

5 THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT NO. 17 OF 2005
(AS AMENDED)
AND
10 IN THE MATTER OF THE PARLIAMENTARY ELECTIONS (ELECTION PETITIONS)
RULES SI 141-2
AND
IN THE MATTER OF THE PARLIAMENTARY ELECTION HELD ON THE 14TH DAY
OF JANUARY 2021
15 ELECTION PETITION No. 013 OF 2021

NTENDE ROBERT..... PETITIONER

VERSUS

1. IDDI ISABIRYE

20 2. ELECTORAL COMMISSION

3. RETURNING OFFICER, MAYUGE RESPONDENTS

BEFORE: HON LADY JUSTICE SUSAN ABINYO

25 **JUDGMENT**

Introduction

30 This petition arises from an election for the Member of Parliament for Bunya South
Constituency, Mayuge District which took place on the 14th day of January, 2021.
There were seven Candidates including the Petitioner and the 1st Respondent. The
Petitioner obtained 14,913 votes while the 1st Respondent had 17,294 votes in
accordance with the Return Form for the Transmission of Results. The 2nd
Respondent a statutory body, which is mandated to manage the Presidential,
35 General Parliamentary and Local Government Council elections, then published

5 in the gazette dated 17th February, 2021 Vol. CXIV No. 16, that the 1st Respondent was the winner with 19,833 votes and the Petitioner polled 14,364 votes. The Petitioner being dissatisfied with the outcome of the election, has challenged the results and the conduct of the said election.

Facts

10 The matter came up for scheduling on the 18th day of August, 2021. During the scheduling proceedings, Counsel for the parties herein presented their facts as follows:

15 The Petitioner instituted this petition in which he contends that the election was not conducted in accordance with the provisions and principles laid down in the electoral laws and, that the various illegalities and irregularities affected the final results in a substantial manner. That the 1st Respondent personally and through his agents, committed various illegal practices of bribery and giving donations during the campaign period and; offences of undue influence, multiple voting, ballot stuffing, making wrong returns of an election and the appointment of partisan
20 election officials.

The Petitioner seeks for declarations that the 1st Respondent was not validly elected as Member of Parliament for Bunya County Constituency, Mayuge District and that the Petitioner is the duly elected Member of Parliament for Bunya County South Constituency, Mayuge District and, orders that; the declaration of
25 the 1st Respondent as elected Member of Parliament for Bunya County South Constituency, Mayuge District be annulled, the 1st Respondent committed illegal practices and election offences and was therefore not validly elected and, or in the alternative, an order for the conduct of fresh elections for the seat of Member of Parliament in respect of Bunya County South Constituency.

30 The 1st Respondent avers and denies the Petitioner's allegations on any wrong doing in regard to the illegalities or offences and, maintains that the elections were free and fair; and prays that the petition be dismissed with costs.

The 2nd and 3rd Respondents deny the allegations of the Petitioner and aver that the elections were free and fair and, conducted in accordance with the electoral
35 laws.

The 2nd and 3rd Respondents contend that all the allegations by the Petitioner on illegalities were not brought to their attention and that, the elections were conducted in a calm and peaceful manner with no single voter disenfranchised.

5 The 2nd and 3rd Respondents further contend that the error which was published in the gazette was brought to their attention and it was corrected; that this still left the 1st Respondent the winner and; prays that the petition be dismissed with costs.

The agreed facts were that:

- I. The election was held on the 14th day of January, 2021.
- 10 II. The contestants were the Petitioner, 1st Respondent and five others.
- III. The number of votes indicated in the Return Tally Form dated 16/01/2021.

Representation

The Petitioner was represented by Mr. Byamukama Jude jointly with Mr. Wanambugo Innocent and Mr. Mwesiga Phillip while the 1st Respondent was
15 represented by Mr. Ochieng Evans jointly with Mr. Galisonga Julius, Mr. Wanume Ivan, Ms. Ichom Norah and Ms. Namigadde Sandra, and Mr. Lugoloobi Hamidu appeared for the 2nd and 3rd Respondents.

Issues

At scheduling, the following issues were agreed upon by Counsel for the parties
20 herein for determination by court.

1. Whether there was non-compliance with the principles laid down in the electoral laws and if so, whether the non-compliance affected the results in a substantial manner.
2. Whether the 1st Respondent committed any illegal practices or electoral
25 offences personally or through his agents with his knowledge and consent or approval during the election.
3. What remedies are available to the parties.

During the hearing of the instant petition, Counsel for the Petitioner indicated to
30 Court that he intends to raise an objection on the competence of the 1st Respondent's additional affidavits by illiterate persons and this Court, advised Counsel to defer the objection in the final submissions thus the preliminary objection now raised by Counsel for the Petitioner.

Counsel for the Petitioner contends that 21 affidavits by illiterate deponents in support of the 1st Respondent's answer to the petition, violate the mandatory
35 provisions of the Illiterates Protection Act, Cap 78 and the Oaths Act Cap 19; the said affidavits were marked accordingly to belong to the deponents whose names are listed as follows: RA1-1, Dikusoka Nur- Din Waiswa; RA1-4, Kakya George; RA1- 5, Ochwo Stephen; RA1-6, Oketch Moses; RA1-7, Tamale

5 Alamazani; RA1-8, Akong Agnes Osinde; RA1-9, Waiswa Robert; RA1-11,
Nabuduwa Rehema; RA1-12, Wabwire Robert Moi; RA1-13, Basalirwa Saul; RA1-
14, Basalirwa Akim; RA1-17, Bagaga Shaban Kitindi; RA1-19, Segero Alimansi Sujja;
RA1-20, Zirimala Musitafa; RA1-23, Mugonya Fred; RA1-24, Malinga Issa; RA1-25,
10 Nampala Jamir; RA1-26, Otana Fatina; RA1-28, Kisumuluzo Shafic; RA1-29,
Mutenyo Fred; and RA1-31 Egesa Muhammad.

Counsel submitted that the said 21 affidavits were prepared in violation of Section
3 of the Illiterates Protection Act, in so far as the author of the said affidavits did
not indicate his or her full name and address at the bottom of those documents;
thereby, rendering them invalid and must be struck off the record and not taken
15 into account in this petition. For this, Counsel relied on the authority of **Mugema
Peter Vs Mudiobole Abedi Nasser, EPA No. 0016 of 2016** in which the Court of
Appeal held that translation and preparation of an affidavit of an illiterate are
two different things. One cannot suffice for the other and affidavits which merely
indicated who had translated their contents to illiterate deponents were struck
20 off the record for failure to comply with the mandatory provision of section 3 of
the Illiterates Protection Act.

Counsel further submitted that the 21 affidavits of the illiterate deponents were
also prepared in violation of the Oaths Act in so far as the interpreter of the same,
Massa Innocent in his supplementary affidavit marked as RAS-2, did not take the
25 interpreter's oath and the Commissioner for Oaths did not include any jurat to
confirm that the said interpreter had taken oath as required under section 1 and
Form E of the Oaths Act; that this is an incurable illegality which vitiates the said
affidavits, and that the supplementary affidavit by Massa Innocent does not cure
the violations of section 3 of the Illiterates Protection Act and section 1 of the
30 Oaths Act.

Counsel further contends that Massa Innocent deponed two affidavits in support
of the 1st Respondent's answer to the petition which were labelled as RA1-1 and
RAS-2 respectively however, his National Identity Card which was attached as
Annexure "A" shows that he is unable to sign yet the jurats of his affidavits have
35 a signature; that this renders his affidavit suspicious and it must be rejected;
Counsel relied on the authority of **Muyanja Simon Lutaaya Vs Kenneth Lubogo &
Electoral Commission, EPA No. 82 of 2016** in which, the Court of Appeal held that
an affidavit of a deponent who signs in the jurat yet has a National Identity Card
which indicates that he or she cannot sign is incompetent and cannot be
40 accepted by Court, in support of his contention.

5 Counsel contended that the affidavit of Egesa Muhammad marked as RA1-31 is purported to have been translated by Mukwaya Swaibu Ahmad. However, the copy served on them is incurably defective as the said Mukwaya did not sign; which confirms that he did not take oath before the Commissioner for Oaths. He argued that the attempt by Mukwaya to amend his affidavit in paragraph 8 must
10 be equally rejected; Counsel relied on the authority of **Hon. George Patrick Kassaja Vs Fredrick Ngobi Gume & Electoral Commission, EPA No. 68 of 2016** in which the Court of Appeal held that it is of paramount importance that affidavits are carefully drafted most especially because they are the principle source of evidence in election matters, to support his contention.

15 In reply, Counsel for the 1st Respondent submitted that the objection to the 1st Respondent's 21 affidavits is misconceived and does not have merit and that they wish to underscore the fact that this witness, Massa Innocent (RA-2) was not cross examined on his signature, competence to read, comprehend and interpret in the English language; that this left the evidence on his signature and capacity to
20 sign un-assailed.

Counsel relied on the Supreme Court decision of **Habre International Limited Vs Ibrahim Kassim and others SC C.A No. 4 of 1999** in which it was held that:

25 "an omission or negligence to challenge the evidence-in-chief on a material or essential point by cross examination, would lead to the inference that the evidence is accepted, subject to its being assailed as inherently incredible or probably untrue."

to submit that it cannot be inherently incredible or probably untrue that a person who procured his National Identity Card as an underage but has since gone on to complete his studies and attained qualification, cannot have a signature, four
30 years after he got his National Identity Card.

Counsel contended that, be that as it may, the moment a witness took the stand and, he demonstrated how he interpreted those affidavits, he identified his signature and relied on the authority of **Odo Tayebwa Vs Gordon Kakuuna Arinda & Anor EPA No. 86 of 2016** in which, an affidavit of an illiterate without a jurat,
35 interpretation clause was accepted in Court after cross examination of the deponent and that in the instant matter, Massa Innocent was cross examined with leave of Court and no question in regard to taking or not taking an oath as an interpreter was ever put to him, as such the Petitioner cannot raise it when they did not ask him if they deemed it material.

5 Counsel further relied on the Court of Appeal decision in **Namboowa Rashida Vs Bavekuno Mafumu Godfrey Kyeswa & Anor EPA No. 69 of 2016** in which the court observed that while the inclusion of the jurat on an affidavit is a matter of substance, the manner of certification or the person who does it is a matter of form and that a deviation in form of the jurat does not go to the root of the substance; to submit that indeed, once the illiterate signs, the presumption is that he instructed the interpreter to prepare and interpret the document, moreover, the Illiterates Protection Act does not provide for a specific form in which the verification should be done, and that the interpretation done by Massa Innocent (RA-2) on the respective 21 affidavits pass the test of section 3 of the Illiterates Protection Act.

Counsel further submitted that Form B, (certification) which is provided by section 1 of the Oaths Act was materially complied with in those respective affidavits since it is clear from the respective translations that the oaths were read to each of the deponents and that they understood; that even if it was to be the case, section 43 of the Interpretation Act provides that where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document, or which is not calculated to mislead.

In regard to the affidavit of Egesa Muhammad marked as RA1-31, Counsel submitted that, it is signed and dated by both the deponent and the interpreter and that the assertions by the Petitioner are baseless.

In rejoinder, Counsel for the Petitioner submitted that the contention by the 1st Respondent that the Petitioner is precluded from raising a preliminary objection at this stage is erroneous and an attempt to mislead Court and, relied upon the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) 1 EA** on the proposition of law that a preliminary objection on a point of law can be raised at any stage of the proceedings and, Order 6 Rule 28 of the Civil Procedure Rules.

Counsel reiterated their submissions and further contended that the 21 impugned affidavits offend section 1 of the Oaths Act, as they do not contain the mandatory jurat by the commissioner for oaths certifying that the illiterate deponents took oath after having the contents of their affidavits interpreted to them.

5 **Resolution on the preliminary objections**

I have carefully considered the submissions of Counsel for the parties herein as above, the statutory and case law cited and find as follows:

Section 3 of the Illiterates Protection Act, Cap 78 provides as follows:

3.Verification of documents written for illiterates

- 10 " 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 full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it
15 fully and correctly represents his or her instructions and was read over and explained to him or her."

Section 1 of the Oaths Act, Cap 19 provides as follows:

1.Oaths to be taken

- 20 "The oaths which shall be taken as occasion shall demand shall be the oaths set out in the first schedule to this Act.

First Schedule (Section 1)

Oaths for Affidavits

Form B

Form of Jurat (where a third person has read the affidavit to deponent)

- 25 Sworn at ... in the district of ... this ... day of ... 20..., before me, and I certify that this affidavit was read over in my presence to the deponent he (or she) being blind or illiterate and the nature and contents of the exhibits referred to in the affidavit explained to him (or her) in the ... language. The deponent appeared perfectly to understand the same and made his (or her) mark (or signature)
30 thereto in my presence. (Emphasis is mine)

Commissioner for oaths

In reference to section 3 of the Illiterates Protection Act Cap 78 as above, in relation to the impugned 21 affidavits indicated in detail above, the certification of translation at the end of each of the 20 impugned affidavits except the

5 affidavit of Zirimala Musitafa marked as RA1-20, reads in reference to a male deponent as follows: -

10 "I, MASSA INNOCENT of C/o M/s Galisonga & Co. Advocates P.O. Box 508, Ntinda 17, Kakungulu Road, Ntinda, Kampala and M/s Ochieng Associated Advocates & Solicitors Plot 90 Ben Kiwanuka Street, 2nd Floor Kob House P.O. Box 33334 Kampala being conversant in both English and Lusoga, do hereby certify that I have read and explained to the deponent herein the contents of his affidavit and he appeared to have understood the same before appending his signature thereon." (Emphasis is mine)

In respect of a female deponent, it reads as follows: -

15 "I, MASSA INNOCENT of C/o M/s Galisonga & Co. Advocates P.O. Box 508, Ntinda 17, Kakungulu Road, Ntinda, Kampala and M/s Ochieng Associated Advocates & Solicitors Plot 90 Ben Kiwanuka Street, 2nd Floor Kob House P.O. Box 33334 Kampala being conversant in both English and Lusoga, do hereby certify that I have read and explained to the deponent herein the contents of her affidavit
20 and she appeared to have understood the same before appending her signature thereon." (Emphasis is mine)

Following the wording in the certificates of translation above by Massa Innocent, the interpreter in regard to the impugned affidavits, the certification bears the full name of the interpreter as Massa Innocent and physical address is indicated as
25 C/o M/s Galisonga & Co. Advocates P.O. Box 508, Ntinda 17, Kakungulu Road, Ntinda, Kampala and M/s Ochieng Associated Advocates & Solicitors Plot 90 Ben Kiwanuka Street, 2nd Floor Kob House P.O. Box 33334; this conforms to the requirement of section 3 of the Illiterates Protection Act Cap 78.

I am in agreement with the proposition of the law in **Hon. George Patrick Kassaja**
30 **Vs Fredrick Ngobi Gume & Electoral Commission(supra)** that, it is of paramount importance that affidavits are carefully drafted most especially because they are the principle source of evidence in election matters and, I find that the 20 impugned affidavits were drafted in compliance with the law.

35 With regard to the affidavit deposed by Egesa Muhammad marked as RA1-31, the contention by Counsel for the Petitioner is not correct; that it is purported to have been translated by Mukwaya Swaibu Ahmad however, the copy served on them is incurably defective as the said Mukwaya did not sign and that this confirms that he did not take oath before the Commissioner for Oaths.

5 A close scrutiny of a copy of the affidavit marked as RA1-31 filed on the record of Court, indicates that both the deponent and the interpreter signed.

I agree with the submission by Counsel for the 1st Respondent that the assertions by Counsel for the Petitioner are baseless and that the facts in the case of **Muyanja Simon Lutaaya Vs Kenneth Lubogo & Electoral Commission(supra)** which
10 Counsel relied upon are distinguishable. In that case, the witnesses, whose signatures in the affidavits differed from the signatures in their Identity cards attached were expunged by the trial Judge and on appeal, the Court of Appeal held that the trial Judge was right to expunge the 23 affidavits on the grounds that the identity of the deponents was in doubt. In the instant petition before me,
15 the contention is on the signature of Massa Innocent on his affidavits marked as RA1-1 and RAS-2 respectively, yet he was unable to sign on the National Identity Card.

Following the guidance in the decision of **Habre International Limited Vs Ibrahim Kassim (supra)**, the submission by Counsel for the Petitioner is untenable; that
20 Massa Innocent deponed two affidavits in support of the 1st Respondent's answer to the petition which were labelled as RA1-1 and RAS-2 respectively however, his National Identity Card which was attached as Annexure "A" shows that he is unable to sign yet, the jurats of his affidavits have a signature, that this renders his affidavits suspicious and must be rejected.

25 I agree with the submission by Counsel for the 1st Respondent that it cannot be inherently incredible or probably untrue, that a person who procured his National Identity Card as an underage, but has since gone on to complete his studies and attained qualification as a Laboratory Technician, cannot have a signature, four years after he got his National Identity Card.

30 I am in further agreement with the ratio decidendi in the case of **Odo Tayebwa Vs Gordon Kakuuna Arinda & Anor (supra)** facts distinguished from the instant petition. In that case, Counsel for the Respondents had indicated to Court from the very start of the trial that they wished to cross examine all the witnesses of the Petitioner and prayed that their affidavits be struck off by reason of their being
35 not available for cross examination. On Appeal, the Court of Appeal observed that it appears to us, from the record that Counsel for the Petitioner (now Appellant), on his own, stopped availing the Petitioner's witnesses for cross examination by Counsel for the Respondents when he closed the Petitioner's case ... The learned trial Judge was thus right when she held that a deponent

5 who fails to appear for cross examination when so required is evidence of the weakest kind and Court hardly places any reliance upon the same.

The Court of Appeal then resolved in the affirmative that the learned trial Judge was right not to rely on the affidavits of those deponents who had not been cross examined.

10 In the instant petition before me, Massa Innocent, the deponent of the affidavits marked RA1-1 and RAS-2 respectively appeared for cross examination by Counsel for the Petitioner and indeed, he was cross examined by Counsel for the Petitioner but, Counsel did not strictly put questions to the witness, as to the authenticity of his signature on the two affidavits.

15 Accordingly, the objection raised by Counsel for the Petitioner is overruled.

I have looked at Form E in which Counsel for the Petitioner relies upon to contend that, the 21 affidavits of the illiterate deponents were prepared in violation of the Oaths Act in so far as the interpreter of the same, Massa Innocent in his supplementary affidavit marked as RAS-2, did not take the interpreter's oath and
20 the Commissioner for Oaths did not include any jurat to confirm that the said interpreter had taken oath as required under section 1 and Form E of the Oaths Act and, that this is an incurable illegality which vitiates the said affidavits.

Following the proposition of law in **Namboowa Rashida Vs Bavekuno Mafumu Godfrey & Anor, EP Appeal No. 69 of 2016** in which the Court held that:

25 *"It is clear from the above sections of the Illiterates Protection Act that the act of a person writing his or her own true and full name and address on a document written on behalf of an illiterate person, implies that he or she received instructions from the illiterate person to do so and that the contents of the document were properly read over and explained to the*
30 *illiterate." (Emphasis is mine)*

The Court went further to observe that, we note that the Illiterates Protection Act does not provide for a specific form in which the verification should be made and in our considered view, we find that the above certification complied with the requirement stipulated in sections 2 and 3
35 of the Act.

In the instant petition before me, the certification in the impugned 20 affidavits referred to above, indicate the full name and address of the translator to either, a male or female illiterate deponent whichever is applicable. The explanation

5 made by the translator, to the illiterate deponent as he read the content of the affidavit, is well stated in the certification. This in my considered view, implies that the explanation was the actual interpretation and, it was done in the process of the translation; which is from one Language to another Language, since an illiterate deponent cannot understand the translation unless, the interpretation
10 (meaning) of the document is made known to the illiterate deponent and as such, the translator presumably took the required oath. **(See Black's Law Dictionary, 7th Edition on the definition of the words interpretation and translation at pgs. 824 & 1505 resp.)**

15 It is therefore, my considered view that the certification in the impugned affidavits meets the test of section 3 of the Illiterates Protection Act and section 1 of the Oaths Act in accordance with the provision of section 43 of the Interpretation Act which states that:

20 *"Where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead."*

25 In regard to the affidavit of Zirimala Musitafa(RA1-20), in which the certification by the translator does not bear the address of the translator, my considered view is that, this is not fatal, as it were not to bear both the true and full name and address of the translator, this notwithstanding that the Petitioner has not pleaded any prejudice that has been occasioned to him.

For reasons above, I find that the objection raised by Counsel for the Petitioner is devoid of any merit and, is accordingly overruled.

I will now proceed to discuss the merits of this petition before me as below:

30 In accordance with Rule 15(1) of the Parliamentary Elections (Election Petitions) Rules, S1 141-2, this Court deemed that the affidavits for and against the petition had been read in open Court and were admitted in evidence and, accordingly marked as follows:

Affidavits for the Petitioner:

- 35
1. The affidavit of Ntende Robert the Petitioner, in support of the petition filed on 19/03/2021 was marked as PA.
 2. Additional affidavit of Ntende Robert the Petitioner, in support of the petition filed on 23/08/2021 was marked as PA-1.

- 5 3. Additional affidavit of Ntende Robert the Petitioner, in support of the
petition filed on 04/06/2021 was marked as PA-2.
4. The affidavit of Olowo Michael filed on 04/06/2021 was marked as PA-3.
5. The affidavit of Opanyi Vincent filed on 04/06/2021 was marked as PA-4.
- 10 6. The affidavit of Kigalanga Christopher filed on 04/06/2021 was marked as
PA-5.
7. The affidavit of Mubajje Edirisa Haruna filed on 04/06/2021 was marked as
PA-6.
8. The affidavit of Kasango Ronald filed on 04/06/2021 was marked as PA-7.
9. The affidavit of Bwire David Gayira filed on 04/06/2021 was marked as PA-
15 8.
10. The affidavit of Kigenyi Sowedi filed on 04/06/2021 was marked as PA-9.
11. The affidavit of Namususwa Eresi Esther filed on 04/06/2021 was marked as
PA-10.
12. The affidavit of Nanumba Kenneth filed on 04/06/2021 was marked as PA-
20 11.
13. The affidavit of Oduma Edrine filed on 04/06/2021 was marked as PA-12.
14. The affidavit of Otim Joseph Musasizi filed on 04/06/2021 was marked as PA-
13.
15. The affidavit of Barasa Joseph filed on 04/06/2021 was marked as PA-14.
- 25 16. The affidavit of Basooma Emmanuel filed on 04/06/2021 was marked as PA-
15.
17. The affidavit of Namuwanga Theopista filed on 04/06/2021 was marked as
PA-16.
18. The affidavit of Tenywa Christopher filed on 04/06/2021 was marked as PA-
30 17.
19. The affidavit of Kisakye Bosco filed on 04/06/2021 was marked as PA-18.
20. The affidavit of Ngobi Geofrey filed on 04/06/2021 was marked as PA-19.
21. The affidavit of Mpwire Jacob filed on 04/06/2021 was marked as PA-20.
22. The affidavit of Kiirya Nickson filed on 04/06/2021 was marked as PA-21.
- 35 23. The affidavit of Magoma Joshua Jackson filed on 04/06/2021 was marked
as PA-22.
24. The affidavit of Mawerere Kalori filed on 04/06/2021 was marked as PA-23.
25. The affidavit of Mwesigwa Moses filed on 04/06/2021 was marked as PA-24.
26. The affidavit of Kakaire Noah filed on 04/06/2021 was marked as PA-25.
- 40 27. The affidavit of Mwebaza James filed on 04/06/2021 was marked as PA-26.
28. The affidavit of Nabulwa Erieza filed on 04/06/2021 was marked as PA-27.
29. The affidavit of Naigaga Loy filed on 04/06/2021 was marked as PA-28.

- 5 30. The affidavit of Wakibi Jafari filed on 04/06/2021 was marked as PA-29.
31. The affidavit of Muwandike Scovia Annet filed on 04/06/2021 was marked
as PA-31.
32. The affidavit of Zandaba John filed on 04/06/2021 was marked as PA-33.
33. The affidavit of Lutaya Ronald filed on 04/06/2021 was marked as PA-34.
10 34. The affidavit of Mivule Brian filed on 04/06/2021 was marked as PA-35
35. The affidavit of Wakibi Siragi filed on 09/08/2021 was marked as PA-36.
36. The affidavit of Kazungu Dennis filed on 09/08/2021 was marked as PA-37.
37. The affidavit of Nabunya Prossy filed on 09/08/2021 was marked as PA-39.
38. The affidavit of Kafeero Robert filed on 09/08/2021 was marked as PA-43.
15 39. The affidavit of Kiigeere Alamazan Kabomba filed on 09/08/2021 was
marked as PA-44.
40. The affidavit of Ngaaga Michael Kevin filed on 09/08/2021 was marked as
PA-45.
41. The affidavit of Waiswa Hussein filed on 09/08/2021 was marked as PA-46.
20 42. The affidavit of Sinani Wesedha filed on 09/08/2021 was marked as PA-47.
43. The affidavit of Kalinaki Muhammad filed on 09/08/2021 was marked as PA-
48.
44. The affidavit of Musana Twaha filed on 09/08/2021 was marked as PA-52.
45. The affidavit of Lwamusayi Peter Kirya filed on 09/08/2021 was marked as
25 PA-53.
46. The affidavit of Nahaima John filed on 09/08/2021 was marked as PA-54.
47. The affidavit of Bankyaye Latifu filed on 09/08/2021 was marked as PA-56.
48. The affidavit of Mulimya Muhamadi filed on 09/08/2021 was marked as PA-
57.
30 49. The affidavit of Niwagaba Peter filed on 09/08/2021 was marked as PA-58.

It is important to note that the affidavits for the Petitioner marked as: PA-30, PA-32, PA-38, PA-40, PA-41, PA-42, PA-49, PA-50, PA-51, PA-55 and PA-59 were expunged on a preliminary objection raised by Counsel for the Respondents that they are not registered voters since their identity as such, could not be conclusively determined; and this was conceded to by Counsel for the Petitioner.

Affidavits for the 1st Respondent:

- 40 1. The affidavit of Isabirye Iddi the 1st Respondent in support of the answer to the petition filed on 25/03/2021 was marked as RA1.
2. A supplementary affidavit of Isabirye Iddi the 1st Respondent in support of the answer to the petition filed on 25/08/2021 was marked as RAS-1.

- 5 3. The affidavit of Dikusoka Nur-Din Waiswa filed on 25/08/2021 was marked as RA1-1.
4. The affidavit of Massa Innocent filed on 25/08/2021 was marked as RA1-2.
5. A supplementary affidavit of Massa Innocent filed on 26/08/2021 was marked as RAS-2.
- 10 6. The affidavit of Nabaigwa Harriet Namukose filed on 25/08/2021 was marked as RA1-3.
7. The affidavit of Kakya George filed on 25/08/2021 was marked as RA1-4.
8. The affidavit of Ochwo Stephen filed on 25/08/2021 was marked as RA1-5.
9. The affidavit of Oketch Moses filed on 25/08/2021 was marked as RA1-6.
- 15 10. The affidavit of Tamale Alamazani filed on 25/08/2021 was marked as RA1-7.
11. The affidavit of Akong Agnes Osinde filed on 25/08/2021 was marked as RA1-8.
12. The affidavit of Waiswa Robert filed on 25/08/2021 was marked as RA1-9.
- 20 13. The affidavit of Ntale Abdu Malik filed on 25/08/2021 was marked as RA1-10.
14. The affidavit of Nabuduwa Rehema filed on 25/08/2021 was marked as RA1-11.
15. The affidavit of Wabirwe Robert filed on 25/08/2021 was marked as RA1-12.
- 25 16. The affidavit of Basalirwa Saul filed on 25/08/2021 was marked as RA1-13.
17. The affidavit of Basalirwa Akim filed on 25/08/2021 was marked as RA1-14.
18. The affidavit of Nicholas Taabu filed on 25/08/2021 was marked as RA1-15.
19. The affidavit of Bogere Ronald filed on 25/08/2021 was marked as RA1-16.
- 30 20. The affidavit of Bagaga Shabani Kitindi filed on 25/08/2021 was marked as RA1-17.
21. The affidavit of Mukwaya Swaibu Ahmad filed on 25/08/2021 was marked as RA1-18.
22. The affidavit of Segero Alimansi Sujja filed on 25/08/2021 was marked as RA1-19.
- 35 23. The affidavit of Zirimala Mustafa filed on 25/08/2021 was marked as RA1-20.
24. The affidavit of Waiswa Masudi on 25/08/2021 was marked as RA1-21.
25. The affidavit of Namulawa Sarah Obua filed on 25/08/2021 was marked as RA1-22.
26. The affidavit of Mugonya Fred filed on 25/08/2021 was marked as RA1-23.
- 40 27. The affidavit of Malingha Issa filed on 25/08/2021 was marked as RA1-24.
28. The affidavit of Nampala Jamiri filed on 25/08/2021 was marked as RA1-25.
29. The affidavit of Otana Fatina filed on 25/08/2021 was marked as RA1-26.

- 5 30. The affidavit of Wanjala Gracious filed on 25/08/2021 was marked as RA1-27.
31. The affidavit of Kisumuluzo Shafic filed on 25/08/2021 was marked as RA1-28.
32. The affidavit of Mutenyo Fred filed on 25/08/2021 was marked as RA1-29.
- 10 33. The affidavit of Zijja David filed on 25/08/2021 was marked as RA1-30.
34. The affidavit of Egesa Muhammad filed on 25/08/2021 was marked as RA1-31.

Affidavits for the 2nd and 3rd Respondents:

- 15 1. The affidavit of Birungi Sarah Keziah, Returning Officer for the 2nd Respondent, and also the 3rd Respondent, in support to the 2nd and 3rd Respondents answer to the petition filed on 01/04/2021 was marked as RA2.
2. Affidavit of Nabaigwa Harriet, Presiding Officer at Hands of God Primary School Polling Station filed on 13/08/2021 was marked as RA2-1.
- 20 3. Affidavit of Emuron Nasur, Presiding Officer at Kasolo Kamponye Polling Station filed on 13/08/2021 was marked as RA2-3.
4. Affidavit of Bogere Ronald, Presiding Officer at Universal Apostle Church Polling Station filed on 13/08/2021 was marked as RA2-4.
- 25 5. Affidavit of Balina Stephen, Presiding Officer at Namadhi Trading Centre Polling Station filed on 13/08/2021 was marked as RA2-5.
6. Affidavit of Bazira Denis, Presiding Officer at Namadhi B. Borehole Polling Station filed on 13/08/2021 was marked as RA2-6.
7. Affidavit of Kantono Olivia, Presiding Officer at Namavundu Trading Centre Polling Station filed on 13/08/2021 was marked as RA2-7.

30 **Burden and Standard of proof:**

The burden of proof in election petitions is not any different from that envisaged in civil suits in which, any person who alleges a given fact and wishes Court to believe in the existence of those facts, has the burden to prove that those facts exist. **(See sections 101-103 of the Evidence Act Cap 6 and Halima Nakawungu Vs Electoral Commission & Susan Namaganda, EP No. 2 of 2011)**

35

The standard of proof is on a balance of probabilities in accordance with section 61(3) of the Parliamentary Elections Act, 2005 as amended however, taking into consideration the legal standards of proof set out in the jurisprudence, I am inclined to apply the standard of proof slightly above the balance of probabilities

40 because an election has great impact on the political and socio-economic

5 aspects of the nation, which affects both the citizenry and the nation at large. (See *Mukasa Anthony Harris Vs Dr. Bayiga Michael Philip Lulume*, EPA No. 18 of 2007 and *Muiya Vs Nyagah & others* [2003] 2 EA 621 at pg 621); This standard must be to the satisfaction of the Court. (See section 61(1) of the *Parliamentary Elections Act, 2005 as amended* and *Masiko Winifred Komuhangi Vs Babihuga J. Winnie* EPA No. 9 of 2002.

Issue No.1: Whether there was non-compliance with the principles laid down in the electoral laws and if so, whether the non-compliance affected the results in a substantial manner.

Arguments by Counsel for the Petitioner:

15 Counsel submitted that the 2nd Respondent as well as the 3rd Respondent are mandated to ensure that free and fair elections are conducted as required under Article 61(1) (a) and (f) of the Constitution of the Republic of Uganda; that the Petitioner relies on the affidavit evidence of 34 witnesses including Ntende Robert, Olowo Michael, Opanyi Vincent, Mubajje Edirisa, Kasango Ronald, Namususwa
20 Esther, Magoma Joshua, Musana Twaha inter alia to prove that the 2nd and 3rd Respondents grossly failed in this regard and, allowed the 1st Respondent and his supporters to overrun 10 polling stations located in the 1st Respondent's home area of Malongo sub county.

Counsel further submitted that the Petitioner and his witnesses testified that they
25 were not allowed to access the impugned 10 polling stations of Universal Apostle Church; Namavundu Trading Centre; Kasolo Kamponye Trading Centre; Namadhi Trading Centre; Hands of God Primary School; Namoni Beach Primary School; Namoni Health Centre 11; Namadhi Borehole ; St Mary's Church Bukizibu and Bukizibu Primary School; and that a few agents of the Petitioner, who
30 accessed these polling stations such as Mpwire Jacob, were harassed till they run away and others were assaulted including the Petitioner.

Counsel contended that the 2nd and 3rd Respondents in their answer to the petition acknowledge that this election had been marred with violence however, in a surprising departure from the pleadings, the 3rd Respondent turned around to
35 claim that the violence was in respect of a different polling station during cross examination by the 1st Respondent; that this evidence must be rejected and that, the reckless and fraudulent gazettement of wrong results and failure to address the numerous complaints lodged before her, by the Petitioner is a pointer of the 3rd Respondent's failings.

5 Counsel further contended that there was a major failure by the 2nd and 3rd
Respondents to guarantee a fair election and that, by itself substantially affected
the outcome of the election and the evidence of the 2nd and 3rd Respondents'
presiding officers in respect of six (6) of the impugned polling stations does not
10 suffice, since some of the illegalities occurred outside the polling stations and,
beyond the control of the presiding officers such as the assault of the Petitioner
and his agents namely; Kenneth Luwabo and John Nahaima.

Arguments in reply by Counsel for the 1st Respondent:

Publishing wrong results in the gazette

15 Counsel submitted that the Transmission of the Result form which was admitted as
PE-3, clearly showed who was declared winner in the tally centre. The 1st
Respondent obtained 17,294 votes while the Petitioner got 14,913 votes and, that
this was in accordance with section 58(2) of the Parliamentary Elections Act and
as such, there is no prejudice or disenfranchisement whatsoever, which the
Petitioner would have got by the mistake in the gazette.

20 Multiple voting

Counsel submitted that the allegations by the Petitioner on multiple voting at
Universal Apostle Church, Namavundu Trading Centre, Kasolo Kamponye,
Namadhi Trading Centre, Hands of God , Namoni Beach Primary School,
Namadhi B Borehole and Bukizibu Primary School polling stations are baseless
25 because there were no complaints whatsoever from anyone, and after the entire
process, the agents of the respective candidates signed on the Declaration of
Results Forms including the agents of the Petitioner; that no single person was
identified by the Petitioner or his witnesses for having voted twice and relied on
the case of ***Halima Nakawungu Vs Electoral Commission & Anor EP No. 2 of 2011***
30 ***in which Elizabeth Musoke. J*** (as she then was) noted that by the Petitioner 's
agents signing on the Declaration Forms, they confirmed that the votes stated
therein to be valid and that there was no single complaint from the Petitioner and
his agents to either Electoral Commission or to Police or any other independent
entity in respect of the Petitioner's assertion in this ground; in support of his
35 submission.

Threats and forcing the Petitioner's agents to sign Declaration of Results Form

Counsel submitted that from the analysis of the Declaration of Results Form at the
said polling stations, it is clear that the Petitioner had agents present at the said
polling stations, who signed on the Declaration of Results Form and, no evidence

5 was adduced by affidavit that any agent was denied access or assaulted at any polling station.

Counsel relied on the authority of **Col. (RTD) Dr Besigye Kiiza Vs Museveni Yoweri Kaguta & Electoral Commission SC Presidential Election Petition Appeal No. 1 of 2006** in which Odoki CJ (as he then was) stated that:

10 "In determining the effect of the irregularities on the result of the election, the Court should consider whether there has been substantial compliance with the law and the principles and the nature, extent, degree and gravity of non-compliance. The Court should also consider whether the irregularities complained of adversely affected the sanctity of the election.
15 The Court must finally consider whether after taking all these factors into account the winning majority would have been reduced in such a way as to put the victory of the winning candidate in doubt."; in support of his submissions.

Arguments in reply by Counsel for the 2nd and 3rd Respondents:

20 Counsel submitted that on the accusation by the Petitioner against the 2nd and 3rd Respondents, that they grossly allowed the 1st Respondent and his supporters to overrun 10 polling stations located in the 1st Respondent's home area of Malongo Sub County, the Petitioner filed several affidavits to prove this accusation; a substantial number of them were from the registered voters of the
25 said polling stations and that, what is strange is that the Petitioner's polling agents and other candidates' agents signed the Declaration of Results Forms, signifying and authenticating the outcome at all the disputed polling stations.

Counsel further submitted that the Petitioner's witnesses deposed that there was ballot stuffing, multiple voting and unauthorised voting but no one adduced
30 documentary evidence (formal complaints) pursuant to section 46(1) and (2) of the Parliamentary Elections Act and that, in the absence of any evidence of written complaints, the Court is left to speculate.

Counsel contended that, if it is true that some of the polling agents of the Petitioner did not sign the Declaration of Results Forms, then they should have,
35 pursuant to section 47(7) (b) (i) of the Parliamentary Elections Act assigned a reason thereof.

Counsel further contended that it is not in dispute that paragraph 7 of the 2nd and 3rd Respondents' answer to the petition alluded to violence but, which did not

5 affect the polling in anyway pursuant to section 45(1) of the Parliamentary Elections Act.

Arguments in rejoinder by Counsel for the Petitioner:

10 Counsel relied on the authority of **Betty Muzanira Bamukwatsa Vs Matsiko Winnifred Komuhangi & 2 others EPA No. 65 of 2016** in which the Court of Appeal held that a Return form can only be altered by order of Court; to submit that in the instant petition, as agreed to by the Respondents and, during cross examination of the 1st and 3rd Respondents, they admitted that wrong results were published in the gazette and that they never corrected up to date which is damming on the 2nd Respondent, and that this issue should be resolved in the affirmative.

Evaluation of the evidence and resolution:

20 The affidavit evidence of the Petitioner marked as PA filed on 19th March, 2021 in paragraph 14 is in respect of widespread multiple voting and ballot stuffing at the 10 impugned polling stations; paragraph 15 is on the failure by the 3rd Respondent to respond formally to a complaint made by the Petitioner to the 3rd Respondent and paragraphs 10, 11, 12, 13, 14, 15 & 16 of the additional affidavit marked as PA-1 filed on 23/08/2021, is on the incidences of multiple voting and, or ballot stuffing at the 10 impugned polling stations of Universal Apostle Church; Namavundu Trading Centre; Kasolo Kamponye Trading Centre; Namadhi Trading

25 Centre; Hands of God Primary School; Namoni Beach Primary School; Namoni Health Centre 11; Namadhi Borehole; St Mary's Church Bukizibu and Bukizibu Primary School.

The above averments by the Petitioner were confirmed by the Petitioner's witnesses in the affidavits of: Olowo Michael under paragraphs 5 on multiple voting & 6 on unregistered voters being given ballot papers such as Kibamba

30 Piso and Oyelo, and Opanyi Vicent under paragraphs 5 on multiple voting & 7 on unregistered voters being given ballot papers such as Kibamba Piso at Hands of God; Kigalanga Christopher under paragraphs 6 & 7 and Namususwa Eseri Esther under paragraphs 3, 4, 5 on multiple voting and ballot stuffing at Kasolo

35 Kamponye Trading Centre; Mubajje Edirisa Haruna under paragraphs 3, 4 & 7 on multiple voting at Namadhi Trading Centre by Obulu and members of his family; Kasango Ronald under paragraphs 4, 5, 6 & 7 on multiple voting by Living Kitamirike and Tibenkana Charles who are known to him as supporters of the 1st

40 Respondent and ballot stuffing at Namavundu Trading Centre; Bwire David Gayira under paragraphs 3, 4, 5, 6, 7, 8, 9 & 10; Nanumba Kenneth under

5 paragraphs 2, 3, 4, 5, 6 & 7; Oduma Edrine under paragraphs 2, 3, 4, 5, 6 & 7; Otim Joseph Musasizi under paragraphs 3, 4, 5, 6, 7 & 8; Sinani Wesedha under paragraphs 2, 3, 4, 5 & 6 and Kigenyi Sowedi under paragraphs 2, 3, 4, 5, 6, & 7 on ballot stuffing at Namoni Beach Primary School.

10 The affidavit evidence of Nanumba Kenneth, the appointed supervisor of the Petitioner under paragraph 7; Oduma Edrine the appointed agent of the Petitioner under paragraphs 6 & 7 and Kigenyi Sowedi the appointed agent of the Petitioner under paragraph 7, all stated that they witnessed the presiding officer making a call as to the invalid votes but thereafter, the presiding officer added the invalid votes to those of the 1st Respondent and they refused to sign
15 the Declaration of Results Form on those grounds while, Kigenyi Sowedi under paragraphs 5, 6 & 7 stated that he was an appointed agent of Mpata Salleh one of the Candidates, and that he was made to sign a blank Declaration of Results Form by the agents of the 2nd Respondent claiming that it was already late, not knowing that they had intentions of falsifying results and that they were chased
20 by army officers and only allowed back later but, to view the Declaration of Results Form, the results were altered to reflect that the 1st Respondent had garnered 400 votes and Mpata Salleh zero which was false.

The affidavit evidence of Mpwire Jacob (PA-20) under paragraphs 2-11 on the aspect of threats and intimidation by the 1st Respondent's supporters at Universal
25 Apostle Church was neither rebutted nor challenged in cross examination by the 1st Respondent.

Ballot stuffing implies that voting was done by a person more than once at a given polling station, or at various polling stations by persons casting votes either in the names of people who did not exist at all, or those who were dead or absent at
30 the time of voting yet, they were recorded to have voted. The rationale here is that at the end of the polling exercise, the number of votes cast ought to be equal to the number of people who personally turned up to vote. **(See Kinyamatama Vs Sentongo, Kasirabo & EC Vs Mpunga EPA No. 92 of 2016 & Toolit Simon Akecha Vs Ounlanyah Jacob L' Okori & Electoral Commission Court of Appeal EPA No. 19 of 2011)**
35

Following the evidence above adduced by the Petitioner, I am unable to agree with the submission by Counsel for the 1st Respondent that no single person was identified by the Petitioner or his witnesses for having voted twice and, that no evidence was adduced by affidavit that any agent was denied access or
40 assaulted at any polling station however, this evidence is not credible in the sense

5 that, the Petitioner did not adduce other cogent and independent evidence to prove this fact to the required standard.

I am in agreement with the submission by Counsel for the Petitioner that the 3rd Respondent changed her mind to claim that violence was in respect of a different polling station during cross examination by the 1st Respondent and that
10 this evidence must be rejected; and that the gazetting of wrong results and failure to address the numerous complaints lodged before her by the Petitioner is a pointer of the 3rd Respondent's failings.

The submission by Counsel for the 1st Respondent that the Transmission of the Result form which was admitted as PE-3 clearly showed who was declared winner
15 in the tally centre; that the 1st Respondent obtained 17,294 votes while the Petitioner got 14,913 votes and that this was in accordance with section 58(2) of the Parliamentary Elections Act and as such, there is no prejudice or disenfranchisement whatsoever, which the Petitioner would have got by the mistake in the gazette is therefore unsustainable.

20 It is important to note that the number of votes indicated in the Declaration of Results form is the summation of the votes in the Results Tally Form for different polling stations which are expected to be genuine; other factors governing the conduct of a free and fair elections being constant at each polling station. Therefore, what matters is not the numbers but how those numbers were
25 obtained.

The affidavit evidence in support to the 1st Respondent's answer to the petition marked as RA1; affidavit evidence in support to the answer to the petition by the 3rd Respondent the Returning officer and Representative of the 2nd Respondent marked as RA2 and the additional affidavits of the Presiding officers marked as
30 RA2-1-RA2-7 in respect of the six (6) impugned polling stations, all deny the allegations by the Petitioner that the elections were not conducted in compliance with the electoral laws .

It is settled law that total denial by the Respondent is complete defence in itself.

35 It is trite law that in election petitions, the Petitioner has to adduce cogent evidence to prove their case to the satisfaction of the Court. The phrase satisfaction of Court implies; 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. (**See Masiko Winifred Komuhangi Vs Babihuga J. Winnie EPA No. 9 of 2002**)

5 I therefore, find that the Petitioner has proved that there was non-compliance with the principles laid down in the electoral laws.

This leads me to the question, as to whether the non-compliance affected the results in a substantial manner.

10 The expression 'non-compliance affected the results in a substantial manner' means that the votes a candidate obtained would have been different in a substantial manner, if it were not for the non-compliance. Substantiality means that to succeed, the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced but such reduction, however, would have to be such that it
15 would put the victory in doubt. **(See Kyamadidi Mujuni Vincent Vs Ngabirano Charles & EC EPA No. 84 of 2016 citing Masiko Winifred Komuhangi Vs Winnie J. Babihuga EPA No. 9 of 2002)**

A close scrutiny of the National Voters Register in respect of Namoni Beach Primary School polling station (PE 60) and paragraphs 2, 3, 4, 5, 6, 7, 8 & 9 of the
20 affidavit of Otim Joseph Musasizi a polling assistant for the 2nd Respondent, proves that there was non-compliance however, the difference was by six votes in favour of the 1st Respondent.

This Court made a comparison on the figures and attempted to verify whether the agents of the 1st Respondent and the Petitioner, both signed in the
25 Declaration of the Results Form for the impugned 6 (six) polling stations and found as follows:

At Hands of God Primary School, Nabaigwa Harriet(RA2-1) the Presiding officer duly signed and, the agents of the 1st Respondent and the Petitioner, in which the 1st Respondent obtained 186 votes and the Petitioner got 64 votes; At Kasolo
30 Kamponye, Emuron Nasur(RA2-3) the Presiding officer duly signed and, the agents of the 1st Respondent only in which the 1st Respondent obtained 485 votes and the Petitioner got 15 votes; At Universal Apostle Church, Bogere Ronald(RA2-4) the Presiding officer duly signed and, the agents of the 1st Respondent and the Petitioner, in which the 1st Respondent obtained 564 votes and the Petitioner got
35 6 votes.

At Namadhi Trading Centre, Balina Stephen(RA2-5) the Presiding officer duly signed and, the agents of the 1st Respondent and the Petitioner, in which the 1st Respondent obtained 447 votes and the Petitioner got 45 votes; At Namadhi B Borehole, Bazira Dennis (RA2-6) the Presiding officer duly signed and, the agents

5 of the 1st Respondent and the Petitioner, in which the 1st Respondent obtained 276 votes and the Petitioner got 19 votes and, at Namavundu Trading Centre, Kantono Olivia(RA2-7) the Presiding officer duly signed and, the agents of the 1st Respondent and the Petitioner, in which the 1st Respondent obtained 641 votes and the Petitioner got 48 votes.

10 I have taken into consideration, the proposition of law that the signing of Declaration of Results Form by the Presiding officer is mandatory and, failure to do so invalidates the result and, that the 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. **(See Kyamadidi's case (supra))**

15 Given the circumstances of the petition before me and the evidence adduced above in relation to the 10 impugned polling stations of Universal Apostle Church; Namavundu Trading Centre; Kasolo Kamponye Trading Centre; Namadhi Trading Centre; Hands of God Primary School; Namoni Beach Primary School; Namoni Health Centre 11; Namadhi Borehole; St Mary's Church Bukizibu and Bukizibu
20 Primary School in respect of ballot stuffing and in particular, the comparison above of 6 out of the 10 impugned polling stations, where, this Court established that in total, the number of votes that were cast for the Petitioner in the 6 impugned polling stations was totalling to 197 votes, while the 1st Respondent polled 2,599 votes. The vote difference between the two candidates in the six
25 impugned polling stations was 2,402 votes.

This means, that there was an average of 460 votes cast in each of the six impugned polling stations. I am having to make this average, because the parties did not avail Court with details of the total number of voters in all the six impugned polling stations.

30 I have taken into further consideration, the results declared in the Return Form for Transmission of Results(PE-3), in which the 1st Respondent obtained 17,294 votes and the Petitioner got 14,913 votes. The vote difference between the Petitioner and the 1st Respondent is 2,381 votes. I, also note that the difference in the votes between the two parties, from the total votes cast in the 6 impugned polling
35 stations, is 2,402 votes.

A further consideration of the vote difference of 2,381 votes cast for the 1st Respondent in the general elections held on 14/01/2021 for the seat of Member of Parliament in Bunya South Constituency, Mayuge District, and the vote difference of 2,402 votes cast for the 1st Respondent in the 6 impugned polling
40 stations, is 21 votes.

5 In the result, I find that the Petitioner failed to adduce strong and cogent evidence to prove on a balance of probabilities to the satisfaction of this Court, that the conduct of elections by the 2nd and 3rd Respondents, was in total disregard of the principles laid down in the electoral laws and therefore, the non-compliance, affected the results in a substantial manner.

10 Accordingly, I find that the non-compliance with the electoral laws did not affect the results in a substantial manner.

Without prejudice to the foregoing, it is important to note that, the wrong results published in the gazette(PE-2) dated 17th February, 2021 affected the results of both the Petitioner and the 1st Respondent and, not only the Petitioner, when, a
15 comparison is made with the figures declared in the Return Form for the Transmission of Results(PE3). This observation is however, not made to approve the mistake of the 2nd and 3rd Respondents in the declaration of wrong results in the Uganda Gazette but, is a genuine observation.

Issue No.2: Whether the 1st Respondent committed any illegal practices or electoral offences personally or through his agents with his knowledge and consent or approval during the election.
20

Arguments by Counsel for the Petitioner:

Counsel submitted that on the offence of undue influence committed by the 1st Respondent on 1/12/2020; 10/01/2021 and 13/01/2021, the Petitioner relies on the
25 affidavit evidence of Zandaba John, Wakibi Jafari, Kafeero Robert, Ngaaga Michael Kevin and Waiswa Hussein to prove that the 1st Respondent contravened the provisions of section 80(1) of the Parliamentary Elections Act when he urged his supporters and agents to use force and violence to compel people to vote for him and refrain from voting for the Petitioner.

30 Counsel contended that the overwhelming affidavit evidence of the Petitioner, Musana Twaha, Magoma Joshua, Namususwa Eseri, Kasango Ronald, Mubajje Edirisa and Opanyi Vincent indicates the extent to which the Petitioner's agents and supporters were indeed harassed and assaulted due to the 1st Respondent's command to his supporters.

35 Counsel further submitted that the evidence on record is cogent and credible and was never challenged in regard to the incidents of bribery by the 1st Respondent of UGX 100,000 at Butakabira village at the home of Waiswa Hussein on 1/12/2020; at a campaign rally at Bumwena "B" village of UGX 400,000 on 19/12/2020; at the home of Muwandike Scovia Annet of UGX 150,000 on

5 13/01/2021 to vote for him and at Malongo Secondary School of UGX 10,000 to all participants on 13/01/2021 to vote for him and beat up the Petitioner's supporters.

10 Counsel argued that, on the donation of UGX 300,000 to Nalubabwe Youth Association on 10/01/2021 by the 1st Respondent, the affidavit evidence of Lutaaya Ronald, Mivule Brian, Wakibi Jafari, Kazungu Dennis and Bogere George, confirms that the 1st Respondent pledged UGX 600,000 to Nalubabwe Youth Association and made a down payment of UGX 300,000 to them, to mobilise voters for him and promised to clear the balance after the elections.

15 Counsel submitted that the 1st Respondent's denial together with his witnesses on the allegations of bribery, is just a general denial which is insufficient and relied on the case of ***Tubo Christine Nakwang Vs Akello Rose Lily, EPA No. 80 of 2016*** on that proposition.

Arguments in reply by Counsel for the 1st Respondent:

20 Counsel submitted that although, the Petitioner pleaded the offence of undue influence in paragraphs 11(a-d) and 12 of the petition, the particulars of the offence of undue influence are not disclosed in particular the dates of 1/12/2020 and 10/01/2021 and relied on the authority of ***Interfreight Forwarders (U) Ltd Vs East African Development Bank Civil Appeal No. 33 of 1992*** on the proposition of the law that a party is bound by his pleadings.

25 Counsel further submitted that the 1st Respondent's evidence was not controverted through cross examination or by way of a rejoinder.

30 Counsel argued that the evidence of the 1st Respondent and his witnesses on the allegations of bribery at the home of Waiswa Hussein on 1/12/2020; Bumwena "B" on 19/12/2020; Malongo Secondary School and at the home of Muwandike Scovia Annet on 13/01/2021 remained unrebutted and therefore, this allegation was not proved.

35 Counsel contended that the recorded video by Nabunya Prossy and the analysis by Niwagaba Peter the expert, does not pass the test of authenticity provided in section 8(5) of the Electronic Transactions Act and as such, no weight should be attached to it.

Arguments in reply by Counsel for the 2nd and 3rd Respondents:

Counsel submitted that they adopt the submission by the 1st Respondent and add that, the Petitioner must discharge the legal and evidential burden in an election

5 petition to the required standard of proof in any case, which is the intermediate one of above the balance of probabilities but below beyond reasonable doubt rather than on allegations of criminal or quasi-criminal in which the standard is beyond reasonable doubt in order to succeed.

Arguments in rejoinder by Counsel for the Petitioner:

10 Counsel submitted that the argument that the Petitioner departed from his pleadings is an erroneous interpretation of the facts and the law available on the subject.

Counsel further submitted that the import of section 8(7) of the Electronic Transactions Act clearly provides that rules on best evidence and authentication
15 are modified in regard to electronic evidence, and relied upon the case of **Michael Mawanda Vs Electoral Commission & Anor EPA No. 98 of 2016** which according to Counsel provides the correct approach. Counsel further argued that the case of **Amongin Jane Frances Vs Lucy Akello & Anor EP No. 1 of 2014** relied upon by the 1st Respondent is not in consonance with section 8 of the
20 Electronic Transactions Act, 2011.

Counsel reiterated the earlier submissions on the incidents of bribery and contended that this has been proved to the required standard.

Evaluation of the evidence and resolution:

In accordance with part XI of the Parliamentary Elections Act No. 17 of 2005 as
25 amended, which provides for illegal practices and part XII which provides for election offences, consideration has been made to the provisions of sections 68 (1) and (2) on bribery and 68 (7) on giving of donations during the period of campaigning; and election offences of undue influence c/s 80, multiple voting c/s 76(f), ballot stuffing c/s 77, making wrong returns of an election c/s 78, and the
30 appointment of partisan election officials, as alleged by the Petitioner against the 1st Respondent personally or through his agents with his knowledge and consent or approval during the election.

Bribery c/s 68 (1) and (2) of the Parliamentary Elections Act No. 17 of 2005 as amended:

35 In the affidavit deposed by the petitioner in support of the petition filed on 19/03/2021 in paragraph 16 (a), (b) & (c), he avers that the 1st Respondent personally committed the illegal practice of bribery on the 1st day of December, 2020 at Butakabira village at the home of Waiswa Hussein, where voters had

5 gathered to meet with the 1st Respondent and he bribed them with UGX 150,000 (Uganda Shillings One Hundred Fifty Thousand only) and a saucepan. On the 19th day of December, 2020 at a campaign rally in Bumwena "B" village, the 1st Respondent bribed voters with a total of UGX 400,000 (Uganda Shillings Four Hundred Thousand Shillings only) to share amongst themselves. On the 13th day of
10 January, 2021 at Malongo Secondary School, the 1st Respondent held a meeting and gave all the participants UGX 10,000 (Uganda Shillings Ten Thousand Shillings only) as a bribe to vote for him and to beat up the Petitioner's supporters and, on the same date of 13th January, 2021 at Bumwena, the 1st Respondent met female voters at the home of Muwandike Scovia Annet and bribed them with UGX
15 150,000 (Uganda Shillings One Hundred Fifty Thousand only) to vote for him.

The additional affidavit of the Petitioner marked as PA-1 filed on 23/08/2021 was filed on the basis of the Court granting leave and giving directions at the commencement of the scheduling proceedings on 18/08/2021 whereupon, Counsel for the parties herein sought leave of Court to allow the parties to file
20 additional affidavits for or against the petition. Counsel for the parties complied with the schedule given by the Court.

The allegations of bribery were averred to by the Petitioner's witnesses in the affidavits of: Muwandike Scovia Annet under paragraphs 7 & 8; Nabunya Prossy in paragraph 5; Zandaba John in paragraph 10; Lutaaya Ronald under
25 paragraphs 9, 10 & 11; Mivule Brian under paragraphs 8, 9 & 10; Wakibi Siraji under paragraphs 9, 10 & 11; Kazungu Dennis under paragraphs 7, 8 & 9; Kafeero Robert under paragraphs 12, 14 & 15; Kiigere Almazan Kabomba under paragraphs 9, 10 & 11; Ngaaga Michael Kevin under paragraphs 12, 14 & 15 and Waiswa Hussein under paragraphs 8 & 9 to the effect that the 1st Respondent met with the said
30 registered voters and bribed them with money to vote for him.

The 1st Respondent in his affidavit in support to the answer to the petition marked as RA1 in paragraph 14(b) and the supplementary affidavit in support to the answer to the petition marked as RAS-1 in paragraph 34 denies the allegations that he gave a bribe of Ugx 400,000 (Uganda Shillings Four Hundred Thousand
35 only) to voters at Bumwena B on the 19th day of December, 2020 since, he was with his mobiliser Bagaga Shabani Kitidi, campaigning door to door in Kityerera Sub county from 10:00 am to 5:00pm and returned to his place of residence thereafter.

In addition, the 1st Respondent in his affidavit in support to the answer to the
40 petition marked as RA1 in paragraph 14(a) and, the supplementary affidavit in

5 support of the answer to the petition marked as RAS-1 in paragraph 44, denies the allegations that he bribed voters with UGX 100,000 and a 40 litre saucepan on the 1st day of December in the home of Waiswa Hussein because he knows that Waiswa is a strong supporter of the Petitioner and does not know where his home is situated.

10 The 1st Respondent's witnesses in the affidavits of Bagaga Shabani Kitindi under paragraphs 3, 4 & 5; Segero Alimansi Sujja under paragraphs 5, 6, 7, 8, 9, 10 & 11; Nampala Jamiri under paragraphs 5, 6 & 7; Otana Fatina under paragraphs 6, 7, 8, 9, 10 & 11; Zijja David in paragraph 4 and Egesa Muhammad under paragraphs 5, 6 & 7 further denied the allegations of bribery by the 1st Respondent.

15 During the cross examination of the Petitioner, he indicated that he obtained information about the alleged bribery of voters at Butakabira village from Waiswa Hussein; at Bumwena "B" village, he obtained information from Nabunya Prossy and other well-wishers and at Malongo Secondary School, he obtained information from Nekesa however, the affidavit (PA-42) of Nekesa Hellen was
20 expunged on grounds that no evidence was adduced to prove that she was a registered voter which, is one of the requirements, a Petitioner must prove to succeed on the offence of bribery.

I am cognisant of the settled position of the law that the Petitioner must prove the offence of bribery to the satisfaction of Court on the following; that the gift was
25 given to a voter, the money or gift was given by a candidate or through an agent and, that the giving of money or a gift must have been with the intention to influence voters.

This court finds therefore that the affidavit evidence adduced by the Petitioner's witnesses as above, is consistent, credible and cogent as to the persons who were
30 present during a meeting held with the 1st Respondent in the home of Waiswa Hussein at Butakabira village on the 1/12/2020; a campaign rally at Bumwena "B" village on 19/12/2020 and female voters at the home of Muwandike Scovia on 13/01/2021, where the 1st Respondent personally met people and bribed them with money to vote for him.

35 With regard to the contention by Counsel for the 1st Respondent on the authenticity and reliability of the electronic evidence adduced by Nabunya Prossy in the form of a recorded video and the transcription and translation by Niwagaba Peter; the opportunity by Counsel for the 1st respondent to challenge it was lost, when they declined to cross examine the said witnesses yet they were

5 given leave by this Court to do so, but decide now to make submissions in that regard on what was not formally addressed to the Court during the hearing.

Without prejudice to the above, this Court finds that in as much as the Evidence Act does not relate to affidavits, the rules of evidence apply to the annextures attached to the affidavit evidence relied upon by any party in matters of this nature.

10 In the instant petition before me, Nabunya Prossy the person who made the recording of the video, relied on the transcript and the translation by Niwagaba Peter the expert, to present to Court the said recorded video however, the chain of evidence as to how the recorded video was obtained by the expert and vice versa is not stated. This distortion in the chain of evidence raises issues as to its credibility which this Court cannot ignore.

For this reason, although this Court had ruled that the video recording, its transcription and the translation thereof was presented to Court in the traditional way for usability by the Court as guided by the decision in the **Mawanda** case (supra), and that such evidence was admissible as an exhibit, the determination of its authenticity, was reserved to be discussed in the judgment.

It is on that basis that I, now, address the issue of the chain of evidence as discussed above and, find it to underscore the authenticity and reliability of the recorded video by Nabunya Prossy and its transcription and translation by Niwagaba Peter the expert. Moreover, the affidavit evidence of Nabunya was not challenged by cross examination on the other aspects of the evidence adduced therein, than, on only what relates to the electronic evidence in form of a video recording. I find that the weight, to be attached to this evidence as a whole, is of less evidentiary value.

30 It's a well-known principle in law that there is no specific number of witnesses required to prove a given fact. Even one credible witness can prove a case. (See **section 133 of the Evidence Act Cap 6; Kikulukubyu Faisal Vs Muhammad Muwanga Kivumbi, Court of Appeal EPA No. 44 of 2011 and Anthony Harris Mukasa Vs Dr. Michael Lulume Mayiga, Supreme Court EPA No. 18 of 2007**)

35 The evidence adduced by the Petitioner on the incident of bribery at Malongo Secondary School to all the participants therein, did not prove to the satisfaction of this Court; the total number of participants who were present at the time, whether they were all registered voters or not, and that the alleged amount of UGX 10,000 was distributed by the 1st Respondent or through an agent to all the

5 said participants. This left Court in speculation and as such, that evidence could not be relied upon.

I have taken into account, the proposition of the law, that the Court does not require multiplicity of incidents of bribery to annul an election; a single incident of bribery, once committed by the 1st Respondent can suffice, if the evidence
10 adduced proves the alleged bribery to the satisfaction of the Court. **(See *Bakaluba Peter Mukasa Vs Nambooze Betty Bakireke* Supreme Court EPA No. 4 of 2009)**

In the result, I find that the Petitioner has adduced evidence that proves to the satisfaction of this Court, that the 1st Respondent personally committed the illegal
15 practice of bribery c/s 68 (1) and (2) of the Parliamentary Elections Act No. 17 of 2005 as amended at the home of Waiswa Hussein at Butakabira village on the 1/12/2020; in a campaign rally at Bumwena "B" village on 19/12/2020 and at the home of Muwandike Scovia Annet on 13/01/2021, where he personally met with the said registered voters, gave them money and requested them to vote for him.

20 **Giving of donations during the period of campaigning c/s section 68 (7) of the Parliamentary Elections Act No. 17 of 2005 as amended:**

It was the evidence of the Petitioner in paragraph 17 of the affidavit in support of the petition, that the 1st Respondent committed an illegal practice of giving
25 donations during the campaign period on the 10th day of January, 2021 when he met with the members of Nalubabwe Youth SACCO and donated to them a sum of UGX 300,000 (Uganda Shillings Three Hundred Thousand Shillings only) in the course of his campaigns.

During cross examination, the Petitioner stated that he meant Nalubabwe Youth Association, which he corrected in his additional affidavit marked as PA-1.

30 The 1st Respondent denied the allegations of giving donations during the period of campaigning in paragraphs 5, 7, 11, & 14 (c) of his affidavit in support of the answer to the petition (RA1) and paragraph 43 of the supplementary affidavit (RAS-1) that he was in Malongo together with his driver however, the evidence adduced by the Petitioner's witnesses of Lutaya Ronald (PA-34) under
35 paragraphs 1, 3, 5, 6, 7, 8, 9, 10 & 11; Mivule Brian (PA-35) under paragraphs 1, 2, 4, 5, 6, 7, 8, 9, & 10; Wakibi Siraji (PA- 36) under paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, & 12 and Kazungu Dennis (PA-37) under paragraphs 1, 2, 3, 4, 5, 6, 7, 8 & 9 is to the effect that, the 1st Respondent personally met with them as registered voters and made a pledge of UGX 600,000 but made down payment of only UGX

5 300,000 so as to support him and vote for him; this is overwhelming evidence against the 1st Respondent and the defence of alibi cannot suffice.

In the result, I find that the Petitioner has proved to the satisfaction of this Court that the 1st Respondent personally committed the illegal practice of giving donations during the period of campaigning c/s section 68 (7) of the
10 Parliamentary Elections Act No. 17 of 2005 as amended.

Electoral offences:

Undue influence c/s 80 (1) (a) of the Parliamentary Elections Act No. 17 of 2005 as Amended:

15 The Petitioner averred in paragraph 13 of his affidavit in support of the petition that there is no doubt that the unprecedented incidents of violence were a direct result of the 1st Respondent's mobilisation of his supporters to attack him and the supporters; Olowo Michael in paragraph 3 of his affidavit averred that Kakya George the LC 1 Chairman of Namadhi B village started chasing away the Petitioners supporters who had come to vote and this was confirmed by Opanyi
20 Vicent in paragraph 3 of his affidavit.

The 1st Respondent denied any incidence of violence and that the elections were conducted in a calm and peaceful manner however, the 2nd and 3rd Respondents admitted that there were incidents of violence, which did not affect the results of the election in a substantial manner.

25 It is important to note that the affidavit evidence in favour of the petition by Olowo and Opanyi as above was not subjected to cross examination.

Its trite law that, where the evidence of a witness is not subjected to cross examination, no adverse inference may be drawn, but it is presumed that the evidence therein is accepted as true subject to, that evidence being found to be
30 intrinsically or inherently incredible. (***See Lule Umar Mawiya Vs Ssempijja Vincent Bamulangaki & EC EP No. 16 of 2011*** which cited with approval ***EP No.2 of 2002, Dr Runumi Mwesigye Vs The Returning Officer & 2 Others.***)

From the evidence above, I find that the Petitioner failed to adduce credible and cogent evidence to prove this allegation to the required standard.

35 Multiple voting c/s 76(f) and Ballot stuffing c/s 77 of the Parliamentary Elections Act No. 17 of 2005 as Amended:

- 5 The evidence adduced in favour of the petition on this aspect of multiple voting and ballot stuffing has been considered above in the negative.

Making wrong returns of an election c/s 78 of the Parliamentary Elections Act No. 17 of 2005 as Amended:

- 10 This allegation was not disputed by the 2nd and 3rd Respondents during cross examination, when she stated that she requested for a corrigendum but has not received a response.

On the allegation by the Petitioner that the Respondents appointed partisan electoral officials, the Petitioner failed to adduce credible and cogent evidence to prove that fact on a balance of probabilities to the satisfaction of this Court.

- 15 Accordingly, I find that the 1st Respondent committed illegal practices of bribery and, giving of donations during the period of campaigning. The 2nd and 3rd Respondents committed the electoral offence of making wrong returns of an election as above.

Issue No.3: What remedies are available to the parties.

- 20 Pursuant to sections 63(4) and 61(1) (c) of the Parliamentary Elections Act in which this Court has found the 2nd issue above in the affirmative, the election of the 1st Respondent as the Member of Parliament for Bunya County South Constituency, Mayuge District is hereby set aside.

- 25 The seat, in Parliament, for Bunya County South Constituency, Mayuge District is hereby declared vacant.

Accordingly, a fresh election shall be held.

With regard to costs, section 27(1) of the Civil Procedure Act Cap 71 is explicit on costs; that is, it shall follow the event unless for justifiable reasons, the Court decides otherwise. I find no reason to deny the Petitioner costs of this petition.

- 30 This petition is allowed with costs against the Respondents.

A certificate is issued for two Counsel, in accordance with Regulation 41(1) and (2) of the Advocates (Remuneration and Taxation of Costs) Regulations SI 267-4, taking into consideration the nature and importance of an election petition.

5 Judgment read and delivered in open Court on the 15th day of October, 2021.

SUSAN ABINYO

JUDGE

15/10/2021

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