

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT-01-CV-EP-003/2021

AKUGIZIBWE LAWRENCE PETITIONER

VERSUS

1. MUHUMUZA DAVID
2. BAGUMA R DANIEL (RETURNING OFFICER
KYENJOJO DISTRICT)
3. ELECTORAL COMMISSION RESPONDENTS


Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

This is a parliamentary election petition brought by the Petitioner Akugizibwe Lawrence, a registered voter at Kagoma Primary School Polling Station in Mwenge County North Constituency, Kyenjojo District and one of the nominated candidates in the Parliamentary Election for Mwenge County, North Constituency, Kyenjojo District. The Parliamentary Elections were held on the 25th day of January, 2021 and the 1st Respondent was declared the winner and published in the Uganda Gazette Volume CXIV dated the 17th February 2021.

The Petitioner seeks to challenge the election results and declaration of the 1st Respondent, Muhumuza David as the validly elected Member of Parliament for Mwenge County North Constituency in Kyenjojo District. The Petitioner prays for this court to declare that he was the validly elected candidate, an alternative order for the election to be set aside and a new election held with a new Returning Officer and Polling Officials, and, costs of the petition.

The 1st Respondent, Muhumuza David in his answer to the Petition denied all allegations in the Petition and prayed for the same to be dismissed with costs.


11/10/2021

The Petitioner relied on evidence of the Uganda Gazette dated 17th February 2021 admitted as PEx1, Return Forms of Transmission of Results dated 25th January 2021 admitted as PEx2, Results Tally Sheet dated 25th January 2021 admitted as PEx3, DR Forms for the Petitioner admitted as Pex4, copies of ballot papers admitted as PEx5 and a letter from MTN for mobile money statement dated 26th February 2021 admitted as PEx6.

The Respondent cross examined 04 (four) of the Petitioner's witnesses namely; PW1 Anaclet Kwesiga, PW2 the Petitioner Akugizibwe Lawrence, PW4 Basaba Kyaligonza and PW5 Mwesige Columbus.

The Respondent relied on evidence of DR Forms for the Respondent admitted as RE1 and the evidence of the 1st Respondent, the other affidavits supporting his answer having been expunged from the record.

I will consider both Parties' evidence in determining the Petition.

Representation;

The Petitioner was represented by Counsel Caleb Alaka, Kato Fred, Nasasira Josephine and Galisonga Julius.

The 1st Respondent was represented by Counsel James Byamukama, Counsel Severino Twinobusingye and Counsel Amos Masiko.

The 2nd Respondent, the Electoral Commission was represented by Mr. Enoch Kugonza and Honest Baguma.

Both Counsel for the Petitioner and 1st Respondent filed written submissions which are on the court record.

I will consider the submissions and evidence of both Parties in my resolution of the issues.

Consideration of the Preliminary objections;

Counsel for the 1st Respondent raised preliminary objections and as a rule of practice they are considered first. The first objection is to the effect that since the Petitioner amended

his pleadings, he is estopped from relying on the original petition and its supporting affidavits. He referred this court to the High Court and Court of Appeal decision in **Election Petition No. 007 of 2016: Mashate Magomu Peter vs. The Electoral Commission and Another.**

In that case, the Petitioner amended his petition and attached as photocopies affidavits in support of the original petition. The High court presided over by Hon. Lady Justice P. Basaza Wasswa **held that;**

“By replacing his original petition and its accompanying affidavits with the amended petition, it was no longer open to the Petitioner to fall back to his original petition nor its accompanying affidavits. On this basis, court rejected all the affidavits filed in support of the earlier petition as they were an integral part of the original petition which was replaced”.

(Election Petition Appeal No. 0047 of 2016: Mashate Magomu Peter vs. The Electoral Commission and Another)

The principle that once the Petitioner amends their Petition, it is no longer open to them to rely on the original Petition and its accompanying affidavits was upheld.

I am alive to the above decision and the facts of the said case and will park it for now and distinguish it later.

In the instant case, the Petitioner filed a “supplementary affidavit” to the amended petition and also filed several affidavits on the 16th day of March 2021 when the amended petition was filed.

Counsel for the 1st Respondent relied on the *Black’s Law Dictionary* definition of a *supplementary affidavit* that *it is an affidavit that is presented in addition to the original and supports your contention further.* Counsel prayed for the supplementary affidavit to be struck out as it ought to have been an affidavit supporting the amended

Wang
11/10/2021

petition instead of supplementing a non-existing affidavit. It was also Counsel's submission and prayer that the amended petition be struck out for being incurably defective as it lacks an affidavit in support required under *Rule 4(8) of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules SI 141-2*.


I have carefully considered the 1st Respondent's submissions and the Petitioner's pleadings.

The Petitioner filed the original petition on the 4th day of March 2021 and the amended petition was filed on the 16th day of March 2021. On the same day, the Petitioner filed other affidavits deposed by one Ahebwa Jamil, Mugisha John Bosco, Musinguzi Joseph, Komuntaro Ruth among others, who had not deposed any previous affidavit in support of the original petition. I am inclined to believe that these affidavits which were filed on the same day as the Amended Petition were filed in support of the amended petition. To hold otherwise would be a mockery to the intention of electoral justice.

The Respondent also challenges the Petitioner's affidavit annexed to the amended petition as it was titled supplementary instead of affidavit in support of the amended petition. In that regard Counsel for the 1st Respondent argues that the affidavit was incompetent as there was no affidavit to supplement since the petition was amended.

A supplementary affidavit is meant to be an addition to the founding affidavit. An affidavit made in addition to a previous one, in order to supply some deficiency in it. (*Black's Law Dictionary Revised 4th Edition*).

In the instant case, the Petitioner's affidavit annexed to the amended petition was titled "supplementary affidavit". This is an election petition which is not just a civil matter but a matter of public interest. In consideration of the principle of equity that equity looks at substance rather than form, and further consideration being given to rules of natural justice, I find that *Article 126 (2)(e) of the Constitution of the Republic of Uganda 1995* should be relied on in the instant facts to administer justice without undue regard to


11/10/2021

technicalities. In administering justice in election petitions, courts adopt a liberal approach to statutory interpretation so that justice is not only done but seen to be done.

Citing the Court of Appeal Kenya decision in *Martha Wangari Karua v Independent & Boundaries Commission & 3 others Nyeri Election Petition Appeal No. 1 of 2017; [2018] eKLR*

"As has been stated by courts in this country, election petitions are sui generis, and akin to public interest litigation. These are not disputes that are primarily between only the parties to the petition; there is a greater concern because the electorate has an interest in knowing the winner; and if they were disenfranchised in the conduct of that election. It therefore behooves, courts to undertake and place substantive considerations above those of procedure, especially where the procedural infractions are curable." I find this decision persuasive in the instant case.

I therefore find that the title to the affidavit should not be used to defeat the Petitioner's right to a fair hearing. It is also important that despite this being an election petition with rules of procedure, this court administers justice substantively without undue regard to technicalities to have the substantive issues finally settled.

This court therefore holds that the Petitioner's affidavit annexed to the amended petition as a supplementary affidavit is competent and its title does not affect its competence.

This preliminary objection is therefore overruled.

The 2nd Point of Law raised by the 1st Respondent is that all the Affidavits in support of both the original and the Amended Petition are incurably defective for having been prepared in contravention of the provisions of Sections 2 and 3 of the Illiterates Protection Act, Cap. 78.

That the Amended Petition is accompanied by 21 Affidavits, deposed by 21 illiterate persons filed on 16th March, 2021 inclusive of the Petitioner's "2nd Supplementary Affidavit". The said Affidavits were allegedly commissioned, interpreted and translated

by a Commissioner for Oaths contrary to the provisions of **Sections 2 & 3 of the Illiterates Protection Act** and the **Commissioner for Oaths Advocates Act, Cap. 5**. The Commissioner for Oaths does not state his full name and address in the jurat. He also does not indicate that he had instructions to draft the 21 affidavits and interpret them on behalf of the 21 illiterate persons.


In accordance with the provisions of **Sections 2 & 3 of the Illiterates Protections Act**, the person who drafts a document on behalf of the illiterate person, is the one to interpret it. Such person must issue a certificate of translation confirming that they read over and explained the contents of the document to the illiterate in the language they understand.

Section 3 of the Illiterate Protection Act provides that;

Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and it fully and correctly represents his or her instructions and was read over and explained to him or her.

He referred this court to the Ruling of the Hon. Lady Justice Victoria. N. N. Katamba in the case of **Akugizibwe Lawrence Vs. Muhumuza David and 2 Others Election Petition No. 003 of 2021 at pages 15 to 16**, on the import of section 3 of the Illiterates Protection Act.

He also relied on the decision of His Lordship Mr. Justice Richard Wejuli in the case of **Sentamu Betty Vs. Nayebele Sylvia and Anor. Election Petition No. 001 of 2021 at pages 11, 13, and 14 of the decision**. The latter case highlights both the instructions of the illiterate and states further that *"mere statements by the commissioner for oaths that the affidavits were read over and explained to the deponents did not suffice to bring them in conformity with the requirements of the Act, nor does the proclamation*


11/10/2021

of the Commissioner's proficiency in Luganda and English fill in the Statutory prescription".

Also the decision of **Justice Richard Wejuli in the case of Mubiru Eliphazi Vs. Kiviri Tumwehe Geoffrey and Anor. Election Petition No. 003 of 2021**

I have looked at the affidavit in support of the amended petition sworn by the petitioner, it shows that it was sworn at Kampala on the 12th day of March 2021 but commissioned and translated by a Magistrate Grade One at Kyegegwa Magistrate court sealed with the seal of court. It is not unlikely that the affidavit could have been drafted at Kampala but sworn and commissioned in Kyegegwa before the Grade 1 Magistrate.

Furthermore, the said Magistrate did not state his or her name and address apart from the court seal. The Petitioner is however literate and did not need a certificate of translation on his affidavit. I would attribute the presence of a certificate of translation on his affidavit to the omnibus practice of preparation used by lawyers when preparing election petition pleadings.

It is also my considered opinion that such irregularities despite being present in election petitions whose procedure is strict, should not affect the administration of justice if courts are to determine election petitions substantively. Otherwise almost all petitions will be dismissed for technical irregularities and justice will not be administered.

In the case of *Suggan Vs. Road Master Cycles Ug Ltd 2002 E.A Page 55*, DCJ Mpagi Bahigaine held that it is trite that defects in the jurat or any irregularity in the form of an affidavit cannot be allowed to vitiate an affidavit in view of *Article 126(2)e of the 1995 Constitution of the Republic of Uganda* which stipulates that substantive justice shall be administered without undue regard to technicalities.

In addition, Justice Bart Katureebe stated in the Supreme Court in **Dr. Kiiza Besigye Vs Electoral Commission Presidential Election Petition No. 01 of 2006** that, "...in a case of this importance and in which evidence is required by way of affidavit, it is important that the affidavits conform to the law particularly as to substance..." *emphasis mine*


11/10/2021

I find it necessary to administer substantive justice in the instant case, this being an election petition that is a matter of public interest. The Petitioner's supplementary affidavit is therefore competent and will be relied on and considered as his evidence in the determination of the merits of this case.

For the rest of the supporting affidavits supporting the amended petition filed on the 16th of March, 2021 and commissioned by the same magistrate who also acted as the translator of the said affidavits, I am inclined to strike them off the record. This is because this court did not have the opportunity to determine whether the deponents were literate or not or whether they truly understood the contents therein.

The 2nd preliminary objection therefore partly fails in as far as it seeks to challenge the Petitioner's affidavit for irregularities in the jurat, and partly succeeds in challenging the other affidavits that were deposed by illiterates without following the provision in Section 3 of the Illiterates Act.


Competence of the Amended Petition and affidavit evidence;

Rule 4 (8) of the Parliamentary Election petitions (Election petitions) rules SI 141-2 requires the petition to be supported by an affidavit.

According to the decision of court of Appeal in the case of **Suubi Kinyamatama Juliet Versus Sentongo Robinah Nakasirye Election Petition Appeal No. 92 of 2016** that a petition not supported by any evidence as is required by law is defective.

The Court of Appeal in *Mashate Magomu Peter Vs. the Electoral Commission and Sizomu Gershom Rabbi Wambembe Election Appeal No. 47 of 2016* held that an amended pleading replaces the earlier pleading and once a pleading ceases to be on court record, it cannot be restored by judgment.

The effect of the above decision is that once a petitioner amends his or her petition, the original petition ceases to exist before the court and the amended petition stands. This


11/10/2021

would also mean that when the amended petition is struck out the petitioner would have no case before the court.

In the instant case, the Petitioner relied on the evidence and affidavits sworn in support of the original petition. Counsel for the Respondent argued that since the affidavits in support of the amended petition were defective, the amended petition was also struck out.

I am aware of the decision of the Court of Appeal in the Mashate Case. However, I have considered and upheld the Petitioner's "supplementary affidavit". The Petitioner states in the said affidavit and makes reference to the affidavits deposed in support of his earlier petition in paragraphs 7-19. I find that the import of these paragraphs made the Petitioner's affidavit supporting the amendment explanatory in nature and by referring the affidavits sworn earlier in support of the original petition, they were adopted and given effect in the amendment.

Counsel for the Petitioner argued that the amendment affected the petition only and not the affidavit evidence and that the evidence by affidavit survived such amendment. I do not agree with this submission but rather find that because the Petitioner in his affidavit supporting the amended petition, paragraphs 7 to 16 thereof made reference to the affidavits supporting the original petition gave them competent effect.


I therefore find and hold that the original affidavits are competent as they were appraised and adopted by the Petitioner's subsequent affidavit. As such, their evidence is validly before the court and will be considered in determining the merits of the Petition.

Determination of the Petition;

Issues;

Parties raised the following issues for the determination by court;

1. Whether the elections were conducted in compliance with the provisions and principles of the Constitution, the Parliamentary Elections Act and Regulations and the Electoral Commission;


11/10/2021

2. If so, whether the non-compliance affected the result of the election in a substantial manner;
3. Whether the 1st Respondent or his agents with his knowledge and consent or approval, committed any illegal practice or offence;
4. What are the remedies available to the Parties;

Consideration of the Petition:

Burden and Standard of Proof:


The burden of proof in election petitions lies on the Petitioner to prove the grounds in the Petition to the satisfaction of court and on the basis of a balance of probabilities (*Section 61 (1 & 3) of the PEA and, Presidential Petition No. 1 of 2001, Dr. Kiiza Besigye Vs Y.K Museveni & Anor*).

This burden of proof remains on the Petitioner throughout the trial and does not shift to the Respondent. (*Mutembuli Yusuf Vs Nangwomu Moses Musamba and the EC EPA No. 43 of 2016*)

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

Although the Parliamentary Elections Act provides for the standard to be on the basis of a balance of probabilities, it must be slightly higher than the balance of probabilities as in ordinary suits. (*Akugizibwe V Muhumuza, Mulimira & EC (EA No. 22 of 2016) citing Matsiko Winfred Kyomuhangi v J Babihuga EP No. 09 of 2002*)

Furthermore, the Petitioner is required to adduce credible or cogent evidence to prove the allegations/grounds on the balance of probabilities. (*Mastiko Winfred Komuhangi Vs J Babihuga Election Petition No. 09 of 2002*)


11/10/2024

With the stated burden and standard of proof, I will proceed to resolve the issues raised in consideration of the evidence and submissions of the Parties.

Issue one; Whether the elections were conducted in compliance with the provisions and principles of the Constitution, the Parliamentary Elections Act and Regulations and the Electoral Commission;

Counsel for the Petitioner restated the Petitioner's allegations in the petition that the election was conducted in contravention and contrary to the provisions and principles under the Constitution of the Republic of Uganda 1995, the Electoral Commissions Act, the Parliamentary Elections Act.

Counsel cited the provisions of *Article 61 (a) of the 1995 Constitution of the Republic of Uganda* and *Section 12 (1) (e) of the Electoral Commissions Act Cap 140* which enjoin the Electoral Commission to ensure that regular, free and fair elections are held.

The Petitioner contends that there was ballot stuffing contrary to *Section 76 (f) of the Parliamentary Elections Act*. Counsel for the Petitioner relied on evidence of Birungi Michael, Richard Baguma, Gumisiriza Gordon, Katebarirwe John and Namara Turyamureeba who all stated in their affidavits that there were pre-ticked ballots.

To rebut this evidence, counsel for the 1st Respondent argued that the affidavit of Birungi Michael is hearsay and not admissible as he refers to information from a 3rd party and that the alleged car does not belong to the 1st Respondent as he stated in his answer to the Petition. Counsel further contended that the Petitioner's agents signed the declaration form without any complaint of ballot stuffing a clear indication that there was no ballot stuffing at Hansanju Polling Station.

It is also Counsel's submission that there is no evidence of whether the alleged stuffed ballot papers were stuffed in favour of the 1st Respondent.

Counsel submitted that Richard Baguma's evidence should be treated with a pinch of salt unless corroborated by cogent evidence which was not done. To support the submission,

Counsel relied on the case of Nakate Lilian Segujja and the Electoral Commission vs. Nabukenya Brenda Consolidated Election Petition Appeals No. 17 and 21 of 2016 where the Court of Appeal held that evidence by an agent is partisan and must be corroborated.

In addition, Counsel for the Respondent argued that the Petitioner did not adduce evidence to prove that the votes cast at any polling station were over and above the number of the registered voters to justify his allegation of ballot stuffing.


Ballot stuffing is one of the offences relating to voting. *Section 76 (f) of the Parliamentary Elections Act* provides that a person who knowingly and intentionally puts into a ballot box anything other than the ballot paper which he or she is authorised to put in commits an offence.

Ballot stuffing is an election malpractice which involves voting more than once at a polling station or moving to various polling stations casting votes either in the names of people who did not exist at all or those who are dead or absent at the polling exercise, the number of votes cast ought to be equal to the number of people who turned up to vote. *(see Kyinyamatama V Sentongo & EC Election Petition No. 92 of 2016)*

Regarding the allegations of ballot stuffing, the Petitioner stated in the petition that there was ballot stuffing. In his evidence, PW2 the Petitioner testified that his agents did not report any anomalies relating to the voting process. He also stated that the results were properly captured but there was a problem with accountability.

When asked about the allegations that the 1st Respondent printed ballot papers, he stated that it was a one Mukasa George who informed him. Furthermore, the evidence relied on by Counsel for the Petitioner to support the allegation of ballot stuffing is insufficient. The evidence of Michael Birungi who states that he saw the 1st Respondent and soldiers in the car UBA 073/U ticking ballots is insufficient as the said car was never directly connected to the 1st Respondent.

I am inclined to find such evidence an afterthought as it was never raised or reported during the voting process. The evidence that soldiers were giving voters pre-ticked votes


11/10/2024

was also not directly attributed to the 1st Respondent and as such cannot be relied on to challenge his election. None of the people mentioned to have stuffed pre-ticked ballot papers were directly linked to the 1st Respondent.

The Petitioner had agents at all polling stations who never reported any anomalies as he confirmed in his evidence. The law of agency is clear and *Section 1 (1) Parliamentary Elections Act* states that an agent by reference to a candidate includes a representative and polling agent of a candidate. Candidates are liable for all authorised acts done by their duly appointed agents.

In the instant case, the actions of the agents who signed the DR forms bind the candidates and since they did not raise any issues with the voting process, the candidates are bound by the agents' observations.

The Petitioner has not adduced evidence to prove that the total number of cast votes exceeded the registered voters at the different polling stations or even the number of voters that showed up to vote at the different polling stations. In his evidence, the Petitioner attributed ballot stuffing to alterations on some of the DR Forms. He specifically identified the DR Form for Kanyegambire B, Busimba Itambiro, Kagazi Church of Uganda, Katambare Primary School, Kayanaja Church of Uganda, Kibaale Itambiro and Nturaje Haitambiro these being 9 out of 132 DR Forms.

It was established in cross examination that out of the 09 (nine) DR Forms, the Petitioner had won in 02 (two) with the other DR Forms presenting a wide margin between the Petitioner and the 1st Respondent. It was also clearly established that the discrepancies were minor for example the discrepancy at Nyaburara Catholic Church where the discrepancy in the valid votes was a difference 01, Kagima Primary School where the discrepancy in unused ballots was a difference of two ballots.

Furthermore, when the Petitioner was asked whether he found an anomaly in the results after crosschecking the 132 DR Forms against the results tally sheet, his answer was "no". the Petitioner has therefore failed to prove that the total number of votes cast exceeded

the ballots issued or the registered voters due to the alterations. I agree with Counsel Byamukama that the discrepancies complained of were minor and could not have affected the result of the election.

Regarding the evidence of Richard Baguma that there were pre-ticked ballots, I am also inclined to agree with Counsel for the Respondent that the evidence by Richard Baguma is partisan since he was the Petitioner's agent and as such his evidence should be treated with a pinch of salt unless corroborated by cogent evidence. Court of Appeal in *Betty Muzanira Bamukwatsa Vs. Masiko Winnifred Komuhangi, the Returning Officer, Rukungiri and the Electoral Commission Election Petition Appeal No. 65 of 2016* sated that the evidence of a partisan witness, i.e. a supporter of a particular candidate, requires some corroboration.

The Petitioner also adduced evidence of PW1 who was the 1st Respondent's agent, to prove that there was ballot stuffing (pre-ticked ballots). In his evidence he stated that he supported the 1st Respondent but found that after the election, the 1st Respondent did not meet his expectations. The different forms of non-compliance and the electoral offences are clearly stated under the law. A voter does not get to change their mind upon voting simply because the elected party did not meet their expectations. His evidence that he changed his mind about the 1st Respondent after the election also shows that his evidence is simply an afterthought and is not guided by the intention of preserving the integrity of the election or otherwise challenging the same.

It is my observation that the evidence adduced by the Petitioner's witnesses is simply an afterthought considering that there were no anomalies reported by his agents and there is no direct evidence attributing the alleged ballot stuffing to the 1st Respondent.

I therefore find that the Petitioner has not adduced sufficient evidence to prove that the 1st Respondent engaged in any forms of ballot stuffing.


11/10/2021

Failure of the 3rd Respondent to restrain soldiers from intimidating voters at polling stations.

Counsel for the Petitioner relied on evidence of Byomuhangi Donzio who stated in his affidavit that the 1st Respondent's agents came to the polling station and started a fight and that the 2nd Respondent did not stop them. Counsel further relied on evidence of Balikhoha Julius who stated in his affidavit that there were very many soldiers at Hansanju Polling Station who controlled the voting process and scared voters away, and further that the Electoral Commission Officer denied him the opportunity to write what he had witnessed on the DR forms.

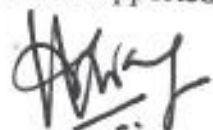
Counsel for the Respondent in rebutting the allegations argued that there was no evidence of voter intimidation by soldiers at polling stations as submitted by the Petitioner during the voting process or at all. Counsel further relied on the evidence of Basaba Kyaligonza Anthony the presiding officer for Nyaruzigati COU polling station who stated in his affidavit that the elections were free and fair.

This offence is created under *Section 42 of the Parliamentary Elections Act* which prohibits persons from being armed at polling stations unless lawfully or by the office they hold.

Court in *Hellen Adoo & EC Vs Alaso Alice Alaso Court of Appeal Election Petition Appeal No. 57 and 54 of 2016* stated that it must be established that there was generalized violence and intimidation.

The allegations of assaults by the 1st Respondent's agents alluded to by the Petitioner were neither recorded on the DR forms nor reported to any police station as there is no evidence of the same. The names of the agents alleged to have assaulted voters were also not provided.

Furthermore, the allegations are not attributed to the 1st Respondent as it was not stated whether the alleged actions were authorized by the 1st Respondent and if truly the alleged persons were agents of the 1st Respondent. All these allegations are not supported by



11/10/2021

evidence and as such, I find that the allegations are not only mere afterthoughts but also falsehoods. Court in *Kyamadidi Mujuni Vincent Vs Ngabirano Charles & Electoral Commission Election Petition Appeal No. 84 of 2016* observed that it is trite law that in election contests, witnesses, most of them motivated by the desire to secure victory against the opponents, deliberately resort to peddling falsehoods.

I associate myself with this decision especially considering that there is no evidence of prior reporting to the police or the Electoral Commission of the alleged assaults or intimidation.

I therefore find that the Petitioner has not adduced sufficient evidence to prove that there was intimidation of voters on the Respondents' part.


I find that the Petitioner has not proved to the satisfaction of court on a balance of probabilities that there was voter intimidation.

Failure of the 3rd Respondent to handle Declaration Forms with impartiality.

The Petitioner's Counsel relied on evidence of Kyakunzire Celia a registered voter of Nyamyezi polling station who stated in her affidavit that on the 25th January 2021, she heard someone say that she should not vote because she was rigging the votes, and that the security forces forced her to sign on the Declaration of Results Forms.

Counsel also relied on evidence of Basaba Kyaligonza who stated in his affidavit that the Electoral Commission Officer denied him the opportunity to write irregularities that he witnessed, on the DR forms.

Counsel submitted that the evidence adduced by the Petitioner proves that the election was not free and fair and invited court to hold that there was non-compliance with the provisions of the Parliamentary Elections Act. To support this argument Counsel cited and relied on the Supreme Court decisions of *Col (Rtd) Dr Kiiza Besigye Vs Electoral Commission & Yoweri Kaguta Museveni Election Petition No. 1 of 2006* and *Election*


11/10/2021

Petition No. 1 of 2016, Amama Mbabazi Vs Yoweri Museveni, Electoral Commission and the AG.

To rebut the allegations, Counsel for the Respondent submitted that there is no evidence to prove that the Petitioner's agents were forced to sign the DR Forms. Counsel further relied on Basaba Kyalingonza's evidence who stated in cross examination that he signed the DR forms after the candidates' agents had signed and that there was no complaint recorded, and submitted that this is a clear indication that the voting process was peaceful. Counsel further argued that the Petitioner's evidence in support of the allegations of non-compliance is so wanting and below the required standard.

The evidence of Kyakunzire Celia relied on by Counsel for the Petitioner is hearsay and it is also not corroborated. She stated that she heard someone, yet this "someone" was not disclosed. Allegations that the Electoral Commission officials denied the agent the opportunity to record what they had witnessed is merely an afterthought as already stated.

PW4 Mr Basaba the presiding officer at Nyaruzinga COU stated in his evidence that the agents had the opportunity to comment on the DR Forms and also if they refused to sign, he would comment to that effect. This was not done on any of the DR forms and puts in issue the evidence of partiality in handling the DR forms by the 3rd Respondent.

The Petitioner has therefore failed to prove that there was partiality on the 3rd Respondent's part.

This issue is resolved in the negative.

Issue two; If so, whether the non-compliance affected the result of the election in a substantial manner;

In order to warrant the grant of an order overturning an election, the non-compliance has to be so substantial as to affect the results of the election. (*See Section 61 (a) of the Parliamentary Election Petitions Act and; Opendi V EC & Ayo, citing Rehema Mulindo v Winfred Kiiza and the EC Election Petition No. 29 of 2011*)


11/10/2021

The substantial effect means that the irregularities raised or non-compliance with electoral laws affected the results in a substantial manner.


Counsel for the Petitioner cited the case of *Kiiza Besigye vs Museveni & the EC Election Petition No 1 of 2006* in which court stated the principles of a free and fair election as follows;

1. The election must be free and fair;
2. The election must be by universal adult suffrage;
3. The election must be conducted in accordance with the law and the procedure laid down by Parliament;
4. There must be transparency in the conduct of the elections;
5. The result of the election must be based on the majority of the cast votes;

Counsel for the Petitioner further submitted that the 1st Respondent infringed the voters' constitutional right to vote under *Article 59 of the Constitution of the Republic of Uganda 1995*. It was also Counsel's submission that there was disenfranchisement of voters with the arbitrary closure of polling stations when voters were still lined up and that the 3rd Respondent permitted the use of heavy deployment which intimidated voters.

Counsel for the 1st Respondent argued that the Petitioner has not adduced any evidence to prove that he lost more than 2,179 votes due to non-compliance and further that the particulars of voters who were disenfranchised were not given. The Petitioner alleged that there was non-compliance which has been considered in issue one above and weighed against the position of the law and decided cases. It is this court's finding that the offences and forms of non-compliance raised were not proved to the standard required.

Section 29 (2) of the Parliamentary Election Petitions Act provides that polling time shall commence at 7 O'clock in the morning and close at 4 O'clock in the afternoon. Counsel for the Petitioner submitted that there was disenfranchisement as some polling stations closed when voters were still in line. There is however no evidence supporting this claim.


11/10/2021

Further, the position of the law is that the test of the "substantial effect" may be both a qualitative and a quantitative one. (see *Kiiza Besigye vs Museveni & the EC Election Petition No 1 of 2006*)

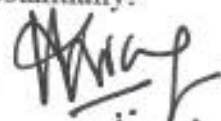
The quantitative test takes a numerical approach where the Petitioner is required to prove that had it not been for the non-compliance and irregularities, the margin that divided him/her and the Respondent would have drastically reduced or non-existent or that he/she would have won the election. The qualitative test examines the quality and conditions under which the election was conducted as to whether there was fairness, compliance with the laws and procedure, no violence or intimidation or any other criminal acts that affected the election.

As resolved in issue one, there was no evidence of intimidation and no evidence was adduced to prove that the presence of soldiers at the polling stations substantially affected the voters and prevented them from exercising their right to vote.

The total number of votes for each party was; 17,754 votes for the Petitioner and 19,933 votes for the Respondent and the total number of valid votes cast for the candidates was 38189 with 824 votes being invalid.

It is my observation that the above results reflect the will and choice of the people and further that the environment under which voting proceeded was not marred with fear, intimidation, violence or unfairness. This is primarily because there is no evidence that the any of the candidates and or their agents reported any anomalies in the election during or immediately after the election.

It was the Petitioner's evidence that the election results were properly captured and the only issue was with accountability in the alterations he cited. Court in the case of *Kasirabo Ninsiima Boaz and EC Vs Mpuuga David, Election Petition Appeal No. 55 of 2016* stated that an election should not be set aside basing on trivial errors and formalities. The alterations complained of by the Petitioner have already been considered herein and resolved to be minor and as such, they did not affect the election results substantially.


11/20/2021

In the instant case, the Petitioner agreed that the election results were properly captured and there is no evidence that the voters were intimidated or prevented from exercising their right to vote.

I therefore hold that the Petitioner has not adduced sufficient evidence of non-compliance with electoral laws to substantially affect the election results.

This issue is also resolved in the negative.


Issue three; Whether the 1st Respondent or his agents with his knowledge and consent or approval, committed any illegal practice or offence;

It is the Petitioner's claim that the 1st Respondent committed illegal practices of bribery contrary to *Section 68 (1) of the Parliamentary Elections Act*. Counsel for the Petitioner relied on evidence of PW1 Kwesiga Francis Annaclet who testified to have been the 1st Respondent's agent and also stated in his affidavit that the 1st Respondent sent him money to give to voters, SACCOs, church and at funerals. Counsel further relied on the evidence of Kitembo Edward, Opuo Daniel, Rwamwengye Yasin, Kyomuhendo Robert, Agaba Severino, Erias Magezi and Tusingwire Agnes who gave evidence attributing acts of bribery to the 1st Respondent.

Counsel for the Petitioner also submitted that the Petitioner committed the offence and illegal act of sectarianism contrary to *Section 23 of the Parliamentary Elections Act*. To this, the Petitioner stated in his affidavit that the 1st Respondent and his supporters went on radio talk shows to spread hate campaign and tribalism.

It was also the Petitioner's claim that the 1st Respondent's agents were canvassing for votes within 100 meters of the polling stations on polling day contrary to Sections 81 (1) and (2) of the Parliamentary Elections Act.

In response, Counsel for the 1st Respondent argued that the witnesses that the Petitioner is relying on are unreliable and at best they are accomplices under Section 68 (2) of the Parliamentary Elections Act. Counsel further submitted that evidence of PW1 Kwesiga


11/10/2021

Annaclet shows that he is a friend to the 1st Respondent which was also confirmed by the 1st Respondent. Further, that the 1st Respondent denying bribery allegations was not impeached or discredited.

Counsel for the 1st Respondent further submitted that the Petitioner did not adduce evidence to prove the ingredients of sectarianism under Section 23 (1) PEA and the words used were not particularized in the Petition.

Section 68 (1) Parliamentary Elections Act creates the electoral offence of bribery. To prove this offence, the Petitioner has to prove that a gift was given to a voter, the gift was given by a candidate or their agent, and that it was given with the intention of inducing the person to vote. (*Col. Dr. Kiiza Besigye Vs. Yoweri Kaguta Museveni & EC Presidential Election Petition No. 1 of 2001*).

The Petitioner has to prove all the ingredients of the offence to the satisfaction of court beyond a mere balance of probabilities.

In *Amoru and EC Vs. Okello Election Appeal Nos. 39 and 95 of 2016*, 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.

PW1 Kwesiga Annaclet Francis testified that he got money from the 1st Respondent to be given to voters. He also testified that he was the 1st Respondent's agent which was confirmed by the 1st Respondent. When asked about the money he allegedly gave to one Beatrice and one Kennedy and why the amount they stated differed from what he stated in his affidavit, he stated that he gave out money different times and did not keep record every time. He also stated that he forgot and that some of the documents and records in which he recorded went missing.

It was also PW1's evidence that the 1st Respondent gave him money to contribute to funerals. This does not necessarily amount to bribery. He further stated that some of the

people whom he gave money and did not write were those he trusted would vote the 1st Respondent. This leaves the court wondering why the 1st Respondent's agent would need to offer a bribe to people he was sure would vote for the 1st Respondent if the bribe is meant to induce a person to vote for the candidate?

I also find that evidence of PW1 was unreliable as his credibility was challenged when it was established that he was friends with the 1st Respondent and even received money from him before and after the election period. He confirmed in cross examination that he received money in July 2020 before elections started and again in February 2021 after election to make payments. A gift and bribe is different from a payment.

PW1 was the 1st Respondent's agent and yet he testified that the 1st Respondent's victory is not his victory and also that after the election, the 1st Respondent did not meet his expectations. This raises doubt as to whether the evidence adduced by PW1 is honest and truthful or if it is influenced by ill will and intention.

I am inclined to reject PW1's evidence as it was not only contradictory to the affidavits deposed by other witnesses to wit; Kennedy Tukwasibwe, Nyangoma Beatrice but also tainted with ill will and malice.

In proving allegations of bribery, the particulars of the parties bribed and those who bribed should be clearly provided and such evidence needs corroboration.

Kisembo Edward stated that the 1st Respondent went to his home on 24th January 2021 at 8:00pm and gave him 50,000/= to vote for the 1st Respondent. Opio Daniel testified that he saw the 1st Respondent give Kisembo Edward money a day before the election. Opio Daniel did not state exactly where this happened in order to sufficiently corroborate Kisembo Edward's evidence. Their evidence is therefore not cogent and is insufficient to prove bribery in the instant case.

Evidence of Rwamwenge Yasin that the 1st Respondent promised him a job and gave him money part of which was to ride people to the polling station, does not necessarily point to inducing either Rwamwenge nor any other voters to vote for the 1st Respondent.

The evidence of Kyomuhendo Robert is not sufficient to corroborate bribery of Rwamwenge by the 1st Respondent since it has already been ruled out that the money allegedly given to Rwamwenge does not point to an inducement to vote a particular candidate.

Evidence of Agaba Sepriano and Tusingwire Agnes was not corroborated and such cannot be relied on to prove the offence of bribery. This is because elections are adversarial in nature and evidence of supporters requires corroboration in order for court to find it credible and cogent. The position of the law is that no particular number of witnesses is required to prove a certain fact. However in election petitions, corroboration is required where deponents to affidavits are usually supporters of either party (*see Dr. Kiiza Besigye V Y. K. Museveni & the EC EP No. 1 of 2001*).

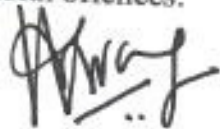
Regarding the alleged offence of sectarianism, *Section 22(6) Parliamentary Elections Act* prohibits the making of false, malicious, sectarian, divisive and mudslinging statements against fellow candidates.

The ingredients for the electoral offence of sectarianism are stated in Section 23 (1) that; the respondent had used a symbol or colours with tribal, religious or other sectarian connotation, and that the symbol, colour or other sectarian connotation had been the basis of their candidature or campaign.

The evidence relied on by the Petitioner that the 1st Respondent and his supporters were spreading hate campaign and tribalism is insufficient in as far as the particulars of such hate and tribalism are not provided. The court cannot simply rely on the Petitioner's allegations without supporting evidence to prove those allegations.

It is therefore this court's finding that the Petitioner has failed to adduce sufficient and cogent evidence to prove to the satisfaction of this court that the 1st Respondent engaged in any illegal practices and committed any electoral offences.

This issue is also determined in the negative.



11/10/2021.

Issue four; What are the remedies available to the Parties;

Having resolved that the Petitioner has failed to prove any of the allegations of non-compliance, illegal practices or electoral offences, and further that the election was free and fair and conducted in accordance with the electoral laws, the petition bears no merits and is hereby dismissed.

The whole petition fails and hereby dismissed with costs to the Respondents. The first Respondent is hereby issued with a certificate of three counsel as the matter was complex and voluminous hence necessitating the hiring of three lawyers.

I so order.

Dated at Fort Portal this ^{11th}.....day of October, 2021.

Signed; _____



Victoria Nakintu Nkwanga Katamba

Judge