

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
IN THE MATTER OF ELECTORAL COMMISSION ACT CAP. 140
AND
IN THE MATTER OF LOCAL GOVERNMENT COUNCIL ELECTIONS
ELECTION PETITION NO. 02 OF 2021
NYANZI FRED SSENTAMU :::::::::::::::::::::::::::::::::: PETITIONER
VERSUS
1. THE ELECTORAL COMMISSION
2. RETURNING OFFICER KAMPALA
3. NSEREKO MUHAMMAD :::::::::::::::::::::::::::::::::: RESPONDENTS

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

Background

- [1] The Petitioner, **Nyanzi Fred Ssentamu** (National Unity platform-NUP), 3rd Respondent, **Nsereko Muhammad** (Independent) with 3 others contested for the vacancy of Member of Parliament for Kampala Central Constituency. The elections were organized and conducted by the 1st Respondent Electoral Commission on the 14th day of January, 2021.
- [2] At the conclusion of the polls, the 3rd Respondent was returned as the duly elected Member of Parliament, Kampala Central Constituency having garnered majority votes with **16,998 votes** as against the Petitioner who garnered **15,975 votes**.

- [3] As a result, the 3rd Respondent was on 17th February 2021 gazetted as the winner and eventually sworn in as Member of Parliament for the Kampala Central Constituency. Dissatisfied by the result and the general conduct of the elections, the Petitioner petitioned this Court challenging the conduct of the elections. At the commencement of the trial of the petition, Counsel for the 1st Respondent raised a preliminary point of law that the 3rd Respondent was never served with the petition. Consequently, Court dismissed the petition on the ground of non-service of the petition to the 3rd Respondent.
- [4] The Petitioner on being dissatisfied with the decision of court dismissing the petition, filed an appeal to the Court of Appeal which found inter alia, that the 3rd Respondent was served with the Notice of presentation of the petition and the petition itself. The Court of Appeal sent the petition back to the High Court for hearing and determination on its merits.
- [5] During the retrial, this court ordered the parties to adopt the earlier pleadings and the 3rd Respondent's answer to the petition that had been filed subsequently.
- 6] In the instant petition, the Petitioner is challenging inter alia, the declaration of the 3rd Respondent as the winner of the elections and seek to annul the outcome of the election on account of;

(a)Non-compliance with the Electoral laws and failure to conduct a free and fair election which affected the results in a substantial manner by:



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- i. Failing without lawful excuse to furnish the Returns of the election to the Returning Officer within the time in which they were required to furnish those returns.
- ii. Making wrong entry on the final tally by posting wrong votes at respective polling station.
- iii. Omitting various votes at the various polling stations in the final tally sheet.
- iv. Disenfranchisement of several credible voters at several polling stations.
- v. Wrong posting of results on Declaration of Results (DR) forms.
- vi. Vote stuffing orchestrated by the 3rd Respondent personally and or with his knowledge, consent and approval.
- vii. Bribery of voters by the 3rd Respondent with intent to directly and or indirectly influence them to vote him.
- viii. Wrong invalidation of votes in favour of the 3rd Respondent.

[7] The 1st and 2nd Respondents in answer to the petition denied the Petitioner's attributions of all alleged illegal practices and malpractices made against the Respondents and contended that the election was free from violence, intimidation and improper influence. That the elections were conducted independently, transparently, administered in an impartial, neutral, efficient, accurate and in an accountable manner.

[8] At scheduling, the following issues were agreed upon for consideration in the determination of the petition:



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1. *Whether there was non-compliance with Electoral laws in the conduct of the election.*
2. *Whether there were any Electoral offences committed by the 1st and 2nd Respondents.*
3. *Whether there were any electoral offences committed by the 3rd Respondent.*
4. *If so, whether it substantially affected the results of the elections.*
5. *Whether there are remedies available to the parties.*

Counsel legal presentation

- [9] The petitioner was represented by **Mr. Justine Semuyaba** of **Ms. Semuyaba, Iga & Co. Advocates, Kampala** while the 1st and 2nd Respondents were represented by **Mr. Eric Sabiiti** and **Mr. Hamidu Lugoloobi** of the 1st Respondent's legal Department, **Kampala** and the 3rd Respondent was represented by **Mr. Robert Bautu** of **Ms. Arcadia & Co. Advocates, Kampala** together with **Ms. Nsereko Sauda** of **Ms. Nsereko- Mukalazi & Co. Advocates, Kampala**. The Counsel filed their respective final submissions as permitted by this Court, for consideration in the determination of this petition.



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Burden and standard of proof

- [10] As rightly submitted by all the Counsel of the parties in this Petition, the burden of proof lies on the petitioner to prove the assertions in the election petition (**S.101 of the Evidence Act**) and the standard of proof required is proof to the satisfaction of Court on the basis of a balance of probabilities; **Section 61(1) and (3) of the Parliamentary Elections Act (PEA); Mukasa Anthony Harris Versus Dr. Bayiga Michael Phillip Lulume, EPA No. 18 of 2007 (S.C)**. The Courts have however explained that the standard of proof is higher in election matters than that required in ordinary suits because of the public importance and seriousness of the allegations normally contained in the petitions, see **Ocen Peter and Anor. Versus Ebil Fred, EPA No. 83 of 2016** citing **Rtd. Col. Dr. Kiiza Besigye Vs Y.K.Museveni & Anor. Presidential Election Petition No.1 of 2001** and **Mugerwa Peter Versus Mudiobole Abedi Nasser, EPA No.30 of 2011**.
- [11] In this case therefore, the Petitioner has a duty to adduce credible and or cogent evidence to prove the allegations in the petition to the stated standard of proof.

Preliminary issues

- [12] Counsel for the 1st and 2nd Respondents opined that in **Paragraph 37 of the Petition**, the Petitioner stated that during the hearing of the petition, he would seek for orders that this Court takes into its custody for safekeeping all the ballot boxes and that the 1st and 2nd Respondents do produce certified copies of all the DR forms used in the election, together with all complaints received in relation to the said forms, the entire voters' register, the

Packing list of all the voting materials, the Results Transmission Tally sheet and the Reports filed by the 2nd Respondent, all in respect of the election for Member of Parliament Kampala Central Constituency. However, that at trial, the Petitioner only applied for a certified **Copy of the Voters' Register** which was accordingly availed. He invited Court to assume that the Petitioner abandoned the said application for the rest of the materials and or documents.

- [13] The record shows that no application was made by the Petitioner as he had indicated in his Petition that he would seek for the orders regarding production of the referred to election materials. The Petitioner only applied for the certified **Copy of the Voters' Register** which was accordingly availed to him in the course of hearing of the Petition. This Court would in the premises therefore not delve itself in directing for the production of these Election materials when they were neither requested nor applied for by the Petitioner. It is in the premises therefore taken that the Petitioner abandoned the said application for orders to produce the said election materials.
- [14] Secondly, Counsel for the 1st and 2nd Respondents submitted that during scheduling, the Respondents indicated that they would examine all the Petitioner's witnesses who swore Affidavits and that Court also accordingly ordered so, but that only 5 (**five**) of the Petitioner's witnesses showed up for cross examination. He invited this Court to find the evidence of these deponents/witnesses who failed to show up for cross examination incomplete or their Affidavits be expunged from the Court record;



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Freda Nanziri Mubanda Vs Mary Babirye Kabanda & Anor, EPA No. 38 of 2016. In the alternative, that if this Court is inclined not to find the evidence incomplete and or expunge it, it should form an inference that the case set up by the Petitioner and his witnesses who did not appear for cross examination is not correct.

[15] Counsel for the Petitioner in rejoinder objected to the expunging of the Affidavits of the Petitioner's deponents who failed to appear for cross examination on the following grounds;

- (a) The 1st, 2nd and the 3rd Respondents abandoned the cross examination of the Petitioner's witnesses who did not turn up for cross examination. That they opted to only examine the Petitioner and **Lubega Hamza Kaziro (Pw2)**.
- (b) All Affidavits of the Petition were admitted as exhibits at the beginning of the trial.
- (c) The witnesses had reported to Court on the day of cross examination but were threatened and they run away.

[16] Counsel concluded that in the circumstances of this case, the consequence of failure of some witnesses failing to appear for cross examination is not to expunge their affidavits but to consider them since they were admitted as exhibits.

Consideration by court

[17] In this case the trial of the Petition was set to proceed by Affidavit evidence. However, guided by the Court of Appeal in the case of **Kayanja Vicent De Paul Versus Rulinda Fabrice Brad & Anor, EPA No.14 of 2021**, this Court proceeded by having the deponents/ witnesses appearing before the court before sworn in by Court as envisaged under **Section 64 (1) (a) PEA** which provides that;



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"64 witnesses in election petition

(a)Any witness shall be summoned and sworn in the same manner as witness may be summoned and sworn in civil proceedings;"

[18] In the **Kayanja** case (supra), **Rule 15 of the Parliamentary Elections (Interim provisions) Rules** which provides for trial by affidavit was found inconsistent with the Parent Act (**S.64 PEA**) and therefore void to the extent of making a mandatory provision for trial to be by affidavit.

[19] Affidavits are by definition declarations in writing made on oath/affirmation, see **Black's Law Dictionary, 6th Edition** and **Mugema Peter Vs Mudiobole Nasser, EPA No. 30/2011**. In the instant case, the affidavits were admitted during the preliminary hearing in the trial and were treated as Written witness statements though they would be governed under **O.19 r. (1) CPR** which provides thus;

"Any court may at any time for sufficient reason order that any particular fact may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable; except that where either party bonafide desires the production of a witness for cross examination and that such witness can be produced, an order shall not be made authorizing the evidence of that witness to be given by affidavit."

Emphasis.



- [20] From the above rule, it is apparent that cross examination of witnesses proceeds with leave of the court, and it is at the option of the opposite party.
- [21] In the instant case, upon admission of the Affidavits of the respective parties by this court, the record of 7th November 2022 is to this effect:

Mr. Eric Sabiiti (for 1st and 2nd Respondents):

On the part of the 1st and 2nd Respondents, we intend to cross examine the petitioner and Mr. Lubega Hamza Kaziro.

Mr. Bautu (for the 3rd Respondent):

We shall cross examine all the 14 deponents.

Mr. Semuyaba for the petitioner

We intend to cross examine all the Respondent's deponents.

Court

Hearing put to 17th and 18th November 2022 at 9:00 am.

Both parties to ensure the presence of the required deponents''.

- [22] Clearly, the above show that the affidavits/Witness statements which had been filed and served upon the opposite party were following or in compliance with an order of the court. Court adopted them in these proceedings. The filing and service of affidavits/witness statements connotes that a party has elected to adduce evidence of the relevant deponents/witnesses at the trial and therefore the failure by any deponent/witness to appear in court when summoned and ordered to do so, the presumption is that such a deponent/witness has been abandoned by the party

who intended to rely on him/her as a witness since the party bear the responsibility of ensuring his/her attendance in court.

- [23] As was nevertheless rightly submitted by Counsel for the Petitioner, a party in a case can elect whether or not to adduce evidence when such a party is called upon by the court to open his or her case. In this case, the Petitioner had intimated to present 14 deponents/witnesses who included the petitioner but during trial, he presented only **4 (four)** deponents/witnesses, i.e., the Petitioner himself as **PW1**, **Lubega Hamza Kaziro** (PW2), **Mugisha Gilbert** (Pw3) and **Nakitende Mavis** (Pw4) and then closed his case.
- [24] In the circumstances of this case, I find that the petitioner opted not to adduce evidence of the other 10 deponents/witnesses though he had filed and served affidavits/witness statements of the said deponents/witnesses. An affidavit/witness statement filed and served does not constitute evidence in law once the opposite party has elected to cross examine him or her and the court has granted leave or ordered for such cross examination. Until the author of the affidavit/witness statement mounts the witness box, takes oath and identifies his/her affidavit/witness statement and then is subjected to cross examination does such affidavit or witness statement qualify to be evidence on record to be relied on by court. Court orders and directions have to always be complied with at all times.
- [25] Turning to this case, it is true as argued by the Counsel for the Petitioner that all the affidavits of the Petitioner were admitted as exhibits at the beginning of the trial, but it should be noted that

the admission of these affidavits/witness statements was subject to the deponents/witnesses appearing for cross examination as requested for by the Respondents and as per the order of the Court.

- [26] The claim by the Counsel for the Petitioner that in the instant case the Petitioner's witnesses had reported to court on the day of cross examination but were threatened and that they run away is a lie. This Court considered this claim during the trial when the Counsel for the Petitioner raised the same complaint at the closure of the Respondents' case and court found the claim unfounded as follows:

"Mr. Semuyaba: I want to be on record on how the Respondents threatened our witnesses from the corridors and steps of this building".

"Court: Mr. Semuyaba's claims have to be taken with reservations. This court received no report (complaint) at all regarding the allegation. If it happened in the precincts of this court, it ought to have been reported. Secondly, with this massive presence of the press with cameras and other individual smartphones around, such an incident as described by Counsel Semuyaba would not occur unnoticed. Besides, he had intimated to court that his witnesses were present in a safe place. I find no evidence of any alleged threats. The witnesses are just not available."

- [27] Clearly, I find the Petitioner's claims that his witnesses were threatened and chased away not supported by any evidence. Indeed, if the Petitioner's witnesses had come and sat in court and



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threats were geared towards them by anybody, it would not pass by unnoticed and unreported. If they were intimidated from outside the court, still this court would have expected a complaint being raised by the Petitioner to that effect. In the absence of any evidence of the alleged threats, I find the claim regarding the alleged threats to the Petitioner's witnesses a mere afterthought intended to mislead court and as a result, I reject it for being devoid of any merit.

- [28] In **Freda Nanziri Mubanda Versus Mary Babirye and Anor, EPA No.38 of 2016**, on the day fixed for hearing of Petitioner's case, all witnesses were not present for cross examination despite the directive by court that the hearing would proceed, the Court of Appeal held thus:

"After the cross examination of the Appellant's witnesses who were present in court, all counsel for the appellant had to say was that" I have no more witnesses"..... We are thus unable to find any reasons for faulting the trial judge in expunging from the record the affidavits of the Appellant's witnesses who did not appear for the hearing on the scheduled dates."

- [29] In the premises where 4 out of the 14 Petitioner's listed witnesses appeared in the court and identified their affidavits/witness statements and were cross examined for purposes of testing the veracity of their testimonies, I proceed to consider and evaluate the evidence of only the **four** witnesses; **PW1, PW2, PW3 and PW4** who include the Petitioner and accordingly expunge from record the affidavits/witnesses statements of those who did not appear in court for cross examination. The same legal position of course

shall also apply to the Respondents. The Respondents' deponents/witnesses who failed to appear for Cross examination, their affidavits accordingly suffer the same fate. They are also accordingly expunged.

Merits of the application

Issue No.1 : Whether there was Non-compliance with the Election laws in the conduct of the election for Member of Parliament Kampala Central Constituency.

- [30] It is the Petitioner's case that the election was not concluded in accordance with the Electoral laws and that the non-compliance with the Electoral laws and failure by the 1st and 2nd Respondents to conclude a free and fair election affected the results in a substantial manner.
- [31] The overall polling stations in the Kampala Central Constituency were **126** in number. The Petitioner pleaded a total of **31 polling stations** as those he is contesting the results for falsification of votes. He however demonstrated only **13 polling stations** of the queried/contested ones as per the table below:

	POLLING STATION	PETITIONER (NYANZI FRED)	3 RD RESPONDENT (NSEREKO MUHAMMAD)
1.	KCCA Primary school (A-MUG)-Kamwokya II	67	179
2.	Hajji Katende's home-Bukesa	180	313
3.	Serwanga (N-Z)-Mengo	87	110

4.	Community(M-NAM)- Kamwokya II	103	122
5.	Basker Ville-Kololo I	60	76
6.	L.C Meeting place(N-Z) Kitawuluzi-Kisenyi III	105	98
7.	All Saints. B- Nakasero II	124	159
8.	Banamasaka-Kagugube	144	193
9.	7 th Day Adventist Church (A-KH)-Kagugube	102	139
10.	Park Yard(N-Z)	69	152
11.	Budonian Club- Mengo	155	99
12.	Kiira Rd Playground- Kamwokya I	67	157
13.	Basajja Balaba Taxi Park (A-K)	141	163
	TOTAL	<u>1404</u>	<u>1960</u>

N.B: The difference of votes between the Petitioner and the 3rd Respondent -556.

[32] Counsel for the Petitioner submitted that the manner in which the Presiding officers of the 1st and 2nd Respondents filled the DR forms in the above contested polling stations show that there was non-compliance with the law, to wit:

- (a) Unaccounted for/Ballot papers in excess those issued; (Serwanga(N-Z), Kiira Road Playground, Park yard(N-Z) & Basajja Balaba Taxi Park)
- (b) Disappearance and or Missing of ballot papers form the Polling stations; (KCCA Primary school (A-MUG), Community(M-NAM), L.C Meeting(N-Z), Hajji Katende).
- (c) DR forms not signed/endorsed by the Presiding Officers; (All Saints. B- Nakasero II & Banamaska- Kagugube).


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- (d) Making wrong Returns and or Falsification of results in favour of the 3rd Respondent; (All Saints. B, 7th Adventist Church).
- (e) Wrong computation of results and or wrong entries on DR forms; (All the 13 polling stations).
- (f) Unfilled DR forms; (Budonian Club)

[33] Counsel for the Petitioner concluded that these errors substantially change the results in the election given the fact that the margin between the 3rd Respondent as the winner and the Petitioner as runner up was only **1023 votes**. That any non-compliance with the law regulating Election Process would affect the validity of the election as demonstrated by the Petitioner through affidavit evidence. The election was full of irregularities and illegalities that affected the result and that the only fate of this election is to set it aside.

[34] Counsel for the Respondents on the hand submitted that the 1st and 2nd Respondents complied with the provisions of Electoral laws particularly the Parliamentary Election Act and that, if there was any non-compliance on part of the 1st and 2nd Respondents, it did not affect the result of the election in a substantial manner.

Consideration by Court

Filling of DR forms;

[35] The Petitioner's complaints regarding unaccounted for/Ballot papers in excess those issued and wrong computation of results/ wrong entries on DR forms relates to the filling or the way the DR



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forms were filled. Under **Ss. 47 and 50 PEA**, Votes cast at a polling station are counted at the polling station and the votes cast in favour of each candidate are recorded separately and filled on the DR form. The Presiding Officer and the Candidates or their agents, if any, sign and retain a copy of the declaration stating the Polling Station, the number of votes cast in favour of each candidate. Then the Presiding Officer there and then announces the results of the voting at that particular polling station before communicating them to the Returning Officer.

[36] **Ss. 47 (5), (6) & (7) PEA and Art. 68 (4) of the Constitution (as amended)** gives 4 essential ingredients of a valid DR form;
(a)Endorsement by the Presiding Officer

(b)Endorsement by the Candidates' representatives or agents

(C)The name of the polling station

(d)The number of votes cast in favour of each candidate. See also **John Baptist Kakooza Vs E.C & Anor, EPA No. 11/2007 (SC)**.

[37] I have perused and examined all the DR forms the Petitioner is challenging and alleging irregularities and malpractices (which form **P.Exh. 2**), I have found that apart from DR forms from 2 polling stations alleged not to had been endorsed by the Presiding officer, i.e, **All Saints. B - Nakasero II and Banamasaka-Kagugube**, the rest were duly endorsed by the respective Presiding officers and the respective agents of the candidates. There is no suggestion from the petitioner that any of the endorsements and or signatures on the DR form in question are forged. In the spirit of **S.47 (6) PEA**, which provides thus;



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"Votes cast for each candidate shall be recorded in both figures and words and countersigned by polling agents before the declaration of the results,"

the DR forms in question were duly filled with the number of votes in favour of each candidate at a particular named polling station.

- [38] It is my view that once the DR form has satisfied the above requirements, then it is valid and authentic even if it is missing the other details of the computation categorizing the different votes and ballot papers at the polling station. In this case, apart from the 2 (two) DR forms alleged by the Petitioner to lack endorsement of the presiding officers, I find the rest of the DR forms being challenged by the Petitioner satisfying the requirements of a valid DR form and thus valid and authentic.
- [39] The votes cast for each candidate involve the electorates during the counting witnessed by the candidates and or their agents and voters present. However, the computation of different categories of **valid votes cast, rejected (invalid) ballot papers, Ballot papers issued and unused together with the distribution of females and males who voted** is done by the electoral officials without the participation of the electorate. The computation and categorization of votes and ballot papers, therefore, does not affect the actual number of votes garnered or received by each candidate as counted in the presence of the candidates and or their agents; see **also Birihariwe Eryeza Vs Bright Tom Amooti & 2 Ors, EP. No. 10/2021 [2021] UGHCEP 45.**
- [40] However, the foregoing does not mean that court is to disregard the Petitioner's complaints regarding the errors reflected in the

computation categorizing breakdown of the votes and ballot papers. The DR forms are a very vital documents in an election process and therefore are a crucial part of the record of elections. They contain the data as to the votes cast at each polling station. It is the totality of these votes as contained in the DR forms that determines the winning candidate in a given constituency. Given their importance, it is crucial that the provisions of the law relating to them is complied with. **Ss. 47 & 50 PEA** places a duty on the Presiding officers to properly fill and endorse the DR forms before communicating the results to the Returning Officer. **S.78(a) PEA** imposes a penal sanction on an Election Officer or other person having any duty to perform in relation to an election, who makes in any record, return or other document which he or she is required to keep or make under the Act any entry which he or she knows or has any reasonable cause to believe to be false. The election officer who violates **S.78** commits an offence of 'making wrong returns of an election'.

- [41] In the instant case, I have carefully examined each of the DR form complained of, in all of them the total number of the votes cast for each candidate were reflected. However, there are numerous errors in the computation categorizing of the different votes and ballot papers. As I have already observed, these errors did not invalidate the DR forms which were duly endorsed by the respective agents of the candidates and the Presiding officers (save those from the 2 polling stations the Petitioner allege were not accordingly endorsed. I will revert to them later in the course of this judgment).

[42] Under S.46(1) PEA it is provided thus;

“46. Complaints at polling

(1) The candidates’ agents and any voter present at a polling station may raise and present in writing complaints relating to the voting at the polling station and shall have the right to obtain information from the presiding officer concerning the counting process.

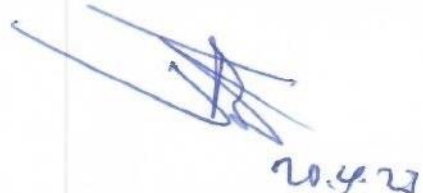
(2)

(3), any presentation received by the presiding officer under this section shall be deliberated upon and resolved by the presiding officer and the polling assistants”.

S.48 PEA provides for complaints during the counting of votes by a candidate or a candidate’s agent or any voter.

[43] The purpose and the intention of the above provisions of the law providing for complaint handling at both the polling and during the counting of votes by the E.C. lower level authority is to offer the aggrieved candidates and the election officials an opportunity to expeditiously have the grievances resolved administratively without necessarily interrupting the would be smooth running of the election process and thus relieve the higher administrative body of the Electoral Commission of the burden of complaint handling at a lower level.

[44] It is trite that signed DR forms are proof that the agents are satisfied with what transpired at the time of voting.; **Hon. George Patrick Kasaja Vs, Fredrick Ngobi Guma & Another, EPA No.68**



of 2016 at p.23. In **Babu Edward Francis Versus E.C & another**, EP No.10 of 2002, Justice Stella Amoko(As she then was) held:

“When an agent signs a DR form, he is confirming the truth of what is contained in the DR form. He is confirming to his principal that this is the correct result of what transpired at the polling station. The candidate in particular is therefore stopped from challenging the contents of the form because he is the appointing authority of the agent”.

- [45] In the instance case there is no evidence on record that any of the Petitioner’s agents took the opportunity offered by **Sections 46 & 48 PEA** and formally raised any complaint regarding the alleged malpractices of posting wrong votes at the respective polling stations, disfranchisement of any credible voter at any polling station, wrong posting of results on the DR forms, unaccounted for or ballots in excess of those issue, and or any other irregularity. The petitioner only raised a complaint on the 15th of January 2021, **P.exhibit 1**. during or after tallying. There is no provision in the law that provides for complaints during or after tallying though raising such a complaint at this stage is not prohibited.
- [46] In my view, in view of the fact that each of the queried DR forms were signed by the Petitioner’s agents without indication of any complaint at the polling stage, counting of votes stage and on the duly signed DR form itself, such is sufficient evidence that the electoral process was satisfactory. The errors in the computation categorizing of the votes and the ballot papers are not fatal because, if corrected, there is no evidence that it would affect the

outcome of the election i.e., it would have no effect on the figures reflected in the DR forms regarding the votes cast to and secured by each of the candidates.

- [47] The fact that the Petitioner's agents did not object to the DR forms by raising a formal complaint and or refuse to endorse them is evidence that the forms present and reflect a proper election for each of the impugned polling stations and therefore reflected the will of the people.
- [48] Besides, the errors that occur during the computation categorizing the different ballot Papers and the votes on the DR forms have been explained to be a result of incompetence and inefficiencies with the 1st Respondent's officers, election fatigue that is characterized with elections generally because of the high pace usually set for conclusion of the election exercise and therefore, that it has nothing to do with the Respondent, the winner of the elections; **Babirye Jane Versus Bukenya Michael. Iga & Anor, EP No.2 of 2001 and Birihariwe Eryeza Vs Bright Tom & 2 Ors (Supra)**. Since "making wrong returns of an election under **Section 78 PEA** is an offence and not perse a ground for annulling an election under **Section 61 PEA**, the 1st Respondent cannot be held vicariously liable for the offence and omissions made by the Election Commission officials unless there is evidence that the actions and omissions substantially affect the outcome of the election which evidence has in all sincerity, not been adduced by the Petitioner.
- [49] In conclusion, I find that as long as what was reflected on the DR forms as the votes cast for each candidate at the polling station is

endorsed by the candidates and or their agents with no indication of any complaint, then the rest regarding the computation categorizing the different votes and ballot papers on the DR forms become a formality which is only intended to benefit the Electoral Commission for accountability, policy and planning purposes.

- [50] However as I observed in the **Birihariwe petition** (supra), this is not to say that the 1st Respondent agents/ Officials should abrogate their duties and obligations of conducting Electoral process with utmost diligence and seriousness. The DR forms are Crucial for purposes of propriety and integrity of the electoral process. It is therefore imperative for Election officials to enter all the relevant information on the DR forms in order to provide safeguards against any fraud. Court therefore still emphasizes that the Election officials and agents are not excused for their lack of diligence in conducting the election as mandated by the law, otherwise they face the penal sanction provided under **Section 78. PEA.**

Unaccounted for and ballot papers in excess those issued.

- [51] As per the Petitioner, the contested polling stations for the existence of unaccounted for ballots include; **Serwanga(N-Z), Park yard(N-Z), Kiira Rd Playground and Basajja Balaba Taxi Park.** The 1st Respondent through its legal officer, **Musiime Doreen** (PW1) testified that at Summit view Polling station in particular, the presiding officer mismatched the total number of ballot papers counted with the number of total ballot papers issued but that nonetheless, he verified the entries and the tallies in all the statutory forms accordingly before declaration of the results and

found that the alleged errors did not affect the actual number of votes garnered by each of the candidate or that this conferred an advantage to any candidate.

- [52] As I have already observed, the noted miscomputations did not affect the outcome of the election. They were errors and mistakes that did not undermine or affect the results.
- [53] Besides, the petitioner did not adduce any credible and cogent evidence showing that the alleged unaccounted votes and or ballot papers in excess those issued were used to cast votes and that the 3rd Respondent or any of the candidates benefited from them. What he has attempted to show is a mere hypothesis and conjecture. In the absence of such evidence, I find that the alleged excess ballot papers were neither cast nor taken into consideration in determining the poll results. They had no effect on the result of the election, **See Hellen Adoa & Anor, Vs E.C & Anor, EPA Nos. 57 & 54/2016.**

Declaration Forms unsigned by a Presiding officer.

- [54] The signing of the DR forms by the presiding officer is mandatory under **Section 47 (5) of PEA** and failure invalidates the results, **Betty Muzanira Vs Winnifred Matsiko & Anor, EPA No. 65/2016.**
- [55] In the instant case, the impugned DR forms in question are those of **All Saints. B-Nakasero II** and **Banamasaka- Kagugube**. Whereas the petitioner's copies of the DR forms regarding these two polling stations do not have the endorsement of the presiding officers, the certified copies of the 1st Respondent have the endorsements. I have compared the two sets of the DR forms, but

I have found that the certified copies of 1st Respondent were endorsed by the respective presiding officers and at the same time by the Petitioner's agents. Neither of these agents appeared in court to testify and deny the respective signatures attributed to them as appended on the certified set of the DR forms presented by 1st Respondent and that therefore, their purported signatures are a forgery. With this finding, it follows that the uncertified DR forms of the two impugned polling stations relied on by the Petitioner are found not authentic and therefore unreliable.

- [56] Besides, even if the results from the two impugned polling stations were to be omitted or added to those obtained by the Petitioner, the 3rd Respondent would still emerge the winner of the election in view of the winning margin of **1023 votes**.

Unfilled Declaration Forms

- [57] Upon careful perusal of all the queried DR forms including the **L.C Meeting Place(N-L)** and **Budonian club**, I was not able to find any DR form that was not filled by the election officials though, some were not completely filled on the part where votes and ballot papers were to be computed. As already seen this omission did not affect votes cast to the individual candidates. There is therefore in the premise no evidence that was adduced by the Petitioner to back up the allegation of the existence of the unfilled DR forms.
- [58] As a result of the foregoing, I find that the Petitioner has not adduced evidence to the satisfaction of court that there has been


a failure to conduct the election in accordance with the principles as laid down in the provisions of the Electoral laws.

Issue No.2: Whether there were any Electoral offences committed by the 1st and 2nd Respondents.

(a)Falsification of Results

[59] The petitioner relied heavily on the affidavit of a one **Nalubega Mariam** who never appeared in court to testify and substantiate or clarify the contents of her alleged letter, **P. Exh.11**, wherein she purportedly revealed that one of her colleagues one **Umar Mukose** lured her into a deal of adding 100 votes to the 3rd Respondent on top of what he had garnered. Besides, even if one was to consider her affidavit, which was nevertheless expunged, it is doubtable whether it would work for the Petitioner because it has a certification of translation meaning or implying that she was illiterate and therefore, never knew English yet her purported handwritten confessional statement, **P. Exh.11** is in English language without a certificate of translation. It would in the premises be doubtable as to whether the said **Nalubega Mariam** is the author of the document (**P. Exh.11**).

[60] In the premises, since the said **Nalubega Mariam** never appeared in court to identify her affidavit/witness Statement and be cross examined as ordered by court for purposes of testing the veracity of her testimony (hence her affidavit was expunged), I find **P.Exh.11** doubtable and therefore not authentic. It cannot reliably be based on to make a finding of falsification of results as a proved ground to upset the will of the people by overturning the



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election. It therefore follows that the Petitioner has not adduced any evidence to back up his claims of making Wrong returns and falsification of results by the 1st Respondent. The rest of the alleged entry of wrong returns during the computations of the different categories of votes and ballot papers has already been explained in this judgment.

- [61] Besides, the Petitioner did not present any DR forms that bear Results which are contrary to the Results that were relied upon by the 1st Respondent in declaring the 3rd Respondent as the winner, **Freda Nanziri Vs Mary Babirye & Anor, (Supra)**.

(b) Harassment, intimidation, violence and multiple voting at Summit view(A-J) and Summit view (ON-Z)

- [62] The Petitioner relied on the affidavits of **Mugisha Gilbert** (PW3) who was his agent and **Nakitende Mavis** (PW4), his polling supervisor to prove harassment, intimidation, violence and multiple voting by Military officers at the impugned polling stations. Though both the two witnesses claim to had reached at **Summit View Polling station** together, **PW3** claim that they were restricted entry by the military officers but **PW4** did not allude in his affidavit seeing any military officer until later, when **PW3** allegedly called her on phone and informed her of the military officers' presence and their mischief of harassment, intimidation and multiple voting.

- [63] Secondly, whereas **Pw4** claim that one of the Petitioner's polling agents a one **Ssemanda Ismail** was badly beaten by the military officers and he almost lost his eye when he tried to raise the issues at hand to the presiding officer, **PW3** who was the presiding

officer at the polling station did not in his evidence, allude at all to this incident i.e., of the said **Ssemanda Ismail** being beaten by military officers. Unfortunately, the Petitioner did not avail the said **Ssemanda Ismail** in Court to clarify and or substantiate the allegations.

- [64] Lastly, **PW4** stated in evidence that with the help of the military, the Petitioner's agents were told to stand very far from the ballot box and that as a result, they could not see what was being done and were not able to see and observe the entire process. **Pw3** on the other hand testified the contrary. He stated that he saw and observed the entire process, witnessed the military officers voting using Voter location slips that did not belong to them and was also able to pick these Voter Location slips (**P. Exh.9**) when these soldiers carelessly disposed them off.
- [65] Inspite of the above alleged electoral malpractices by Military officers as claimed by **PW3**, he signed the DR forms without indication of any complaint contrary to the requirements of **S.47 (7) (b) PEA**, regarding the malpractices of the said military officers. The Petitioner did not adduce any evidence as regards address and location of these Soldiers to enable the authorities follow them up for action and or, for court to appreciate the claim.
- [66] Besides, there's no evidence that such an incident regarding the beating of **Ssemanda Ismail** was reported to police as there is no **Report or Certified copy of any Police SD Reference Number** or any **formal complaint** to the Presiding officer of such an incident was attached to either of the witnesses, **Pw3 and Pw4**.

[67] As regards **Summit view (ON-Z)** polling station, no witness appeared in court to lead evidence in support of the petition as regards the alleged harassment, Intimidation and Multiple voting by Military officers. **As was held in Amoru 7 Anor. Vs Okello Okello, EPA No. 39/2016;**

"In election matters, partisan witnesses have a tendency to exaggerate claims about what might have happened during elections. In such situations, it is necessary to look for "other" evidence from an independent source to confirm the truthfulness or falsity of the allegations".

[68] In the instant case, in the circumstances where the Respondents deny the allegations and contend that no such report of the alleged incidences were reported to the presiding officer or the Electoral Commission, and in the absence of any independent evidence to support and collaborate the Petitioner's allegations, the claims of harassment, Intimidation, violence and multiple voting by Military officers remain unsubstantiated and therefore not proved.

(c) Ballot Stuffing

[69] The petitioner relied on the evidence of **Lubega Hamza Kaziro (PW2)** and **Nakitende Mavis (PW4)** to prove Ballot stuffing. Ballot stuffing is an election malpractice which involves voting more than once at a polling station or moving to various polling stations casting votes either in the name of people who do not exist at all or those that are dead or absent at the time of voting and yet they are recorded to have voted; **Toolit vs Oulanya Jacob & Anor EPA No. 19/2011. In Robinson Simiyu & Anor. Vs Independent**

Electoral Commission & Boundary Commission of Kenya, EP No. 1/2017 at Kitale, Ballot stuffing was defined as the illegal addition of extra ballots aimed at swinging the results of an election towards a particular direction.

- [70] According to **Lubega Hamza(PW2)**, he stated that he carried out some ballot box stuffing for the 3rd Respondent at various polling stations to wit: **L.C Meeting Place-N-Z (Kisenyi III), Nakivubo Blue (Kisenyi II), Mango Tree (Old Kampala)** and that he was introduced to the deal of stuffing at a fee of 3.5 million by a one **Jimmy Liiso** on behalf of the 3rd Respondent and a one **Rashid Musisi**, a Personal Assistant to 3rd Respondent who issued him with the E.C aprons(**P.Exh.14**) to enable him disguise as an election official and gain access to the ballot box where he would remove from his long sleeved shirt, pre-ticked ballot papers in the favor of the 3rd Respondent, fold them and push them into the box. The pre-ticked 40 ballot papers that remained with him unstuffed were tendered in evidence as **P. Exh.7**.
- [71] However, during cross examination, **PW2** came out both as a joker and a self-confessed criminal who has enjoyed immunity from arrest and possible prosecution. He referred to himself as a "problem creator" in the city who does not have a National Identity Card but that he possessed a forged Refugee identity card printed from "Nasser" wherein he is described as a student.
- [72] I take the judicial notice of the notoriety of the statement in Uganda that "Nasser Street" in Kampala is famous and known for forgery of documents using the available printing technology.

- [73] In cross examination, he (Pw2) demonstrated how he would fold once, about 30 to 40 bullet papers at ago in order to beat time and then drop them in the Polling ballot box (it would not take him more than two minutes to accomplish the task of ballot stuffing). This was allegedly on the instructions of the 3rd Respondent.
- [74] As regards **Nakitende Mavis** (PW4), She stated that their (Petitioner's) agents were told to stand very far from the ballot box and they were therefore not allowed to see and observe the entire process at the polling station. That they were only allowed to come closer or nearer at the time of counting votes, but nevertheless they were able to witness multiple voting by the military officers.
- [75] It is now well established at law that, a petitioner bears a higher standard of proof in proving election offences than when dealing with ordinary irregularity; **Mugisha Vicent Vs Kajara Aston & 2 Ors**, EP No. 4/ 2016[2016] UGHCEP 30. See also **Nakate Lillian & Anor. Vs Nabukenya**, EPA Nos. 17 & 21 of 2016. Both multiple voting and ballot stuffing are Electoral offences under **Section 76 PEA**.
- [76] In the instant case, I found **Lubega Hamza's** (PW3) evidence unbelievable. During cross examination he demonstrated to court how he allegedly carried out the ballot stuffing, i.e., folding about 30-40 ballot papers and drop them in the polling ballot box at go! Those of us using our own experience as citizens of Uganda who have participated in voting, it appears to me very problematic for anyone to have 30 to 40 ballot papers folded together and have them dropped in the polling ballot box at ago considering the fact

that even with one ballot paper, one has to first fidget with it before it enters the box. **PW2** must have lied on this aspect.

- [77] Secondly, **PW2** claimed to have been given the alleged pre-ticked ballot papers by **Jimmy Liiso Kaparaga** and the E.C aprons to enable him to disguise himself as an electoral official by **Rashid Musisi**. None of these swore any affidavit or appeared in court to testify and corroborate **PW2**'s evidence.
- [78] Lastly, **PW2** being a self-confessed criminal who claim to have been behind forgeries and the frame up of people for murder and arms deal, his evidence would have to be taken with a lot of caution. His possession of forged identity cards and the carrying out of several criminal acts taints his credibility as a truthful witness.
- [79] In the premises, I find **PW2**'s evidence requiring other independent evidence to corroborate it before it can be safely relied upon by a court of justice. Such corroborating evidence is lacking in this case. The way **PW2** was not even able to properly name the polling stations he participated in during his ballot stuffing gives this court an irresistible inference that **Lubega Hamza** (**PW2**) was merely a Petitioner's stage managed witness.
- [80] As regards the claims that the Petitioner's agents were told to stand very far from the ballot boxes and therefore, that they were not able to properly oversee the voting exercise, I find that it is always prudent for E.C election officials not allow candidates agents to be near the Ballot box and therefore overcrowd the area of voting because this would have other negative effects not limited to compromising the security at the polling station.

[81] In the premises, I find that it is not true that **Lubega Hamza** (PW2) participated in the ballot stuffing. His evidence is that of a stage-managed witness and as a result, such evidence must accordingly be rejected for being unbelievable. The petitioner has not proved to the satisfaction of court that any ballot stuffing took place at the Impugned polling stations. The miscomputations of categories of votes and ballot papers and in particular, the alleged disappearance of ballot papers from polling stations have already been explained in this judgment. I find that the source and the authenticity of the allegedly left unstuffed ballot papers (**P. Exh.7**) remain unverified and therefore, such cannot be relied on to upset an election.

Issue No.3. Whether there were electoral offences committed by the 3rd Respondent.

[82] The offence of bribery under section 68(1) PEA is committed when a person either before or during an election with the intent, either directly or indirectly influences another person to vote or to refrain from voting for any candidate by giving/providing or causing to be given/provided any money gift or other consideration to that other person.

[83] In the instant case, the Petitioner relied heavily on a Flash disc(**P.Exh.13**) purportedly recorded by a one **Nuwamaya Habert** using a smart phone at **Nakitende Garage, Budonian village**. However, this witness together with a one **Mukisa Ronald** who would have corroborated his evidence never appeared in court to substantiate the claims. Their affidavits are among those ones that were expunged for non appearance of the deponents/

witnesses in Court for cross examination when ordered by court to do so.

- [84] Secondly, upon playing over of the Flash disk (**P.Exh.13**) in court, its content was found to be not in the language of court, English. Under **Section 88 CPA Cap 7**, it is to the effect that the language of all courts shall be in English, and evidence in the courts shall be recorded in English; see also **Nkalubo Vs Kibirige [1973] E.A 102**.
- [85] In this case, the **Flash disk** (P. Exh.13) having been found to had had contents that were not in English but in the vernacular, the Petitioner ought to have accompanied it with an English translation transcript or English transcribed recording. In **Michael Mawanda Vs E.C & Anor. EPA No. 8/2016**, it was held that a party seeking to rely on video recording that is in a language other than the language of court, the evidence is introduced in court by way of transcription of the recording and translation into the language of court well before the hearing date of the cause in which it was required to be adduced and played short of which such evidence is unusable by court, see also **Ntende Vs Isabirye EPA No. 74/2016**.
- [86] In the premises I find that the omission to accompany the **Flash disk** (P.Exh.13) with a transcription of the recording and translation into English definitely affected its admissibility and its relevancy/evidential value, since its contents cannot be comprehended and be used by court.



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- [87] Besides, the said **Nuwamanya Habert** who purported to had taken the recording of the contents in the **Flash disk** did not appear in the court to offer evidence and substantiate the contents.
- [88] As a result, the foregoing creates doubt as to whether the said **Nuwamanya Habert** is the one who actually recorded the incident, in what location, function and on what particular date.
- [89] In the premises, the **Flash disk** (P. Exh.13) provided by the petitioner to prove bribery is found unusable and therefore of no evidential value for its contents are in a local language not comprehensible by court. Besides, no evidence was also adduced to prove that any of the persons in the crowd shown in the flash disk is a voter within the meaning **S.1(1) PEA** and therefore capable of being bribed.
- [90] The other claims of bribery at **Kamuwokya stage, Kiira Rd Playground** and other alleged polling stations have not been proved since no witness testified in court to prove the allegations.
- [91] In the premises the 2nd and 3rd issues are found in the negative. The petitioner has not proved that any Electoral offence committed by the 1st, 2nd, and 3rd Respondents during the election of the Member of Parliament for Kampala constituency. The findings on the 2nd and 3rd issues disposes of the 4th issue. There is no evidence adduced by the Petitioner to the satisfaction of court that there was non-compliance with the electoral laws or commission electoral

offences and that such substantially affected the results of the election.

Issue No.5. Whether there are remedies available to the parties.

1. Prayer for declaration that the Petitioner was validly elected winner as a member of Parliament for Kampala Constituency and not the 3rd Respondent.

[92] This Court having found that the Petitioner has failed to adduce cogent and the credible evidence to prove that the Respondents did not comply with the electoral laws and committed any electoral offences, it follows that the petitioner would not be entitled to the declaration that he was validly elected winner as Member of Parliament for Kampala Constituency or any of the remedies prayed for. The 3rd respondent was validly elected as a Member of Parliament for Kampala Constituents.

2. Recount of votes under S.54 PEA


[93] Under **paragraphs 30 to 34 of the petition**, it is the petitioner's case that upon realizing that the election was characterized by irregularities and malpractices he, complained to the Returning officer for a recount (**P.Exh. 1**). However, the issue of whether a recount was necessary in the circumstances of this case was settled in the Petitioner's application vide **Misc. App. No. 15/2021**, before the **Chief Magistrates Court of Kampala at Mengo** (**P. Exh.4**) and it was accordingly dismissed with the costs. In the premises that the matter before me is not an application for revision or an appeal against the refusal for a recount, am not

prepared to delve into it though, this court would still have powers to order recount if there are valid grounds for it. In this case, the Petitioner ought to have established, by way of an application, a clear basis for a recount in the areas of dispute during the preliminary hearing of the petition by naming the specific polling stations he wished to have a recount. Besides, it is apparent that the Petitioner relied on information from his agents and the DR forms in their possession to formulate grounds for a recount yet the agents duly endorsed the DR forms certifying that the elections reflected the will of the people. Court would not in the circumstances grant the order.

3. Costs:

- [94] Under **Section 27 CPA**, costs of any action, cause or other matter or issue follow the event unless the court or judge for good reasons otherwise order. In this case, since the Respondents are the successful parties, they are entitled to the costs of this petition. In the premises I declare the 3rd Respondent **Nsereko Muhammad** as the validly elected Member of Parliament for Kampala Central Constituency. The petition is in the premises dismissed with costs.

Dated at Kampala this 20th day of April 2023.


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Byaruhanga Jesse Rugyema
JUDGE