7 The law of agency in electoral matters requires that for a candidate to be liable for the acts of another, the agent had to be named as was noted in the *Kiiza v. Kabakumba Masiko* case.

2.3.12.8 An agent was a person who in most cases was authorised by another to act for that other, one who undertook to transact some business or manage some affair for another by the authority or on account of the other.[240]

2.3.12.9 A person who alleges that an agent of a candidate gave or offered bribes to voters had to mention the name of the agent. Failure to name the agent made it impossible for the accused to prepare a rebuttal. No reasonable tribunal could hold the principal vicariously liable for the conduct or actions of an undisclosed agent.

2.3.12.10 An agent is a person authorised by another to act for them in their place. Agency is created by agreement, estoppel or by presumption. Where the agency relationship is established, then the principal is responsible for the foreseeable consequences of the acts of their agent. Agency is an area of law which created obligations and a legal relationship between third parties and a person called their agent. Agency is created either by a formal written contract, a quasi-contractual relationship or simply by a fiduciary non-contractual relationship.[241]

2.3.12.11 The agent referred to under Section 32 of the PEA is one who was procured specifically for purposes of safeguarding the interests of the candidate with regard to the polling process. Such

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239 *ibid.*

240 *Ntende v. Isabirye.*

241 *Mayanja Bernard & Acan Joyce Okeny v. Hon. Hood Katuramu & Hon. William Wilson Nokrach,* Election Petition Appeal No.42 of 2016.

persons were therefore procured in writing as polling agents for a specific period. The purpose of requiring the agency to be in writing was to avoid political clashes and to maintain order at a polling station. Furthermore, for audit purposes, public funds could be appropriated to those persons and accounted for.[242]

2.3.12.12 The polling agent is not the same as the political agent. They are agencies created by words and/or actions. Where, for instance, a politician appointed a person to a position which manifested agency-like powers, those who know that this agent was acting on behalf of the principal were entitled to assume that there was ostensible authority granted by the principal to that person to act on his/her behalf.[243]

2.3.12.13 If, as in the case of *Mayanja Bernard and Acan Joyce Okeny*, a politician standing for Parliament created the impression that a certain political assistant was his/her agent and was authorised to act when there was no actual authority, third parties who acted on the impressions of the agent, would be protected by estoppel. The principal would be estopped from denying the existence of the agency to third parties.

2.3.12.14 In the above mentioned case of *Mayanja Bernard and Acan Joyce Okeny*, ostensible or apparent authority was regarded merely as a form of estoppel – indeed it is termed agency by estoppel.

2.3.12.15 Another principle arising from the decision of Mayanja Bernard and Acan Joyce Okeny is that, the principal is liable for all the acts of the agent which are within the authority usually conffered on an agent, notwithstanding the limitations. Actual authority could be expressed or implied.

2.3.12.16 Our law in Uganda was based on common law. Under common law, contracts could either be written or unwritten.

Similarly, agency relationships could be written or unwritten contracts. Indeed, while an agent at the polling station would, for the reasons stated earlier, ordinarily require a written contract, most agents had ostensible power.[244]

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242 *ibid.*
243 *ibid.*
244 *ibid.*

2.3.12.17 There are many categories of agents. Some are specially appointed to undertake special or specific assignments while others could be public. While some agents might be appointed, others could be ostensible or apparent.[245]

Comment: With regard to the requirement of establishing a principal-agent relationship [See: **Principle 2.3.11 above**], and the difficulty thereof, might there be some value in providing for the presumption of agency in certain circumstances, as well as the imputation of authorisation – the onus then being on the candidate to show that either the relevant person was not in fact their agent or that the acts in question were not sanctioned or authorised?

2.3.13 Reports to police and the Electoral Commission

2.3.13.1 The duty of the Electoral Commission with regard to complaints made to it was stipulated under Section 15 (1) of the Electoral Commission Act, Cap. 140.

2.3.13.2 Allegations against the integrity of the Electoral Commission must be backed by independent cogent evidence. [246]

In *Kyamadidi v. Ngabirano & EC* (supra), there was no evidence on record to show that the 2nd respondent connived with the 1st 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.

2.3.14 Effect of commission of illegal practice

The commission of an illegal practice, once proved to the satisfaction of the court, is sufficient in itself, under Section 61 (1) (c) of the PEA, to set aside the election of a candidate as a Member of Parliament.[247]

In *Mawanda v. EC & Andrew Martial,*[248] the 2nd respondent had been found to have committed the illegal practice of bribery,

245 *Adoa & EC v. Alaso.*

246 *Kyamadidi v. Ngabirano & EC*, citing *Toolit Simon Akecha v. 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).

247 *Mawanda v. EC & Andrew Martial*

248 *ibid*.

contrary to Section 61 (1) of the PEA and of making a false statement concerning the character of a candidate, contrary to Section 73 (1) of the PEA. Either of these was sufficient cause to annul the election.

3.0 BURDEN AND STANDARD OF PROOF

3.1 The General Rule as to Burden of Proof

3.1.1 The burden of proof lies on the petitioner to prove the assertions raised in their petition.[249] This means that he who alleges must prove.[250]

3.1.2 The burden of proof remains on the petitioner throughout the trial to prove the assertions raised in their petition to the satisfaction of the court. The burden does not shift.[251] Even where the respondent raises the defence of alibi, the petitioner still has the burden to place them at the scene.[252]

3.2 A shifting burden in relation to academic qualifications

3.2.1 An exception to the rule that the burden of proof lies on the petitioner relates to situations where the authenticity of one's academic credentials is challenged. In such a case, the burden of proving the authenticity of the impugned academic credentials rests on the person who relies on those credentials.[253]

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249 *Kyakulaga and EC v. Waguma*; *Akuguzibwe v. Muhumuza, Mulimira and EC,* citing Section 61 of the PEA and *Dr Kiiza Besigye v. YK Museveni & Another,* Presidential Election Petition No.1 of 2001; *Kalemba and EC v. Lubega,* citing Section 61 of the PEA and *Dr Kiiza Besigye v. YK Museveni & Another*, Presidential Election Petition No.1 of 2001; *Opendi v. EC and Ayo*, citing *Peter Mugema v. Peter Abedi Mudiobole,* Election Petition Appeal No. 30 of 2011; *Kirya Grace Wanzala v. Nelson Lufafa and The Electoral Commission*. See also *Waligo Aisha Nuluyati v. Ssekindi Aisha and the Electoral Commission*; *Hon. Okot John Amos v. The Electoral Commission and Prof. Morris Ogenga Latigo Wodamina*; *Winifred Komuhangi Masiko v. Bamukwatsa Betty aka Muzanira Betty and the Electoral Commission*; *Hon. Nakate Lilian Segujja & The Electoral Commission v. Nabukenya Brenda*; *Mutembuli Yusuf v. Nagwomu Moses Musamba and the Electoral Commission*; *Toolit Simon Aketcha v. Oulanyah Jacob L'Okori and The Electoral Commission*; *Onega Robert v. Hashim Sulaiman and The Electoral Commission.*

250 *Akuguzibwe v. Muhumuza, Mulimira and EC*; Waligo Aisha Nuluyati v. *Ssekindi Aisha and the Electoral Commission*.

251 *Mutembuli Yusuf v. Nagwomu Moses Musamba and the Electoral Commission*.

252 *Kiiza v. Kabakumba Masiko*.

253 *Acen Christine Ayo v. Abongo Elizabeth*, citing *Abdul Balingira Nakendo v. Patrick Mwondah*, Supreme Court Election Appeal No. 9 of 2006 – dictum of Katureebe JSC. But also see *Ocen and EC v. Ebil* (citing *Peter Mugema v. Mudi Obole Abed Nasser,* Election Petition Appeal No. 30 of 2011); *Chemoiko v. Soyekwo and EC*; *Ninsiima v. Azairwe and EC*, citing *Peter Mugema v. Peter Abedi Mudiobole,* Election Petition Appeal No. 30 of 2011; *Odo Tayebwa v. Arinda and EC*; *Kyamadidi v. Ngabirano and EC*, citing Section 61 (1) and (3) of the PEA and *Anthony Harris Mukasa v. Dr Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No.18 of 2007; *Acen Christine Ayo v. Abongo Elizabeth*, citing *Masiko Winifred Komuhangi v. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002 – dictum of Kikonyogo DCJ for the proposition that: 'The burden of proof in election matters lay squarely on the petitioner to prove all the allegations. The burden never shifted to the respondent.'

3.3 Standard of Proof: The Various Standards Apparent in the Jurisprudence

According to Section 61 of the PEA, an election can be set aside if a particular allegation is proved to the satisfaction of the court on a balance of probabilities.

3.3.1 Balance of probabilities

3.3.1.1 The grounds of a petition are to be proved on a balance of probabilities;[254] and not beyond reasonable doubt as is the case for criminal matters.[255]

3.3.1.2 As regards parliamentary election petitions, the standard of proof is that prescribed by Section 61(3) of the Parliamentary Elections Act, namely proof on a balance of probabilities.[256]

3.3.1.3 The standard of proof that is slightly higher than that on a balance of probabilities is, on the authority of *Kiiza Besigye v. Museveni* (Supreme Court Election Petition No. 1 of 2001), applicable to presidential election petitions.[257]

3.3.1.4 While the Parliamentary Elections Act prescribes a standard of proof (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 of proof provided for by the Parliamentary Elections Act.[258]

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254 *Ikiror v. Orot;* Kasirabo *and EC v. Mpuuga* (citing Section 61 (3) of the PEA and *Paul Mwiru v. Hon Igeme Nathan Nabeta Samson and 2 Others,* Court of Appeal Election Petition Appeal No.6 of 2011) and *Kyakulaga and EC v. Waguma* (citing Section 61 (3) of the PEA and *Paul Mwiru v. Hon Igeme Nathan Nabeta Samson and 2 Others,* Court of Appeal Election Petition Appeal No.6 of 2011).

255 *Mandera v. Bwowe***.**

256 *Waligo Aisha Nuluyati v. Ssekindi Aisha and the Electoral Commission*; *Freda Nanziri Kase Mubanda v. Mary Babirye Kabanda and the Electoral Commission*. See also *Emorut Simon Peter v. Akurut Violet Adome and the Electoral Commission*.

257 *Waligo Aisha Nuluyati v. Ssekindi Aisha and the Electoral Commission*.

258 *Freda Nanziri Kase Mubanda v. Mary Babirye Kabanda and the Electoral Commission*, citing *Paul Mwiru v. Hon. Igeme Nathan Nabeta Samson & 2 Others* (Court of Appeal Election Petition Appeal No. 6 of 2011).

3.3.1.5 Unlike the Parliamentary Elections Act, the Presidential Elections Act does not specify a standard of proof for presidential election petitions; hence, *Kizza Besigye v. Museveni* is the controlling precedent for such petitions.[259]

3.3.1.6 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. Sections 61(1) and (3) of the Parliamentary Elections Act are neither contradictory nor mutually exclusive; they are complementary. Section 61(1) restricts nullification of an election result in 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'.[260]

3.3.1.7 It is wrong for courts to rely on the authority of *Kizza Besigye v. Museveni* (Supreme Court Election Petition No. 1 of 2001) when trying parliamentary and other election petitions filed under the Parliamentary Elections Act as it is no longer applicable to them.[261]

3.3.1.8 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, 2005 contains a prescribed standard of proof.[262]

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259 *Waligo Aisha Nuluyati v. Ssekindi Aisha and the Electoral Commission*.

260 *Hon. Nakate Lilian Segujja & The Electoral Commission v. Nabukenya Brenda*, citing *Arumadri John Drazu v. Atoka Isaac & Another*, Court of Appeal EPA No. 37 of 2016 and *Mukasa Anthony Harris v. Dr Bayiga Michael Philip Lulume*, Supreme Court Parliamentary Election Petition Appeal 18 of 2007.

261 *Waligo Aisha Nuluyati v. Ssekindi Aisha and the Electoral Commission*, citing *Toolit Simon Akecha v. Oulanyah Jacob L'Okori,* Court of Appeal Election Petition Appeal No. 19 of 2011; and *Paul Mwiru v. Hon. Igeme Nathan Nabeta*, Court of Appeal Election Petition Appeal No. 2 of 2011. See also *Freda Nanziri Kase Mubanda v. Mary Babirye Kabanda and the Electoral Commission*.

262 *Hon. Nakate Lilian Segujja & The Electoral Commission v. Nabukenya Brenda*, citing *Mukasa Anthony Harris v. Dr Bayiga Michael Philip Lulume*, Supreme Court Parliamentary Election Petition Appeal 18 of 2007.

3.3.2 Proof slightly above the balance of probabilities

3.3.2.1 The standard of proof in election petitions is slightly above the standard of proof on a balance of probabilities that is employed in ordinary suits.[263]

3.3.2.2 The standard of proof in election petitions is slightly higher than that in ordinary civil suits, in that it is to the satisfaction of the court. This is because of the importance of the electoral process and the fact that election petitions concern the freedoms and liberties of the citizenry in a fundamental way.[264]

3.3.2.3 A person seeking a court order to set aside the election of an 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. 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.[265]

3.3.3 Proof on a balance of probabilities, with credible/cogent evidence

3.3.3.1 The petitioner has to adduce credible or cogent evidence to prove their allegations to the stated standard of proof.[266]

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263 *Kalemba and EC v. Lubega*, citing *Matsiko Winfred Kyomuhangi v. J Babihuga*, Election Petition No.9 of 2002 and *Akuguzibwe v. Muhumuza, Mulimira and EC*, citing *Matsiko Winfred Kyomuhangi v. J Babihuga*, Election Petition No.9 of 2002. In the *Akuguzibwe v. Muhumuza, Mulimira and EC* case, the Court of Appeal held that it was not enough for the 1st 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 1st respondent should have shown that the said persons were present and ready to vote but were denied the right to do so. See also *Kirya Grace Wanzala v. Nelson Lufafa and The Electoral Commission,* citing *Matsiko Winfred Kyomuhangi v. J. Babihuga*, Election Petition No. 9 of 2002; *Mugisha Vincent v. Kajara Aston Peterson, Mulamira Barbara and The Electoral Commission*.

264 *Toolit Simon Aketcha v. Oulanyah Jacob L'Okori and The Electoral Commission*, citing *Col. (Rtd) Dr K. Besigye v. Museveni Yoweri Kaguta and the Electoral Commission*, Supreme Court Election Petition No. 1 of 2001.

265 *Okello P Charles Engola Macodwogo and the Electoral Commission v. Ayena Odongo Krispus Charles*, citing *Mukasa Anthony Harris v. Dr Bayiga Michael Philip Lulume*, Election Petition Appeal No. 18 of 2007 and *Masiko Winfred Komuhangi v. Babihuga J. Winnie*, Court of Appeal Election Petition Appeal No. 1 of 2002.

266 *Kyamadidi v. Ngabirano and EC*, citing *Masiko Winfred Komuhangi v. Babihuga J Winnie*, Court of Appeal Election Petition Appeal No.1 of 2002 and *Paul Mwiru v. Hon Igeme Nathan Nabeta Samson and 2 Others*, Court of Appeal Election Petition Appeal No.6 of 2011. See also *Winifred Komuhangi Masiko v. Bamukwatsa Betty aka Muzanira Betty and the Electoral Commission.*

3.3.4 Proof to the satisfaction of the court

The petitioner has to prove their case to the satisfaction of the court.[267]

3.3.5 Proof on a balance of probabilities, to the satisfaction of the court

The 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.[268]

3.3.6 Proof on a balance of probabilities, to the satisfaction of the court, with credible/cogent evidence

3.3.6.1 Section 61 (3) of the PEA requires that grounds have to be proved, firstly, to the satisfaction of court, and secondly, on a balance of probabilities.[269] The satisfaction of court and balance of probabilities go hand in hand.[270]

3.3.6.2 The standard of proof required is proof on a balance of probabilities. Though the standard of proof was set by the statute to be on a balance of probabilities, given the public importance of an election petition, the facts in the petition had to be proved to the satisfaction of the court.

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267 *Kyakulaga and EC v. Waguma*; *Kasirabo and EC v. Mpuuga*; *Betty Muzanira Bamukwatsa v. Masiko Winnifred Komuhangi and 2 Others*.

268 *Ibaale v. Katuntu and EC*; *Ocen and EC v. Ebil*, citing Section 61 (1) and (3) of the PEA; *Opendi v. EC and Ayo*, citing *Peter Mugema v. Peter Abedi Mudiobole*, Election Petition Appeal No. 30 of 2011 (itself referring to Section 61 (1) and (3) of the PEA); *Anthony Harris Mukasa v. Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No.18 of 2007 and *Masiko Winifred Komuhangi v. Winnie J Babihuga*, Supreme Court Election Petition Appeal No. 9 of 2002; *Kirya Grace Wanzala v. Nelson Lufafa and The Electoral Commission*, citing Sections 61(1) and (3) of the PEA and *Rtd Col. Dr Kizza Besigye v. Museveni Yoweri Kaguta and Another,* Presidential Election Petition No. 1 of 2001. See also *Hon. George Patrick Kassaja v. Frederick Ngobi Gume and The Electoral Commission*; *Mutembuli Yusuf v. Nagwomu Moses Musamba and the Electoral Commission.*

269 *Nakato v. Babirye and EC*; *Nabukeera v. Kusasira and EC*; *Isodo v. Amongin*; *Nabukeera v. Kusasira and EC*, citing Blyth v. Blyth (1966) AC 643 (dictum of Lord Denning); *Kamba Saleh Moses v. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal No. 27 of 2011 and *Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (dictum of Odoki CJ)); *Odo Tayebwa v. Arinda and EC*, citing Section 61 (3) of the PEA.

270 *Nakato v. Babirye and EC*.

3.3.6.3 A petitioner had to prove credible and/or cogent evidence to prove their case to the satisfaction of the court.[271] 'Cogent' meant compelling or convincing.[272] 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.[273]

3.3.6.4 The standard of proof was slightly higher than on a preponderance of probabilities but short of proof beyond reasonable doubt.[274]

3.3.6.5 Given the public importance of elections, the degree of proof in election petitions was relatively higher than in a normal civil action. The term 'proved to the satisfaction of the court on a balance of probabilities' placed a duty upon the petitioner to prove their case to the level where the court was convinced that the occurrence of a fact to have been more probable than not.[275]

3.3.6.6 The more serious an allegation or the more serious its consequences if proven, the stronger the evidence had to be before a court to find the allegation proved on the balance of probabilities.[276]

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271 *Kiiza v. Kabakumba Masiko*, citing *Masiko Winifred Komuhangi v. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002) (dictum of Kikonyogo DCJ); *Isodo v. Amongin*, citing *Masiko Winifred Komuhangi v. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002 (dictum of Kikonyogo DCJ); *Ninsiima v. Azairwe and EC*, citing *Peter Mugema v. Peter Abedi Mudiobole*, Election Petition Appeal No. 30 of 2011 (itself referring to Section 61 (1) and (3) of the PEA) and *Chemoiko v. Soyekwo and EC*, citing Section 61 (1) and (3) of the PEA; *Anthony Harris Mukasa v. Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No.18 of 2007; *Masiko Winifred Komuhangi v. Winnie J Babihuga*, Court of Appeal Election Petition Appeal No. 9 of 2002; *Paul Mwiru v. Hon. Igeme Nathan Nabeta Samson and 2 Others*, Court of Appeal Election Petition Appeal No.6 of 2011 (dictum of Byamugisha JA); *Blyth v. Blyth* (1966) AC 643 (dictum of Lord Denning) and *Rtd Col. Dr Kiiza Besigye v. Electoral Commission and YK Museveni*, Presidential Election No. 1 of 2006 (dictum of Odoki CJ).

272 *Kiiza v. Kabakumba Masiko*, citing Black's Law Dictionary, 6th Edition; *Isodo v. Amongin*, citing Black's Law Dictionary, 6th Edition and *Sematimba and NCHE v. Sekigozi*, citing Black's Law Dictionary, 6th Edition.

273 *Kiiza v. Kabakumba Masiko*, citing *Masiko Winifred Komuhangi v. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002 (dictum of Kikonyogo DCJ); *Sematimba and NCHE v. Sekigozi*, citing Section 61(3) of the PEA; *Masiko Winifred Komuhangi v. Winnie J Babihuga*, Election Petition Appeal No. 9 of 2002 (dictum of Kikonyogo DCJ) and *Paul Mwiru v. Hon Igeme Nathan Nabeta Samson and 2 Others*, Court of Appeal Election Petition Appeal No.6 of 2011.

274 *Isodo v. Amongin*, citing *Odo Tayebwa v. Nasser Basajabalaba and Another*, Election Appeal No.13 of 2001 and *Rtd Col. Dr Kiiza Besigye v. Electoral Commission and YK Museveni*, Presidential Election No. 1 of 2006.

275 *Odo Tayebwa v. Arinda and EC*, citing *Anthony Harris Mukasa v. Dr Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No.18 of 2007.

276 *Kyamadidi v. Ngabirano and EC*, citing *Home Department v. Rehman* (2003) 1 AC 153. In the *Kyamadidi v. Ngabirano and EC* 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.

3.3.7 Proof higher than on the balance of probabilities, but not beyond reasonable doubt

3.3.7.1 The balance of probabilities in election petitions was higher than that in ordinary civil suits, though not beyond reasonable doubt.[277]

3.3.7.2 The standard of proof was 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.[278]

3.3.7.3 It was now well established that the standard of proof in election petitions was higher than that which was applied in ordinary civil cases, that is to say, on a balance of probabilities; although it was not equal to the standard of proof beyond reasonable doubt which was applied in criminal cases.[279]

3.3.8 Proof that ensured absence of any reasonable doubt

3.3.8.1 Election petitions were of critical importance to the public and raising mere suspicion was not enough. [280]

3.3.8.2 Satisfaction of court was key, especially where there were allegations of illegal practices and offences. [281]

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277 *Nakato v. Babirye and EC*, citing *Kamba Saleh Moses v. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal No. 27 of 2011 and *Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (dictum of Odoki CJ).

278 *Ocen and EC v. Ebil*, citing *Rtd Col. Dr Kiiza Besigye v. YK Museveni & Another*, Presidential Election Petition No.1 of 2001; *Mukasa Anthony Harris v. Dr Bayiga Michael Phillip Lulume*, Supreme Court Election Petition Appeal No.18 of 2007 and *Masiko Winfred Komuhangi v. Babihuga J Winnie*, Court of Appeal Election Petition Appeal No.1 of 2002. See also *Turiyo Tito v. Kangwagye Steven and the Independent Electoral Commission*, citing *Muhindo Rehema v. Winfred Kiiza*, Court of Appeal Election Petition Appeal No. 29 of 2011.

279 *Adoa and EC v. Alaso*. See also *Turiyo Tito v. Kangwagye Steven and the Independent Electoral Commission*, citing *Muhindo Rehema v. Winfred Kiiza*, Court of Appeal Election Petition Appeal No. 29 of 2011. See also *Onega Robert v. Hashim Sulaiman and The Electoral Commission*, citing *Col. (Rtd) Dr Kiiza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Election Petition No. 1 of 2001 and *Mukasa Anthony Harris v. Dr Bayiga Michael Lulume*, SCCA No. 18 of 2007 and Section 61(1) of the PEA.

280 *Nakato v. Babirye and EC*, citing *Blyth v. Blyth* (1966) AC 643 (dictum of Lord Denning); *Nabukeera v. Kusasira and EC*, citing *Blyth v. Blyth* (1966) AC 643 (dictum of Lord Denning); *Kamba Saleh Moses v. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal No. 27 of 2011 and *Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (dictum of Odoki CJ).

281 *Nakato v. Babirye and EC*, citing *Blyth v. Blyth* (1966) AC 643 (dictum of Lord Denning).

3.3.8.3 The expression 'proved to the satisfaction of court' connoted absence of any reasonable doubt – the amount of proof which produced the court's satisfaction had to be that which left the court without reasonable doubt.[282]

3.3.8.4 It did not mean that the matter had to be proved beyond reasonable doubt.[283]

3.3.8.5 It meant that a court could not be said to be 'satisfied' when it was in a state of reasonable doubt.[284]

3.3.9 Proof beyond reasonable doubt

Forgery of academic documents was criminal in nature, and the standard of proof in this regard was 'beyond reasonable doubt' – a higher standard than in election petitions.[285] 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.[286]

3.3.10 The special situation of fraud

3.3.10.1 Since election matters are civil in nature, the rules as to pleading and proving fraud in civil matters also apply to them. Particulars of fraud in an election should be specifically pleaded and proved.[287]

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282 *Ntende v. Isabirye*, citing *Col. Rtd Dr Kiiza Besigye v. Yoweri Kaguta Museveni & Another*, Presidential Election Petition No.1 of 2001 (dictum of Mulenga JSC).

283 *Nabukeera v. Kusasira and EC*, citing *Blyth v. Blyth* (1966) AC 643 (dictum of Lord Denning); *Kamba Saleh Moses v. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal Number 27 of 2011 and *Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (dictum of Odoki CJ).

284 *Ntende v. Isabirye*, citing *Blyth v. Blyth* (1966) AC 643 (dictum of Lord Denning); *Nakato v. Babirye and EC*, citing *Blyth v. Blyth* (1966) AC 643 (dictum of Lord Denning); *Nabukeera v. Kusasira and EC*, citing *Blyth v. Blyth* (1966) AC 643 (dictum of Lord Denning); *Kamba Saleh Moses v. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal No. 27 of 2011 and *Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No.1 of 2001 (dictum of Odoki CJ).

285 *Acen Christine Ayo v. Abongo Elizabeth*, citing S. 5 (1) (b) of the PEA, which 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.'

286 *ibid.*

287 *Okello P Charles Engola Macodwogo and the Electoral Commission v. Ayena Odongo Krispus Charles.*

3.3.10.2 Fraud must be pleaded specifically.[288]

3.3.10.3 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.[289]

3.3.10.4 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.[290]

3.3.10.5 The burden of proof lies on the petitioner to prove his case to the satisfaction of the court.[291]

3.3.10.6 The burden of proof lay on the petitioner to prove the allegations he made 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.[292]

3.3.10.7 Given the public importance of elections, the degree of proof in election petitions was relatively higher than in a normal civil action. The term 'proved to the satisfaction of the court on a balance of probabilities' placed a duty upon the petitioner to prove their case to the level where the court was convinced that the occurrence of a fact to have been more probable than not.[293]

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288 *Okello P Charles Engola Macodwogo and the Electoral Commission v. Ayena Odongo Krispus Charles*, citing *Fredrick J K Zaabwe v. Orient Bank Ltd and 5 Others*, Supreme Court Civil Appeal No. 4 of 2006.

289 *Okello P Charles Engola Macodwogo and the Electoral Commission v. Ayena Odongo Krispus Charles*, citing *Kampala Bottlers Ltd v. Damanico (U) Ltd*, Supreme Court Civil Appeal No. 22 of 1992, per Wambuzi, CJ.

290 *ibid*. In the Okello Charles case the Court of Appeal found that there was evidence in the form of a letter authored by Lt. Col. David Basimbwa (Division Commander, Air Defence, and UPDF) and relied upon by the NCHE, for the existence of the institution from which the 1st appellant obtained his certificates regarding Air Defence courses. The 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.

291 *Ocen and EC v. Ebil*, citing Section 61 (1) and (3) of the PEA.

292 *Odo Tayebwa v. Arinda and EC*, citing Section 61 (3) of the PEA.

293 *Odo Tayebwa v. Arinda and EC*, citing *Anthony Harris Mukasa v. Dr Michael Philip Lulume Bayiga*, Supreme Court Election Petition Appeal No. 18 of 2007.

3.3.11 Election offences and criminal offences

3.3.11.1 Where the petitioner alleged the commission of election offences, the burden lay on him or her to prove all such allegations to the satisfaction of the court.[294]

3.3.11.2 Findings on criminal offences could not be based on mere surmise or conjecture but on accurate, succinct and credible evidence.[295]

Comment: There is a clear inconsistency evident in the various legal standards of proof apparent in the jurisprudence. For instance, various decisions had variously stipulated the requisite standard of proof as:

i) proof on the balance of probabilities;

ii) proof slightly above the balance of probabilities;

iii) proof on the balance of probabilities, with credible/cogent evidence;

iv) proof to the satisfaction of the court;

v) proof on a balance of probabilities, to the satisfaction of the court;

vi) proof on a balance of probabilities, to the satisfaction of the court, with credible/cogent evidence;

vii) proof higher than on the balance of probabilities, but not beyond reasonable doubt;

viii) proof which ensured absence of any reasonable doubt; and

ix) proof beyond reasonable doubt.

These cannot all be correct. It is critical for the Court of Appeal, as the apex court in this regard, to reach consensus and provide a definitive position in this regard – especially since the standard of proof adopted has a direct bearing on the outcome of any particular case.

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294 *Okello P Charles Engola Macodwogo and the Electoral Commission v. Ayena Odongo Krispus Charles*.

295 *ibid.,* citing *John Kiarie Waweru v. Beth Wambui Mugo and 2 Others* [2008] Kenya Law Reports.

Comment:

Emerging evidentiary principles from the foregoing analysis (legal burden of proof, and standards of proof)

1. The petitioner has the legal burden of proof imposed by Section 60 of the PEA to prove his or her case to the satisfaction of the court. In proving a case, the petitioner has to prove the permissible grounds on which an election might be set aside. At this point, the second principle kicks in and that is how to prove these grounds, which naturally entails evidence. The evidence, like in all cases, whether criminal or civil, must be cogent, reliable, strong and credible. These adjectives speak to the weight of evidence, which is determined by the court. The evidence might be direct as in altered DR forms or circumstantial as in bribery cases and other electoral offences. Traditionally, standard of proof is of two kinds: *on a balance of probabilities* or *beyond reasonable doubt*. The first kind (balance of probabilities) is the standard applicable in civil cases and it is this standard that applies to electoral irregularities that do not have the status of 'offence'. The second kind (beyond reasonable doubt[296]) is applicable in criminal cases under the Penal Code Act Cap. 120. A third kind of standard was introduced by case law in election petitions, and that is: *standard of proof slightly higher than in civil cases but not as high as in criminal cases*. This standard applies to allegations of electoral offences like bribery, intimidation etc. A unique aspect of this standard is the requirement for independent evidence to corroborate affidavits of the petitioner alleging the opponent committed an electoral offence.

2. Once the court is satisfied that the petitioner has proved grounds for setting aside an election, through presentation of evidence (which has been admitted, analysed and evaluated) and the law, then he or she is said to have discharged the legal burden of proving to the satisfaction of the court that the election ought to be set aside.

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[296] *Woolmington v. DPP* [1935] AC 462 where the common law principle based on the doctrine of presumption of innocence in criminal cases was re-affirmed by the House of Lords (Viscount Sankey held that '…If at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner…the prosecution has not made out the case and the prisoner is entitled to an acquittal.')

3. Apart from the reference in one case *(Acen Christine Ayo v. Abong Elizabeth* (supra)) to the standard of proof in criminal cases, there has been consistency by the Court of Appeal on the legal burden of proof (to the satisfaction of the court) and standard of proof of evidence (*balance of probabilities and slightly higher standard than balance of probabilities)* in election petitions.

4. The definition of the principle 'balance of probabilities' was clarified in the classic case of *Miller v. Minister of Pensions*. It simply means that evidence in a civil case must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but if the probabilities are equal, it is not.[297]

5. The Supreme Court requires proof beyond reasonable doubt to prove alleged offences in Presidential Petition owing to its importance. This standard should not be automatically transposed to petitions under the PEA as these are not at the same status as a presidential petition.

[297] *Miller v. Minister of Pensions* (1947) 2 All ER 372, 374.

4.0 PROCEDURAL AND EVIDENTIARY ISSUES

4.1 Timelines

4.1.1 Essential steps in appeal

4.1.1.1 Under Rule 82 of the Court of Appeal Rules, a person served with a notice of appeal could 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 claimed 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.[298]

4.1.1.2 Taking an essential step was the performance of an act by a party, whose duty was to perform that fundamentally necessary action demanded by the legal process, so that, subject to the permission by the court, if that action was not performed as by law prescribed, then whatever legal process had been done before, became a nullity, as against the party who had the duty to perform the act.[299]

4.1.1.3 In addition, election matters were by their very nature a unique breed of litigation where time was of great importance. There was need for expediency in handling, hearing and determining election appeals. As such, there was a duty upon the intending appellant to vigilantly pursue their appeal.[300]

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298 *Omara v. Abacacon and EC*, citing *Peter Mukasa Bakaluba and Another v. Mary Margaret Nalugo Sekiziyivu*, Court of Appeal Election Petition Application No. 24 of 2011.

299 *ibid*, citing *Moses Kasibante v. The Electoral Commission*, Court of Appeal Election Petition Application No.7 of 2012.

300 *ibid.*, citing *Moses Kasibante v. The Electoral Commission*, Court of Appeal Election Petition Application No.7 of 2012 and *Electoral Commission and Another v. Piro Santos*, Civil Application No.22 of 2011 (itself citing the Kenyan case of *Muiyah v. Nyangah and Others* [2003] 2 EA 616 C.H.C.K). In the instant appeal, the High Court's decision was rendered on 13 June 2016, and the appellant filed a notice of appeal on 24 June 2016, which was endorsed by the Registrar on 29 June 2016. In terms of Rule 29 of the Parliamentary Elections Petitions Rules, 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 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.

In the case of *Omara v. Abacacon and EC* (supra), the High Court's decision was rendered on 13 June 2016, and the appellant filed a notice of appeal on 24 June 2016, which was endorsed by the Registrar on 29 June 2016. In terms of Rule 29 of the Parliamentary Elections Petitions Rules, 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 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.

4.1.2 Timelines for filing and prosecuting petitions

General

4.1.2.1 Section 1 (1) of the PEA defined an election petition as one which was filed in accordance with Section 60 of the same Act.[301]

4.1.2.2 In terms of Section 60 of the Act, election petitions were 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.[302]

4.1.2.3 One of the grounds for setting aside an election, under Section 61 (1) of the PEA, was that the candidate was at the time of their election not qualified or was disqualified for election as Member of Parliament.[303]

4.1.2.4 Under Section 60 (3) of the PEA, the election petition had 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.

301 *Ikiror v. Orot.*
302 *Ikiror v. Orot; Okabe v Opio and EC*; *Namujju Dionizia Cissy v. Martin Kizito Sserwanga.*
303 *Ikiror v. Orot.*

4.1.2.5 In *Ikiror v. Orot,*[304] the following timeline for determination of an election matter was laid down: The petition had to be served upon the respondent within 7 days of its being filed.

4.1.2.6 The court had to proceed to hear and determine the petition expeditiously and could, for that purpose, suspend any other matter pending before it.

4.1.2.7 At the conclusion of the hearing, the court could determine and declare that the respondent had been duly elected; that some other candidate was the one duly elected; or that the respondent was not duly elected, the seat was thus vacant and that a re-election had to be held.

4.1.2.8 The High Court had to determine a matter within six months of its being lodged in court.

4.1.2.9 A person aggrieved by the decision of the High Court had a right to appeal to the Court of Appeal, through lodging a notice of appeal within 7 days of the decision.

4.1.2.10 The Court of Appeal had to hear and determine the appeal within 6 months from the date the appeal was filed.

4.1.2.11 The decision of the Court of Appeal is final.

4.1.2.12 The entire Part X of the PEA (Sections 60 to 67) is characterised by strictness as to time of lodgment and prosecution of an election petition, including an appeal, if any.

4.1.2.13 This strictness had been emphasised by persuasive jurisprudence from the High Court of Kenya.[305]

4.1.2.14 The provisions of Part X of the PEA had to be interpreted and applied with this aspect of strictness as to timelines being of material significance.[306]

In *Ikiror v. Orot* (supra) the appellant had pursued the petition under Part X of the PEA, the latest date for the filing would have been 3 April 2016. She would also have had her petition supported by the signatures of not less than 500 voters registered in the constituency. The appellant had sought to present her petition

304 *ibid*

305 *Ikiror v. Orot, ibid.*, citing the Kenyan case of *Muiya v. Nyagah and Others* [2003] 2 EA 616 at p.621)

306 *Ikiror v. Orot, ibid.*

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 of the PEA. She had presented the petition on 22 September 2016. In terms of Section 60 (3) of the PEA, her petition was lodged out of time, and was therefore null and void.

4.1.2.15 The Parliamentary Elections Act of 2005 (including Sections 1, and 60-67 of the Act) operationalised Article 86 of the Constitution. Section 86 of the PEA dealt with questions of membership of Parliament. While this Section also operationalised Articles 80 and 86 of the Constitution, it had certain provisions which excluded some of its own very provisions from applying to election petitions whose adjudication was a preserve of Part X of the PEA (Sections 60-67). The import of Section 86 (3) and (4) was that only after there had been compliance with Part X of PEA (Sections 60-67) could the Attorney General or any petitioner (with the support of the signatures of at least 50 registered voters within the constituency) carry out what was required by Section 86 (3) and (4) of the Act.

4.1.2.16 It is also significant, in this regard, that the decision of the High Court determining the question referred to it under Section 86 (3) and (4) was appealable to the Court of Appeal, and from the Court of Appeal to the Supreme Court under Section 86 (5). This was very different from the case of election petitions covered by Part X (Section 60-67) of the PEA, where the right of appeal from the High Court only stopped at the Court of Appeal according to Section 66 (3) of the Act.

4.1.2.17 As such, a petition relating to the determination of whether or not one had been validly elected as a Member of Parliament through a general election or by-election could only be brought in accordance with the provisions of Part X (Sections 60-67) of the Act. By contrast, under Sections 86 (3) and (4) of the PEA, the Attorney General or a petitioner could pursue a petition involving a question as to membership of someone to Parliament on grounds other than those which one had to rely upon when lodging a petition under Part X (Sections 60-67) of the PEA.

In the case of *Ikiror v. Orot,* the appellant 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 of the PEA. She had presented the petition on 22 September 2016. The Court of Appeal observed that if the appellant had pursued the petition under Part X of the PEA, the latest date for the filing would have been 3 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. According to the court, in terms of Section 60 (3) of the PEA, her petition was lodged out of time, and was therefore null and void. The appeal before the court, and the petition before the lower court, brought under Articles 80 and 86 of the Constitution, and Section 86 of the PEA, was not competent is so far as Section 86 (3) mandatorily required the appellant to first comply with 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.

4.1.2.18 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 terms of Rule 31 of the said Rules, the record of appeal should be filed within 30 days after filing the Memorandum of Appeal. 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 Court of Appeal Rules (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 with respect to electoral litigation.[307]

[307] *Kubeketerya v. Kyewalabye and EC*, citing *Peter Mukasa Bakaluba and Another v. Mary Margaret Nalugo Sekiziyivu*, Court of Appeal Election Petition Application No. 24 of 2011; *Electoral Commission and Another v. Piro Santos Eruga,* Civil Application No.22 of 2011 and *Kasibante Moses v. Katongole Singh Marwaha*, Court of Appeal Election Petition Application No.8 of 2012. According to the Court, citing *Wanyama Gilbert Mackmot v. Hisa Albert and Electoral Commission*, Court of Appeal Election Petition No. 99 of 2016, Rule 83 was only applicable in respect of Local Council elections and not in parliamentary election petitions. In the *Kubeketerya v. Kyewalabye and EC* case, the Court of Appeal observed that the appellant had filed the Memorandum of Appeal 8 days out of time, contrary to Rule 30 (b), and had also not complied with Rule 31.

4.1.2.19 Election petitions had to be handled expeditiously. The rules and timelines for filing proceedings were couched in mandatory terms. They had to be strictly interpreted and adhered to.[308]

4.1.2.20 Rule 29 of the Parliamentary (Interim Provisions) 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.[309]

4.1.2. 21 Rule 30 (2) requires a memorandum of appeal to be filed within 7 days of the filing of the notice of appeal whereas in the present case, a written had been given.

4.1.2.22 Rule 31 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.

4.1.2.23 This rule fundamentally differs from Rule 83 of the Court of Appeal Rules. Under Rule 83 of the Court of Appeal Rules, an intending appellant who applied for a copy of the High Court within 30 days of the judgment was granted a consequential extension of time until the High Court had prepared and delivered to the appellant a copy of the Certified High Court Record. Before then, the time to file a record of appeal did not begin to run. Again, under Rule 83 (1) of the Court of Appeal Rules, an intending appellant had to file a memorandum of appeal together with the record of appeal. This was not so under the electoral law referenced above.

4.1.2. 24 Under the referenced electoral law, no consequential extension of time was provided for the filing of either the memorandum of appeal or the record of appeal. Each of these documents had to be prepared and filed within the time prescribed by the electoral law. In this regard, Article 126 (2) (e) was not a magic wand in the hands of defaulting litigants.[310]

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308 *Kubeketerya v. Kyewalabye and EC.*

309 *Omara v. Acon, EC, UNEB and NCHE.*

310 *ibid*, citing *Abiriga Ibrahim v. Musema Mudathir Bruce*, Court of Appeal Election Application No.24 of 2016; *Kirya Grace Wazala v. Daudi Migereko and Another*, Election Reference Appeal No. 39 of 2012; *Peter Mukasa Bakaluba and Another v. Mary Margaret Nalugo Sekiziyivu*, Court of Appeal Election Petition Application No. 24 of 2011 and *Moses Kasibante v. The Electoral Commission*, Court of Appeal Election Petition Application No.7 of 2012. In the *Omara v. Acon, EC, UNEB and NCHE* case, the Court of Appeal observed that the notice of appeal, having been filed on 15 June 2016, the memorandum of appeal ought to have been filed on or before the 22 June 2016 (not 6 September). The record of appeal ought to have been lodged with the Court of Appeal registry by 22 June 2016 (not 24 October 2016). In the court's view, both the

4.1.2.25 It was sufficient compliance with the law for a petitioner to file, within the 30 days stipulated under the PEA, 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) Rules) did not stipulate that all affidavits intended to be relied upon by the petitioner had to be filed within the restricted time.[311]

4.1.2. 26 Part X of the Parliamentary Elections Act, 2005, on election petitions, was not only intended to ensure that disputes concerning election of the people's representatives would be resolved without undue delay. It was also intended to foster the public interest in subjecting electoral disputes to fair trials and determination on the merits. [312]

4.1.2.27 It is now well accepted that in lodging an appeal within the legal framework governing election petitions, time was of the essence and the framework uniquely imposed a more onerous burden on the intending appellant with regard to time limits. An intending appellant had to take necessary steps to prosecute their appeal and to ensure that it was brought in time.[313]

In the *Turyasingura Esther*[314] case, which was an appeal from a decision of the Electoral Commission, the High Court found that the appeal was clearly time-barred because contrary to r 5(1) of the Parliamentary Elections (Appeals to the High Court from Commission) Rules, S.I. 141-1, it had been filed more than 5 days after the decision of the Electoral Commission complained of in the petition. The appeal had been filed more than a month later. The court noted that the use of the word 'shall' in the above provision made it mandatory and that in the absence of 'strong reasons', the petitioner could not ask 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 had no time for frivolous and vexatious applications such as the present one.

311 *Akuguzibwe v. Muhumuza, Mulimira and EC.*

312 *Gertrude Nakabira Lubega v. Hon Muyanja Mbabaali*, citing *Sitenda Sebalu v. Sam Njuba and the Electoral Commission*, Civil Appeal No. 26 of 2007.

313 *Turyasingura Esther v. The Electoral Commission and Nabanja Robbinah*, citing *Kasibante v. the Electoral Commission*, Election Petition Application No. 7 of 2012 at paras. 165-175.

314 *Turyasingura Esther v. The Electoral Commission and Nabanja Robbinah, ibid* .

court to ignore the error. The rules were not merely directory. Holding them to be merely directory and capable of being departed from would render them superfluous and defeat the intention of the lawmaker.

4.1.2.28 While timelines in election litigation were very crucial, court had to take into account the unique circumstances of each case. An appellant could not be expected to do anything beyond making countless requests for the record of proceedings, and the best way to do this was to write letters. Letters written in pursuance of a record of proceedings are proof of diligence of an appellant in pursuing their appeal. The duty to transfer the record of proceedings to the appellant lay upon the Registrar. In practice, however, diligent litigants did not have to sit and wait for the Registrar to deliver the record of proceedings to them; continued letters written to remind the Registrar and sometimes physical trips to the Registry to check on whether the Record is ready were therefore in order.[315]

In *Mugema Peter v. Mudiobole,*[316] the appellant's counsel had written two letters respectively requesting and reminding the Registry about their request for a typed and certified record of proceedings. The Court of Appeal held, citing *Fred Bwino Kyakulaga v. Badogi Ismail Waguma* (Election Petition Application No. 26 of 2016), that 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 August, although it mentioned that the record had been certified on 22 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.

315 *Mugema Peter v. Mudi Obole Abedi Nasser.*
316 *ibid.*

4.1.2.29 The provisions of Part X, including s. 60(3) which provided for the filing of election petitions within 30 days of the publication of the results of an election by the Electoral Commission, were not set in stone. Court retained the discretion to extend the time set out in s. 60(3). This was because the public interest in having election disputes expeditiously disposed of had to be balanced with the public interest in having them heard on their merits.[317]

In the *Gertrude Nakabira Lubega v. Hon Muyanja Mbabaali,*[318] the High Court found that the special circumstance of oversight on the part of the applicant's former advocates warranted the grant of an extension of time within which to file an election petition. The applicant had instructed her advocates to challenge the academic qualifications of the respondent but they did so through a stranger procedure which ended with the dismissal of her action. This 'misjudgment' on her advocates' part would not be visited on her. The applicant was not guilty of dilatory conduct. She filed the instant application a few days after her ill-conceived original action was dismissed. In the circumstances, the application was allowed, and the applicant was granted two weeks to file her petition and serve it on the respondent. However, this remains a controversial matter with contradictory decisions from the High Court. The majority High Court judges have determined that the 30-day window for filing of election petitions after publication of results in the gazette is a strict limitation period and court has no jurisdiction to extend it. (See *Patrick Nkarubo v. Theodore Ssekikubo,* MC 16 of 2016 in High Court at Masaka; *Ikiror Kevin v. Orot Ismael*, EP No.8 of 2016 in High Court at Soroti; *Ronald Katumba v. Kyeyune Haruna*, MC 24 of 2016.) The question whether the court has jurisdiction to extend time fixed by a statute remains undecided by the Court of Appeal. In *Kato Lubwama v. Habib Buwembo*, Election Petition Application No. 2 of 2017, the Court of Appeal granted leave to the applicant to appeal against a ruling granting leave to file a petition out of time.

317 *Gertrude Nakabira Lubega v Hon Muyanja Mbabaali*, citing *Sitenda Sebalu v. Sam Njuba and the Electoral Commission* (Civil Appeal No. 26 of 2007).

318 *Gertrude Nakabira Lubega v Hon Muyanja Mbabaali*, *ibid*.

4.1.2.30 It is also significant, in this regard, that the decision of the High Court determining the question referred to it under Section 86 (3) and (4) 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 (Section 60-67) of the PEA, where the right of appeal from the High Court stops at the Court of Appeal according to Section 66 (3) of the Act.[319] On the basis of the foregoing, a petition relating to the determination of whether or not one had been validly elected a Member of Parliament through a general election or by-election could only be brought in accordance with the provisions of Part X (Sections 60-67) of the Act. By contrast, under Sections 86 (3) and (4) of the PEA, the Attorney General or a petitioner could pursue a petition involving a question as to membership of someone in Parliament on grounds other than those which one had to rely upon when lodging a petition under Part X (Sections 60-67) of the PEA. In the latter case, time was less of the essence compared to the determination of an election petition.

The appeal before the court, and the petition before the lower court, brought under Articles 80 and 86 of the Constitution, and Section 86 of the PEA, was not competent in so far as Section 86 (3) mandatorily required 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.

4.1.3 Timelines for appeals

4.1.3.1 Rule 29 of the Parliamentary (Interim Provisions) Rules SI 141-2 required 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.

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[319] *ibid.*

4.1.3.2 Rule 30 (2) required 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.

4.1.3.3 Rule 31 required 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.

4.1.3.4 This rule fundamentally differed from Rule 83 of the Court of Appeal Rules. Under Rule 83 of the Court of Appeal Rules, an intending appellant who applied for a copy of the High Court record of proceedings within 30 days of the judgment was granted a consequential extension of time until the High Court had prepared and delivered to the appellant a copy of the Certified High Court Record. Before then, the time to file a record of appeal did not begin to run. Again, under Rule 83 (1) of the Court of Appeal Rules an intending appellant had to file a memorandum of appeal together with the record of appeal. This was not so under the electoral law referenced above.[320]

4.1.3.5 Under the referenced electoral law, no consequential extension of time was provided for the filing of either the memorandum of appeal or the record of appeal. Each of these documents had to be prepared and filed within the time prescribed by the electoral law.

In *Omara v. Acon* (supra), it was held that the notice of appeal, having been filed on 15 June 2016, the memorandum of appeal ought to have been filed on or before 22 June 2016 (not 6 September). The record of appeal ought to have been lodged with the Court of Appeal registry by 22 June 2016 (not 24 October 2016).

4.1.3.6 Article 126 (2) (e) of the Constitution was not a magic wand in the hands of defaulting litigants.[321] Both the applicant and his counsel were guilty of very dilatory conduct. Their failure to

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320 *ibid.*

321 *Omara v. Acon, ibid.,* citing *Abiriga Ibrahim v. Musema Mudathir Bruce*, Court of Appeal Election Application No. 24 of 2016; *Kirya Grace Wazala v. Daudi Migereko and Another*, Election Reference Appeal No. 39 of 2012; *Peter Mukasa Bakaluba and Another v. Mary Margaret Nalugo Sekiziyivu*, Court of Appeal Election Petition Application No. 24 of 2011 and *Moses Kasibante v. The Electoral Commission,* Court of Appeal Election Petition Application No. 7 of 2012.

comply with the timeframe set by the law was inexcusable. The court had no time for frivolous and vexatious applications such as the present one.

4.1.4 Filing affidavits in support of petition

4.1.4.1 It was sufficient compliance with the law for a petitioner to file, within the 30 days stipulated under the PEA, their petition together with an accompanying affidavit(s), and to then file other evidential affidavits thereafter.[322]

4.1.4.2 The law (including Rules 4 (8) and 15 of the Parliamentary Elections (Interim Provisions) Rules) did not stipulate that all affidavits intended to be relied upon by the petitioner had to be filed within the restricted time.[323]

4.1.5 Service of petition out of time

4.1.5.1 The controlling jurisprudence in this regard was the decision of the Court of Appeal in *Muhindo Rehema v. Winfred Kizza and Electoral Commission*[324] (to the effect that service of process required in election petitions was directory rather than mandatory, and that failure to do so, especially where no injustice or prejudice was caused, would be a mere irregularity which did not vitiate the proceedings).[325]

4.1.5.2 Under the doctrine of *stare decisis*, that decision was binding on the High Court. The trial judge had no justification for disregarding the changed position of the law, as spelt out by the appellate court, on the question of the late service of a petition.[326]

In *Lumu v. Makumbi and EC,*[327] the 1st respondent did not suffer any prejudice and filed his answer to the petition in a timely manner. The trial judge should, therefore, have exercised his discretion to validate the late service, if any, even if no such application was placed before him.

322 *Akuguzibwe v. Muhumuza, Mulimira and EC.*
323 *ibid.*
324 Election Petition Appeal No. 29 of 2011.
325 *Lumu v. Makumbi and EC.*
326 *ibid.*
327 Election Petition Appeal No.109 of 2016.

4.1.5.3 In any case, the evidence on record contradicted the 1st respondent's claims that he was served on the 13 April 2016 rather than 8 April 2016 (1 day outside the 7-day period). It was plausible that service could have occurred on 8 April 2016 but acknowledged a few days later. It was also plausible that the process server might have been untruthful, in his affidavit of service of 15 April 2016, in stating that he had served process on 8 April 2016. In view of the contradictions, this was not a matter which should have been determined in a preliminary objection. There was no basis for believing the 1st respondent's version of events over the said process server who was not cross-examined. Therefore, the late service of the petition was not a legal or legitimate ground for striking it out.

4.1.6 Competence of the petition

4.1.6.1 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.[328]

In *Ocen and EC v. Ebil,*[329] court found that 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 1st appellant or with his knowledge, consent or approval) contrary to Order 6, Rules 1 and 3 of the Civil Procedure Rules. The petition was therefore incompetent. The Supreme Court in *Rev. Peter Bakaluba v. Betty Nambooze* adopted a more flexible standard.

4.1.7 Effect of non-service of notice of presentation of the petition

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.[330] Article 126 (2) (e) of the Constitution applied in this instance.[331]

328 *Ocen and EC v. Ebil.*
329 *ibid.*
330 *Mandera v. Bwowe.*
331 *ibid.*

4.1.8 Circumstances in which grant of leave to extend time for filing the record of appeal can be granted

4.1.8.1 Under Rule 5 of the Judicature (Court of Appeal Rules) Directions SI 13-10, court could, for sufficient reason, extend the time limited by those rules for the doing of an act authorised or required by the rules.[332]

4.1.8.2 Under Rule 31 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules SI 141-2, the appellant was required to lodge a record of appeal within 30 days after filing the memorandum of appeal.[333]

In *Wanda v. EC and Werikhe,* (supra) although the record of appeal was filed about 4-5 months after obtaining the record, from the facts, 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.

4.1.8.3 Jurisprudence has established that a mistake by counsel through negligence amounted to sufficient cause, which would not be visited upon the appellant.[334]

4.2 Pleadings

4.2.1 For a cause of action to be made out, the pleadings had to set out the facts (and not the evidence by which they are to be proved), which the party that wished to succeed needed to prove in order to succeed on its claim. The facts set out had to show the right that the petitioner enjoyed, the violation or breach of that right, and that as a result of such breach and/or violation the petitioner was entitled to relief. No such facts were shown either in the petition or the affidavits attached to the petition as to how the appellant's rights had been violated.[335]

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332 *Wanda v. EC and Werikhe.*

333 *ibid.*

334 *ibid*, citing *Nicholas Roussos v. Gulam Hussein Habib Virani and Another*, Civil Appeal No.9 of 1993.

335 *Mawanda v. EC and Andrew Martial.*

4.2.2 Where it was alleged that a candidate committed an election offence, the illegal practice or offence had to be specifically pleaded in the petition and affidavit in support for the court to be able to investigate it. Alleging the offence in counsel's submissions would amount to a departure from the petitioner's pleadings.[336]

4.3 Affidavit and Other Evidence

4.3.1 General considerations

4.3.1.1 Under the law, evidence in election litigation in favour of or against a petition at trial is by way of affidavits read in open court.[337]

4.3.1.2 Evidence in support of or in answer to a parliamentary election petition was furnished through affidavits read in open court, the deponents of which might – with leave of court – be subjected to cross-examination by the opposite party or parties. Court then evaluates this evidence and determines whether the particular allegations have been proved to the requisite standard.[338]

4.3.1.3 Litigation was not supposed to go on endlessly, and timelines were set for parties to follow when conducting their respective cases. This was especially so in election litigation.[339]

In *Ibaale v. Katuntu and EC,*[340] the trial judge properly exercised her discretion in rejecting the appellant's attempt to make a further response to the 1st respondent's affidavits (having already filed an initial rejoinder, and the 1st respondent having filed a sur rejoinder). He should have used the time under the law to

336 *Ntende v. Isabirye*.

337 *Ibaale v. Katuntu and EC. Hon George Patrick Kassaja v. Frederick Ngobi Gume and The Electoral Commission*, citing Rule 15 of the Parliamentary Elections (Election Petitions) Rules, S.I. 141-2. See also *Winifred Komuhangi Masiko v. Bamukwatsa Betty aka Muzanira Betty and the Electoral Commission*; *Mutembuli Yusuf v. Nagwomu Moses Musamba and the Electoral Commission*; *Mugema Peter v. Mudi Obole Abedi Nasser*; *Mugisha Vincent v. Kajara Aston Peterson*, *Mulamira Barbara and The Electoral Commission*.

338 *Winifred Komuhangi Masiko v. Bamukwatsa Betty aka Muzanira Betty and the Electoral Commission*.

339 *Ibaale v. Katuntu and EC,* citing *Electoral Commission and Another v. Piro Santos*, Court of Appeal Civil Application No. 22 of 2011 (itself citing the Kenyan case of *Muiya v. Nyangah and Others* [2003] 2 EA 616 C.H.C.K)

340 *Ibaale v. Katuntu and EC, ibid*.

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.

4.3.1.4 An affidavit was a statement/declaration in writing made on oath/affirmation. It was made *ex parte* unlike evidence given orally in open court in the personal direction and superintendence of a judge.[341]

4.3.1.5 Unless it was by agreement of the concerned parties or by some legislation, evidence in an election cause had to be by affidavit alone. A party could supplement affidavit evidence by *viva voce* evidence in court. Also, where court found affidavit evidence to be unsatisfactory, it had discretion to exclude the affidavits and direct the witnesses to be examined orally not withstanding any agreement to the contrary.[342]

4.3.1.6 Additionally, a deponent might – 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.[343]

4.3.1.7 Cross-examination of deponents in the context of parliamentary election petitions was only conducted with the leave of court. Court therefore had discretion to disallow it.[344]

4.3.1.8 An affidavit is evidence and cannot therefore be amended. Instead, a supplementary affidavit may be filed.[345]

4.3.1.9 If an election petition and the reply thereto were considered as pleadings, then a petitioner was 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 could not adduce evidence in respect of a matter that is not pleaded.[346]

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341 *Wanda v EC and Werikhe*.
342 *ibid.*
343 *Mutembuli Yusuf v. Nagwomu Moses Musamba and the Electoral Commission.*
344 *Mugisha Vincent v. Kajara Aston Peterson, Mulamira Barbara and The Electoral Commission.*
345 *Kafeero Sekitoleko Robert v. Mugambe Joseph Kifomusana.*
346 *Mutembuli Yusuf v. Nagwomu Moses Musamba and the Electoral Commission.*

4.3.1.10 Where a deponent's affidavit was struck off the record and the court was left with their oral evidence only, that oral evidence had to be corroborated by other evidence.[347]

4.3.1.11 Affidavits were considered purely as evidence, and could therefore only contain what has already been pleaded. Under the rules of evidence, re-examination of witnesses was limited only to matters raised in cross-examination that were not anticipated in examination-in-chief; and as regards submissions by counsel, submissions in rejoinder were limited to new issues raised in submissions in reply.[348]

4.3.1.12 Affidavits in rejoinder could only be sworn to clarify or rejoin specific issues raised by the respondent in affidavits in reply. They could not 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 (Election Petitions) Rules, S.I. 141-2, which required expeditious hearing of election petitions.[349]

4.3.1.13 A stranger to a petition might validly file an affidavit in rejoinder if the facts or issues that call for the rejoinder were within that person's knowledge.[350]

4.3.1.14 It was of paramount importance that affidavits were carefully drafted, especially because they were the principal source of evidence in election matters.[351]

4.3.1.15 Election petitions were important proceedings and court had to take a liberal approach to affidavits so that petitions were not defeated on the basis of technicalities. Non-payment of court fees was a minor procedural error which could be remedied by

347 *Mugema Peter v. Mudi Obole Abedi Nasser* (2016), citing *Peter Mugema v. Mudi Obole Abedi Nasser*, Election Petition Appeal No. 30 of 2011. In the instant 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.

348 *Mutembuli Yusuf v. Nagwomu Moses Musamba and the Electoral Commission.*

349 *ibid.*

350 *ibid.*

351 *Hon. George Patrick Kassaja v. Frederick Ngobi Gume and The Electoral Commission.*

an order to a defaulting party to pay the requisite fees, at any stage of the proceedings.[352]

4.3.1.16 While courts had to take a liberal approach to affidavit evidence, they would not condone outright irregularities, especially those that affected the proper identification of the deponent. Affidavit evidence was, by its nature, very delicate and despite the pressure under which election cases are organised, some mistakes could not be ignored or held to be inconsequential.[353]

4.3.2 Unsealed annexures to affidavits

4.3.2.1 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.[354]

4.3.2.2 However, this was a technicality which was curable under Article 126 (2) (e) of the Constitution, as failure to comply with it would not occasion any injustice.[355]

4.3.2.3 Election petitions were very important, and courts were especially enjoined to take a liberal view of affidavits so that petitions were not defeated on technicalities.[356]

4.3.2.4 The trial judge erred in not ignoring this technicality, and in refusing to consider the annexures in question.[357]

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352 *Apollo Kantinti v. Sitenda Sebalu, The Independent Electoral Commission and the Returning Officer*, Wakiso. In the instant case, the Court of Appeal held that the trial judge was correct when he overruled objections as to the admission of affidavits due to the non-payment of fees in their respect. The trial judge properly exercised his discretion in admitting the affidavits in the interest of substantive justice. The court also noted that court may order a defaulting party to pay appropriate court fees, fines and deposits at any stage of the proceedings.

353 *Hon. George Patrick Kassaja v. Frederick Ngobi Gume and The Electoral Commission*. In the instant case, the Court of Appeal found that the impugned affidavits had been correctly rejected because of their serious irregularities. Some affidavits were signed and yet the deponents' IDs 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

354 *Amoru and EC v. Okello Okello*.

355 *ibid.,* citing *Egypt Air Corporation t/a Egypt Air Uganda v. Suffish International Food Processors Ltd and Another*, Supreme Court Civil Application No. 14 of 2000 and *Rtd Col. Dr Kizza Besigye v. Yoweri Kaguta Museveni and the Electoral Commission*, Supreme Court Presidential Election Petition No. 1 of 2006 – dictum of Odoki CJ.

356 *ibid.*

357 *Amoru and EC v. Okello Okello*.

4.3.3 Affidavits deponed by illiterate persons and persons with sight impairment

4.3.3.1 Section 2 of the Illiterates Protection Act required that the signature of an illiterate person be verified by a mark.

4.3.3.2 A 'mark' was a symbol, impression or feature on something usually to identify it or distinguish it from something else.

4.3.3.3 A signature was 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.

4.3.3.4 It followed from the above that a signature could be a mark which could be put by a person on a document to show that they owned up to it. The essence of an illiterate person appending a mark on a document was to prove that the document had been authored by them or that it belonged to them.

4.3.3.5 There was a general trend towards taking a liberal approach when dealing with defective affidavits. This was in line with Article 126 (2) (e) of the Constitution, which required that substantive justice be administered without undue regard to technicalities.[358]

In the case, in *Kyakulaga and EC v. Waguma,*[359] the deponents in question not having been cross-examined in the lower court (the issue of compliance with the Illiterates Protection Act 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.

4.3.3.6 Form of jurat and certification of affidavits as regards blind or illiterate deponents is governed by Form B under the First Schedule (under the headings 'COURT PROCEEDINGS', 'Oath for Affidavits' [and 'Blind or Illiterate Deponent']) to the Oaths Act, Cap. 19. Two forms of jurats are provided for; the first is

[358] *Kyakulaga and EC v. Waguma*, citing *Kasaala Growers Cooperative Society v. Kakooza Jonathan and Another*, Supreme Court Civil Application No. 19 of 2010 (itself citing with approval *Banco Arabe Espanol v. Bank of Uganda*, Supreme Court Civil Appeal No. 8 of 1998).

[359] *Kyakulaga and EC v. Waguma, ibid*.

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. The jurat referred to above 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.[360]

4.3.3.7 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. Therefore, 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.[361]

4.3.3.8 Where an affidavit is drafted 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, as required by Section 3 of the Illiterates Protection Act, Cap. 78. This is distinct from indicating who the translator is. Preparation and translation of affidavits are two different

360 *Hon. Nakate Lilian Segujja & The Electoral Commission v. Nabukenya Brenda.*
361 *ibid.*

things and one cannot be held to suffice for the other. The law on affidavit evidence should be adhered to without hoping that he who violates it may find refuge under Article 126(2e) of the Constitution.[362]

4.3.3.9 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.[363] Affidavits deponed by illiterate persons in violation of the Oaths Act or the Illiterates Protection Act are generally void and inadmissible.

4.3.4 Evidence in election litigation

4.3.4.1 All evidence at the trial of an election petition was required to be adduced by affidavits.[364]

4.3.4.2 Cross-examination of deponents could be permitted only with the leave of the court as stipulated under Rule 15 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules.

In *Kiiza v. Kabakumba Masiko*[365] the trial judge was right to have struck out the appellant's supplementary affidavits in reply to the respondent's rejoinder. At the same time, she ought also to have severed the new evidence adduced in the respondent's affidavits in rejoinder, in the interests of justice.

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362 *Mugema Peter v. Mudi Obole Abedi Nasser*. In the instant case, the Court of Appeal noted that, without proof that the impugned affidavits, numbering 23, were drafted at the instruction of the deponents, it 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/writer of an affidavit written for a third party illiterate) was a matter of form only and not substance. 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.

363 *Hon. Nakate Lilian Segujja & The Electoral Commission v. Nabukenya Brenda*.

364 *Kiiza v. Kabakumba Masiko*.

365 *ibid*.

4.3.5 Timelines for filing affidavits

4.3.5.1 Rules 8 (1) (3) (a) and 15 (1) of the Parliamentary Elections (Interim Provisions) Rules 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.[366]

4.3.5.2 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 10 days after service of the petition set by Rule 8 (1), then the respondent ought to do so. But where this was not possible or where, for example, the witness was secured after the expiry of the said 10 days, then Rule 15 left the door open for one to prepare and lodge an affidavit to be read in open court.[367]

4.3.5.3 It was up to the court to set the timelines which were to ensure justice to all parties to the election petition, bearing in mind the overall constitutional goal that, while an election petition had to be disposed of, Article 126(2)(e) of the Constitution enjoined the court to administer substantive justice without undue regard to technicalities.[368]

In *Odo Tayebwa v. Arinda and EC,* although the 57 affidavits in question had been filed 22 and 23 days from the last date stipulated by Rule 8 (1), 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.

4.3.5.4 It had to be further noted that, once at the stage of scheduling, timelines were set by agreement of all parties to the petition as to when all affidavits and rejoinders to them were to be filed, then a party to the petition needed no leave of court to file the same, unless and until the filing was outside the agreed time. 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.[369]

366 *Odo Tayebwa v. Arinda and EC.*

367 *ibid.*

368 *Odo Tayebwa v. Arinda and EC, ibid.,* citing *Yowasi Kabiguruka v. Samuel Byarufu,* Court of Appeal Civil Appeal No. 18 of 2008.

369 *ibid*, citing Section 114 of the Evidence Act.

4.3.6 Validity of affidavits deponed by illiterate persons – claiming to have 'read and understood' affidavits

4.3.6.1 An affidavit was a written statement in the name of a deponent by whom it was voluntarily signed and sworn to or affirmed. It was confined to such statements as the deponent was able of their knowledge to prove, but in certain cases could contain statements of information and belief with the sources and grounds thereof being disclosed.[370]

4.3.6.2 Rules 15 (1) and (2) of the Parliamentary Elections (Interim Provisions) Rules SI 141-2 provided 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 could be cross-examined by the opposite party and re-examined by the party on behalf of whom the affidavit was sworn.[371]

4.3.6.3 In a proper case, depending on the circumstances of the case, the court had the discretion to sever and reject parts of an affidavit that were defective or superfluous and to consider and rely upon the proper parts of the same affidavit.[372]

4.3.6.4 In the case of *Odo Tayebwa v. Arinda and EC* (supra), 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 judge 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.

4.3.6.5 Only the affidavit of a deponent who did not turn up for cross-examination was liable to be given hardly any consideration.

4.3.7 Admission of evidence

4.3.7.1 The admission of evidence in election petitions was regulated principally by the Parliamentary Elections (Interim Provisions) (Election Petition) Rules SI 141-2. Rule 15 of the Rules

370 *Odo Tayebwa v. Arinda and EC.*

371 *ibid*.

372 *Odo Tayebwa v. Arinda and EC*, citing Col. (Rtd) *Dr Kiiza Besigye v. Yoweri Kaguta Museveni & Another*, Presidential Election Petition No. 1 of 2001.

envisaged two modes of adducing evidence in an election petition – affidavit evidence and examination of witness – the latter at the court's own motion.[373]

In *Wanda v. EC and Werikhe,*[374] the appellant was attempting to turn himself into a witness by tendering documents himself – which offended the said 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 nor introduced by any other witnesses.

4.3.8 Status of affidavit evidence

4.3.8.1 Evidence of affidavits whose deponents were 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.[375]

In *Ocen and EC v. Ebil*,[376] the trial judge erred when he found that the bare denials of the 1st 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 1st 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 1st appellant committed electoral offences which substantially affected the outcome of the election.

4.3.9 Admissible evidence

4.3.9.1 Rule 15 of the Parliamentary Election Petition Rules required all evidence at the trial in favour of or against the petition to be by way of affidavit read in open court.[377]

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373 *Wanda v. EC and Werikhe.*

374 *ibid.*

375 *Ocen and EC v. Ebil*, citing *Ngoma Ngime v. Electoral Commission and Hon Winnie Byanyima*, High Court Electoral Petition No.1 of 2001.

376 *ibid.*

377 *Mashate Magomu v. EC and Sizomu Wambedde.*

4.3.9.2 This in no way referred to photocopies, which would otherwise be secondary evidence and would deny the other party a chance to cross-examine the witnesses. 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).[378]

4.3.10 Admissible affidavits

4.3.10.1 Given the importance of affidavits in election petitions, it was equally the case that the identity and integrity of deponents of such affidavits was a matter of keen interest to the court, given that an election could only be set aside if it was proved to the satisfaction of the court. Indeed, the identity and integrity of a deponent went to the root of the substance and probative value of their affidavit, and this could not be regarded as a mere technicality in any way.[379]

4.3.10.2 It was not prohibited for a trial judge to compare signatures/handwriting in the absence of expert evidence; but court had to exercise great caution because of the lack of expertise in the matter.[380]

In *Muyanja v. Lubogo and EC,*[381] the matter was an obvious one to the court. The trial judge was correct to expunge the 23 affidavits in question in so far as the identity of the deponents was in doubt (signatures on affidavits differing from identity cards, or signatures on one document and a thumbprint on another).

4.3.11 Late affidavits

4.3.11.1 Evidence in election petitions was adduced mainly by way of affidavits. This was the essence of Rule 15 of the Parliamentary Elections (Interim Provisions) Rules. This was to advance expeditious disposal of petitions without forgetting to do justice

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378 *ibid*.

379 *Muyanja v. Lubogo and EC*, citing *Makula International Ltd v. His Eminence Cardinal Nsubuga & Anor* (1982) HCB 11 and *Kalazani Charles v. Musoke Paul Sebulime*, High Court Election Petition No. 17 of 2016.

380 *ibid*, citing *Hon. Kipoi Tonny Nsubuga v. Ronny Waluku Wataka and 2 Others*, Election Petition Appeal No.7 of 2011.

381 *ibid*.

to the parties. The essence of timely disposition was emphasised by Section 63 (2) of the PEA which required the court to hear and determine election petitions expeditiously and envisaged that the court could, for that purpose, suspend any other matter pending before it.[382]

4.3.11.2 In *Muyanja v. Lubogo and EC* (supra),it was improper for a petitioner to file an affidavit in support of his allegations with his final submissions. This would offer the opposite party no opportunity to cross-examine the deponents had he so wished. Final submissions were mere summations of evidence already tendered in court, and not an avenue to introduce new matter.[383]

The trial judge was therefore 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.

4.3.11.3 It was wrong to disregard considerable affidavit evidence simply because it was filed after the petition. Considering the court's decision in *Bantalib Issa Taligola v. Wasugirya Bob Fred and the Electoral Commission,* Election Petition Appeal No. 11 of 2006, time was of the essence when it came to the filing of election petitions and, therefore, subsequent affidavit evidence could be adduced to prove an allegation made by the petitioner.[384]

4.3.12 Recanting witnesses

4.3.12.1 It was evident, from the third set of affidavits deponed by particular persons, that they had been approached by the 2nd respondent who told them that they would suffer arrest and prosecution for bribery unless they cooperated and recanted their earlier testimony.[385]

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382 *Muyanja v. Lubogo and EC*, citing *Col. (Rtd) Dr Kiiza Besigye v. Yoweri Kaguta Museveni and Electoral Commission*, Presidential Election Petition No. 1 of 2001 – dictum of Mulenga JSC. and *Ernest Kiiza v. Kabakumba Labwoni Masiko*, Election Petition Appeal No. 44 of 2016.

383 Citing *Esrom William Alenyo v. The Electoral Commission and Another*, Election Petition No. 9 of 2007.

384 *Betty Muzanira Bamukwatsa v. Masiko Winnifred Komuhangi and 2 Others.*

385 *Kintu v. EC and Walyomu.*

4.3.12.2 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.[386]

4.3.12.3 The trial judge erred in asserting that there was no evidence of intimidation in this regard.[387]

4.3.12.4 The actions of the 2nd respondent and his legal team, in approaching the witnesses of the petitioner and obtaining further affidavits from them, were 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.[388]

4.3.12.5 Under the Rules, the challenge to such evidence would only be by way of cross-examination to test the veracity of their evidence. An adverse side was prohibited from approaching witnesses for the other party with a view to inducing them to testify against that other party. It was therefore erroneous for the trial judge to take the view that the final (third set of) affidavits sworn by the recanting witnesses had been made to fit the holding in *Bakaluba Peter Mukasa v. Nambooze Betty Bakireke*.[389] It was the conduct of the 2nd respondent and his advocates which brought the facts of the instant case within the case of *Bakaluba v. Bakireke*. The trial judge was required to review all the evidence on record, including the final affidavits deponed, before reaching a conclusion as to what really took place regarding the contested facts.[390]

4.3.13 Untested affidavits

4.3.13.1 Where 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.[391]

386 *ibid.*
387 *ibid.*
388 *ibid.*
389 Supreme Court Election Petition Appeal No. 4 of 2010.
390 *Kintu v. EC and Walyomu*.
391 *ibid.*, citing Katutsi J in *Uganda v. Moses Ndifuna,* High Court Criminal Case No.4 of 2009 [2009] UGHC 83.

4.3.13.2 What tipped the scale in *Kintu v. EC and Walyomu* (supra) was the outrageous conduct of the 2nd respondent and his legal team, to extinguish the evidence pointing to illegal practice. The court was satisfied that the 2nd respondent need not have undertaken such conduct unless he believed such evidence to be true, hence the need to douse it.

4.3.13.3 Failure to cross-examine witnesses by both parties meant that the court was left with affidavit evidence that was full of accusations and counter-accusations; and this led inevitably to a conclusion that a petitioner had not discharged their burden of proof to the required standard.[392] This therefore leads to the proposition that parties ought to have an unrestricted right to cross-examine deponents of affidavit evidence adduced both in support of and opposition to a petition.

4.3.13.4 Where evidence was given by way of multiple affidavits, it was not enough to only seek to controvert some or a few of them and leave others unchallenged.[393]

4.3.14 Deponent's non-appearance before Commissioner for Oaths

4.3.14.1 Non-appearance before a Commissioner for Oaths implies that the document purported to be an affidavit is not one. It is not admissible in evidence together with any annexures to it.[394]

4.3.15 Validity of affidavits

4.3.15. 1 There was no reason to fault the trial judge's decision to strike out affidavits which were not dated or not commissioned.[395]

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392 *Betty Muzanira Bamukwatsa v. Masiko Winnifred Komuhangi and 2 Others.*

393 *ibid.*

394 *Winifred Komuhangi Masiko v. Bamukwatsa Betty aka Muzanira Betty and the Electoral Commission*, citing *Kakooza John Baptist v. the Electoral Commission and Yiga Anthony*, Supreme Court Election Petition Appeal No. 11 of 2007.

395 *Aisha Kabanda v. Mirembe, EC and Returning Officer.*

4.3.16 Effect on petition where affidavit in support commissioned by advocate whose practising certificate for the relevant year has not been renewed

4.3.16.1 The essence of Section 14A of the Advocates (Amendment) Act 2002 was to protect innocent litigants from unscrupulous advocates. Section 14A (1) (b) (2) made provision for a victim of such an advocate to be given time to make good any defects arising from such an event.

4.3.16.2 The effect of non-renewal of a practising certificate was that the advocate in question ceased and stopped to act as an advocate.[396]

In the case of *Kinyamatama v. Sentongo,*[397] court held that 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 practising certificate for the year 2016. The petitioner, having realised that the affidavits had been commissioned by an advocate who had no practising certificate for the year, ought to have proceeded under Section 14A(1)(b)(2) of the Advocates Act to make good the defect.

It was wrong for the trial judge to hold as he did that this defect could be cured or overlooked under the terms of Article 126 (2)(e). The effect of non-renewal of a practising certificate was that the advocate in question ceased and stopped acting as an advocate.[398] Thus, the failure to properly commission the affidavit, in the present circumstances, was not a mere technicality within the meaning of Article 126 (2) (e).[399] It was an irregularity that could not be cured under Article 126 (2) (e). It followed that the petition in question, from which this appeal arose, was illegally filed in court in contravention of Section 60 of the PEA and Rules 3(c) and 4(8) of the Parliamentary Elections (Interim Provisions) Rules and it, therefore, collapsed with the collapse of the affidavit in support filed alongside the

396 *Kinyamatama v. Sentongo*, citing *Returning Officer, Iganga and Chairman Interim Electoral Commission v. Haji Muluya Mustaphar*, Court of Appeal Civil Appeal No.13 of 1997.

397 *ibid*.

398 *ibid*, citing *Returning Officer, Iganga and Chairman Interim Electoral Commission v. Haji Muluya Mustaphar*, Court of Appeal Civil Appeal No. 13 of 1997.

399 *Kinyamatama v. Sentongo*, citing *Musoke Emmanuel v. Kyabaggu Richard and Electoral Commission*, Court of Appeal Election Petition Appeal No. 67 of 2016.

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.

4.3.16.3 As such, any such affidavit was not duly commissioned, with the result that, where the petition in question was supported by such affidavit, the petition had to be struck out.[400]

4.3.17 Electronic evidence

4.3.17.1 A person seeking to introduce an electronic record in evidence has the burden of proving its authenticity and reliability.[401]

In *Winifred Komuhangi Masiko v. Bamukwatsa Betty,*[402] the court noted that the authenticity and reliability of the compact discs (CDs) and transcripts of alleged recordings of the 1st respondent and her agents making false statements against the petitioner would still be wanting if they had been presented because the recordings were allegedly made by the petitioner's supporters while the transcriptions had been procured by a person under the control of the petitioner. As these persons were persons whose interests were not adverse to the petitioner's or who were under the control of the petitioner, authenticity of the recordings could not be presumed under s. 8(5b and 5c) of the Electronic Transactions Act, 2011 and of the Computer Misuse Act, 2011.

4.3.18 Untranslated and untranscribed material in evidence

4.3.18.1 In terms of Section 88 of the Civil Procedure Act, Cap. 71, the language of the court was English, evidence had to be recorded in English and all written applications had to be in English.[403]

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400 *Kinyamatama v. Sentongo*

401 *Winifred Komuhangi Masiko v. Bamukwatsa Betty aka Muzanira Betty and the Electoral Commission* , citing Sections 8 (2, 4, & 5) of the Electronic Transactions Act, 2011 and 29 (2, 4, & 5) of the Computer Misuse Act, 2011.

402 *Winifred Komuhangi Masiko v. Bamukwatsa Betty aka Muzanira Betty and the Electoral Commission, ibid.* .

403 *Ntende v. Isabirye.*

4.3.18.2 Section 88 was couched in mandatory terms, and failure to comply with it rendered the document unusable.[404]

4.3.18.3 As such, the trial judge could not be faulted for expunging an affidavit which was to introduce an untranslated audio CD, since this offended Section 88 of the CPA.[405]

4.3.18.4 A party seeking to rely on DVD/video recordings had to transform the evidence into a form that the court could make use of. Where the recording was in a language other than the language of the court, the evidence was introduced in court by way of transcription of the recording and translation into the language of the court well before the hearing date of the cause in which it was required to be adduced and played.[406]

4.3.18.5 Where a party presented a recording in the vernacular and the tape was not transcribed and also not translated into English, the court was unable to make use of such evidence.[407]

4.3.18.6 Where text has been translated into English, the actual/original text must also be presented for comparison with the translation and to enable the opposite party to appropriately respond to the complaint made.[408]

4.3.19 Affidavit evidence – requirement to state source of knowledge

4.3.19.1 It was trite law that the failure to disclose the source of information in an affidavit rendered the affidavit null and void.[409]

In *Chemoiko v. Soyekwo & EC,*[410] 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 April 2016) and later all read in court before the commencement of the hearing.

404 *ibid.*
405 *ibid.*
406 *Mawanda v. EC and Andrew Martial.*
407 *ibid.*
408 *Winifred Komuhangi Masiko v. Bamukwatsa Betty aka Muzanira Betty and the Electoral Commission.*
409 *Chemoiko v. Soyekwo and EC,* citing *Uganda Journalist Safety Commission and* Others *v. Attorney General*, Constitutional Petition No. 7 of 1997.
410 *ibid.*

4.3.19.2 The omission to disclose a petitioner's source of information contained within their affidavit was not fatal. The trial court had to 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.[411]

4.3.20 Affidavits in rejoinder

4.3.20.1 In principle, there was nothing in law which barred a person who had not sworn an affidavit in support of the petition from swearing an affidavit in rejoinder to the respondent's reply, if it is that such a person was possessed with the facts forming the rejoinder.

4.3.20.2 It is also a position of law that an affidavit in rejoinder cannot be permitted to introduce new matters or issues of fact which were never raised by the affidavit in reply or those supplementing it. To do so would be 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 to.[412]

4.3.20.3 The affidavits in rejoinder were valid if they were for purposes of controverting what was sworn by the respondent in reply to the appellant's averments.[413]

4.3.21 Deponents of affidavits in rejoinder need not have filed affidavits in support as long as they were responding to particular averments in a particular affidavit in reply, which they indicated in the rejoinder.[414]

4.3.21.1 Affidavits in rejoinder were essentially for the purpose of giving an opportunity to the petitioner to rejoin to and controvert or dispute the contents of the affidavits in reply sworn by the respondent or affidavits sworn on his or her behalf.[415]

411 *Betty Muzanira Bamukwatsa v. Masiko Winnifred Komuhangi and 2 Others.*
412 *ibid.*
413 *ibid.*
414 *Chemoiko v. Soyekwo and EC.*
415 *ibid.*

4.3.21.2 Where an affidavit in rejoinder makes averments outside contents of affidavits in reply by a respondent and/or affidavits sworn on behalf of the respondent, such affidavit in rejoinder would be disallowed.[416]

4.3.21.3 A person who did not swear an affidavit in support of an election petition could swear an affidavit in rejoinder for the purposes of controverting what was averred by the respondent in his or her reply to the appellant's averment. It could not be argued that such deponent was a stranger to the petition on the basis that they did not swear affidavits in support of the petition.[417]

4.3.21.4 The Parliamentary Elections (Election Petitions) Rules, S.I. 141-2, did not envisage replies or affidavits in surrejoinder. Any such filings were improper and the courts would not consider them in the evaluation of evidence.[418]

4.3.22 Deponent denying facts previously stated on oath

A witness who denied facts which were previously stated on oath and changed to support another party was unreliable. Their affidavits could not be credible.[419]

4.3.23 Refusal to be cross-examined

Where a party failed to submit himself or herself for cross-examination, the basis for rejecting the affidavit was that there was no means of confronting the deponent or of ascertaining the truth of the statements made. Even if the affidavit was technically admissible, evidence of that nature was of little weight that it could not materially assist the party relying on it.

4.4 Corroboration

4.4.1 The evidence of an accomplice requires corroboration (other independent evidence) for it to stand. This is because evidence

416 *ibid.*

417 *ibid.*

418 *Mugisha Vincent v. Kajara Aston Peterson, Mulamira Barbara and The Electoral Commission.*

419 *Turiyo Tito v. Kangwagye Steven and the Independent Electoral Commission*, citing *Ourum Okiror Sam v. The Electoral Commission and Another*, Election Petition No. 8 of 2011.

of an accomplice is highly suspect and needed support of other independent evidence in order for the court to rely on it.[420]

In *Spencer George William v. Abbas Agaba Mugisa & EC,*[421] three witnesses swore affidavits that they were agents of the petitioner. That they were each approached by the respondent and offered money to leave the petitioner's camp and become supporters of the respondent. In their affidavits, each witness averred that they had accepted money from the respondent but had declined to change loyalty. The Court of Appeal upheld the finding of the trial court that the evidence of the three witnesses was accomplice evidence. That having admitted to taking the money offered by the respondent which, according to them was for bribery, it was a requirement under the law that their evidence needed independent corroborative evidence in order to stand.

4.4.2 Bribery was a criminal offence and an election offence in which both the giver and the receiver were culpably responsible, which made the receiver of a bribe an accomplice, hence the need for corroboration. Without corroboration, the testimony of the accomplice remained the confession of the alleged receiver of the bribe and such testimony was inconclusive.[422]

4.4.3 The evidence of a single witness in election petitions did not invariably require corroboration. What was important was that the evidence adduced had to be strong enough to prove the alleged facts.[423]

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420 *Spencer George William v. Abbas Agaba Mugisa & EC.*

421 *ibid.*

422 *Turiyo Tito v. Kangwagye Steven and the Independent Electoral Commission*, citing *Kadama Mwogezaddembe v. Wambuzi Gagawala and Another*, Election Petition No. 2 of 2001. In the *Turiyo Tito* case, the court found that evidence of the lone witness to the acts of bribery alleged to have transpired at Kyarugaju playground lacked corroboration and yet she had confessed to having received a bribe of UGX 20,000. See also Onega Robert v Hashim Sulaiman and The Electoral Commission. In *Onega*, the High Court noted that the witness presented to prove the act of bribery had also admitted to taking the bribe and to knowing that receiving such money was illegal. The court could not condone the illegality and permit the witness and petitioner to benefit from it.

423 *Odo Tayebwa v. Arinda and EC.*

4.4.4 Where a deponent's affidavit was struck off the record and the court was left with their oral evidence only, that oral evidence had to be corroborated by other evidence.[424]

4.4.5 Courts were not at liberty to require that any evidence be corroborated. The law provided instances where a particular type of evidence had to be corroborated and instances where corroboration was not necessary.[425]

4.4.6 In the particular circumstances of a particular case, however, the court might not be satisfied with the evidence of a single witness. Court might find the evidence of the single witness insufficient on its own and thus look for other independent credible evidence, if any, to support the allegation.[426]

4.4.7 Where the court found no such credible independent evidence, court would make a finding that the allegation had not been proved to the requisite standard.[427]

4.4.8 There was no rule of law requiring a plurality of witnesses to prove any fact. A single witness could suffice if they were credible and reliable.[428]

4.4.9 However, it is now well settled that the evidence of a single witness as regards an allegation in an election petition has to be received by court with utmost caution because election petitions present peculiar and extraordinary situations 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.[429]

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424 *Mugema Peter v. Mudiobole Abedi Nasser* (2016), citing *Peter Mugema v. Abedi Mudiobole Nasser*, Election Petition Appeal No. 30 of 2011. In the instant 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.

425 *Mugema Peter v. Mudiobole Abedi Nasser*, *ibid*.

426 *ibid*.

427 *ibid*.

428 *Hon. Nakate Lilian Segujja & The Electoral Commission v. Nabukenya Brenda*, citing *Kikulukunyu Faizal v. Muwanga Kivumbi Mohammed*, Election Petition Appeal No. 44 of 2011; and *Mukasa Anthony Harris v. Dr Bayiga Lulume*, Court of Appeal Election Petition Appeal No. 14 of 2006.

429 *Hon. Nakate Lilian Segujja & The Electoral Commission v. Nabukenya Brenda*.

4.4.10 It was unsafe and inadvisable to rely on the uncorroborated and refuted evidence of a partisan witness.[430]

In *Hon. Nakate Lilian Segujja & The Electoral Commission v. Nabukenya Brenda,*[431] the 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 1st appellant and her witnesses. Consequently, the trial judge 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. Another of the respondent's witnesses was an agent of the respondent and therefore a partisan witness whose evidence required corroboration by other evidence before it could be relied upon.

4.5 Evidence of witness with unclear citizenship

4.5.1 The court could not fault the trial judge for her finding that a witness was unreliable in so far as he had neither a voter's card nor a national ID to prove his citizenship.[432]

4.6 Effect of a bare denial

It was trite law that total denial was a complete defence in itself. It was incumbent upon the petitioner to prove or to produce cogent evidence to prove their allegation and not to rely on the weakness of the respondent's case.[433]

In *Hon. Ocen and EC v. Ebil,*[434] the 1st appellant did not have to file an affidavit to supplement his general denial evidence considering that the burden was on the respondent at all material times to prove that the 1st appellant (Hon. Ocen)

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430 *ibid.*

431 *ibid.*

432 *Ibaale v. Katuntu and EC.*

433 *Isodo v. Amongin.* In the *Ocen and EC v. Ebil case*, the Court of Appeal observed that the 1st appellant did not have to file an affidavit to supplement his general denial evidence considering that the burden was on the respondent at all material times to prove that the 1st appellant (Hon. Ocen) committed electoral offences which substantially affected the outcome of the election in Kole South Constituency.

434 *Ocen Peter and EC v. Ebil Fred*, Election Petition Appeal No.83 of 2016.

committed electoral offences which substantially affected the outcome of the election in Kole South Constituency.

4.7 The Right to Gather Evidence to Support One's Case

An aggrieved party had every right to gather evidence in support of his or her case even after filing the petition.[435]

4.8 *Obiter Dicta* re Timing of Highlighting Discrepancies (after Elections Rather Than before)

The court expressed concern on the filing of election petitions in which the petitioners raised discrepancies after an adverse result and not before the election was held.[436]

4.9 Conduct of Counsel

4.9.1 In terms of Regulation 9 of the Advocates (Professional Conduct) Regulations SI 267-2, counsel in the case of *Lumu v. Makumbi and EC* was prohibited from appearing in a matter in which they were a potential witness. Not only was counsel for the 1st respondent a potential witness, he had actually filed an affidavit in support of the respondent in the lower court. This action was not proper.[437]

In *Kintu Alex Brandon v. EC and Walyomu Moses,*[438] the actions of the 2nd 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.

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435 *Nabukeera v. Kusasira and EC.*
436 *Ninsiima v. Azairwe and EC.*
437 Election Petition Appeal No. 109 of 2016.
438 Election Petition Appeal No.64 of 2016.

4.9.2 Under the Rules, the challenge to such evidence – of recanting witnesses – would only be by way of cross-examination to test the veracity of their evidence. An adverse side was prohibited from approaching witnesses for the other party with a view to inducing them to testify against that other party.[439]

4.9.3 The court expressed concern on the filing of election petitions in which the petitioners raised discrepancies after an adverse result and not before the election was held.[440]

4.9.4 It was also disheartening to file an election petition when there was no clear explanation for the basis and/or cause of action for the election petition.[441]

Comment: On some occasions, the court was very strict with regard to matters of procedure and form, while in other instances, a much more liberal approach was adopted.

It would be helpful for the Court of Appeal to reach a definitive position as to which of these two approaches is more in keeping with the ends and demands of electoral justice – including with the constitutional imperative under Article 126 (2) (e) – to ensure substantive justice without undue regard to technicalities.

439 *ibid.*
440 *Ninsiima v. Azairwe and EC.*
441 *ibid.*

5.0 ROLE OF COURTS, SCOPE OF REVIEW, DECLARATIONS AND ORDERS

5.1 Role of Trial Judge

A trial judge 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, and rendered non-derogable under Article 44 (c) of the same Constitution. The court must remain, and be seen to be, impartial at all times.

In *Akuguzibwe Lawrence v. Muhumuza David, Mulimira and EC*,[442] it was a fatal error for the trial judge to rely upon the evidence of a non-existent witness in the petition (one who neither swore an affidavit nor testified in person).

5.2 Duty of 1st Appellate Court

5.2.1 The duty of a first appellate court to re-evaluate the evidence applies to both oral testimony of a witness in court as well as to affidavit evidence, except that in case of the affidavit evidence where the deponent is not cross-examined on the affidavit in court, the issue of demeanour of a witness does not arise.[443]

5.2.2 The Court of Appeal being the first and final appellate court for election matters, has a duty to subject the evidence adduced at the trial to a fresh and exhaustive reappraisal and scrutiny, and then to decide whether or not the learned trial judge came to correct conclusions. If not, then the Court of Appeal is entitled to reach its own conclusions.[444]

5.2.3 The duty of a 1st appellate court to re-appraise or re-evaluate the evidence applied to both oral testimony of a witness as well as to affidavit evidence. However, where the deponent was not cross-examined on the affidavit in court, the issue of demeanor of a witness did not arise. The court ought to have cautioned itself that in re-appraising and re-evaluating the evidence adduced at

442 Election Appeal No.22 of 2016.
443 *Chemoiko v. Soyekwo and EC.*
444 *Isodo v. Amongin.*

trial, regard had to be had to the fact that witnesses often, though not necessarily always, tended to be partisan in supporting their candidates against the rivals in the election contest. This might result in deliberate false testimonies or exaggerations and to make the evidence adduced to be subjective. This called upon court to require the authenticity of such evidence to be tested from an independent and neutral source by way of corroboration.[445]

5.2.4 On first appeal, an appellant was entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court had a duty to rehear the case and to consider the materials before the trial judge. The appellate court had to then make up its mind by carefully weighing and considering the evidence that was adduced at trial.[446]

5.2.5 The duty of a first appellate court to re-evaluate the evidence applies to both oral testimony of a witness in court as well as to affidavit evidence, except that in the case of the affidavit evidence where the deponent is not cross-examined on the affidavit in court, the issue of demeanour of a witness does not arise.[447]

5.2.6 The court should caution itself that in re-appraising and re-evaluating the evidence adduced at trial, regard has to be had to the fact that witnesses, though not necessarily always, tend to be partisan in supporting their candidates against the rivals in the election contest. This might result in deliberate false testimonies or exaggerations and to make the evidence adduced to be subjective. This calls upon court to have the authenticity of such evidence to be tested from an independent and neutral source by way of corroboration.[448]

5.3 Scope of Review

5.3.1 The role of the court is not confined to balancing the rights and merits of the opposing parties. Rather, it must answer the

445 *Wanda v. EC and Werikhe.*
446 *Ninsiima v. Azairwe and EC.*
447 *Chemoiko v. Soyekwo and EC* and *Wanda v. EC and Werikhe.*
448 *Wanda v. EC and Werikhe.*

question as to whether a valid election was held, having regard to the rights of the voters in that constituency.[449] This therefore implies that courts should not readily rely upon technicalities to set aside an election that genuinely represents the will of the voters.

5.3.2 This may include scrutinising relevant forms (such as DR forms).[450]

5.3.3 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 and Article 68 (4) of the Constitution being not to disenfranchise but to safeguard votes against fraudulent manipulation.[451] In the circumstances of this case, 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.

5.4 Fair Trial of Election Petitions

5.4.1 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 judge who felt constrained by time.[452] In these circumstances, the trial judge ought to have expunged from the record the 24 affidavits which had been filed late and without leave of court, since the appellant

449 *Opendi v. EC and Ayo*, citing *Frederick Nkayi Mbaghadi and Another v. Frank Wilberforce Nabwiso*, Court of Appeal Election Petition Appeal Nos. 14 and 16 of 2011.

450 *Opendi v. EC and Ayo*, citing *Frederick Nkayi Mbaghadi and Another v. Frank Wilberforce Nabwiso*, Court of Appeal Election Petition Appeal Nos. 14 and 16 of 2011 (itself citing *John Baptist Kakooza v. The Electoral Commission*).

451 *Opendi v. EC and Ayo*, citing *Frederick Nkayi Mbaghadi and Another v. Frank Wilberforce Nabwiso*, Court of Appeal Election Petition Appeal Nos. 14 and 16 of 2011 (itself citing *Baxter v. Baxter* (1950) ALL ER 458; *Matsiko Winifred Komuhangi v. Winnie J. Babihuga*, Court of Appeal Election Petition Appeal No. 9 of 2002 and *Anifa Kawooya Bangirana and Electoral Commission v. Joy Kabatsi Kafura*, Election Petition Appeal Nos. 3 and 4 of 2007.

452 *Nakwang Tubo Charitsine v. Akello Rose Lily,* Election Petition Appeal No.89 of 2016.

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 judge 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.[453]

5.5 Court's Duty to Call Witnesses

5.5.1 In terms of Section 64 (1) (b) of the PEA, and Rule 15 (1) of the Parliamentary Elections (Interim Provisions) Rules, the court was empowered to call, examine or re-examine witnesses if the court thought that that might assist it to arrive at an appropriate decision.[454]

5.5.2 This power was discretionary, and not mandatory. The court did not find any reason to fault the trial judge who, in exercise of his 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.[455]

5.6 Costs

5.6.1 Ordinarily, costs followed the event.[456] The position was that established under Rule 27 of the Parliamentary Elections (Interim Provisions) Rules SI 141-2 [to the effect that '[a] ll 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'.][457]

5.6.2 The award of costs was a matter of judicial discretion. This discretion, however, had to be exercised judiciously and not arbitrarily.[458]

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453 *ibid.*

454 *Muyanja v. Lubogo and EC.*

455 *ibid.*

456 *Hon. George Patrick Kassaja v. Frederick Ngobi Gume and The Electoral Commission*; *Apollo Kantinti v. Sitenda Sebalu, The Independent Electoral Commission and the Returning Officer, Wakiso.*

457 *Acire v. Okumu and EC*; *Akuguzibwe v. Muhumuza, Mulimira and EC*; *Kyakulaga and EC v. Waguma,* and *Ocen* and *EC v. Ebil.*

458 *Hon. George Patrick Kassaja v. Frederick Ngobi Gume and The Electoral Commission*, citing Section 27 of the Civil Procedure Act, Cap. 71 and Rule 27 of the Parliamentary Elections (Election Petition) Rules, S.I. 141-2].

In the case of *Hon. George Patrick Kassaja v. Frederick Ngobi Gume and The Electoral Commission,*[459] the court found that 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.

5.6.3 Costs followed the event unless, for good reason, the court ordered otherwise. The discretion to deny a successful party costs must be exercised judiciously and with good cause. [460]

5.6.4 Costs were not meant to be punitive, but to indemnify or compensate the successful party for the expenses they incurred during the litigation. A successful party might only be deprived of their costs in exceptional circumstances. In making its decision on costs, the court had to 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.[461]

5.6.5 At the same time, election petitions were matters of national and/or political importance, a factor which a court should bear in mind while awarding costs.[462]

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459 *Hon. George Patrick Kassaja v. Frederick Ngobi Gume and The Electoral Commission, ibid.*

460 *Apollo Kantinti v. Sitenda Sebalu*, The Independent Electoral Commission and the Returning Officer, Wakiso, citing *Col. (Rtd) Dr Besigye Kizza v. Museveni Yoweri Kaguta*, Supreme Court Presidential Election Petition No. 1 of 2001. See also *Freda Nanziri Kase Mubanda v. Mary Babirye Kabanda and the Electoral Commission*.

461 *Apollo Kantinti v. Sitenda Sebalu, The Independent Electoral Commission and the Returning Officer, Wakiso*, citing *Col. (Rtd) Dr Besigye Kizza v. Museveni Yoweri Kaguta*, Supreme Court Presidential Election Petition No. 1 of 2001.

462 *Acire v. Okumu and EC*, citing *Kadama Mwogezaddembe v. 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.' In the instant case, however, the Court found no reason to interfere with the High Court judge's discretion in awarding costs as he did.

5.6.6 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 consideration, or that an error in principle was made while exercising that discretion.[463]

5.6.7 Even where there was an error in principle, the court had 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.[464]

5.6.8 Electoral litigation was a matter of great national importance in which courts had to carefully consider the question of awarding costs so as not to unjustifiably deter aggrieved parties with a cause from seeking court redress.[465]

5.6.9 Although costs were governed by Rule 27 of the Parliamentary Elections (Interim Provisions) Rules SI 141-2; this Rule was contrary to Section 27 of the Civil Procedure Act – a substantive Act which would not be overridden by a subsidiary Rule 27 of the Parliamentary Election Rules.[466]

5.6.10 In terms of Section 27 of the Civil Procedure Act, costs were at the discretion of the court.[467]

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463 *Freda Nanziri Kase Mubanda v. Mary Babirye Kabanda and the Electoral Commission*, citing *Banco Arabe Espanol v. Bank of Uganda*, SCCA No. 8 of 1998; and *Twiga Chemical Industries Ltd v. Viola Chemical Industries Ltd*, Court of Appeal Civil Appeal No. 9 of 2002.

464 *Akuguzibwe v. Muhumuza, Mulimira and EC*, citing *Paul Semwogerere and Another v. Attorney General*, Supreme Court Civil Application No.5 of 2001.

465 *Akuguzibwe v. Muhumuza, Mulimira and EC*, citing with approval the dictum of Bamwine PJ in *Kadama Mwogezaddembe v. Gagawala Wambuzi*, Election Petition No.1 of 2001. In the *Akuguzibwe v. Muhumuza, Mulimira and EC* case, the non-compliance, such as existed, was largely caused by the Electoral Commission. 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. See also *Aisha Kabanda v. Mirembe, EC and Returning Officer*, citing with approval the dictum of Bamwine PJ in *Kadama Mwogezaddembe v. Gagawala Wambuzi*, Election Petition No.1 of 2001. In the *Aisha Kabanda v. Mirembe, EC and Returning Officer* case, where the vote margin between the two main contestants, the parties to the instant appeal was only 67 votes, the Court of Appeal felt that it would be inappropriate to condemn either party to costs.

466 *Kyakulaga and EC v. Waguma*.

467 *Ntende v. Isabirye*. In the *Ntende v. Isabirye* case, the High 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. According to the Court of Appeal, the trial judge could not be faulted for exercising her discretion in this manner.

5.6.11 Where, from the record in its entirely, it appeared that the petition 'was not entirely unmeritorious', the justice of the case required that each party meet their own costs in the Court of Appeal and the court below.[468]

5.6.12 Section 27 of the Civil Procedure Act provided that the costs of an action would follow the event unless the court, for good cause, ordered otherwise.[469]

In *Odo Tayebwa v. Arinda and EC,*[470] the Court of Appeal was of the view that 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).

In *Lumu v. Makumbi and EC,*[471] the Court of Appeal was of the view that the respondents' case in the instant court had been substantially conducted by counsel for the 1st respondent. In the circumstances, according to the court, it would not be fair to award costs to the 2nd respondent for the appeal. Similarly, given the conduct of the 1st respondent's counsel as noted by the court, he did not deserve an award of costs in the instant appeal beyond reimbursements for appearance.

In *Chemoiko v. Soyekwo and EC,*[472] the Court of Appeal considered that, although the appeal had failed, the appellant had succeeded in part on certain grounds. The appellant also had some reasonable cause of action with regard to some of the allegations of non-compliance with electoral law, although the court's finding was that the non-compliance did not affect the results in a substantial way.

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468 *Kyakulaga and EC v. Waguma*. In the *Ocen and EC v. Ebil* case, the Court of Appeal observed that 'since the petition in the High Court was not completely unmeritorious; the only problem being that insufficient evidence was availed to 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 lower court.

469 *Odo Tayebwa v. Arinda* and *Ebil* cases.

470 *ibid*.

471 Election Petition Appeal No.109 of 2016.

472 Election Petition Appeal No.56 of 2016.

5.7 Scope of Possible Orders

5.7.1 Under Section 60 (2) of the PEA, an election petition could 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.[473]

5.7.2 The scope of possible reliefs was set out under Section 63 (4) and (6) of the PEA.

5.7.3 The suggestion that there was a runner-up who should have been pronounced as having been validly elected was untenable.[474] The court strangely followed this approach in *Wakayima Nsereko vs. Sebunya* and declared a runner-up as winner on grounds that the candidate with the highest number of votes was not eligible to contest. This had the effect of disenfranchising the majority voters that had chosen the ineligible candidate. 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.[475]

5.8 Declaration of Alternative Winner

5.8.1 In terms of Section 63 (4) of the PEA, the High Court had the power to declare that a candidate, other than the person declared elected, was validly elected. In declaring the respondent the validly elected MP, the trial judge did not thereby disenfranchise the voters in the constituency.[476]

In *Wakayima and EC v. Sebunya,*[477] having found that the 1st 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 Member of Parliament. In accordance with Section 63 (6) (b) of the PEA, the respondent was the person entitled to be declared

473 *Ocen and EC v. Ebil.*

474 *Ocen and EC v. Ebil*, citing *Ngoma Ngime v. Electoral Commission and Hon. Winnie Byanyima*, High Court Electoral Petition No. 1 of 2001.

475 *Ocen and EC v. Ebil.*

476 *Wakayima and EC v. Sebunya.*

477 *ibid.*

the duly elected Member of Parliament for the constituency. The trial judge could not be faulted in duly declaring him so. This is disenfranchisement of voters who elected the ineligible candidate. They were entitled to be given opportunity to select another candidate. If this standard were adopted, it would mean in all cases where the winning candidate is disqualified, the runner-up should be declared winner of the race. The decision to declare the runner-up a winner in Wakayima was therefore a grave anomaly that ought not to be encouraged.

In *Nabeta Igeme Nathan Samson v. EC & Mwiru Paul,*[478] the court held that given the existence of all the irregularities in the electoral process at a particular polling station, the court's view was the results of the election had been tainted. The Electoral Commission 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.

5.9 Recounting of votes

5.9.1 In terms of Section 63 (5) of the PEA, the High Court was entitled, before coming to a decision on a petition, to order a recount of the votes cast.[479]

5.9.2 Section 54 of the PEA provides instances where a recount was mandatory, including where there was an equality of votes, or where the number of votes separating the candidates was less than 50. Under Section 55, a candidate could apply to a Chief Magistrate's Court for a recount.[480]

5.9.3 Before a court could order a recount of votes, there had to be sufficient evidence to show that it was necessary. An election could not be set aside unless it was clear that the anomalies being raised undermined the conduct of a free and fair election.[481]

478 Election Petition Appeal Nos. 45 and 46 of 2016.

479 *Ibaale v. Katuntu and EC.*

480 *ibid.*

481 *Ibaale v. Katuntu and EC*, citing *Ngoma Ngime v. Electoral Commission and Hon. Winnie Byanyima*, Electoral Petition Appeal No. 11 of 2002.

5.9.4 A party could only be entitled to ask for a recount if that party followed the process and procedure, as opposed to just alleging generally that the votes were declared wrongly.[482]

5.9.5 When an agent signed a DR form, they thereby confirmed the truth of what was contained in that form. They thereby confirmed to the principal that it was the correct result of what transpired at that polling station. The candidate in particular was therefore estopped from challenging the contents of the form, in so far as the candidate was the appointing authority of the agent.[483]

In *Ibaale v. Katuntu and EC* (supra), in the absence of any evidence from the appellant or their agents justifying the recount, there was no reason to fault the trial judge'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.

5.9.6 Cases of mandatory recounts

Under Section 54 of the PEA where margins were very narrow, that is 50 votes or below, and a candidate or registered voter in the affected constituency asks for a recount in writing, the Returning Officer is obliged to carry out a recount.

In *Hon. Achiro Lucy Otim and EC v. Kidega Nabinson*[484] the appellant (Achiro) emerged as the winner with 8,599 votes. The respondent (Kidega) emerged as the second with 8,597 votes. The difference between the winner and the second runner-up was two votes only. The respondent applied to the Chief Magistrate of Kitgum for a vote recount which was granted. However, on the date set for the recount, the election materials were destroyed by a rowdy mob and the recount was frustrated.

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482 *Ibaale v. Katuntu* and EC, citing *Kamba Saleh Moses v. Namuyangu Jennifer*, Court of Appeal Election Petition Appeal No. 27 of 2011.

483 *Ibaale v. Katuntu* and EC, citing *Edward Francis Babu v. The Electoral Commission and Erias Lukwago*, Election Petition No. 10 of 2006.

484 Election Petition Appeal No.19 of 2016.

The Court of Appeal in resolving the issue *inter alia* held that: Parliament seemed not to have envisaged a situation where the vote recount was frustrated because there was no provision in the law as to what happened when a recount ordered by court was disrupted. This however could not leave a litigant without a remedy. The Court could certainly invoke its inherent powers to make such orders as were necessary for the ends of justice to be met or to prevent abuse of process of court.

5.9.7 As to whether or not court ordered recounts and mandatory recounts were part of the election process, the Court of Appeal was of the view that the mandatory recount under Section 54 of the Parliamentary Elections Act was part of the election process but not the court-ordered recount provided for under Section 55 of the Parliamentary Elections Act.[485]

[485] *Hon. Achiro Lucy Otim and EC v. Kidega Nabinson, ibid .*

CONCLUSION

This study set out to identify broad principles that emerged from the Court of Appeal's jurisprudence regarding the 2016 parliamentary election disputes.

It was envisaged that clear principles would be discernible from the cases sampled so that the High Court would derive guidance from the Court of Appeal in the adjudication of post-2021 elections disputes.

Instead, the study finds that while there is judicial consensus in some areas,[486] substantial divergence is apparent on a number of key issues. These include questions such as: the standard of proof required before the court can make a finding that a petitioner has proved an allegation on the basis of which they pray that the election be set aside; the concept of 'substantial effect'; the requirement for corroboration of evidence to prove allegations; the degree to which courts should insist on the timelines set under the law; the approach to certain technicalities; the relationship between the court's mandate and that of certain statutory bodies (the Electoral Commission, National Council for Higher Education, Uganda National Examinations Board and others); the range of appropriate orders and remedies that a court may issue and, indeed, others.

We find it useful to conclude with a summarised discussion of the areas in which the court's interpretation of legal provisions is either controversial or where there is lack of clarity. We will, where possible, end with what may be a way forward or recommendation.

As already indicated, the foundational question of the standard of proof applicable has elicited different views from the Court of Appeal. This state of affairs is deeply problematic since the court's adjudication (including its analysis of factual and evidential issues) very much depends on the standard of proof applied. In essence, without consensus on this issue, the decision that a litigant can expect becomes a feature of chance – it may depend on which coram one's matter is allocated to – rather than principle.

[486] These include the question of the burden of proof, and the statutory provisions applicable to various aspects.

The PEA provides for two standards of proof in respect of the grounds for setting aside a parliamentary election. Whereas Section 61(1) stipulates that the election of a candidate as a Member of Parliament shall only be set aside if the allegations are proved *to the satisfaction of the court*, Section 61(3) stipulates that the allegations must be *proved on a balance of probabilities.* The critical question is therefore whether the correct standard of proof is the former or the latter.

Although the Court of Appeal has in one case held that the satisfaction of court and balance of probabilities go hand in hand,[487] we see different schools of thought coming from the court with regard to its understanding of the effect of the two sub-sections upon each other. In some of its decisions, the court has held that all that is required is proof on a balance of probabilities, the standard usually applied in civil cases; in other cases it has been held that the standard of proof in election petitions is higher than that applied in ordinary civil cases (balance of probabilities), although it is not equal to the standard of proof applied in criminal cases. Yet in others it has been held that the expression 'proved to the satisfaction of court' connoted the absence of any reasonable doubt – the amount of proof which leads to the court's satisfaction had to be that which left the court without reasonable doubt. That a court could not be said to be 'satisfied' when it was in a state of reasonable doubt. Is this not tantamount to the criminal law standard of 'proof beyond reasonable doubt'? In some cases it is stated that a standard higher than balance of probabilities is only required where serious allegations (of a quasi-criminal nature) are made.

One can perhaps say that in cases where the court has held that the standard applicable in election matters is a 'mere' balance of probabilities, the panel's understanding of the phrase to "*the satisfaction of court"* is that it is linked to the burden of proof and not to the standard of proof – *"the burden of proof lies on the petitioner to prove what they assert to the satisfaction of the Court.*" In line with this school of thought, one can say that the phrase is linked to the legal duty of the petitioner to prove the disputed assertion, their duty to convince/satisfy the court that their allegation is true and they should succeed in the relief sought – to set aside the election. It also appears that the approach that prefers the 'balance of probabilities' is based on the

[487] *Nakato Mary Annet v. Babirye Veronica and Electoral Commission,* Election Petition Appeal No.89 of 2016.

view that any higher standard is mistakenly borrowed from the Supreme Court's jurisprudence relating to presidential election disputes.

Nevertheless, we are alive to the fact that irrespective of the standard of proof set by the law, every decision of the court is communication that one party as opposed to the other has satisfied the court that they are right. It, therefore, would follow that it is Section 61 (3) which deals with the standard of proof – specifically stated as balance of probabilities.

It is also noted that the justifications for the application of standards higher than that ordinarily applied in civil matters are varied. In some cases the court has suggested that a higher standard is required because of the special nature of elections as events of public importance. In others the rational has been the "seriousness" of the allegations normally contained in the petitions. It is also suggested that a special – and higher – standard is required where serious allegations (of a quasi-criminal nature) are made.

Thus it has been held that forgery of academic documents is criminal in nature and the standard of proof required is beyond reasonable doubt – a higher standard than for other election irregularities.[488] In other cases the suggestion is that the higher standard (approaching proof beyond reasonable doubt) is necessitated by the potential effect of certain findings – a single finding that an electoral offence or illegal practice was committed is sufficient to set aside an election.

Whatever school of thought one applies, it has also been held that in election disputes thorough scrutiny of evidence and more caution are needed.[489] The specific call for more scrutiny of evidence in election disputes is closely linked not only to the standard of proof but also to another area on the law of evidence which has elicited varying and, in fact, contradictory decisions from the election appeal court – the rule of evidential corroboration, especially in dealing with allegations of bribery of voters by a candidate. In some cases the court has held that one witness could prove an allegation of bribery – that no particular number of witnesses is required to prove any

488 *Acen Christine Ayo v. Abongo Elizabeth*, Election Petition Appeal No. 58 of 2016.

489 *Amoru Paul and Electoral Commission v. Okello Okello John Baptist*, Election Petition Appeals Nos.39 and 95 of 2016; *Odo Tayebwa v. Arinda Gordon Kakuuna and Electoral Commission*, Election Petition Appeal No. 86 of 2016; *Wanda Ben Martin v. Electoral Commission and Werikhe Michael Kafabusa*, Election Petition Appeal No. 81 of 2016; *Chemoiko Chebrot Stephen v. Soyekwo Kenneth and Electoral Commission*, Election Petition Appeal No.56 of 2016.

particular fact. Even one witness could prove a case if they were credible.[490] In other cases it has been held that although, in terms of Section 133 of the Evidence Act, no particular number of witnesses was required to prove any particular fact, it is not safe for the trial judge to rely, with regard to the bribery allegation, upon the evidence of one witness. A trial judge ought to look for independent evidence from an independent witness to corroborate the evidence in question.[491] The justification for the requirement of independent evidence/corroboration has been that election petitions are highly partisan. The witnesses who are invariably partisan could easily resort to telling lies. They are likely to go to any lengths to establish adverse claims to secure victory for their preferred candidate. The evidence of such witnesses is suspect and it, therefore, 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.[492] But in light of the fact that Uganda is a common law jurisdiction and uses an adversarial system in which opposing sides invariably compete to convince court that their version of the facts is the most convincing, one must ask the question: How different are election disputes from other disputes? What makes it less likely that a witness called by a plaintiff to testify in a land matter, for example, is more likely to be "impartial" than one who testifies in an election dispute? In my view, perhaps what the court should emphasise is the credibility of witnesses.

In any case, it is clear that an amendment to the Parliamentary Elections Act is in order and that Parliament should consider legislatively settling the question of applicable standards of proof, first by electing only one of the two standards of proof currently articulated by Section 61, and then by definitively stating whether the elected standard of proof applies to all issues before the court or whether some special issues – such as allegations of the commission of electoral and other offences –should, indeed, carry a weightier standard of proof. This will foster increased consistency and predictability in how the judiciary resolves parliamentary election petitions.

490 For example *Isodo Apolot Stella v. Amongin Jacquiline*, Election Petition Appeal No. 60 of 2016.

491 *Amoru Paul and Electoral Commission v. Okello Okello John Baptist*, Election Petition Appeals Nos. 39 and 95 of 2016.

492 *Amoru Paul and Electoral Commission v. Okello Okello John Baptist, ibid*.

Another area which needs comment is the issue of locus to present a petition. In terms of Section 60 of the PEA, a petition challenging the results of a parliamentary election could be presented either by a candidate who lost an election, or by a registered voter in the relevant constituency whose petition must be accompanied by at least 500 signatures of voters registered in that constituency. It has been held that the requirement of 500 signatures is not a technicality. It is a substantive legal requirement which must be strictly adhered to.[493] A question which, however, needs clarification is: Where a voter appends their signature on a petition which is then duly filed in court but later on changes their mind so that at the time of adjudication, the supporting signatures are as a result less than 500, would the petition collapse? Perhaps justice demands that as long as the petition was at the time of filing accompanied by the requisite minimum number of signatures, the petitioner would have complied with the law.

Section 73 of the PEA deals with the utterance of false statements concerning the character of one candidate by another candidate. The court has held that a petitioner seeking to overturn an election on the ground that their competitor uttered "defamatory" statements against them must adduce evidence to show that because of the specific words complained of, the electorate, who held him in high esteem, shunned him. It must be proved that a *very good proportion* of the electorate lost all the respect they had for him after the said words.[494] Implicit in this principle is that the petitioner lost the election because of the utterances of the candidate who won the election. It would be interesting to interrogate the question: What nature of evidence would prove that a "very good proportion of voters" were affected by the false utterances.

It has been further held by the court that the words complained of had to be attacking the personal character of a candidate.[495] What we, however, find controversial is that it has been held that the insinuation of one being 'academically challenged' does not extend to personal character.[496] In light of the legal requirement that for a person to be a Member of Parliament they must possess a (specified) minimum formal academic qualification, should

493 In *Namujju Dionizia Cissy v. Martin Kizito Sserwanga*, a petition supported by 469 signatures was declared incompetent.

494 *Ocen Peter and Electoral Commission v. Ebil Fred*, Election Petition Appeal No. 83 of 2016.

495 *Ocen Peter and Electoral Commission v. Ebil Fred, ibid.*

496 *Mulimba John v. Onyango Gideon*, *Electoral Commission and Returning Officer*, Election Petition Appeal No. 48 of 2016.

a false allegation that a candidate does not possess the required academic qualification not lead to an annulment of the elections if it is proved that after the said words were uttered the electorate lost the respect they had for the individual?

Another area where there has been divergent application of the law deals with the degree to which courts should insist on the timelines set under the law. In *Omara v. Abacacon and Electoral Commission* and *Ikiror v. Orot* the court emphasised the strictness of time limits set under the law for filing petitions and prosecuting any appeals, and strictly enforced the same. Similarly, in *Kubeketerya v. Kyewalabye and Electoral Commission* the Court stressed that election petitions had to be handled expeditiously; and that since the rules and timelines for filing proceedings were couched in mandatory terms, they had to be strictly interpreted and adhered to.

On the other hand, in the *Lumu v. Makumbi and Electoral Commission* case, the Court of Appeal noted that the controlling jurisprudence in this regard was the decision of the Court of Appeal in the 2011 case of *Muhindo Rehema v. Winfred Kizza and Electoral Commission*[497] to the effect that the service of process required in election petitions was directory rather than mandatory, and that failure to meet this requirement, especially where no injustice or prejudice was caused, would be a mere irregularity which did not vitiate the proceedings. As such, the court in *Lumu* was of the view that since the 1st respondent did not suffer any prejudice and filed his answer to the petition in a timely manner, the trial judge should have exercised his discretion to validate the late service, if any, even if no such application was placed before him. According to the court, in the instant case, the late service of the petition was not a legal or legitimate ground for striking it out. Under the doctrine of *stare decisis*, the *Muhindo Rehema v. Winfred Kizza and Electoral Commission* decision was binding on the High Court. The trial judge had no justification for disregarding the changed position of the law, as spelt out by the appellate court, on the question of the late service of a petition.

Similarly, in *Wanda v. EC and Werikhe,* the court observed that where the appellant could show that the failure to file the record of appeal was attributable to counsel, and that they had themselves been diligent, this was a good ground for extending time for filing the record.

[497] Election Petition Appeal No. 29 of 2011.

In the area of procedural technicalities, the Court of Appeal has in some cases taken a relaxed approach to the issue of technicalities. In *Ocen and EC v. Ebil,* for instance, the court noted that citing a wrong law did not necessarily invalidate the pleadings, and that the use of the acronym 'PEA' instead of 'Parliamentary Elections Act' could not have misled any reasonable person or advocate. Similarly, in *Mandera v. Bwowe,* the court noted that non-service of the notice of presentation of the petition is not, *per se*, fatal, where it can be shown that it did not prejudice the respondent.

Further, in *Amoru and EC v. Okello Okello* the court observed that election petitions were very important, and courts were especially enjoined to take a liberal view of affidavits so that petitions were not defeated on technicalities. As such, although 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, in the court's view, this this was a technicality which was curable under Article 126 (2) (e) of the Constitution, as failure to comply with it would not occasion any injustice.

In the same vein, in *Kyakulaga and Electoral Commission v. Waguma*, the court noted that there was a general trend towards taking a liberal approach when dealing with defective affidavits, an approach which was in line with Article 126 (2) (e) of the Constitution, which required that substantive justice be administered without undue regard to technicalities.

On other occasions, however, the court has taken a very strict approach to technical matters of procedure. Perhaps the most striking instance in this regard was the decision in *Kinyamatama v. Sentongo* in which the court held that the effect of non-renewal of a practising certificate was that the advocate in question ceased and stopped acting as an advocate and that, as such, any such affidavit was not duly commissioned, with the result that, where the petition in question was supported by such affidavit, the petition had to be struck out. In that case, therefore, the Court of Appeal held that 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 practising certificate for the year 2016, and on this ground, dismissed the petition.

The very important principle of substantial effect must also be addressed. The election of a candidate as a Member of Parliament can only be set aside if it is proved that there was non-compliance with the law and that the non-compliance affected the result of the election in a substantial manner. It is now trite law that the test to be applied in determining whether the proven malpractices or irregularities affected the result of the election in a substantial manner is both quantitative and qualitative. The quantitative approach takes a numerical approach to determining whether the non-compliance significantly affected the results. In almost all the cases the court has applied the quantitative test and several principles have been established such as: that the expression 'non-compliance affected the result of the election in a substantial manner' could only mean that the votes a candidate obtained would have been different in a substantial manner, if it were not for the non-compliance; that to succeed in proving that the proven irregularity had a substantial effect on the result, the petitioner did not have to prove that the declared candidate would have lost. It has also been held that it was sufficient to prove that the winning majority of the respondent would have been reduced and the reduction was such as would put the victory in doubt.[567] Application of the quantitative test also calls for making adjustments for the effect of the proved irregularities. If after making adjustments for the effect of the proved irregularities the contest seems much closer than it appeared to be when first determined, then it will be held that the election result was affected in a substantial manner. But when the difference between the votes of the winning and the losing candidate remains wide even after making adjustments for the proved irregularities, then it cannot be said that the irregularity affected the result of an election in a substantial manner.[498] Whereas there may be said to be consistency in the interpretation of what underlies the quantitative test, it can be said with certainty that in the cases analysed in the study, whereas the court acknowledged the qualitative aspect of the substantiality test, the court has applied it in only one case,[569] where it was held that a court which has made a finding that the electoral process lacked integrity cannot

[498] See, for example, *Chemoiko Chebrot Stephen v. Soyekwo Kenneth and Electoral Commission*, Election Petition Appeal No. 56 of 2016; *Kyakulaga Bwino Fred and Electoral Commission v. Waguma Badogi Ismail*, Election Petition Appeal Nos.15 and 20 of 2016; *Amoru Paul and Electoral Commission v Okello Okello John Baptist,* Election Petition Appeals Nos. 39 and 95 of 2016; *Adoa Hellen and Electoral Commission v. Alaso Alice*, Election Petition Appeal Nos.57 and 54 of 2016.

attempt to make adjustments for the proved irregularities so as to arrive at a finding that any particular candidate won the elections – an indication that it is not only how many votes one got that matters but also how the votes were obtained.[570]

There is a possibility that the court's concentration on the numerical approach pushes the need for efficiency and development of high quality electoral management processes into obscurity. In order to enhance the rule of law, the court must come out loud and clear that although annulling of election results is on a case-by-case analysis of the evidence adduced before the court, and while validity is not equivalent to perfection, if there is evidence of such *substantial departure* from legal imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The courts, in exercise of judicial independence and discretion, are at liberty to annul the outcome of a sham election, for such is not in fact an election. As held elsewhere, "[f]or an election to be conducted substantially in accordance with the law *there must be a real election … and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election.*"[499]

There clearly is an urgent need for a peer-to-peer reflection and dialogue – at the Court of Appeal level – around the various areas of divergence identified by this study, areas which are at the centre of electoral justice. The dialogue must be aimed at achieving a measure of judicial consensus, ahead of the 2021 electoral cycle. As the apex court for parliamentary election litigation, the court is supposed to be the last word on the law, providing clarity and coherence in the relevant legal standards. This is the very foundation of the country's legal system – the notion of firm and dependable precedent – *stare decisis.* If the Court of Appeal has not been able to achieve consensus on several key issues, how are the lower courts – particularly the High Court, which serves as the court of first instance for parliamentary election disputes – to be guided?

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499 *Col. Dr Kizza Besigye v. Attorney General*, Constitutional Petition No. 0013 of 2009 (Decision of Prof. Tibatemwa-Ekirikubinza, JCC. (as she was then).

From a procedural point of view, it is proposed that in the coming electoral dispute cycle, the Court of Appeal will, if presented with disputes whose resolution is rooted in areas where contradictory jurisprudence has come out, the court sets up panels of more than three justices, to resolve the contradictions and harmonise the court's interpretations of the law. This is critical to the very notion of electoral justice in Uganda.

Lastly, it will be prudent to highlight a few areas where legal reform is required. Some of these areas have already been highlighted elsewhere. They include the following:

1. Section 61 of the PEA ought to be amended to clarify what the standard of proof is or ought to be, so that the confusing discrepancy between proof to the satisfaction of the court and proof on a balance of probabilities is eliminated. Parliament should also statutorily settle the standard of proof applicable to special facts or allegations such as the commission of electoral offences.

2. The law should definitively provide that a fresh equating of academic certificates is not necessary every electoral cycle; one certificate of equivalence ought to suffice for future elections as well unless it is revoked for good cause. The requirement that a fresh certificate be obtained for every election cycle appears to be unreasonable.

3. Given that the Supreme Court is the final court of appeal in Uganda, whose decisions on questions of law are binding on all courts throughout Uganda (Article 132(1) and (4) of the Constitution), it is advised that some questions of law will be so important as to require finality in their determination, by the apex court. For that matter, and considering as well the interest in having election disputes conclusively decided within a short time, the law ought to be amended to create a special avenue for filing a final appeal to the Supreme Court on a pure question of law, with the certificate of the Court of Appeal or the Supreme Court itself that the question is one of high public importance.

This publication provides a systematic analysis of the 2016 Parliamentary Election Petition cases decided by the Court of Appeal of Uganda - the highest court of resort in such cases. Through a one-one analysis of the various election petition judgments, the study examines court's interpretation of key legal principles relating to elections, with a view to providing an acceptable interpretation.

The work, a product of two distinguished jurists from Uganda, offers a body of information as well as clarity on key legal principles relating to elections in Uganda with a view to influencing their improved applicability by judicial officers and legal practitioners in parliamentary election petition cases, and ultimately, enhance electoral justice in the country.

This publication will benefit the judiciary, legal practitioners and scholars in Uganda and beyond.

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