THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA (COA) AT KAMPALA

ELECTION PETITION APPEAL NO. 22 OF 2016)

(ARISING FROM ELECTION PETITION NO. 002 OF 2016)

AKUGIZIBWE LAWRENCE:::::::::::::::::::::::::::::: APPELLANT

VS

1. MUHUMUZA DAVID
2. MULIMIRA BARBARA } **:::::::::::::::::: RESPONDENTS**
3. ELECTORAL COMMISSION

CORAM:

HON. JUSTICE ALFONSE OWINY DOLLO, DCJ
HON. JUSTICE S. B. K. KAVUMA, JA
HON. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT OF THE COURT

Introduction

This is an Appeal from the Judgment and Decree of the High Court of Uganda at Fort Portal (*Hon. Henrietta Wolayo, J*) dated the 24th of June 2016.

Background

The background to the Appeal is that the appellant and the respondent were candidates in the Parliamentary election for Mwenge County North Constituency in Kyenjojo District held on the 18th February 2016. The 2nd respondent, gazetted the appellant as the winner with 19, 144 and the respondent as the runner-up with 18, 426 votes in the Uganda Gazette dated 3rd March 2016. The vote difference was 718 votes.

The respondent, being dissatisfied with the election results, filed **Election Petition No. 002 of 2016; Muhumuza David v Akugizibwe Lawrence, Mulimira Barbara (District Returning Officer) & Electoral Commission,** in the High Court of Uganda at Fort Portal on 1st April 2016.

Judgment was delivered on 24th June 2016 allowing the Petition with costs to the petitioner, setting aside the election of the appellant and ordering a fresh election to be conducted by Election Officers other than those who were involved in the annulled one. The costs were to be borne by the respondents in the proportion of 80% for the 3rd and 20% for the 1st respondent respectively.

The appellant being dissatisfied with the decision of the High Court, lodged this Election Petition Appeal No. 22 of 2016 in this Court by filling a Notice of Appeal dated 24th June 2016, followed by a Memorandum of Appeal dated the 28th June 2016 seeking orders to, *inter alia*, set aside that decision.

The 2nd and the 3rd respondents in the Petition at the High Court also lodged a Notice of Appeal dated 1st July 2016. By a consent order dated the 13th July 2016, the appellant withdrew his Appeal against the 3rd respondent and subsequently filed an Amended Memorandum of Appeal dated 29th July 2016 naming two parties to the Appeal namely, the appellant and the respondent.

On 29th July 2016, the 2nd and the 3rd respondents filed their Cross-Appeal with seven grounds of appeal. On 11th August 2016, the respondent filed a Reply to the appellant's Amended Memorandum of Appeal as well as to the 2nd and the 3rd respondents' Cross-Appeal and then, lodged his own Cross- Appeal on three grounds.

Grounds of Appeal

The grounds upon which the Appeal is premised are laid out in the Amended Memorandum of Appeal as follows:

1. *The learned trial Judge erred in law when she held that the affidavits filed in support of the Petition after the time within which to file an Election Petition had expired were properly filed and when she took them into account to annul the election of the appellant.*
2. *The learned trial Judge erred in law and fact when she held that the Court had no tally sheet as evidence that tallying was completed.*

3. *The learned trial Judge erred in law and in fact when she held that Article 68 (3) of the Constitution had been violated.*
4. *The learned trial Judge erred in law and in fact when in determining the Petition, she refused to consider some evidence presented by the appellant.*
5. *The learned trial Judge erred in law and in fact when she held that there was non- compliance which affected the results in a substantial manner.*
6. *The learned trial Judge erred in law and in fact when in determining the Petition against the appellant the Court did not properly evaluate the evidence leading her to arrive at wrong conclusions.*
7. *The learned trial Judge erred in law and in fact when she used conjecture and fanciful theories and unjustified inferences rather than the evidence on record to determine the Petition which occasioned a miscarriage of justice.*
8. *The learned trial Judge erred in law when she relied on evidence of witnesses who were demanded by the appellant's counsel for cross- examination but who never showed up.*
9. *The learned trial Judge erred in law when she misdirected herself on the burden of proof and shifted it from the petitioner.*
10. *The learned trial Judge erred in law and in fact when she ordered the appellant to pay the respondent 20% of the costs of the Petition when the Court had not made any finding that the appellant had done anything wrong in the electoral process.* (Sic)

The Cross- Appeal

The respondents' Cross- Appeal raises four grounds of appeal as follows:

1. *Whether the learned trial Judge erred in law and in fact when she admitted the 1st respondent/ appellant's Answer to the petition without addressing and make a ruling on the respondent's submission that such Answer was not properly before Court;*
2. *Whether the learned trial Judge failed to properly evaluate the evidence on record on the ground of Illegal practices/ Election offences which resulted in the erroneous conclusion by court that there was no sufficient evidence to prove the said ground as against the 1st respondent/ appellant.*
3. *Under remedies, whether the learned trial Judge erred in law and in fact by failing to consider the merits of the petitioner/ respondent's prayer that Court should declare the petitioner/ respondent as the winner of the election as one of the available remedies and;*
4. *Under costs, whether the appellant's and cross- appellant's counsel are entitled to costs in the lower court when they did not have valid practicing certificates at the time of the proceedings.*

Agreed Issues

1. *Whether the learned trial Judge erred in law when she held that the affidavits filed in support of the Petition after the time within which to file an election petition had expired were properly filed and when she took them into account to annul the election of the appellant;*
2. *Whether the learned trial Judge erred in law and in fact when she held that the Court had no tally sheets as evidence that tallying was completed;*
3. *Whether the learned trial Judge erred in law and in fact when she held that Article 68 (3) of the Constitution had been violated;*
4. *Whether the learned trial Judge erred in law and in fact when in determining the Petition, she refused to consider some evidence presented by the appellant;*
5. *Whether the learned trial Judge erred in law and in fact when she held that there was non- compliance which affected the results in a substantial manner;*
6. *Whether the learned trial Judge erred in law and in fact when in determining the Petition against the appellant the Court did not properly evaluate the evidence leading her to arrive at wrong conclusions.*
7. *Whether the learned trial Judge erred in law and in fact when she used conjecture and fanciful theories and unjustified inferences and imported extraneous matters rather than the*

evidence on record to determine the Petition which occasioned a miscarriage of justice;

8. *Whether the learned trial Judge erred in law when she relied on evidence of witnesses who were demanded by the appellant's counsel for cross- examination but who never showed up;*
9. *Whether the learned trial Judge erred in law when she misdirected herself on the burden of proof and shifted it from the petitioner;*
10. *Whether the learned trial Judge erred in law and in fact when she ordered the appellant to pay the respondent 20% of the costs of the Petition when the Court had not made any finding that the appellant had done anything wrong in the electoral process to warrant such order;*
11. *Whether the learned trial Judge erred in law and in fact when she admitted the 1st respondent/ appellant's Answer to the Petition without addressing and making a Ruling on the respondent's submission that such Answer was not properly before Court;*
12. *Whether the learned trial Judge failed to properly evaluate the evidence on record on the ground of Illegal practices/ Election offences which resulted in the erroneous conclusion by court that there was no sufficient evidence to prove the said ground as against the 1st respondent/ appellant;*
13. *Under remedies, whether the learned trial Judge erred in law and in fact by failing to consider the merits of the petitioner/ respondent's prayer that court should declare the*

petitioner/ respondent as the winner of the election as one of the available remedies; and

14. *Under costs, whether the appellant's and cross-appellants' counsel are entitled to costs in the lower court when they did not have valid practicing certificates at the time of the proceedings. (Sic)*

Representation

At the hearing of the Appeal, the appellant was represented by Mr. Ngaruye Ruhindi Boniface, Mr. Serunjonji Nasser & Mr. Busingye A. Victor, (counsel for the appellant). The cross- appellants were represented by Mr. Geoffrey Kandeebe Ntambirweki, (counsel for the cross appellant), while the respondent was represented by Mr. James Byamukama and Mr. Vincent Mugisha, (counsel for the respondent).

Submissions of the appellant

Counsel for the appellant elected to start with ground 7 and submitted that the learned trial Judge heavily relied upon the evidence of one, Ategeka Wilson, who testified as PW20, yet there was no such person and neither did he swear an affidavit. Counsel argued that in so doing, the learned trial Judge relied on extraneous imported evidence to annul the election, since a look at all the affidavits before court reveals that none belonged to Ategeka Wilson.

Counsel further pointed out that the learned trial Judge drew a table for results of a station called Kitega Primary School A-K in which, she observed, the respondent had obtained 100 votes yet the Declaration of Results Forms reflected no such votes. It was his contention that the conclusions the learned trial Judge made were based on false figures and this was prejudicial to the appellant.

Counsel for the appellant contended that the learned trial Judge wrongly found that there was no evidence that tallying had been done since there was no tally sheet. He referred to the evidence of PW1, the respondent, wherein he admitted that he got a copy of the tally sheet. He also cited the evidence of one, Tumwesigye Tumbu who stated that he was the official agent of the respondent and also alleged that the information on the DRForms was different from that on the tally sheet. Counsel wondered how that comparisons could be made in the absence of the tally sheet.

Counsel also cited the affidavit of one, Semei Herbert, and noted that during his cross- examination, it was not put to him that the attached tally sheet was a forgery or that it did not exist. Finally, counsel observed that the tally sheet was one of the agreed documents and that since the respondent sought to be declared the winner, that declaration could only be made on the basis of tallied results.

Counsel observed that the learned trial Judge found that there was non- compliance with electoral laws and the principles therein at only two out of ninety one polling stations yet he did not mention

them. She noted however, that from a reading the Judgment, it could be deduced that the two were Kitega and Kagoma. He observed further that the learned Judge held that four people had been denied a right to vote, viz; Kushemerwa Paul, Byamukama Byatiza, Kagoro Petero and Muhindo Kiiza but, that this finding was not proved because three of them presented National IDs as evidence of being registered voters. To him, mere holding of a National ID did not entitle one to vote.

He pointed out that the simplest way to prove that one was a registered voter who was denied a right to vote was by producing the voters' register and showing that one's name was not ticked and that such a burden lay with the petitioner. Alternatively, counsel argued, the complaining voter could present his/her voter slip and that in this case, those that produced voter slips, had been able to vote.

Counsel referred to the evidence of Fosca Masaba Nyamaizi on whose evidence the learned Judge heavily relied because according to the Judge, the witness struck her as credible. Counsel pointed out that this was the same witness who stated that she had taken video recordings of what took place and promised to adduce the same in evidence but she did not. The same witness, counsel submitted, had averred that Father Bernard Bitekyerezo was a registered voter at Kitega L-Z and yet in the evidence of Ndabazi Charles, who was the petitioner's polling agent, he averred that Fr. Bernard Bitekyerezo who was supposed to vote from Kitega A-K

voted from his polling station. Counsel submitted further that Nyamaizi had stated that polling officials did not vote from Kagoma owing to their responsibilities. She also alleged that Robina was the Presiding Officer of Kategere polling station yet the DRF for Kategere indicated the Presiding Officer as Mutelemwa Bright. Counsel contended that court should not have believed such an obvious liar and that relying on her as a star witness was a grave error on behalf of the learned trial Judge.

It was his submission that the learned trial Judge did not evaluate the evidence properly.

On the finding that there was ballot stuffing at Kagoma and Kitega polling stations, counsel referred to the DRForm for Kitega Primary School that was signed by one, Kaliyaliti, the polling agent of the respondent. Counsel pointed out that the said polling agent signed the DRForm without any reservations or complaints, and that nothing adverse was recorded in that DRForm. He also referred to the DRF signed by one, Tusingwire Kennedy, the respondent's agent. Counsel pointed out that these were copies of DRForms from the respondent himself who should not be heard to be complaining.

He cited **Election Petition Appeal No. 11 of 2002 Ngoma Ngime vs. The Electoral Commission and Winnie Byanyima** where Court found that in six polling stations all the agents had signed the DR Forms without any complaints. Court held that where the agents of a principal have signed the DRForms without reservation

or questioning, the principal cannot turn around and start questioning them.

Counsel thus contended that his agents having signed the DRForms in issue without complaining, the respondent could not start questioning them.

Counsel submitted that Section 60 (3) of the PEA is instructive and Rule 4 (8) of the Parliamentary Elections (Election Petitions) Rules, 1996, requires that the Petition is accompanied by an affidavit. He referred to Section 3 (3) of the Interpretation Act and contended that mention of affidavit implied affidavits. He thus submitted that in a situation where the time for filing an Election Petition is thirty days, this goes for all the accompanying affidavits as well.

It was thus counsel's contention that when the learned trial Judge allowed the respondent to keep on filing affidavits even after the appellant had already made his Answer, it was prejudicial hence the objection to the affidavits that were filed after thirty days. He contended that the judge in overruling that objection erred.

Further, counsel submitted that there was no Application for extension of time and that even if there had been one, been, time which is fixed by legislation cannot be extended by the court. He referred to **Makula International Ltd v His Eminence Cardinal Emmanuel Nsubuga & Anor [1982] HCB 11**, in that regard.

The learned trial Judge held that the declaration of results to the petitioner without revealing when and where the tallying was

completed was a violation of **Article 68 (3)** of the Constitution. It was counsel's contention that the learned trial Judge mixed up matters since polling stations and the tallying of results were not related. To him, it was immaterial where the results tally sheet was handed to the respondent because, at the very least, he admitted that he received it at Kampala and the Returning Officer explained the circumstances that led her to handing over the tally sheet there.

Counsel contended that it was wrong for the learned trial Judge to reject the sur rejoinders and Affidavits in Support thereof in the evaluation of the evidence, before her. He argued that a trial court has the primary duty to fully and consciously consider the totality of the evidence adduced by all the parties before it in whatever way, ascribe the probative value to it and put it on an imaginary scale of justice to determine the party in whose favor the balance tilts. He cited **Court of Appeal Civil Appeal No. 26 of 2009 Brian Kaggwa v Peter Muramira** in which the Nigerian case of **Osuana v the State (210) LPELR/ CA/OW/ 150/ 2009** was cited.

Counsel noted that out of about one hundred and twenty one affidavits, only thirty one were produced for cross-examination yet the learned trial Judge heavily relied on the evidence in all of them without distinction. He argued that where a witness is demanded for cross- examination and he is not brought, the evidence should be expunged, or at best be treated separately because it is of the weakest kind. In this case, the learned trial Judge gave equal

treatment and weight to the evidence in the affidavits of deponents who were cross examined and those who were not.

Finally counsel submitted that the trial judge did not evaluate the evidence on record. That when one looks at all the affidavits that were on record, one discovers that she just picked a few isolated of them, said something about those and ignored the rest. And, most importantly, some of the glaring inconsistencies and contradictions in the evidence were not even looked at.

Submissions of the cross-appellant

Counsel submitted on issue 1 that Rule 4 (8) of the Parliamentary Elections (Interim Provisions) Rules provides that the Petition shall be accompanied by an affidavit setting out facts on which the Petition is based together with the list of any documents for which the petitioner intends to rely. So that's the affidavit accompanying the Petition which is referred to in Section 60 of the PEA. Further, that Rule 15 provides that evidence at the trial in favor and against the Petition shall be by way of affidavits read in open court, which essentially means that all one has to file during that restricted time is the Petition and the accompanying Affidavit and the rest are taken as evidence and, they come in at any time.

Counsel submitted on the issue of the evaluation of the evidence that the trial Judge put the issue of non-compliance as a standard and yet the qualitative and quantitative tests should be used to see

whether the non-compliance, that must have already been proved, meets the quantitative test. That the learned trial Judge found non-compliance at only two out of the ninety one polling stations and held that the nature of irregularities was so grave that it called for a qualitative test but she never not applied it. The trial Judge mentioned the denial of the right to vote but of all the concerned witnesses, it is only Kushemererwa Paul that appeared for cross examination and yet the appellant sought leave to cross examine all of them. Further, that since those witnesses were not produced for cross examination, there was no way to test the credibility of their evidence. The Judge also made reference to a witness named Muhimbo Kiiza who was actually not part of the witnesses produced before court.

Counsel contended the petitioner did not discharge the burden of proof and the trial judge found so except for only two and yet even those two, there was evidence of a non-existent witness which the Judge heavily relied upon. Counsel prayed that the petitioner, who is the respondent now, failed to discharge the burden of proof. The Judge relied on the evidence of Masaba Nyamaizi in regard to the second polling station and yet the witness had major contradictions in her evidence.

The trial Judge relied on **Article 68(3)** of the Constitution specifically about the rights of a candidate at a polling station however, tallying doesn't take place at polling stations, it is done at the Returning Officer's office or a Council Hall and the candidate or

his representative would be entitled to be present. The Judge was relating the Article to polling stations, after the casting of votes, the opening of the ballot boxes and the ascertainment of the results which was a misdirection.

Counsel submitted that the Presiding Officer gave evidence before the trial court that the tallying took place and the agents and the general public had access to the tally center but that immediately after the exercise, there was technological break down of the machines. The computers could not print the results although all of them had been entered and captured therein. That declaration of results is a physical exercise as one has to print out the tally sheet and the Returning Officer signs and stamps it. That's the declaration which is also called a transmission of results form. The respondent did not prove that there was any change of results from what transpired at the various polling stations and from what was in the tally sheet.

Submissions of the respondent

In reply, counsel for the respondent submitted that the witness called Ategeka Wilson was about closure of the tally center before completion of tallying. That it is true that Ategeka Wilson was actually not one of the witnesses in this matter but the trial judge had other evidence which she used concerning the closure of the tally center before completion of voting. Jonathan Ngabirano was the official representative of the respondent at the tally center and

in his affidavit, he describes in details what happened during the tallying process, how the tally center opened in the morning of the 19th February 2016 and how, at 3pm, the Returning Officer, closed the center before completion of the tallying process and told those who were present to return on the following day at 8am but that when they came back, the center was closed.

Counsel submitted on the issue of the table of results used by the learned trial Judge for Kitega A-K polling station. That that table was derived from the DRForms which clearly demonstrates the issue of ballot stuffing because it revealed 515 ballot papers whereas at that polling station, only 401 ballot papers had been issued. To counsel, there was an excess of about 150 ballot papers which could not be accounted for.

On the issue of tally sheets, counsel submitted that it was agreed by the parties that the 1st and the 2nd respondents would produce them. That this issue was raised during the cross examination of the 1st cross appellant but she never produced the tally sheet. The tally sheet which is attached to Herbert Semeyi's affidavit was found doubtful by the trial Judge because, Semeyi was not an official source of such a tally sheet.

On substantial effect, counsel submitted that even though there were two polling stations out of ninety one, the vote difference was only 718 votes which could have made a difference in the results. Consequently, the learned trial Judge found that the election was

marred by a pattern of fundamental irregularities that altered and affected the results in a substantial manner.

On ballot staffing at Kagoma polling station, the appellant argued that the polling agent of the respondent actually signed the DRForms for that polling station but it should be noted that there were actually two DRForms for Kagoma polling station. One was from the Electoral Commission and the other was received by the candidate from his agent at that polling station. That at the close of the polling, DRForms were given to polling agents which had an excess of 200 voters, and after words at the declaration of results in Kampala, they gave another set of DRForms.

Section 18(1) of the PEA requires that results must be tallied and declared at a gazetted center. In this case the gazetted center was Kyenjojo district headquarters but the Returning Officer preferred to go to Kampala and do it from there.

Submitting on ground 8 regarding the burden of proof, counsel argued that the learned trial Judge was very cautious in her judgment of where it lies when she clearly stated that the burden is on the petitioner and on the balance of probabilities. Therefore, it is not true that she disregarded the burden of proof in this matter. That the trial Judge found that the manner in which the Returning Officer conducted the tallying process was not transparent, there was no evidence to support it and that this was a fundamental irregularity which affected the election. In this regard, counsel cited **Election Petition Appeal No.26 of 2006, Nangiro John vs.**

Loroti, where the Court of Appeal by a unanimous decision, held that failure to complete the tallying process vitiates the entire election results.

Further, on the issue of non-compliance with the law, counsel contended that there was illegal transfer of voting materials, specifically ballot papers. That even though it was contended by the Presiding Officers that the supply of ballot papers at some polling stations was low and as such they got some from other polling stations that had them in excess, the Returning Officer denied knowledge of their actions.

There were also many illegal practices like abduction of people, media people were beaten and NTV journalists and their vehicle covering the national election were destroyed among other acts.

On the Cross-Appeal, counsel argued that the trial Judge found ballot staffing and voters in excess of the registered number. However, when one puts into consideration those polling stations and discount them, the respondent emerges the winner. The trial Judge considered only three polling stations; Kagoma primary school, Kitega A-K and Kitega L-Z although there were others in the Petition. But going by these three where court pronounced itself, the voters who voted exceeded those on the register. That the learned trial Judge should have exercised her powers under Section 63(4) of the PEA to declare the respondent as the winner. Counsel prayed that the Cross-Appeal succeeds and that court declares the

respondent the winner. In the alternative, that the judgment of the court below be upheld.

Resolution of the Issues

This being, *inter alia,* a first appellate Court, we are alive to its duty as such. The cases of **Kifamunte Henry v Uganda Supreme Court Criminal Appeal No. 10 of 1997, Pandya v. R [1957] EA 336,** and **Bogere Moses and Another v. Uganda, Supreme Court Criminal Appeal No. 1 of** held that a first appellate court has a duty to review/reappraise the evidence and consider all the materials which were before the trial Court and come to its own conclusion regarding the facts, taking into account, however, the fact that it neither saw nor heard the witnesses testify and that in this regard, it should be guided by the observations of the trial court on matters of the demeanour of witnesses.

The duty of Court is set out in ***Rule 30*** of the ***Judicature (Court of Appeal Rules) Directions.*** Which provides:

"30. Power to reappraise evidence and to take additional evidence

(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—

(a) Reappraise the evidence and draw inferences of fact; and

(b) In its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner."

The appellate court must make up its mind after carefully weighing and considering the evidence that was adduced at trial. **Mugema Peter Vs Mudiabole Abedi Nasser Election Petition Appeal No.30/2011**

The burden of proof lies on the Petitioner **(Presidential Petition No. 1/2001 Dr. Kiiza Besigye V. Y. K. Museveni & Anor, Section 61 of the Parliamentary Elections Act)** and the standard of proof in Election Petitions is slightly above the balance of Probabilities in ordinary suits. **(Election petition No. 9 of 2002 Matsiko Winfred Kyomuhangi V. J. Babihuga.)**

Bearing the above in mind, we proceed to consider the grounds herein in the same order the parties have argued them.

Ground 7

Evidence of Ategeka Wilson

Counsel for the appellant argued ground 7 first submitting that the learned trial Judge used conjecture and unjustified inferences rather than evidence on record to determine the Petition. This was particularly in regard to the evidence of Ategeka Wilson who, according to the trial Judge, testified as PW20, yet there was no such a person and neither did he swear an affidavit. Counsel for

respondent admitted that it was true that Ategeka Wilson was actually not one of the witnesses in this matter. He contended however, that the trial judge had other evidence which she used concerning the closure of the tally center before the completion of voting.

This, in our view, was a grave error on the part of the learned trial Judge. The Judge relied on the evidence of Ategeka Wilson who was a non-existent witness in the Petition. This connotes of an attempt by the Judge to descend into the arena in support of one candidate against the other contrary to the rules of Natural justice as enshrined in **Article 28** of the Constitution which is underogable under **Article 44(c).** A court of law must at all times, throughout, the hearing of a matter before it remain impartial otherwise its observance of the letter and the spirit of **Article 28** of the Constitution is thrown into serious doubt. This is, in our view, an a fetal defect and as such, ground 7 of this Appeal succeeds.

No tally sheet

Under issue three, the appellant faults the trial Judge for finding that there was no evidence that tallying had been done since there was no tally sheet. He relied on the evidence of Tumwesigye Tumbu who stated that he was an official agent of the respondent at the tally centre and alleged that the information on the DRForms was different from that on the tally sheet.

First we note that the evidence of Tumwesigye Tumbu was struck off the record by the trial Judge. Second, one is left wondering how a comparison of the evidence of the DRForms and the tally sheet would be made in the absence, as claimed by the respondent, of a tally sheet. Third, according to the evidence on record, the tally sheet is one of the admitted documents. Fourth, at one point in his evidence, the respondent admitted to have had a copy of the tally sheet which he acknowledges was provided to him by the Returning Officer. Fifth, one of the respondent's prayers to the trial court is for him to be declared the winner of the election. Unless the respondent, again admits the existence of a tally sheet, on what basis is he making that prayer? We, in view of all this, accept the submission for counsel for the appellant and the evidence of the Returning Officer given in clarification of the circumstances surround the transmission and declaration of the results of this election. That the tallying had actually been done to completion at all the polling stations but the challenge that cropped up at the two impugned ones, was due to a breakdown in the system which interrupted the process at the stage of printing out and transmitting the results.

We also accept the evidence of the Returning Officer that the candidate's agents and the general public had access to the tallying Centre where the tallying was done. It being a requirement of the law that the Presidential Election results had to be declared within 48 hours of the closure of voting, and considering that the Presidential elections were held on the same day as the

Parliamentary ones, we are satisfied that the exigencies of the moment compelled the Returning Officer to adopt the course of declaring the results of the Elections she took.

The learned trial Judge, while addressing the issue of tallying, made reference on several occasions to the evidence of Ategeka Wilson, who, as shown above was a non-existent witness. She states that "*although the fact that the 2nd respondent declared the results of candidates means tallying was infact done, the sequence of events as narrated by Ngabirano Jonathan, Ategeka Wilson and the petitioner lead to the inference that the tallying was not done publicly in a transparent manner.*"

The trial Judge also refers to Section 54 of the PEA as prescribing the tallying process. Section 54 of the PEA does not provide for the tallying process. It is Section 53 that provides for tallying in the presence of candidates or their agents. The Returning Officer testified that tallying was done in the presence of the agents of the two candidates and after it was complete, but before the results were transmitted to Kampala, the system broke down and failed to even print them out.

The Judge noted that the tally sheet exhibited through Semei Herbert was neither certified by the Returning Officer nor commissioned. It is on record as shown hereinabove that the 1st respondent himself admitted having been provided with a tally sheet though in Kampala and not in Kyenjonjo that tally sheet was, no doubt, at the centre of the 1st respondent's prayer that he be

declared by Court, the winner of the parliamentary elections in issue. We are not impressed with the 1st respondent's treatment of the tally sheet the way he did. Consequently, this ground also succeeds.

Violation of Article 68(3) of the Constitution

Ground 3 faults the learned trial Judge for holding that **Article 68 (3)** of the Constitution had been violated. The appellant argued that **Article 68(3)** of the Constitution specifically is about the rights of a candidate at a polling station however, tallying doesn't take place at a polling station, it takes place at the Returning Officer's office or at council hall and the candidate or his or her agent would be entitled to be present.

Article 68 (3) provides that;

"Voting at elections and referenda.

(3) A candidate is entitled to be present in person or through his or her representatives or polling agents at the polling station throughout the period of voting, counting of the votes and ascertaining of the results of the poll."

On a close look at this Article, it is clear to us that a candidate or his/her agent has a right to be present at a Polling Station to witness events that take place there. Being that a candidate cannot be present at all polling stations in a constituency it the same time, it provides for polling agents to be present throughout voting,

counting of votes and ascertaining the results in representative capacity. We accept the submissions of counsel for the respondent that this Article is specifically on events at polling stations and not tally centers and as such, there was no violation of **Article 68 (3)** of the Constitution.

The law applicable to tallying of results in Section 53 of the PEA which provides for tallying of results by the Returning Officer. It provides that;

"53 Tallying of results by the returning officer.

(1)After all the envelopes containing the declaration of results forms have been received the returning officer shall, ***in the presence of the candidates or their agents or such of them as wish to be present,*** *open the envelops and add up the number of votes cast for each candidate as recorded on each form."*

This sub-section does not make it mandatory for tallying to be done in the presence of candidates or their agents. Our understanding of the phrase *'or such of them as wish to be present'* is to the effect that it is in the discretion of the candidate and/or his/her agent to be or not to be present at the tallying centre. The circumstances in the instant case however are quite different as there was a technical breakdown of the tally system and the Returning Officer had to resort to emergency measures in a desperate situation. Therefore, ground 3 also succeeds.

Affidavits in support of the Petition

The appellant argues that the trial Judge erred when she held that the affidavits filed in Support of the Petition after the time within which to file an Election Petition had expired were properly filed and she took them into account to annul the election. It is argued for the respondent and Cross-Appellant that Rule 4 (8) of the Parliamentary Elections (Interim Provisions) Rules provides that "*the petition shall be accompanied by an affidavit setting out facts on which the petition is based together with the list of any documents for which the petitioner intends to rely.*" That's the affidavit accompanying the Petition which is referred to in Section 60 of the PEA. Further, that Rule 15 provides that evidence at the trial in favor and against the Petition shall be by way of affidavits read in open court which essentially means that all one has to file during that restricted time is the Petition and the Affidavit Accompanying it and the rest are taken as witnesses, and they may come in at any time. Having evaluated the evidence on this aspect of the Appeal and after a careful analysis of the submissions of counsel for both parties, we find that it is sufficient compliance with the law for the Petitioner to fill, within the thirty days provided for in the PEA, his/her petition together with an accompanying Affidavit or Affidavits and then file other evidential affidavits thereafter.

The law does not say all affidavits intended to be relied on by the petitioner have to be filed within the restricted time. We agree with

the learned trial Judge that the affidavits were properly filed and as such, this ground fails.

Burden of proof

The appellant argued that the trial Judge shifted the burden of proof to the petitioner with regard to the allegations that some people had been denied that right to vote. She held that four people had been denied that right to wit; Kushemerwa Paul, Byamukama Byatiza, Kagoro Petero and Muhindo Kiiza. He contended that this finding was also not proved because three of them presented National IDs as evidence of being registered voters. He pointed out that the simplest way to prove that one was a registered voter who was denied a right to vote was by one producing the voters' register and showing that name was not ticked and that such a burden lies with the petitioner.

We have already sated above that the burden of proof lies on the Petitioner. See **Dr. Kiiza Besigye V. Y. K. Museveni & Another** (supra) and Section 61 of the PEA. This, in essence, means he who alleges must prove. The respondent alleged that the above four named persons had been denied the right to vote. He relied on their National Identity Cards to prove this. Possession of a National ID does not, in our view, prove that the holder is an eligible registered voter and that he/she, did or did not vote. Clearly, the petitioner, now respondent, had to produce some tangible evidence to show that the said persons were present ready to vote but were denied

the right to do so. He failed to do that. Ground 9 therefore succeeds.

Non-compliance

The appellant argued that the learned trial Judge erred in law and in fact when she held that there was non-compliance with the electoral laws which affected the results in a substantial manner. The trial Judge held that there was non-compliance at only two, out of ninety one polling stations and these were Kitega and Kagoma.

On the question of ballot stuffing at Kagoma and Kitega, counsel cited the DRForms for Kitega Primary School that was signed by one Kaliyaliti, the polling agent of the respondent. Counsel pointed out that Kaliyaliti had signed the DRForm without any reservations or complaints yet the DRForm provided space for objections and nothing was recorded therein to this effect. He also referred to the DRForm signed by one Tusingwire Kennedy, the respondent's agent and stated that these were copies from the respondent himself yet he was complaining.

We note that the learned trial Judge found non-compliance at only two out of ninety one polling stations but held that the nature of the irregularities she found was so grave that it called for a qualitative and quantitative tests but she did not apply those test. She instead focused on the standard of irregularities at those two polling stations to determine the substantiality of the effect of those

irregularities to the results. Section 61 of the Parliamentary Elections Act provides for instances where the election of a Member of Parliament may be set aside. Section 61(a) provides that;

> **"non-compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the non-compliance and failure affected the results of the election in a substantial manner."**

In **Amama Mbabazi vs Yoweri Kaguta Museveni and 2 others Election Petition No. 1 of 2016, the Supreme Court held that**

> **"Where the petitioner alleges non-conformity with the electoral law, he must not only prove that there was non-compliance with the law but also that such failure to comply did affect the results of the election in a significant/substantial manner".**

The Supreme Court in **Presidential Election Petition No. 1 of 2001: Col. (Rtd) Dr. Kizza Besigye Vs Museveni Yoweri Kaguta and the Electoral Commission**, the Learned Chief Justice Odoki, cited with approval the case of **Borough of Hackney Gill Vs Reed [1874] XXXI L.J. 69,** where Grove, J emphasized that an election should not be annulled for minor errors or trivialities thus:

"An election is not to be upset for informality or for a triviality. It is not to be upset because the clock at one of the polling booths was five minutes too late or because some of the voting papers were not delivered in a proper way. The objection must be something substantial, something calculated to affect the result of the election. ..... so far as it appears to me the rational and fair meaning of the section appears to be to prevent an election from becoming void by trifling objections on the ground of informality, but the Judge is to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect."

Non-compliance, as found by the trial Judge, in two out of ninety one polling stations should not, in our view, justify a nullification of an election. Nullifying such an election would disenfranchise the people in the remaining 89 polling stations. That is not mentoring the tension among the population that is normally experienced during campaign and election time. The financial pressure exerted on the national and the personal economies, especially of the candidates is a matter not to ne lost sight of. Further, in the two polling stations in which the trial Judge found some irregularities, she erroneously relied on the evidence of a non-existent witness.

This, in our view, was a grave error on the part of the Judge. In these circumstances, we are unable to hold that the of the irregularities found by the learned trial Judge on the results of these election was either put to the correct test or proved to the satisfaction of court. We therefore find that said the non-compliance did not affect the results of the election in a substantial manner.

Cross-Appeal

We reiterate our earlier finding that the non-compliance found by the learned trial Judge herein did not affect the results of the election in a substantial manner. Further, the number of votes that exceeded the registered voters was small and this Court cannot ascertain in whose favour the excess votes were. At Kitega Primary School A-K, 401 ballots had been issued and yet the total number of ballots cast for each candidate plus the unused ballots amounted to 515 votes. The cross-appellant testified that there was illegal movement of ballots from one polling station to another. The evidence of the Returning Officer showed that some polling stations got less ballots than those requested for and as such, there was need to get ballot papers from polling stations that had them in excess to those which had a shortage. This was an irregularity on the part of the Electoral Commission which should not be visited on the appellant. Consequently, the Cross-Appeal fails and is accordingly dismissed.

Costs

The appellant contends that although the learned trial Judge is conferred with discretion to award costs, such discretion must be exercised judiciously taking into account the relevant circumstances of each case. The law on costs is settled that they follow the event and a successful party is entitled to them. Under normal circumstances, the appellate court will not interfere with the exercise of discretion unless it is shown that wrong principals were followed.

Rule 27 of the **Parliamentary Elections (Interim Provisions) Rules** provides that;

"all costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the court may determine."

The Supreme Court in **Civil Application 5 of 2001 in Paul Semwogerere and anor v Attorney General** held that even where there is an error in principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause an injustice to one of the parties.

Election litigation is a matter of great national importance in which courts should carefully consider the question of awarding of costs so as not to unjustifiably deter aggrieved parties from seeking court redress. We cite with approval the decision of ***Bamwine PJ*** in **Kadama Mwogezaddembe v Gagawala Wambuzi High Court Election Petition No.2 of 2001** where the learned Principal Judge held:

"There is another dimension to such petitions; the quest for better conduct of elections in future.....Keeping quiet over weaknesses in the electoral process for fear of heavy penalties by way of costs in the event of losing the petition.. would serve to undermine the very foundation and spirit of good governance."

As noted above, the non-compliance in this matter was largely caused by the Electoral Commission. We have considered all the circumstances surrounding this appeal notably the winning margin of 718 votes in a constituency where there was a total of 91 polling stations. We are persuaded that none of the candidates should be condemned to pay costs.

In the final result we find and hold that the Appeal succeeds and the Cross Appeal fails. The decision and orders of the lower Court are set aside. We confirm the appellant as the duly elected member of Parliament for Mwenge County North Constituency in Kyenjojo District.

Each party to pay their own costs.

We so order.

Dated at Kampala this 23rd day of July 2017

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Alfonse Owiny Dollo,
DEPUTY CHIEF JUSTICE

.....

S. B. K. Kavuma,
JUSTICE OF APPEAL

.....

Geoffrey Kiryabwire,
JUSTICE OF APPEAL