

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO.0027 OF 2011

BETWEEN

5

KAMBA SALEH
MOSES:.....:APPELLANT

VERSUS

HON. NAMUYANGU
JENNIFER:.....:RESPONDENT

10

CORAM: JUSTICE A.E.N. MPAGI-BAHIGEINE,
DCJ
JUSTICE S.B.K KAVUMA,JA
JUSTICE A.S NSHIMYE,JA

15

JUDGEMENT OF S.B.K KAVUMA, JA

Introduction

This is an appeal from the judgement and orders of the High Court, (*Mike.J. Chibita, J*), dated the 5th August 2011 given at the High Court at Mbale in Election Petition No.18 of 2011.

20

Background

The appellant and the respondent, together with several other persons contested for the seat of the directly elected Member of Parliament for Kibuku County Constituency in the parliamentary elections held on 18th February 2011. The Electoral Commission declared the appellant the validly elected Member of Parliament for the constituency having polled 22855 votes against the respondent's 21893. The respondent was aggrieved by the declared result of the election and filed Election Petition No. 18 of 2011 at the High Court at Mbale. The petition was allowed on the sole ground that the appellant had bribed a village group known as "Butakitibwamoiza", hence this appeal.

Grounds of Appeal

The grounds of the appeal, as set out in the Amended Memorandum Of Appeal, are:

"1. The learned trial judge erred in law and fact when he failed to consider and determine that Election Petition No. 18 of 2011 was filed out of time by reason of the court fees having been paid on 07/04/2011.

2. The learned trial judge erred in law and fact in failure as a court of first instance to properly and thoroughly subject the evidence of the allegation of bribery to Jane Frances Kataike and other
5 members of Butakitibwamoiza group to thorough scrutiny thereby coming to the erroneous conclusion that the appellant committed the offence of bribery contrary to section 68 of the Parliamentary Elections Act.

10 3. The learned trial judge erred in law and fact in relying on the uncorroborated evidence of Jane Frances Kataike, Aisha Musitafa, Kasubi Akim, Bambu William all confessed supporters of the respondent to find that the appellant had
15 committed the offence of bribery.

4. The learned trial judge erred in law and fact in relying on the inconsistent evidence of the witnesses relating to the alleged bribery to Jane Frances Kataike and other members of
20 Butakitibwamoiza group.

5. ALTERNATIVELY, the learned trial judge erred in law and fact in failing to appreciate the extent of

the electoral offence of bribery thereby coming to the erroneous conclusion that the 300.000/= allegedly given to Jane Frances Kataike and other members of Butakitibwamoiza group at their request amounted to an offence of electoral bribery.”(sic)

Issues

The agreed issues at the trial were framed as follows:

“1. Whether the learned trial judge did not properly evaluate the evidence on record in as far as;

(a) he held that there was no direct statement from the appellant denying giving the bribe.

(b) the learned trial judge failed to allude to the inconsistencies of the alleged bribe to Jane Frances Kataike to Butakitibwamoiza group.

(c) He failed to observe that there was no evidence or proof of existence of the purported Butakitibwamoiza Association.

(d) relied on uncorroborated evidence of confessed supporters of the Respondent.

(e) He glossed over the important question whether the persons purportedly given money were, voters.

(f) the trial judge held that the appellant ought to have asked respondent's witnesses whether they were voters or not.

2. whether the purported shs 300.000/= allegedly given to Butakitibwamoiza group was given with intent to induce the said members to vote .

3. whether the petition was competently filed in court and whether the learned trial judge therefore rightly considered the 1st two issues without hearing counsel on both sides.”(sic)

Representation

At the hearing of the appeal, Mr. Yusufu Mutembuli (counsel for the respondent), represented the respondent.

The appellant was represented by Mr. Kamba Hassan, Mr. Basalirwa Asuman and Mr. Katumba Chrisetom, (counsel for the appellant).

5 **The Appellant's case**

Arguing the case for the appellant, his counsel submitted that court fees for the petition had been paid and the petition filed out of time. They argued that under S.60(3) of the Parliamentary Elections Act,(PEA), the petition had
10 to be filed within 30 days beginning from 8th march 2011 and the last day of filing was the 6th April 2011.

They contended that court fees must be paid at the time of filing the petition and that in law, a document is deemed to be filed only when fees is paid. They relied on
15 **Ndaula Ronald vs Haji Nadduli Abdul, Election Petition Appeal No. 20 of 2006.**

Contending that the court fees for the petition was paid on the 7th April 2011, they prayed court to find that the petition was filed out of time.

20 On the evaluation of evidence, counsel argued that the learned trial judge failed to properly evaluate the

evidence before him thereby erroneously coming to the conclusion that the appellant had committed the offence of bribery. To, counsel, the judge's finding that there was no direct denial by the appellant of having given a bribe
5 amounted to shifting the burden to prove the respondents case to the appellant.

Counsel further criticized the learned trial judge for having found that Kataike Jane Frances was a truthful witness.

10 They pointed out that while Aisha Mustafa stated that the group met at a Presbyterian church, Kataike stated during cross-examination, that the appellant met the group at a born again church. Given that contradiction, counsel submitted, the learned trial judge should not
15 have found Kataike a credible witness and should not have relied on her evidence on the alleged bribery.

Counsel further criticized the learned trial judge for having found that bribery had been proved in the absence of evidence that a registered voter received the
20 bribe or any part thereof. They relied on **Kiiza Besigye vs Yoweri K. Museveni S.C.PEA. No. 01 of 2001**, where *Oder J. (RIP)* set down the ingredients of bribery.

They emphasized that a bribe to a voter must be proved to have been intended to influence the voting or nonvoting of the voter. To counsel, in the instant case, the money was for buying hoes and they were actually
5 bought.

They contended further that an assertion by one that one was a vote, was not sufficient proof of one being a registered voter.

Counsel emphasized that Kataike, having testified that
10 she was a supporter of the respondent, there should have been corroboration of her evidence since it was from an interested witnesses.

Counsel prayed court to allow the appeal with costs here and at the court below.

15

The respondent's case

Arguing the case for the respondent, his counsel submitted that the learned trial judge adequately dealt with the issue of court fees. He pointed out that the
20 learned trial judge had carried out an exercise of due

diligence and that the parties agreed to concentrate on the remaining issues.

Counsel contended that the petition was received on 6th April and that there is no way court would have received
5 it without court fees having been paid.

They further argued that even if the money was paid on the 7th, of April, which they disputed, that would not render the petition invalid.

They relied on **Amama Mbabazi vs Musinguzi James,**
10 **C.A Election Petition Appeal No. 12 of 2002.**

They also cited **Rule 6** of the **Judicature (Court fees) Rules** where court can order payment of court fees.

On the question of bribery, counsel submitted that the learned trial judge properly evaluated the evidence. As
15 for the meeting place of the members of the Butakitibwamoiza group and the appellant, counsel submitted that it was clear the witnesses referred to the Presbyterian church and that this was the same as the born again church. In counsel's view, the contradictions
20 peddled by counsel for the appellant were minor and irrelevant.

Regarding whether the group members were voters, counsel argued that it is only registered voters who vote and that since Kataike was a supporter of Namuyangu but only voted the appellant after the receipt of the shs 5 300.000/=, the presumption was she was a voter and so were the other members of the group.

Counsel further, contended that the issue of registered voters is no longer an issue citing the case of **Mukasa Anthony vs Lulume, S.C Election Petition No. Appeal 18 of 2007.** He emphasized that according to 10 that case, it is the intention of the giver of the bribe which matters.

Counsel contended that **Bakaluba Mukasa vs Namboze Betty Bakireke, S.C. Election Appeal 15 No.04 of 2009,** per *Katureebe, JSC* held that the law should not be given a restrictive interpretation. Counsel prayed court to dismiss the appeal with costs.

Reply:

20 By way of reply, counsel for the appellant submitted that all the authorities cited by counsel for the respondent on

the payment of court fees were irrelevant. No question of limitation was ever considered in any of those cases.

Regarding the issue of motive, counsel submitted that **Mukasa .v.Lulume** (supra) is distinguishable from the
5 instant appeal. Here, there is no proof of motive to bribe as Kataike just raised the issue of hoes at the end of the meeting between the appellant and the members of Butakitibwamoiza group.

In conclusion, counsel submitted that bribery allegations
10 call for serious consideration and that there is not such consideration in the instant case. Counsel reiterated their earlier prayers.

Courts consideration of the appeal and decision

Issues to be resolved

15 In resolving the controversy between the parties in this appeal, we shall resolve the issues we frame as below:

1.Whether the learned trial judge properly handled the question of the payment of the court fees for petition No 18 of 2011.

20 **2.Whether the learned trial judge failed to properly evaluate the evidence before him**

before he came to the conclusion that the appellant committed the electoral offence of bribery.

3.What remedies, if any, are available to the parties?

5

Issue one

The gist of this issue is the appellant's complaint that the learned trial judge erroneously dealt with the questions of the payment of the court fees for Election Petition No. 18 of 2011 and that of whether the petition was filed into court outside the time stipulated by law.

Two important matters arise from this complaint. The first one, which is of crucial importance, is that of the appellant being denied a fair hearing before the issue of the payment of court fees was resolved by the trial court.

15

Article 28(1) of the Constitution provides:

28 Right to a fair hearing.

“(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public

20

hearing before an independent and impartial court or tribunal established by law.”

We have thoroughly scrutinized the record of proceedings in this appeal. We have not been able to find anywhere
5 in that record where the court heard the parties on the question of whether the requisite court fees was paid in time.

At page 3 of the judgment the learned trial judge stated:

“...before the start of the hearing court did due diligence
10 and established that the requisite fees had been paid in time...court therefore informed the parties that issues one and two had been disposed of. The parties, through their lawyers, therefore agreed to concentrate on the remaining four issue.”

15 With the greatest respect, I am in no position to accept the submission for counsel for the respondent that the learned trial judge handled the question of hearing the appellant on the question of the payment of court fees correctly. There was, in fact, no hearing of the parties at
20 all.

Further, the agreement of the counsel for the parties to take the courts explanation in the extract above cannot be taken as a valid and binding agreement on behalf of the appellant to forego his right to a fair hearing by the court over the matter. Neither the parties nor their counsel could agree to an illegality.

Article 28(1) of the Constitution which underpins the right to a fair hearing as one of those principles of natural justice greatly cherished and jealously guarded by our justice system is a non derogable article. It is sacrosanct. Any proceedings conducted in contravention of that article could not, and did not, amount to any decision at law.

In De **Souza Vs Tanga Town Council, Civil Appeal No. 89 of 1960** reported in **1961 EA 377** at page **388** the East African Court of Appeal held;

“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the

essential principles of justice. That decision must be declared to be no decision.”

I, therefore, find that the learned trial judge was in grave
5 error to hold, and apparently impose it on the parties
before court, that as a result of the due diligence he had
single handedly carried out, the issue of court fees had
been resolved. That error rendered his finding on the
question a nullity.

10 The above withstanding, however, this court has all the
powers, authority and jurisdiction of the High Court to
deal with the question of payment of the court fees for
Election Petition No.18 of 2011 under Section 11 of the
Judicature Act which provides:

15

**Court of Appeal to have powers of the court of
original jurisdiction**

20

**“For the purpose of hearing and
determining an appeal, the Court of
Appeal shall have all the powers,**

authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated.”

5 Further, this court also has the duty to subject the entire evidence on record to a through and fresh review and scrutiny and make its own inferences. In doing so, however, it has to take it into account the fact that it did not see the witnesses testify and make allowance for
10 that. See **Pandya vs R. 1957 E.A 336** and **Rule 30 (1) (a) of the Judicature (Court of Appeal Rules)Directions.**

We shall therefore, proceed to consider the questions of the payment of the court fees and compliance with the
15 law on the presentation of an election petition to court as the second matter raised in issue one.

Section 60 of the Parliamentary Election Petitions Act (PEA) provides:

S.60 Who may present election petition.

20 **“1. Election petitions under this Act shall be filed in**

the High Court.

2. An election petition may be filed by any of the following persons-

(a) a candidate who loses an election; or

5 **(b).....**
.....

(3) Every election petition shall be filed within thirty days after the day on which the result of the election is published by the Commission in the
10 **Gazette.**

(4).....
.....”

Rule 5 of the Parliamentary Elections (Election Petitions) Rules(PEEPR) Provides;

15

5. Mode of presentation of petition.

“1. Presentation of a petition shall be made by the petitioner leaving it in person or by or through his or her advocate, if any, named at the foot of
20 **the petition, at the office of the registrar within**

thirty days after the declaration of the result of the election.

2.

.....

5 **3. The petitioner or the advocate of the petitioner shall, at the time of presenting the petition, pay a fee of 150,000 shillings.**

4. If sub rule (3) of this rule is not complied with, the petition shall not be accepted.

10 **5.**

.....

6.

.....

7.

15

It is not in dispute that the petition was presented to court on the 6th April 2011 which was the last day for it to be presented. The appellant contends that the court fees were paid on the 7th April 2011, a day after the lapse of the 30 days prescribed by **Section 60(3)** of the **PEA** and Rule **5(1)** of the **PEER**.

Notably, the PEA uses the word *file* while the PEEPR use the word *present*.

None of the two words is defined either in the Act or in the rules cited above.

5 In the absence of such a statutory definition, I have resorted to Black's Law Dictionary, 9th Edn, which defines 'file' as:

“to deliver a legal document to the court clerk or record custodian for placement into the official record”
10

The same dictionary defined *present* as:

“the delivery of a document to an issue or named person for the purposes of initiating action.”

15 I understand the two words used in the Act and the Rules thereunder to mean the delivery to court of an Election Petition at the commencement of a court action. The two words are, therefore, in my view, used interchangeably in the Act and the Rules to mean the same thing.

20 Rule 5(3) requires the payment of court fees for the petition at the same time as the petition is presented to court.

Rule 5(4) goes further to provide that failure to pay the fee should lead to a rejection of the petition by the registrar.

In the instant case, the petition was presented to court on the last day and it was accepted without protest by court over the nonpayment of court fees. Court went ahead to issue an assessment of the fees payable and to direct counsel for the petitioner to proceed to deposit the money into the bank. The money was actually paid into the bank though a day after the expiry of the 30 days stipulated by the PEEPR for the presentation of a petition.

In these circumstances, however, court would treat that late payment of the court fees not as an illegality but an irregularity a technicality that would not be accorded undue regard in endeavors of the court to administer substantive justice over the matter. Court, therefore, invokes the provisions of **Article 126 2(e)** of the Constitution. See also this Courts **Election Petition Application No. 20 of 2007, Electoral Commission vs Namboze Betty Bakireke and Lawrence Muwanga and Stephen Kyeyune Supreme Court Civil Appeal No. 12 of 2001.**

Consequently we find that the payment of the court fees on the 7th April 2011 did not render the petition presented to court on the 6th April 2011 time barred.

5 **Issue 2**

The gist of this issue is whether the learned trial judge erroneously evaluated the evidence before court leading to his erroneous decision that the appellant had committed the electoral offence of bribery.

10 **S.68 of the Parliamentary Elections Act provides:**

15 **1. "A person who, either before or during an election with intent either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy two currency points or**
20 **imprisonment not exceeding three years or both.**

2.
.....

(a)
.....

5 **3.**
.....

(a)
.....

10 **(b)**
.....

4. An offence under subsection (1) shall be an illegal practice.

5.

15
.....

6.
.....”

In **Kiiza Besigye vs Yoweri K. Museveni S.C Election Petition Appeal No. 1 of 2001, Odoki, CJ** stated that to prove bribery, the following must be satisfied:

5 That a gift was given to a voter; that the gift was given by a candidate or his agent; that the gift was to induce the receiver to vote for the candidate or to influence a voter from voting.

This standard thus requires, *inter alia*, the motive of the giver to be established as was stated in the recent
10 authority of **Bakaluba Peter Mukasa vs Nambooze Betty Bakireke, Supreme Court Election Petition Appeal No. 04 of 2009.**

In the instant case, to prove the bribery allegations, the learned trial judge relied on the evidence of one, Kataike.
15 She testified that the appellant gave their group, Butabikitwamoiza group, shs 300.000/= to buy hoes. From the record, the appellant contended, he gave out the money upon being asked by the members of the group who wanted to buy hoes and that the hoes were
20 bought.

This court is alive to the fact that bribery is such a grave illegal practice and as such it must be given serious

consideration. The standard of proof is required to be slightly higher than that of the ordinary balance on probabilities applicable to ordinary civil cases. It does not, however, call for proving the bribery beyond reasonable
5 doubt as is the case in criminal cases. What is required is proof to the satisfaction of court, as was decided by the Supreme Court in the **Kiiza Besigye vs Yoweri Museveni case** (supra). The law also requires, *inter alia*, that the money or gift or consideration given out in
10 bribery is given to a voter. **Section 1** of the **PEA** defines a voter as, “... **a person qualified to be registered as a voter at an election who is so registered and at the time of an election is not disqualified from voting.**”

15 It is absolutely necessary that it is proved to the satisfaction of court by those alleging the bribery that the people allegedly bribed were registered voters at the time of the alleged bribing. The motive of the giver of the bribe is also relevant.

20 In the instant case, none of the group members of Butabikitwamoiza group, including Kataike herself, furnished any satisfactory evidence to court that they

were registered voters at the material time. There was no voters cards or Voters' Register tendered in evidence bearing any of their names. All they did was to tell court that they were voters. Kataike, whose evidence was
5 heavily relied on to prove the bribery was a self confessed supporter of the respondent. In relying on her evidence, the learned trial judge inferred that since Kataike had said she was a supporter of the respondent and that she voted for the appellant after receiving the
10 shs 300,000/=, she was presumed to be a registered voter since it is only registered voters who vote.

I am mindful that in determining election matters involving bribery allegations, the law requires caution on the part of court to subject each allegation of bribery to
15 thorough and high level scrutiny and to be alive to the fact that in an election petition, in which the prize is political power, witnesses may easily resort to telling lies in their evidence, in order to secure judicial victory for their preferred candidate.

20 I, therefore, find no persuasion in the reasoning of the learned trial judge. Assuming it as a fact, as the learned trial judge did, that Kataike must have been a voter

without any satisfactory evidence to support the presumption, is, in my view, speculative.

Further, Kataike's evidence is evidence of a confessed supporter of the respondent. It is also evidence of an accomplice under **S68 (2)** of the **PEA**. Such evidence is suspect. Partisan witnesses, as Kataike is in the instant case, are likely to exacerate their evidence in an effort to tilt the balance of proof in favour of the candidate they support. What was needed in this case was for the learned trial judge to look for independent evidence from a non partisan and independent witness to corroborate the evidence of Kataike. I find no such evidence on record.

On her own evidence, Kataike confesses that on receiving the shs 300,000/=, she betrayed her candidate in the election, the respondent, and voted for the appellant. Kataike's behavior, in my view, portrays her as a person of no integrity and not worth of any credibility as a witness.

On the other hand, the appellant denied having bribed any voter. He contended, the money was given to members of the Butakitibwamoiza group after they had

asked for it to be by hoes. The timing of his donation of the money for hoes may raise questions, but none of the recipients was proved to be a registered voter. The appellants' act in donating the money for the purchases of hoes, therefore, in, my view, can only amount to an error of judgement on his part and no more. There is no motive established on the appellant's part to influence the voting pattern of voters since none of the recipients was proved to be a voter.

10 The cases of **Bakaluba Mukasa and Nambooze Betty Bakireke** and **Anthony Mukasa Dr. Lulume** (supra) are distinguishable from the instant case in that in those cases there was concrete evidence proving some of the recipients of the gifts being voters.

15 In the result, I find that there was no satisfactory evidence to prove to the satisfaction of court that the election malpractice of bribery was committed by the appellant or by any of his agents with his knowledge, approval or consent. I further find that had the learned trial judge properly evaluated the evidence before him on the matter, he would not have come to the conclusions he did. I, therefore, find in the affirmative on issue 2.

In the final result, I would allow the appeal. I would also set aside the orders of the trial court nullifying the election of the appellant as the member of Parliament for Kibuku County Constituency.

5 I would grant costs here and at the court below to the appellant and this would effectively resolve issue 3

I would so order.

Date at Kampala this...**20th** ...day of...**April**...2012.

10

.....

S.B.K Kavuma, JA

Justice of Appeal

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

I agree that for the reasons stated by my brother S.B.K.Kavuma, JA this appeal should be allowed.

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

20

A.E.N.MPAGI-BAHIGEINE,

DEPUTY CHIEF JUSTICE

JUDGMENT OF A.S.NSHIMYE, JA

I have had the benefit of reading the lead judgment of
5 Hon Justice S.B.K.Kavuma, JA.

I concur with him that the appeal be allowed with orders
as proposed by him.

Dated this ...**20th** ...day of ...**April**...2012

10 **A.S.NSHIMYE**

JUSTICE OF APPEAL

15