

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA

ELECTION PETITION APPEAL NO.30/2011

MUGEMA PETERAPPELLANT

VERSUS

MUDIOBOLE ABEDI NASSERRESPONDENT

(An appeal from the Judgement and Orders of His Lordship, The Honourable Mr. Justice Lameck.N. Mukasa delivered at Jinja on the 20th day of August 2011, in Election Petition No.7 of 2011)

10 CORAM:

HON.JUSTICE A.E.N. MPAGI-BAHIGEINE, DCJ

HON. JUSTICE A.S. NSHIMYE, JA

HON. JUSTICE REMMY KASULE, JA.

JUDGEMENT OF REMMY K. KASULE, JA

This is an election appeal from the Judgement and Orders of the High Court (Lamek.N. Mukasa; J.) Sitting at Jinja, delivered on the 20th day of August, 2011, in Election Petition No.7 of 2011.

The learned trial judge allowed the petition on the sole ground that the appellant, 1st respondent in the court below, had committed an illegal practice of fundraising by donating Shs.100,000/= towards construction of St. Gonzaga Prisons Chapel during the campaign period of the Parliamentary Elections. The trial judge set aside the election of the appellant as Member of Parliament, Iganga Municipality Constituency. The Electoral Commission was directed to organize and conduct fresh elections for the constituency.

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The appellant was ordered to pay 40% of the respondent's taxed costs in the High Court. As between the respondent and the Electoral Commission, each party was to bear its own costs.

GROUND OF APPEAL

Dissatisfied with the judgement of the trial judge in the court below, the appellant appealed to this court on three (3) grounds:-

1. The learned trial judge of the High Court erred in law in disregarding the testimony of Rev. Fr. Ndanda given under oath in court.

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2. The learned trial judge of the High Court erred in law and in fact in finding that the appellant committed an illegal practice by carrying on fundraising and donating money in the sum of Ug.

***Shs.100, 000/= (Uganda Shillings One Hundred thousand only)
at the fund raising for St. Gonzaga Prisons Chapel.***

3. The learned trial judge of the High Court erred in law in finding that the appellant by participating in the fundraising of his church, St. Gonzaga Prisons Chapel, committed an illegal practice.

The appellant prays that this appeal be allowed, the judgement of the High Court be set aside, declare that the appellant was validly elected Member of Parliament for Iganga Municipality Constituency. Appellant also prays to
10 be awarded costs of the appeal and those in the court below.

Legal Representation:

The appellant was represented by learned counsel Kiryowa Kiwanuka assisted by Thomas Ochaya. Learned Counsel Ambrose Tebyasa assisted by Denis Kwizera represented the respondent.

Agreed facts:

The Electoral Commission conducted elections for directly elected Member of Parliament for Iganga Municipality Constituency on the 18th February
20 2011. The appellant, the respondent, as well as Kawudha Grace, Mwiri Med Mohamed and Naigubya Tommy Mukwenda were all candidates in the elections. The Electoral Commission declared the appellant winner with 7,288 votes while the Respondent, was the runner up with 6,652 votes.

The respondent not being satisfied with the results, petitioned the High Court at Jinja vide Election Petition No.7 of 2011, on the grounds that the elections were not conducted in compliance with the provisions and principles of the Constitution, the Electoral Commission Act and the Parliamentary Elections Act, 2005. Consequently this affected the results in a substantial manner. The trial court heard the petition and allowed the same. Hence this appeal by the appellant.

Issues for determination on appeal:

- 10 These are the same as the grounds of appeal.

Submissions:

a) For appellant:

- As regards issues 1 and 2, counsel for appellant criticized the learned trial judge for disregarding the oral evidence of Rev. Father Ndanda which, if accepted, would have established that the appellant did not commit the illegal practice of fundraising at Iganga Prisons Chapel, on 13.02.2011. Father Ndanda's testimony given in court on oath ought not to have been disregarded as it was valid evidence, from a competent witness, his
20 affidavit having been held by court to be incompetent notwithstanding.

Further, the trial judge ought not to have relied upon the affidavit evidence of Luganda Alex, who testified for respondent, because this witness was evasive and untruthful. This witness claimed to have been in Kampala on 08.06.2011 at 3:00p.m to depone to his affidavit, yet he was seen in Iganga at about the same time on the same day. So his affidavit evidence was suspect.

As to the affidavits of the respondent's witnesses, Hassan Muyinda and Paul Waiswa, these ought to have been rejected according to the
10 appellant's counsel, because no fees were paid upon them when being filed in court. They did not have any endorsements or stamps to show payment of such fees.

The same affidavits of both witnesses were wrong in law and ought to have been rejected as the jurat of each did not indicate the place where they had been sworn. Each one of them had no certificate of translation, yet the deponents, according to the evidence, were not conversant with the English language, the language of the affidavits.

20 The appellant had denied participation in the fund-raising and with the rejection of the affidavit evidence of Hassan Muyinda and Paul Waiswa, then there would be no credible evidence to prove the allegation of the appellant's having participated in the fund-raising at St. Gonzaga Prisons Chapel.

In respect of the third issue, appellant's counsel submitted that Article 29 (1) of the Constitution protected the appellant's right to participate in activities of his faith. By attending a function of his church, appellant cannot be held to have engaged in fundraising and thus committing an illegal practice.

Appellant's counsel prayed to have the appeal allowed with costs.

b) For Respondent:

10 For the respondent, counsel Tebyasa, maintained in respect of grounds 1 and 2, that the trial judge rightly rejected the evidence of Rev. Fr. Ndanda as his affidavit had not been properly commissioned. The evidence of testimony in court by this witness was tied up with that of his affidavit evidence and accordingly the same collapsed when the affidavit evidence was rejected by the trial judge.

20 According to counsel, the appellant must be taken to have admitted taking part in the fundraising since he did not specifically deny having done so. This is the more so, given the fact that, the evidence of Luganda Alex, Hassan Muyinda and Paul Waiswa pinned the appellant as having participated in the fundraising at St. Gonzaga Prisons Chapel. The trial judge observed the demeanour of these

witnesses and found them to be truthful. The affidavit sworn by each one of these witnesses had been, according to counsel, properly commissioned and drawn up and each one was valid evidence.

As to non-payment of fees, there was no evidence of this as the magistrate who commissioned them clearly testified to court that he had seen the receipts of payments of fees before he commissioned each affidavit. That there was no such endorsement on the affidavits was a minor discrepancy which should not divert the court from doing substantial justice.

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In respect of the third issue, respondent's counsel urged this court to strictly interpret section 66 (7) and (8) of the Parliamentary Elections Act. The intention of Parliament was to restrain candidates from participating in fund-raising during campaign period. Therefore Article 29 (1) (c) of the Constitution was inapplicable. Counsel invited court to dismiss the appeal with costs.

c) Appellant Counsel's reply:

Counsel reiterated in reply that the appellant never admitted to participating in the fundraising. There was, at any rate, nothing wrong for one to participate in the activities of his church. The law as to illegal practice of fund-raising must not be interpreted as taking away the constitutional right of one to participate in the activities of his church. Counsel once again prayed court to allow the appeal.

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The duty of this court:

The duty of this court, this being an appeal of first instance, is set out in rule 29 of the Rules of this court. On a first appeal, an appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to re-hear the case and to reconsider the materials before the trial judge. The appellate court must then make up its mind by carefully weighing and considering the evidence that was adduced at trial.

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When the question arises as to which witness is to be believed, and resolution of that question turns on the manner and demeanour of the witness, then the appellate court must be guided by the impression made by the trial judge who saw the witness at trial.

However, there may be other circumstances, apart from the manner and demeanour of a witness, which may show whether a particular statement of a witness is credible or not, which may warrant a court in differing from the trial judge even on a question of fact turning on the credibility of a witness whom the appellate court has not had the opportunity to see at trial.

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The duty of a first appellate court to re-appraise or re-evaluate the evidence applies to both oral testimony of a witness in court as well as to affidavit evidence, except in case of the affidavit evidence where the deponent is not cross-examined on the affidavit in court, the issue of demeanour of a witness does not arise: See: ***Judgement of Oder, JSC, (RIP) in Supreme Court of Uganda Civil appeal No.8 of 1998: BANCO ARABE ESPANOL VS BANK OF UGANDA.***

10 This being an appeal in an election petition of first instance, this court cautions itself, like the trial court also ought to have cautioned itself that, in re-appraising and re-evaluating the evidence adduced at trial, regard must be had to the fact that witnesses, though not necessarily always, tend to be partisan in supporting their candidates against the rivals in the election contest. This may result in deliberate false testimonies or exaggerations and to make the evidence adduced to be very subjective. This calls upon court to have the authenticity of such evidence to be tested from an independent and neutral source by way of collaboration. See: ***Uganda Court of Appeal Election Petition Appeal No.7 of 2006: MBAYO JACOBS VS ELECTORAL COMMISSION & ANOTHER, Judgement of Lady Justice C.K. Byamugisha, JA.*** See also the ***Tanzanian court of Appeal case of NELSON VS ATTORNEY GENERAL & ANOTHER [1999] EA 160.***

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I am to re-evaluate and re-appraise the evidence in this appeal bearing in mind the above stated principles.

Burden and standard of proof:

The burden of proof lies on the petitioner to prove the assertions in the election petition and the standard of proof required is proof on a balance of probabilities according to Section 61 (1) and (3) of the Parliamentary Elections Act. See: also ***Supreme Court of Uganda Election Petition Appeal No.18 of 2007. Mukasa Anthony Harris Vs. Dr. Bayiga Michael Philip Lulume.***

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Though the standard of proof is set by the statute to be on a balance of probabilities, because of the public importance of an election petition, the facts in the petition must be proved to the satisfaction of the court. A petitioner has a duty to adduce credible and/or cogent evidence to prove the allegations to the stated standard of proof: see: ***Court of Appeal Election Petition appeal No.9 of 2002: Masiko Winifred Komuhangi Vs Babihuga J. Winnie***

and also

Court of Appeal No.6 of 2011: Paul Mwiri Vs Hon. Igeme Nathan Nabeta and Two Others (Byamugisha, JA).

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In *Blyth Vs Blyth* [1966] AC 643 Lord Denning observed as to the import and meaning of the word “satisfied” that:

“The courts must not strengthen it, nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When Parliament has ordained that a court must be satisfied only Parliament can prescribe a lesser requirement. No one whether he be a judge or juror would in fact be “satisfied” if he was in a state of reasonable doubt.....”

10 ***Odoki, C.J. in Col. (Rtd) Dr. Besigye Kiiza Vs Museveni Yoweri Kaguta and Electoral Commission, Election Petition No.1 of 2006***, agreed and applied the above observations of Lord Denning. He stated:

“It is true court may not be satisfied if it entertains a reasonable doubt, but the decision will depend on the gravity of the matter to be proved.....”.

Resolution of issues:

20 Bearing in mind the principles of law stated above as to the duty of this court as the first appellate court and the burden and standard of proof required in an election petition, I now proceed to resolve the issues in this appeal.

(i) Competency of affidavits:

Appellant submitted in respect of a number of affidavits that the same ought to have been rejected by the trial judge for non-payment of fees on

their being filed in court, that the jurat did not show the date and place when and where the oaths on them had been taken. Further, that there were no certificates of translation on these affidavits and that the deponents had not been identified by the commissioner for oaths.

The evidence of the commissioner for oaths, Oluge Richard, who handled the affidavits, was to the effect that he saw a number of receipts of payment of fees on these affidavits, and that, though not bearing certificates of translation, the contents, in the affidavits were first translated
10 into Lusoga before the deponent signed. He also administered an oath/affirmation to each deponent before signing.

I am satisfied on the review and re-appraisal of the relevant evidence that the affidavits were paid for on being lodged and that the contents thereof were translated into Lusoga to the deponents before each one signed. The rest of the complaints such as lack of a jurat or certificates of translations are procedural transgressions and cannot prevent this court from administering substantive justice. I therefore find that the affidavits in
20 question constituted valid evidence and the trial judge was right to rely on those affidavits that he chose to rely on to reach the conclusions that he arrived at.

(ii) Testimony of Rev. Fr. Vincent Ndanda:

Consideration of the issue relating to the testimony of Rev. Fr. Ndanda revolves upon the trial judge's finding.

“I find that the petitioner has proved that the 1st respondent committed the illegal practice by carrying on fundraising and donating money in the sum of Shs.100,000/= at the fundraising for St. Gonzaga Prison Chapel.”

The learned trial judge came to this conclusion basing himself on section
10 68 (7) (8) and (9) of the Parliamentary Elections Act, as amended by the
Parliamentary Elections (Amendment) Act No.12 of 2010; which he applied
to the evidence that was before him, after whose analysis and evaluation,
he reached the stated conclusion.

The evidence in the nature of affidavits and some oral testimonies in cross-
examination on the contents of the affidavits, that was before the trial
judge, was that of the petitioner, now respondent to the appeal, and that of
his witnesses Hassan Muyinda, Waiswa Paul and Alex Luganda. The
evidence in rebuttal was that of the appellant, then respondent to the
20 petition and that of his witness Rev. Fr. Vincent Ndanda.

The issue for resolution is whether or not the learned trial judge was right in law to disregard the testimony of Rev. Fr. Vincent Ndanda given under oath in court.

Fr. Vincent Ndanda stated in his affidavit dated 08.06.2011 that he was then a Roman Catholic Parish priest of St. Peter Claver Church, Iganga Municipality, Iganga District. The appellant had belonged to his church for the last 8 years. On 13.02.2011, he conducted mass and a ground breaking ceremony at the proposed site for Iganga Prisons Chapel. The
10 appellant appeared towards the end of the function. The witness administered a blessing to the appellant who stated that being a candidate during election period, he could not engage in fundraising. He however promised to avail a bag of maize to the construction workers in future when the construction would have begun. He was to do this as a member of the choir of the church. According to this witness, the appellant did not campaign at all, did not offer cash of 100,000/=, a bag of maize flour there and then, or pledge to give in future a trip of aggregate stones for the chapel construction.

20 Fr. Ndanda was cross-examined in court before the trial judge on 11.07.2011. His testimony under cross-examination was on oath. Regarding how he came to depone to his affidavit of 08.06.2011, he explained that he signed the same in the chambers of counsel for the appellant in the presence of Counsel Thomas Ochaya, a member of the

firm of lawyers representing the appellant. After signing the affidavit he left the lawyers' chambers.

The learned trial judge, on perusing the affidavit of Rev. Fr. Ndanda found that it had been commissioned by one NOAH EDWARD MWESIGWA, an advocate and a commissioner for oaths, and not counsel Thomas Ochaya. He therefore found that the affidavit had not been legally commissioned and he rejected the same and struck it off the record.

10 Section 5 of the Commissioners for Oaths (Advocates) Act, cap.5, and section 6 of the Oaths Act, cap.19 and Rule 7 of the Commissioners for Oaths Rules require a deponent of an affidavit to personally appear and sign the affidavit before the Commissioner for Oaths and swear by saying or repeating after the commissioner administering the oath the words prescribed by the law. The place and date of attestation must also be stated in the affidavit. Before signing, the commissioner must ensure and satisfy him/herself that the person signing is the one who is stated in the affidavit and that the contents in the affidavit are of that person's own knowledge. Where the same are based on information or some other
20 sources, then the grounds of belief and the sources of information must be disclosed. The commissioner must be satisfied, in all the circumstances that the deponent understands fully what he/she is deponing to.

The Supreme Court in ***Election Petition Appeal No.1 of 2007 Kakooza John Baptist Vs The Electoral Commission and Anthony Yiga*** upheld the decision of both the High Court and Court of Appeal to reject the affidavit of a deponent who had, explained as to how he had deponed to an affidavit thus:

“I read through the affidavit, signed it before I sent it to the Commissioner.”

I find, on the basis of the evidence and the law before me, that in this case,
10 the trial judge was right in rejecting and striking off the affidavit of Rev. Fr. Ndanda.

The complaint of the appellant however, in this appeal, is that in the course of the cross-examination of Rev. Fr. Ndanda on the contents of his affidavit, he testified on oath by way of oral evidence, which evidence supported the appellant’s case. It is the case of the appellant that the trial judge ought to have considered this evidence that was given viva voce before reaching the conclusions that he reached the rejection of Fr. Ndanda’s affidavit notwithstanding.

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The respondent’s contention, on the other hand, is that once an affidavit is struck off the record, all the evidence elicited in cross-examination, in

connection with that affidavit, must also be expunged from the record and the court cannot rely upon it in resolving the issues at hand.

Rule 15 of the Parliamentary Elections (Election Petitions) Rules provides that evidence at the trial in favour of or against the petition shall be by way of an affidavit read in open court. With leave of court, a person swearing an affidavit which is before the court may be cross-examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn.

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Section 58 of the Evidence Act provides that facts in a case, except the contents of documents, may be proved by oral evidence. This evidence must be direct in that, if it refers to a fact that could be seen, then the one who saw it, if it refers to a fact that could be heard, then the one who heard it, if it refers to a fact that could be perceived, then the one who perceived it and if it refers to an opinion or grounds of that opinion, then the one who holds that opinion must be the one to testify.

20 An affidavit is a statement/declaration in writing made on oath/affirmation before one having authority to administer an oath/affirmation. It is made ex-parte, unlike evidence given orally in open court in the personal direction and superintendence of a judge. While the opposite party has opportunity to cross-examine the one giving oral evidence, in case of an affidavit, the deponent to it can only be cross-examined on the contents of an affidavit

after the affidavit has been deponed to, filed in court or in the cause, and usually with the permission of the court or whoever is presiding over the cause. See **WARNER VS MOSSES, 16 ChD 100 at Page101.**

However, unless it is by agreement of the concerned parties or by some legislation, that evidence in a cause shall be by affidavits alone, a party may supplement affidavit evidence by viva voce evidence in court. See **GLOSSOP V HESTON & 1 LOCAL BOARD, 47 LJ Ch.536.** Also where court finds affidavit evidence to be unsatisfactory, it has jurisdiction to
10 exclude the affidavits and to direct the witnesses to be examined orally not withstanding any agreement to the contrary: See **Re whiteley, 1891, 1 Ch 559. See also SARKAR ON EVIDENCE, 14TH ED. P.2188.**

I conclude, on the basis of section 58 of the Evidence Act and on appreciating the above legal authorities on the point, that evidence given to court on oath viva voce, under the supervision and superintendence of a presiding judge, is proper and valid evidence that the court must consider. It is up to the presiding court presiding to consider the said evidence
20 together with the fact that the affidavit evidence has been rejected or has been contradicted, and then decide what value to put on such evidence.

Accordingly I hold that the learned trial judge was in error to reject the viva voce evidence of Rev. Fr. Vincent Ndanda given on oath under cross-

examination on the ground that Rev. Fr. Ndanda's affidavit had been rejected. This ground of appeal thus succeeds.

(iii) Whether or not the appellant committed an illegal practice of fundraising:

The essence of appellant's contention is that the learned trial judge erred in law and fact when he found that the appellant had committed an illegal practice by participating in fundraising and that the fundraising was constituted in the acts of the appellant attending a ground breaking ceremony by the local Roman Catholic Church for St. Gonzaga Prisons Chapel and donating Shs.100,000/= towards the construction of that church.

In the court below, the respondent alleged in paragraph 28 (b) of his affidavit supporting the petition, that on 13.02.2011, a date in an election period, the appellant participated in a fundraising for construction of a catholic prison chapel, where he donated Shs.100,000/=-, a bag of maize flour (posho) and pledged a trip of aggregate stones.

20 The respondent had not attended the function and so his allegations were as a result of information given to him by third parties who claimed to have attended the function.

My re-appraisal of the evidence adduced at trial shows that the respondent did not deny the assertion of his agent, one Luganda Alex, that he, the respondent himself, had sent the said Alex Luganda to represent him to the function. In effect the respondent, through his said authorized agent Luganda Alex also participated in the function, at least by attending the same.

Alex Luganda, the respondent's agent filed an affidavit and was also cross examined about this fundraising function. In it he asserted that respondent
10 requested him to represent him at the function because there was a rumour that respondent was only interested in Muslim voters and not Christians. At the function he heard the organizers refer to the appellant as one of those who had always supported the activities of the Catholic Church in Iganga Town.

This witness then claimed to have heard the appellant call upon the gathering not to forget to vote their fellow catholic and that he was looking forward to return soon to the area as the Member of Parliament for the area. The witness then saw the appellant give a cash amount of
20 Shs.100,000/= and promised to give a bag of maize for the builders in the following week and to give aggregate stones later on.

Waiswa Paul, a registered voter in the constituency and who was a candidate for L.C IV/Mayor, Iganga Municipality, also claimed to have

attended the function, and according to him, the appellant after giving the cash of Shs.100,000/= and promising to give a bag of posho the following week, heard and saw the appellant pledge to give the church aggregate stones for the church construction only if “they voted wisely when voting time comes.”

Witness Hassan Muyinda, also a witness to the event, a registered voter who contested for Chairperson LC III, Iganga Central Division, stated in his affidavit in support of the petition, that he saw and heard the appellant
10 pledge a cash amount of Shs.100,000/= and a bag of posho to be delivered the following week. Appellant also pledged to give the gathering a trip of aggregate stones if they voted wisely and prayed them to remember those who gave them something when voting time comes.

Witnesses Waiswa Paul and Hassan Muyinda do not claim to have heard the appellant appeal to the gathering to vote for their fellow catholic, which appeal Luganda Alex claims to have heard. Further, while Luganda Alex and Waiswa Paul saw and heard the appellant give a cash sum of Shs.100,000/=, Hassan Muyinda's version is that the appellant just made a
20 pledge of Shs.100,000/= payable on some future date when the bag of posho would also be delivered. No attempt was made to explain away these contradictions.

The appellant denied participating in the fundraising, explaining that he came to the ground breaking function when it had ended or was about to end. The purpose of his going there was to get a blessing from his parish priest as the day was a Sunday and this was his church of prayer for the last eight or so many years. All that he did was to promise to provide some posho as food to the workers on the church construction at some future date when the construction would have begun. He made this promise because he was a church member who was also at the same time serving on the church choir.

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The viva voce evidence of Rev. Fr. Ndanda has already been commented upon. While it remained valid evidence adduced before the court, my appreciation of that evidence is to put little value on the same given the fact that the affidavit evidence of Rev. Fr. Ndanda had been rejected by the trial court. The little value that can be placed on it supports the version of the appellant as to what transpired at this ground breaking function of St. Gonzaga Prisons Chapel.

20 I note from the evidence adduced that it was not in dispute that this function was a religious function with the main participants being the willing members of the church in the area. From celebrating Sunday mass at St. Peter Claver Church, the church faithful were invited to the function by the priest who had celebrated the mass. This independent evidence

collaborates the account of the appellant as to what the real nature of the occasion was.

Section 68 (7) of the Parliamentary Elections Act provides that:

“(7) A candidate or an agent of a candidate shall not carry on fundraising or giving donations during the period of campaigning.”

A candidate who contravenes the subsection commits an illegal practice. Fundraising does not include the soliciting of funds for candidates to
10 organize for elections.

The above section must of course be read, interpreted and applied subject to the Constitution, more particularly in this regard Article 29 (1) (c) of the Constitution which vests a right into every person the freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with the Constitution.

The burden to prove that the appellant was involved in fundraising by
20 paying Shs.100,000/= at the ground breaking function of St. Gonzaga Prisons Chapel, Iganga Municipality, to the satisfaction of the court on a balance of probabilities, lay upon the respondent.

Having reviewed the evidence adduced and the position of the law, as set out above, I find that the versions of the respondent's witnesses who claimed to have attended the same function at the same time are contradictory in the areas already set out and thus cannot provide proof of what exactly transpired. The possibility that the appellant did what he did purely as a matter of the practise and manifestation of his faith cannot also be ruled out.

10 In my view the language of section 68 (7) of the Parliamentary Elections Act appears to be too general and wide and yet at the same time appears to be of strict application, imposing strict liability.

In enacting the said section the legislature intended to restrain candidates in Parliamentary elections during the campaign period from, through fundraising activities, influencing voters to vote one way or the other at the elections by being paid money or being given other material objects and considerations.

20 The words of a statute, in cases of doubt about the meaning, are to be understood in the sense in which they best harmonize with the subject and object of the statute: See TOWERFIELD (OWNERS) V WORKINGTON HARBOUR BOARD [1948] 2 ALLER 736. Thus, in England, one making a bonafide collection in the street for a charitable object was held not to be violating the provisions of the Vagrancy Act, 1824, intended to get rid of

beggars off the streets in England. The Act had to be interpreted and applied according to its purpose and effect. This principle has been applied in Uganda in ***Supreme Court Constitutional Petition Appeal No.1 of 1998: Attorney general Vs Salvatori Abuki.***

Courts of law are by principle enjoined to interpret and apply statutes so as to avoid absurdity or injustice, except where the language of the statute is clear and explicit, in which case the court must give effect to it, whatever the consequences. But where the language of the statute is unclear or is
10 capable of several meanings then the court must interpret the same avoiding absurdity and causing injustice. See: ***REPUBLIC VS EL MANN [1969] EA 357***

and

CONSTITUTIONAL PETITION NO.8 OF 2006: DARLINGTON SAKWA & ANOTHER VS THE ELECTORAL COMMISSION & 44 OTHERS: JUDGEMENT OF L.E.M MUKASA-KIKONYOGO, DCJ, as she then was.

Applying the above principles to this case, I find that section 68 (7) and (8) of the Parliamentary Elections Act must be interpreted and applied in such
20 a way that it relates to fundraising functions or occasions, during election campaigns in which a candidate or his/her agent participates with the knowledge and consent of a candidate, for the purpose of influencing voters to vote in a particular way.

It is therefore a legitimate consideration, though not a condition precedent, for the application of the section, to find out whether or not, those said to have participated in the fundraising were registered voters, or how the fundraising would influence those attending when election time comes. It also matters for the court to appreciate as to how many people are involved in the fundraising. The learned trial judge never addressed any of these aspects at all.

10 I also take judicial notice of the fact that in Uganda, as a matter of practising and manifesting their faith, Ugandans carry out some sort of fundraising as part of their prayer services. Many Christians do this during the “**offertory**” period of praying, while members of the Islamic faith carry out “**sadaq**” as part of praying and manifesting the faith. What is true of religious faith is also true of cultural and other social functions. Articles 29 and 37 of the Constitution would offer protection in such instances. I therefore hold the view that each case must be judged on its own facts and the burden is upon the petitioner to show that the alleged fundraising campaign was within the scope of the said section 68 (7) and (8) of the Parliamentary Elections Act and was not protected by the Constitution.

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The learned trial judge did not address himself to all the above considerations. Had he done so, he would possibly have concluded, like I have concluded after appraising the evidence on record, that the respondent did not discharge the requisite burden of proof of satisfying

court, on a balance of probabilities, that the appellant participated in the fundraising function of his church, St. Gonzaga Prisons Chapel or that he committed any illegal practice.

In conclusion all the grounds of appeal succeed. The appellant's appeal is allowed and the judgement of the High Court, dated 20th August, 2011, is set aside. The same is substituted with an order dismissing Election Petition No.7 of 2011.

- 10 It is hereby declared that the appellant **MUGEMA PETER** is the validly elected Member of Parliament of **IGANGA MUNICIPALITY CONSTITUENCY** having got the majority votes in the Parliamentary Elections held on the 18th day of February, 2011.

The appellant is awarded costs of the appeal and those in the court below.

Dated this ...**13th**day of**April**.....2012.

JUDGMENT OF A.S.NSHIMYE, JA

I have had the benefit of reading in draft the lead judgment of my brother Justice Remmy Kasule, JA.

I associate myself with it and fully adopt his reasoning in deciding that the appeal be allowed with costs to the appellant here and in the High Court.

Dated at Kampala this ...**13th** ...day of ...**April**...2012.

A.S.NSHIMYE,
JUSTICE OF APPEAL

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JUDGMENT OF A.E.N.MPAGI-BAHIGEINE, JA

I have read in draft the judgment of my brother Remmy Kasule, JA.

I fully concur that the appeal must succeed.

Since my brother A.S.Nshimye, JA also agrees, the appeal succeeds with orders as stated in the lead judgment.

Dated at Kampala this**13th** ...day of ...**April**...2012.

A.E.N.MPAGI BAHIGEINE
DEPUTY CHIEF JUSTICE

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