THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

***CORAM:* BYAMUGISHA, KAVUMA &KASULE JJA.**

ELECTION PETITION APPEAL NO.19/11

BETWEEN

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TOOLIT SIMON AKECHA:::::::::::::::::::::::::: APPELLANT

AND

1. OULANYAH JACOB L'OKORI
2. ELECTORAL COMMISSION :::::::::::::::RESPONDENTS

[Appeal from the judgment and orders of the High Court of Uganda sitting at Gulu (*Rubby Opio Aweri J) *dated 2nd July 2011 in Election Petition No.1/2011]

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JUDGMENT OF BYAMUGISHA, JA.

This is a first appeal from the decision of the High Court in the exercise of its original jurisdiction.

The facts of the appeal are not in dispute. On 18th February 2011 the Electoral Commission, the second respondent, in these proceedings, conducted Presidential and general elections for directly elected members of Parliament and District Woman representative throughout the country.

30 The appellant and the first respondent were nominated as candidates for Omoro County Constituency in Gulu District. At the end of the polling exercise, the second respondent declared the first respondent as winner of those elections

with **11044** votes representing 36.42% while the appellant obtained **9088** votes representing 29.97 %.

These results were published in the Uganda Gazette of 21st February 2011.

On 24th February 2011 the appellant lodged an application for a recount of the votes and the same was granted by the Chief Magistrate, Gulu.

On 2nd March 2011 or thereabouts a recount was abandoned by the Chief Magistrate on the grounds that some of the ballot boxes had been tampered with.

On 17th March, 2011 the appellant filed a petition in the High Court registry at

10 Gulu challenging the results of the elections as declared by the second respondent on the following grounds:

1. The election was conducted in non-compliance with the provisions and principles of the Constitution of the Republic of Uganda, the Electoral Commission Act, and the Parliamentary Elections Act as amended.
2. The electoral process was characterized by ballot stuffing, voter intimidation, voting by non-registered voters, bribery etc.
3. The failure to comply with electoral laws and the Constitution affected the results of the election in a substantial manner.

20 The allegations in the petition were supported by affidavits deponed by the appellant himself and his witnesses.

Both respondents filed separate answers denying the allegations in the petition contending that there was compliance with the provisions of the Constitution and all electoral laws. It was further contended that if there was any noncompliance it did not affect the results in a significant manner.

At the scheduling conference held before the commencement of the trial the following issues were framed for court's determination:

1. Whether the petition was duly served on the 1st respondent.
2. Whether the election of the first respondent as MP from Omoro County was conducted in non-compliance with the Parliamentary election laws and the principles governing elections in Uganda.
3. If so, whether the non-compliance affected the results substantially.
4. Whether the 1st respondent personally or his agents with his knowledge and consent or approval committed any of the alleged illegal practices and offences in connection with the election.
5. What remedies are available to the parties?

The trial judge answered all the issues in the negative. He dismissed the petition with orders that each party bears its costs.

Being dissatisfied with the decision, the appellant filed an appeal in this court seeking to set aside the judgment of the High Court and declare that the 1st respondent was not validly elected as a Member of Parliament that the appellant

was the validly elected MP or in the alternative annul the elections and order fresh elections.

When the appeal came before us for final disposal Mr Opwonya, learned counsel for the appellant, argued grounds 1,2, and 3 together, 4 and 5 separately and the 6th ground alone. He also relied on his conference notes which he filed in this court on 1st February 2012. I shall handle the grounds in the order they were presented commencing with the 6th ground. It stated:

"The learned trial judge erred in law and fact when he placed a higher standard of proof on the petitioner than required by the law."

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Mr Opwonya submitted that the trial judge placed a higher standard of proof on the appellant which was proof beyond reasonable doubt. He stated that the trial judge quoted the judgment of Mulenga JSC in the case of ***Kiiza Besigye v Museveni &another-Election Petition No.1/01*** in which the learned justice stated the standard of proof thus:

"I do share the view that the expression "proved to the satisfaction of the court" connotes absence of reasonable doubt. The amount of proof that produces the court's satisfaction must be that which leaves court without reasonable doubt."

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Learned counsel further submitted that the standard of proof is on the balance of probabilities and the trial judge was wrong to hold otherwise.

In reply, Mr Wakida, counsel for the 1st respondent, submitted that the trial judge was alive to the standard of proof and stated so at page 562-564 of the

record of proceedings. Counsel stated that the judge quoted and relied on the provisions of section 61(1) (3) of the Parliamentary Elections Act and therefore cannot be faulted for doing so.

Mr Bakayana, learned counsel for the 2nd respondent associated himself with the submissions of Mr Wakida on the 6th ground of appeal.

Before the enactment of the Parliamentary Elections Act in 2005(PEA), the High Court, while dealing with the standard of proof in election matters relied

10 on the interpretation laid down by the Supreme Court. The Supreme Court in the ***Besigye*** case (supra) was considering the provisions of the Presidential Elections Act which had no specific provisions regarding the standard of proof. The PEA put the matter to rest by enacting ***section 61(3)*** providing for the standard of proof. It states:

"Any ground specified in subsection (1) shall be proved on the basis of a balance of probabilities."

20 This court in the case of ***Paul Mwiru v Hon. Igeme Nabeta &others-Election Petition Appeal No.06/11*** had occasion to deal with a situation where the trial judge relied on the decision of the Supreme Court on the standard of proof. Mr Wakida who appeared for one of the parties supported the trial judge for applying the standard of proof which was set by the Supreme Court in the

Besigye case because its decisions are binding on all courts in Uganda by virtue of **Article 132(4)** of the Constitution.

In the ***Paul Mwiru*** case this court said:

"Section 61(3) of the PEA sets the standard of proof in parliamentary election petitions. The burden of proof lies on the petitioner to prove the allegations in the petition and the standard of proof required is proof on a balance of probabilities. The provision of this subsection was settled by the Supreme Court in the case of Mukasa Harris v Dr Lulume Bayiga (supra) when it upheld the interpretation given to the subsection by this court and the High Court."

The Supreme Court having set the standard of proof in the case of ***Mukasa Harris v Lulume Bayiga –EPA No.18/07*** courts in Uganda ought to follow that standard in accordance with **Article 132(4)** of the Constitution. I think it is wrong, in my view for the lower courts to send mixed signals by relying on and quoting the decision of the Supreme Court in the Besigye case which is no longer applicable to election matters filed under the PEA and the Local Governments Act. There should be no doubt as to the standard of proof applicable to the election petition before the trial court.

The learned judge in dealing with the standard of proof in election matters said:

"The required standard has since been put beyond doubt by section 61(3) of the Parliamentary Elections Act [2005].

Any ground specified in sub-section (1) shall be proved on the basis of a balance of probabilities…………….
Needless to emphasize that it is the above degree that the petitioner has to prove this petition in order to secure judgment in his favour".

With respect to learned counsel for the appellant, his criticism of the trial judge is not borne out by the above excerpt. Admittedly, the trial judge had referred to the judgment of Mulenga JSC in the Kiiza Besigye case when he was dealing with the phrase "proved to the satisfaction of court". Mulenga JSC said:

10 ***"I do share the view that the expression "proved to the satisfaction of court connotes absence of reasonable doubt………The amount of proof that produces the court's satisfaction must be that which leaves the court without reasonable doubt."***

The learned judge also referred to the judgment of his colleague Musoke – Kibuka J in the case of ***Abdu Katuntu v Kirunda-Kivejinja Ali-Election Petition No.7/06*** in which the learned judge judicially stated what constitutes "proof on the balance of probabilities". Musoke-Kibuka said:

20 ***"The court trying an election petition such as this one, has the duty to ensure that before issuing an order for setting aside the election of a member of Parliament, it is duly satisfied, by the evidence before it, that the allegations made in the petition has been proved to the high degree of preponderance."***

The trial judge was very much alive to the standard of proof required in election matters and it has not been pointed out that he applied a higher standard of proof than that which is provided for by law. He clearly stated that the allegations in the petition were not proved to the satisfaction of court.

This ground was not well founded and it is disallowed.

I shall now consider grounds 1, 2 and 3 together.

Ground 1 state:

"1.The learned trial judge failed to properly evaluate the evidence on record and thus came to a wrong conclusion.
Ground 2

"The learned trial judge erred in law and fact when he held that the election of Member of Parliament for Omoro County, Gulu District was substantially 10 ***conducted in compliance with the parliamentary elections laws and principles governing the conduct of election in Uganda and that any non-compliance did not affect the results of the election in a substantial manner."***

Ground 3

"Whether the trial judge erred in finding that the 1st respondent did not commit any illegal practices and offences or his agents with his knowledge and approval".

20 The signing of declaration of results forms is a creature of the Constitution –

Article 68(4) provides:

"The presiding officer, the candidates or their representatives and in the case of a referendum, the sides contesting or their agents, if any, shall sign and retain a copy of a declaration stating

(a) the polling station;
(b) the number of votes cast in favour of each candidate or question, and the presiding officer shall there and then, announce the results of the voting at that polling station before communicating them to the 30 ***returning officer."***

The above article is reproduced verbatim in **section 47(5)** of the Parliamentary Elections Act. Both provisions were judicially considered by the Supreme Court in the case of ***John Baptist Kakooza v Electoral Commission &another-***

Election Petition Appeal No.11/07. In the lead judgment of Kanyeihamba JSC with which other members of the Coram agreed said:

"Clearly, the declaration of the results must be signed at the very least by the presiding officer and the candidates or their agents must retain a copy. A signed declaration of results form becomes the basis for immediate declaration of results at the polling station. An unsigned declaration of results cannot be validly used as a basis of declaring results.

The minimum legal requirement for declaration of result form is that it must be signed by the presiding officer in order to be used as a basis for declaring results at every polling station. However subsection 7 of the above section makes provision for the signing and announcement of results. It states:

"The following shall apply in respect of the signing of the declaration and announcement of the results of voting under subsection 5-

(a) the candidates or their agents shall sign the declaration form before the announcement of the results of the results under subsection (5)
(b) where any of the candidates or their agents refuse or fail to sign the declaration form-

(i)the candidates and their agents failing or refusing to sign shall record on the declaration form the reasons for the refusal or failing to sign; and

(ii) where they refuse or fail to record the reasons, the presiding officer shall record the fact of their refusal or failure;
(c) where any candidate or agent is absent, the presiding officer shall record the fact of that absence;
(d) the refusal or failure of a candidate or agent to sign any declaration form under subsection(5) or to record the reasons for that refusal to sign as required under this subsection shall not by itself invalidate the results announced under subsection(5);
(e) the absence of a candidate or an agent from the signing of a declaration form or the announcement of results under subsection (5) shall not by itself invalidate the results announced."

The provisions of this subsection require the presiding officer to record on the form why a candidate or an agent has failed or refused to sign the declaration of results. In the same way he/she is required to state whether the candidate or the agent was absent. Failure to do any of what I have stated does not invalidate the results which have been declared as validly obtained by each candidate.

In the instant appeal Mr Opwonya submitted that the trial judge erred when he found that only 3 declaration of results forms were not signed whereas they

10 were more than three. He pointed out that the declaration of results forms which the appellant had attached to his affidavit in support of the petition marked as annexture M1-M6 were not considered by the trial judge.

Mr Wakida conceded that some declaration of results forms were not signed either by the presiding officer or the agents of candidates or both. He submitted that the trial judge addressed each and every allegation and he evaluated the evidence.

The evidence which was adduced in the lower court on declaration of results

20 forms showed that there were forms which were not signed by anyone at all. The polling stations in question were Otumpili where the appellant obtained 47 votes while the first respondent obtained 62 votes; Aboka Chapel, the appellant obtained 29 votes while the 1st respondent obtained 94 votes and at Lamin

Market where the appellant obtained 23 votes while the 1st respondent obtained 162 votes.

Although the results from these polling stations were included in the final tally, they ought to have been excluded because the forms were not signed at least by the presiding officer. When the results are excluded from the final tally the appellant would remain with **8,989** votes and the 1st respondent with **10,726** votes.

Another set of declaration of results forms which were unsigned by candidates or their agents without reasons being recorded by the presiding officers were at

10 Opit Primary School, Owor Primary School, Laneno P.S, Atyang P.S., Atamasi Place, Lawanea Sub County Headquarters and Thomas Primary School.

The third set of declaration of results forms were signed by agents only. These came from Achet Market, Kiteny Chapel, Lamin Onani Market, Omokokitunga Market and Ludwir Primary School. The agents of the candidates did not disown their signatures. The results from the above polling stations were properly included in the final tally.

In the final analysis on the declaration of results forms, the 1st respondent remains the winner with 10,726 votes.

20 I will now consider ballot stuffing as one of the malpractices which were allegedly committed during the voting exercise. The petitioner had alleged in paragraph 5 of the petition and paragraph 16 of the affidavit in support of the

petition that the 2nd respondent failed to control the use of ballot papers and as a result there was massive ballot paper stuffing in favour of the 1st respondent throughout the constituency.

Mr Opwonya in his submission stated that the trial judge erred in not considering the seriousness of ballot stuffing. He relied on the ruling of the Chief Magistrate dated 4th March 2011. The appellant had petitioned the Chief Magistrate for a recount of the votes. The exercise was abandoned when the Chief Magistrate found that the ballot boxes had been tampered with.

Learned counsel claimed that the Chief Magistrate found massive ballots stuffed
10 in the ballot boxes and claimed that the beneficiary of the malpractices was the 1st respondent.

Ballot stuffing is not defined under the Parliamentary Elections Act. The parties who appeared before us cited no authority where the words have been judicially considered and I did not come across any.

According to http:// definitions. Uselegal.com ballot stuffing is defined as a type of electoral fraud whereby a person who is permitted only one vote submits multiple ballots. It can also happen when a person instead of casting votes in a single booth casts his/her vote in multiple booths. Ballot stuffing can take various forms:

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- ❖ a ballot stuffer casts vote on behalf of people who did not show up to the polls.
- ❖ Votes will be cast by those who are long dead or by fictitious characters.

The above definition roughly summarizes what amounts to ballot stuffing. In the absence of decided cases on the subject I shall use the above definition as a guide.

Ballot stuffing is therefore an election malpractice which involves voting more than once at a polling station or moving to various polling stations casting votes either in the names of people who do not exist at all or those who are dead or are absent at the time of voting and yet they are recorded to have voted.

Ideally at the end of the polling exercise the number of votes cast ought to be
10 equal to the number of people who physically turned up to vote.

Section 76 governs offences relating to voting. It states:

"A person who-

(a) …….
(b) ………..
(c) ……
(d) …..
(e) …..
(f) Knowingly and intentionally puts into a ballot box anything other than the ballot paper which he or she is authorized to put in;
20 ***(g) ….***
(h) …..

(i) …

(j) …..

Commits an offence and is liable on conviction to a fine not exceeding one hundred and twenty currency points or imprisonment not exceeding five years or both."

Under our voting system, every registered voter is authorized to cast one vote – see section 31 of the PEA. Therefore, ballot stuffing occurs when some one intentionally and knowingly causes unauthorized votes to be put in the ballot box for purpose of rigging the poll in favour of some candidate.

I shall now examine the evidence adduced by the appellant. The appellant in paragraph 16 of his affidavit alleged massive ballot stuffing in the constituency. He adduced the evidence of one witness,Acaye who stated that at Idure Market polling station the total number of votes counted at this polling station, exceeded the number of voters who turned up to cast their votes. I have examined the declaration of results form for Idure Market at page 385 of the record of appeal. It has the following information:

1. The total number of valid votes cast for candidates -321.
2. Total number of rejected (invalid) votes-51.
3. Total number of ballot papers counted -375.
4. Total number of spoilt ballot papers- 03.
5. Total number of ballot papers issued to the polling station 600.
6. Total number of unused ballot papers-239.
7. The total numbers of voters (female and male)- 362.

This table shows that there were more votes in the ballot box than the voters who turned up to vote. The total number of invalid and spoilt votes was 54. The

appellant and the 1st respondent obtained 94 and 106 votes respectively. The evidence adduced did not show that the 1st respondent benefited from the extra ten votes cast at this polling station. Even if the ten votes are deducted from the final tally, the final outcome would not change significantly to put the victory of the 1st respondent in doubt.

Furthermore, the appellant had alleged that ballot stuffing and other malpractices were carried out on a massive scale throughout the constituency. Omoro county constituency had over 100 polling stations according to the tally

10 sheet on record. The appellant was able to produce only one witness Acaye to prove ballot stuffing at only one polling station.

Lack of evidence showing ballot stuffing in other polling stations throughout the constituency means that the allegations remain unproved.

The appellant and his counsel relied heavily on the aborted recount exercise to show that there was massive ballot stuffing. Whereas I agree that the recounting exercise was stopped due to tampering with ballot boxes, the tampering was due to many factors including carelessness on the part of the officials of the 2nd respondent. The officials were required to seal the ballot boxes and keep them

20 intact and safely until election litigation was over. The recounting exercise shows clearly that this was flouted. The Chief Magistrate found some ballot boxes empty, others contained votes which belonged to the woman member of

Parliament. There was also evidence that ticked ballot papers were found dumped on rubbish pits and some in a class room at Lakwana Primary School.

In order to assess the effect of non-compliance, the qualitative and quantitative tests are relevant. In the case of ***Besigye v Museveni*** (supra) Odoki CJ at page 159 of his judgment said:

"In order to assess the effect the court has to evaluate the whole process of election to determine how it affected the result, and then assess the degree of 10 ***the effect. In this process of evaluation, it cannot be said that numbers are not important just as the conditions, which produced those numbers, are useful in making adjustment for the irregularities."***

I shall endeavor to examine the conditions as a whole which the appellant alleged in his petition and determine whether they affected the results.

The conditions which the appellant alleged had affected the results in the constituency were contained in the letter he wrote to the District Registrar/Returning officer of Gulu dated 20/2/2011. In this letter he was complaining of vote buying by NRM agents, transporting of voters to polling 20 stations by NRM agents, voter intimidation and a host of other malpractices. He was requesting for the suspension of announcing the provisional results until the issues are sorted out.

This letter seems the first official complaint that the appellant raised against the conduct of elections in the constituency. As we all know, a lot of activities take

place before polling day. The evidence of what malpractices occurred if any during the campaign period was not adduced. There is no police report indicating violence or intimidation of voters during the campaign period.
In the absence of such evidence it would be safe to conclude that the period prior to voting day was generally peaceful.

On polling day and its aftermath, the evidence adduced established utter disregard of responsibility on the part of the 2nd respondent with regard to handling election materials.

10 **Section 52** of PEA enjoins the returning officer to keep all election documents safely until the documents are destroyed in accordance with the directions of the Commission.
This direction to destroy election documents cannot be carried out before the settlement of disputes if any, arising from the election. The documents which were used in the election in the constituency were not properly kept by the returning officer as the law requires. The Chief Magistrate had to abandon the recounting exercise on the ground that the ballot boxes were tampered with. Yet recounting is one of the avenues provided under the law to settle disputes arising from elections. There was also evidence of ballot papers which were
20 found at rubbish pits and in a school classroom.

There was also failure by agents of candidates to sign declaration of results forms without assigning any reason. The failure to sign was not massive throughout the constituency.

In the result, Iam satisfied on the evidence as a whole, that the learned trial judge evaluated all the evidence properly and arrived at the right conclusion that the results of the election in Omoro county constituency reflected the will of the majority.

I would uphold the judgment and the orders he made. The appeal would be dismissed with no order as to costs.

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Since the other members of the court agree, the appeal stand dismissed.

Dated at Kampala this …30th …day of……March………2012

C.K.Byamugisha
Justice of Appeal

JUDGMENT OF KAVUMA, JA

I have had the benefit of reading in draft, the judgment prepared by Lady Justice

20 C.K.Byamugisha, JA. I agree this appeal should fail and should be dismissed.

I further hold that although there was failure to comply with some provisions of the electoral law and the principles embodied therein in the conduct of the

election for the Member of Parliament for Omoro County constituency, that failure did not affect the results of that election in a substantial manner.

I am in full agreement with the reasons given by Justice C.K.Byamugisha, JA, in her judgment and the orders she makes.

I would so order.

Dated at Kampala this 30th day of March, 2012

S.B.K.Kavuma,

Justice of Appeal

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JUDGMENT OF REMMY K.KASULE, JA

I have had the benefit of reading, in draft, the judgment prepared by the Honourable Lady Justice C.K.Byamugisha, JA, I agree with the conclusion she has reached that the appeal be dismissed. I have nothing useful to add.

I also agree with the orders, the Hon. Lady Justice has made as to costs.

Dated at Kampala this 30th day of March, 2012.

REMMY K. KASULE

20 JUSTICE OF APPEAL