THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NOs 0057 AND 0054 OF 2016

ARISING FROM ELECTION PETITION NO 0005 OF 2016

1. HELLEN ADOA

2. ELECTORAL COMMISSION } ::APPELLANTS

VS.

ALICE ALASO::RESPONDENT

CORAM: HON. MR. JUSTICE S.B. K KAVUMA, DCJ

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA

JUDGMENT

Introduction

This is a consolidated Election Petition Appeal arising out of the Judgment of Hon Justice Mr. David K Wangutusi, delivered on the 25th day of July, 2016 in which he nullified the election of the 1st appellant as Woman Member of Parliament (MP), Serere District, directed the 2nd appellant to arrange for and

conduct fresh elections for the said seat, ordered the appellants to pay costs in equal amounts and granted a certificate for two counsel to the Petitioner.

The facts giving rise to this appeal are that on the 18th day of February, 2016, elections for Serere District Woman Member of Parliament were held. The 2nd respondent (now 1st appellant), the Petitioner (now respondent) and Ms Agnes Asege contested for the said position. The 1st appellant emerged as the winner, the respondent came second while Ms Agnes Asege came third. The margin between the 1st appellant and the respondent was 16,111 votes. The 1st appellant was declared the winner by the 1st respondent (now 2nd appellant). Later she was gazetted and sworn in as Woman MP, Serere District.

The respondent filed Election Petition No 0005 of 2016 in the High Court of Uganda at Soroti challenging the manner in which the 2nd appellant conducted the election and alleged that the 1st appellant during the elections committed election offences either personally or through her agents with her knowledge and approval which affected the results in a substantial manner.

The appellants denied any wrong doing on their part and maintained that the elections were conducted in a peaceful, free and fair manner in accordance with the principle of transparency established by the electoral laws and that the final results of the elections reflected the true will of the majority voters, and, that the 1st appellant complied with the electoral laws.

Judgment was given in favor of the petitioner. The appellants were dissatisfied with the decision and separately appealed to this court. The 1st appellant filed

Election Petition Appeal No 54 of 2016 while the 2nd appellant filed Election Petition Appeal No. 57 of 2016. The two appeals were consolidated with the consent of the parties since they arose out of the same election and the grounds of appeal were similar.

The grounds of appeal as agreed after the consolidation of the two appeals are as follows;

1. *That the learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that there were excess unused ballot papers.*

2. *The learned trial Judge erred in law and in fact when he found that thousands of unexplained ballot papers at polling station affected the result in a substantial manner after making a finding that there was no evidence of altering results.*

3. *The learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that the military was involved in the harassment and arrest of supporters of the petitioner.*

4. *The learned trial Judge failed to properly evaluate the evidence on record and erred in law and came to the wrong conclusion that the evidence of Cephas Muhwana remained unchallenged.*

5. *The learned trial Judge failed to properly evaluate the evidence and came to the wrong conclusion that there was bribery by the appellant Hellen Adoa.*

6. *The learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that an ambulance was donated and or delivered by Hellen Adoa on 2nd February 2016.*

7. *The learned trial Judge failed to properly evaluate the evidence on record erred in law and came to the wrong conclusion that the ceremony conducted on 2nd Feb 2016, close to Election Day was illegal and in breach of Section 61 (1)(c) of the Parliamentary Elections Act.*

8. *The learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that the ambulance, a government vehicle, was used in Hellen Adoa's campaign with her full knowledge and approval.*

9. *The learned trial Judge failed to properly evaluate the evidence on record and erred in law and came to the wrong conclusion that the LC5 chairperson was on Hellen Adoa's campaign team.*

10. *The learned trial Judge failed to properly evaluate the evidence on record erred in law and came to the wrong conclusion that hundreds of people must have read and jubilated to the words on the ambulance*

11. *The learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that the Etop newspaper circulates in the whole of Teso and had pictures of the ambulance splashed, in it and must have been read by many voters.*

12. *The learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that the election for woman MP Serere District was conducted in non-compliance with the law and that Hellen Adoa committed electoral offenses.*

13. *The learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that Hellen Adoa was not validly elected as woman MP for Serere District.*

At the hearing of the appeal, the 1st appellant was represented by learned counsel Kiryowa Kiwanuka and Elton Mugabi (counsel for the 1st appellant),

the 2nd appellant represented by Latigo Richard (counsel for the 2nd appellant) while the respondent was represented by Emmanuel Twarebireho and Wandera Dan Ogalo (counsel for the respondent).

Mr Kiryowa proposed to argue grounds 1, 2, 3, 4, 5, 6 and 7 separately, grounds 8 and 9 together, grounds 10 and 11 separately and grounds 12 and 13 together, in the that order. He followed the record of appeal in Election Petition Appeal No 54 of 2016 when making his submissions.

On ground 1 of the appeal, counsel submitted that the trial Judge's finding was erroneous because a Declaration of Result (DR) Form is not an electoral document which can assist the court in finding the number of ballot papers delivered to a polling station. He argued that for any court to determine the number of ballot papers that had been issued to a polling station, it had to look at the packing list. He relied on Section 27(b) of the Parliamentary Elections Act and the decision in ***Kizza Besigye vs. Yoweri Kaguta Museveni, Presidential Election Petition No.1 of 2001*** to support his submission.

Secondly, counsel submitted that there was no evidence called to prove that there were excess ballot papers in the hands of polling assistants. No single witness testified to that effect. He therefore, submitted that the trial Judge's finding was speculation based on conjecture.

Counsel further submitted that the issue of unused ballot papers was never pleaded by the respondent nor was there an amendment to the pleadings. He stated that it came up during the cross examination of the Returning Officer

(RW8). He submitted that the appellants were not given a chance to call evidence to explain the alleged discrepancy in the DR Form. He contended that had it been pleaded by the Petitioner in the lower court, the 2nd respondent (the 1st appellant) would have brought the accountability documents because the packing lists were available to show the number of ballot papers that were delivered. He relied on ***Interfreight Forwarders (U) Ltd v East African Development Bank (C.A No.33 of 1992)*** to support his submission.

Counsel also faulted the lower court's finding that the Returning Officer didn't know where the ballot papers came from given that the officer clearly explained the source of the ballot papers brought to the polling station.

Counsel submitted that for election purposes, what the court should be concerned with are the results; specifically of valid votes cast for each candidate in accordance with S. 47 (5) of the Parliamentary Elections Act.

Counsel argued that after court found that there was no evidence of tampering with results, it was wrong for it to set aside the election since the DR Forms were signed by the candidates' agents confirming the results at the different polling stations. He relied on ***Mbagadi Nkayi and Anor v Dr Nabwiso Frank Election Petition Appeals No.14 and 16 of 2011 and Iriama Rose v Anyakun Esther & Anor Election Petition No.004 of 2016*** to support his submissions

Counsel urged this court to take judicial notice of the fact that the people who work during the election period are ordinary people, who are not full time

employees of the Electoral Commission. He noted that given that they are not as sophisticated as one would desire, mistakes are bound to happen owing to the conditions under which they operate.

Counsel faulted the court for sampling 5 out of 290 polling stations to nullify the elections and submitted that even if the results from these polling stations were deducted, they would not affect the margin by which the 1st appellant won.He argued that for court to make a finding on substantial effect, it should have analyzed each declaration of results form to make a finding of fact.

Counsel submitted that there is no anomaly in having unused ballot papers and that it is excess that is an anomaly because many of the voters may not show up, so that the unused ballot papers would remain with the polling assistant.

On ground 3 of the appeal, counsel submitted that the trial Judge was wrong to find that there was military harassment and intimidation and that many supporters of the respondent were arrested based on one arrest of Sam Olira. Counsel contended that Sam Olira's arrest was lawful under **Article 208 (2)** of the Constitution because he was a member of the UPDF participating in partisan politics.

On ground 4 of the appeal, counsel submitted that evidence of a witness cannot remain unchallenged simply because he was not cross examined. He submitted that the evidence of Cephas Muhwana was rebutted at page 647 vol. 2 of the Record of Proceedings by the appellant herself. He further argued that

failure to cross examine a witness does not amount to acceptance of the said witness' evidence. He relied on the authority of ***Uganda Breweries vs. Uganda Railways Corporation SCCA No. 6 of 2001*** to support his submission.

Counsel submitted that the evidence of Cephas Muhwana when properly evaluated is of no evidential value and therefore, there was no need to cross examine him. He cited examples from Cepha's affidavit like not giving particulars of one Hassan and neither giving the particulars of the people who bribed and those who were bribed. He contended that Cepha's evidence was of an accomplice yet it was not corroborated. He relied on ***Kizza Besigye*** (supra) and ***Tolit Simon Oketcha v Oulanya Jacob L'Okiri & Anor Election Petition No.001 of 2011*** to support his submission.

On ground 5 of the appeal, counsel for the appellant faulted the trial Judge for finding that there was evidence of bribery based on the the unchallenged affidavit of Cephas Muhwana. Counsel reiterated his submissions in ground 4 of the Appeal and prayed that this court finds that the respondent failed to discharge the evidential burden upon her. He relied on ***Bakaluba Mukasa Vs Nambooze Election Appeal No.182 of 2007*** to support his submissions. He submitted that the case of ***Bakaluba Mukasa*** (supra) is distinguishable from the instant case in respect of group bribing. Counsel contended that there was no evidence that Cephas Muhwana was an agent of the 1st appellant.

On ground 6 of the appeal, counsel submitted that the learned trial Judge failed to properly evaluate the evidence on record and came to the wrong

conclusion that the ambulance in issue was delivered by the appellant on 2nd February. He conceded that the 1st appellant donated the ambulance but argued that the campaign period was between 7th December 2015 and 16th February 2016 and that the 1st appellant was nominated on 3rd December 2015.He however, contended that the 1st appellant made an offer to donate an ambulance to the District on 3rdApril, 2015, the vehicle was consigned to Uganda on July 8th 2015. The Permanent Secretary of the Ministry of Health requested for tax exemption for the donated ambulance on 19th November, 2015 which was before the campaign period. He submitted that the 1st appellant had no role to play in the process of clearing the vehicle, having it delivered to Serere and the handing over of the same on 2nd February, 2016. He argued that **Odo Tayebwa Vs. Basajjabalaba Court of Appeal Election Petition Appeal No.013 of 2011** which the trial Judge relied was distinguishable. Counsel therefore submitted that it cannot be said that the 1st appellant breached S.68 (7) of the PEA which legislates against donations during the campaign period.

On ground 7 of the appeal, counsel for the appellant submitted that the Court came to the wrong conclusion that the function held on 2nd February close to the Election Day was in breach of section 61 of the Parliamentary Elections Act. Counsel argued that during the function of 2nd February, there was no donation, and was not the day on which the 1st appellant donated the ambulance. He contended that that was the day on which the LC5 chairman

handed over the ambulance in issue to Serere Health Center 4 and that, the appellant had nothing to do with that.

Regarding grounds 8 and 9 of the appeal, counsel submitted that there was no evidence to support the lower court's finding that the LCV chairman sent the impugned ambulance to a campaign rally. He only instructed that the ambulance should be available for service. Counsel argued that there is no law against having particulars of a donor on the donated item. He urged this court to take judicial notice of cars donated by Danish Aid and USAID among others. Counsel submitted that the trial Judge misdirected himself on the 1st appellant's evidence regarding her seeing the ambulance while campaigning. She said she saw it at one time at Onungura, not at her rally. Counsel faulted the trial Judge for overruling his objection to the tendering of photographs of the ambulance by the respondent yet the 1st appellant was not in any of the pictures and there was no evidence that the women dancing around the vehicle were at appellant's political rally. Counsel further submitted that the person who took the photos did not swear any affidavit in this matter and as such, the trial Judge erred to have relied on those photos in his judgment.

On ground 10 of the appeal, counsel for the appellant submitted that the trial Judge's finding that hundreds of people must have read and jubilated at the words on the ambulance "*ADOL DO ONI ABOL*", meaning *"time to develop"* which gave the illiterate hope that there would be development if they elected the 2nd respondent (1st appellant) was conjecture and speculation. He argued that no

witness (the respondent inclusive) testified to jubilating upon reading the words on the ambulance and as such, he prayed that this Court rejects the trial Judge's finding.

Regarding ground 11 of the appeal, counsel submitted that the trial Judge's finding that Etop newspaper circulates in the whole of Teso region and the edition which had pictures of the ambulance was read by many voters was not supported by any evidence.

On grounds 12 and 13 of the appeal, counsel for the appellant submitted that the respondent failed to discharge the burden and standard of proof required of her and the court erred in law and in fact in setting aside the election of the Woman MP Serere. He prayed that this Court allows the Appeal, sets aside the orders of the lower court and provides for costs.

Submissions of counsel for the 2nd appellant

Counsel for the 2nd appellant concurred with the submissions of counsel for the 1st appellant on all the grounds of the Appeal. However he made further submissions on grounds 1 and 2 of the appeal.

He submitted that the trial Judge erred when he sampled 4 out of the 190 polling stations to conclude that there were excess unused ballot papers which affected the result of the election in a substantial manner. He argued that all DR Forms were available on court record and the trial Judge was not justified to pick out only 4 of them. Counsel submitted that the trial Judge erred in

concluding that there were excess unused ballot papers yet evidence showed that the 1st respondent's agents did not raise any complaints at the close of vote counting nor did any of them come to court to testify that there were any anomalies. He submitted that it is not the law that any irregularity in filling the DR Forms as regards the figures of an election results must be fatal and inexcusable.

Submissions of counsel for the respondent

Counsel Twarebireho opted to argue the Appeal in the order of grounds 1, 2,10,11,12 and 13.

He argued grounds 1, 2, 12 and 13 together since he considered them to be touching on the same issues. He submitted that the learned trial Judge properly evaluated the evidence and came to the right conclusion in respect of all the above grounds. Counsel argued that in paragraph 10 of her affidavit in support of the Petition, the respondent clearly pleaded that the appellants committed falsehoods in the counting and the tallying of votes, that the 2nd appellant procured the signing of blank DR Forms prior to the holding of the elections. He disputed the submissions of counsel for the appellants that counsel for the respondent was giving evidence from the bar.

Counsel submitted that the trial Judge was justified in relying on the DR Forms since it is the Electoral Commission that brings the packing list which has the number of ballot papers brought to a polling station and at the end of voting, the DR forms are filled. The DR form reflects the number of ballot

papers brought to a particular polling station, the votes got by each candidate, the spoilt votes (if any), the invalid votes and the remaining (unused) ballot papers at a polling station. The total is supposed to equal the number of ballot papers that were brought to the station which was not the case in the instant Appeal.

Counsel submitted that in 80 out of the 190 polling stations, there were irregularities whereby the ballot papers brought to the said polling stations did not tally with the votes each candidate got, the invalid votes, the spoilt ones and the unused ballot papers. He submitted that as a result of these irregularities, 14457 (fourteen thousand four hundred and fifty seven) votes were questionable which is the equivalent of 42% of the votes cast. Counsel therefore argued that the only logical conclusion was, as found by the learned Judge, that there were ballot papers in the hands of the polling officials and that ballot papers were stuffed before the counting. He submitted that the above conclusion was corroborated by the evidence of Cephas Muhwana.

Counsel further argued that the signing of the DR Forms by the respondent's agents did not bind her. He relied on **Besigye VS Yoweri Kaguta Museveni & Anor the Presidential Election Petition No. 0001 of 2001** to support his submissions.

Regarding ground 2 of the appeal, counsel argued that the trial Judge's finding that there was no alteration of the results did not mean that before the counting of votes, there was no ballot stuffing or multiple voting. Counsel

argued that the trial Judge did not show that the unexplained excess ballot papers benefited a particular candidate. Counsel submitted however that what mattered was that the excess ballot papers had been used during the elections irrespective of the candidate that may have benefited from it.

Counsel submitted that the trial Judge's finding and conclusion that the excess unused ballot papers were brought or must have been with the electoral officials is self-evident because they had all the electoral materials and it was them that filled the forms.

In reply to grounds 12 and 13 of the appeal, counsel for the respondent submitted that the learned trial Judge was correct in arriving at the conclusion that the elections for the Woman MP for Serere District was conducted in noncompliance with the electoral law and that the appellant was not validly elected. He submitted that it is clear from the evidence on record that there were excess ballot papers amounting to fourteen thousand four hundred and fifty seven in 80 polling stations, that there were also one thousand three hundred and twenty seven unaccounted for ballot papers in 10 polling stations, that there was noncompliance with the electoral law when the 2nd appellant failed to attend to complaints raised by the petitioner and her colleagues.

In reply to ground 10, counsel submitted that the trial Judge's finding and the conclusion that hundreds of people must have read and jubilated at the words on the ambulance was not speculative. He argued that the catch words were

meant to attract the people and introducing the ambulance at campaign time and allowing it to go around the constituency must have caused the people to jubilate that somebody had come to save them.

In reply to ground 11 of the Appeal, counsel submitted that court was right to take judicial notice of the fact that the newspapers of Bukedde, Orumuri, Etop and Rupiny are well circulated in the areas where the relevant languages are spoken

Counsel Ogalo argued grounds 3 to 9 of the Appeal. In reply to ground 3, he submitted that the trial Judge was justified in his findings on intimidation and harassment throughout Serere District by soldiers. He submitted that there was sufficient evidence of the presence of the army throughout the district of Serere.

Counsel submitted that Major Engwau in cross examination had conceded that he arrested Sam Olira and released him without charge. He argued that Olira Sam was not a regular soldier according to Major Engwau's evidence. Sam Olira was stated to be in the auxiliary force. He had no army rank according to the evidence. Counsel contended that one arrest was sufficient to amount to an act of intimidation. He submitted that the learned trial Judge was entitled to make a finding of harassment and intimidation because Major Engwau himself admitted to traversing the district which was under his command. Counsel argued that the involvement of the army in the electoral process is no matter which we should take lightly. He relied on **Kizza Besigye v YK Museveni**

(supra) to support his submissions. He urged this Court, as the last Court in electoral matters, to send a very clear message that involving the army during elections undermines the process of free and fair elections and puts the country in danger.

On ground 4 of the appeal regarding failure to cross examine Cephas Muhwana, counsel faulted counsel for the appellants for declining to cross examine the witness when he was availed to them. He argued that the court was alive to both sides of the story in respect to bribery before it reached its decision.

Counsel further submitted that Cephas Muhwana's evidence on bribery was corroborated by the evidence of the respondent in her affidavit in support of the Petition and the appellants did not rebut their evidence.

In reply to distinction of authority No.4 on the respondent's list of authorities, counsel submitted that every case should be decided on its own merits. He argued that it is impossible to expect this stranger in Serere district to be conversant with the names of the people in Serere and their groups among other things.

On ground 5 of the appeal, counsel submitted that Cephas Muhwana should not be faulted for not knowing the name of the person he was guarding because it was not open to him as a body guard to ask his boss what his name was. Further, that it was the 1st appellant's brother giving out the money and

that it is only logical that Cephas Muhwana wouldn't know the exact amount of money which was being given out.

In reply to the issue of agency, counsel for the respondent submitted that Muhwana divulged so many facts which showed that he was an agent of the 1st appellant.

In reply to ground 6 of the appeal, regarding the 1st appellant's control over the processing of the registration of the ambulance, counsel submitted that it is impracticable for a donor not to know the exact date of their donation and as such, counsel for the 1st appellant's submission that the ambulance was donated between July and August is not tenable. He argued that the date was critical in this Appeal because it was of the essence in determining whether or not, the donation was during the campaign period. Counsel submitted that although the offer to donate the ambulance was in April, 2015, it was honored in February 2016, 16 days to the election. Counsel contended that the 1st appellant branded the ambulance in November which was evidence that she had physical possession of it in November, 2015 and she parted with it on 2nd of February, 2016 for handing over to the District.

Counsel further submitted that the 1st appellant could not distance herself from the donation of 2nd February, 2016 because the LCV Chairman, placed her at the ceremony and that the ambulance was registered in the names of the District on the 29th of January 2016. He relied on **Odo Tayebwa V Nasser Basajabalaba & Anor Court of Appeal Election Petition Appeal No.013 of**

2011 and **Fred Badda and Anor V Prof Muyanda Mutebi Supreme Court Election Petition Appeal No.21 of 2007** to support his submissions.

In reply to ground 7 of the appeal, counsel urged this court to find that the trial Judge was justified in following the rules set down by the Supreme Court in **Fred Bad** and **Oddo Tayebwa** (supra).

In reply to ground 8 of the appeal, counsel submitted that the Judge cannot be faulted for making the finding that the ambulance was used for the 1st appellant's benefit under Section 25 of the Parliamentary Elections Act because it was branded with her photographs, had her campaign catchwords and was being driven all over the District.

Counsel pointed out that the LCV chairman gave evidence to say that he used to tell people at rallies that the 1st appellant had fulfilled her pledge. He argued that she could not distance herself from the ambulance because she and the LCV chairman had joint rallies. Counsel supported the trial Judge's finding that the vehicle was used with the full knowledge of the appellant.

Counsel submitted that the respondent had proved her case as required by the law. He prayed that this court dismisses the Appeal with costs, confirm the award of costs of the trial court and prayed for a certificate of 2 counsel.

Rejoinder by counsel for the 1st appellant

In rejoinder ,Counsel for the 1st appellant submitted that the premise of counsel for the respondent's analysis was totally flawed. Counsel argued that if

the lower Court had taken time off to analyze the documents availed to it against each other, it would have found that it was clearly a mistake by the agents at the polling station. Counsel submitted that even if the alleged 14457 unaccounted for ballot papers (which was denied) were deducted from the 1st appellant's total, she would still win by a margin of 333 votes.

Counsel submitted that the law allows deployment of soldiers so long as it is necessary. He argued that the respondent or her counsel did not lead any evidence to show that the deployment of the soldiers in Serere District was unnecessary. He further argued that there was no evidence of harassment.

Counsel submitted that it's entirely untrue that they requested for Cephas to be cross examined. He contended that they requested for one witness who was the petitioner, after making the submission for the expunging of 47 affidavits that they decided that the evidence of the petitioner was not useful in making the case. Counsel submitted that if he had cross examined Cephas, he would have helped the respondent make her case. He argued that the affidavit of the respondent did not corroborate that of Cephas.

Counsel reiterated his submissions on the issue of the date of registration and transfer of the ambulance. He prayed that this court peruses communication from the Permanent Secretary, Ministry of Health in respect of the same. He argued that the 1st appellant did not have possession until it was delivered.

Counsel conceded that the car came when it was branded but argued that when it arrived in Serere, it already belonged to the District, not the 1st appellant.

Counsel submitted that the 1st appellant did not testify that she saw the ambulance at her rallies. He contended that she testified that she was at her rally and saw the vehicle.

He prayed that this court finds that a valid election was conducted in Serere District for the Woman MP and reiterated his earlier prayers.

Rejoinder by counsel for the 2nd appellant

Counsel submitted that there was no evidence in the lower court to prove that the Electoral Commission committed falsehoods in the counting and the tallying of votes. He contended that the Petitioner/respondent did not adduce any evidence that at the time when voting started, there were any ballots already in the ballot boxes at the polling stations.

Counsel submitted that Cepha's evidence was rebutted by that of the Returning Officer in her further affidavit in reply.

Counsel submitted that there was evidence that the Electoral Commission handled complaints brought to its attention through the Returning Officer and dealt with them.

Court's resolution

We have studied the record of appeal and the judgment of the lower court. We have also considered the submissions of counsel for all parties and the authorities that were availed to court for which we are grateful.

It is the duty of this court as the first appellate court to dclvc at some length into actual details and review the facts as presented in the trial court , analyze the same , evaluate the evidence and arrive at its own independent conclusions , but always remembering , and giving allowance for it , that the trial court had the advantage of hearing the parties.see ***Selle and another V. Associated Motor Boat Company Ltd and another (1968) EA 123***. Under rule 30 of the Rules of this court , the Court has power to *reappraise the evidence and draw inferences of fact; and may in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken.* The Supreme Court in ***Kifamunte Henry v Uganda, SSC NO. 1 of 1997,*** emphasized this position when it held that; *"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."*

We find it necessary to resolve grounds 1 and 2 of the appeal together since they relate to the same matter of the excess unused and unexplained ballot papers. While dealing with the issue of the excess ballot papers and altering results, at page 9 of the judgment, the trial judge held; *"Court has found no*

evidence of altering results. The would be witnesses in that regard had their affidavits struck out for non-compliance with the Illiterates Protection Act and the Oaths Act. What however remained clear is that in many stations, the total number of ballot papers at the end of the day exceeded the ballot papers that had been issued"

Section 47 (1) and (4) of the Parliamentary Elections Act, 2005 (PEA) which deals with the validity of votes provides:

S.47 Votes to be counted at each polling station

(1) Votes cast at a polling station shall be counted at the polling station immediately after the presiding officer declares the polling closed and the votes cast in favor of each candidate shall be recorded separately in accordance with this Part of the Act.

(4) At the commencement of the counting, the presiding officer shall, in the presence and full view of all present, open the ballot box and empty its contents onto the polling table, and with the assistance of polling assistants proceed to count the votes separating the votes polled by each candidate.

S. 50 (3) of the PEA provide thus;

The sealed ballot box referred to in subsection (2) shall contain the following items-

a) One duly signed declaration of results form;

b) The ballot papers received by each candidate, tied in separate bundles;

c) *The invalid ballot papers, tied in one bundle;*

d) *The spoilt ballot papers, tied in one bundle;*

e) *The unused ballot papers; and*

f) *The voters roll used at the polling station.*

From the provision of S.47, it is evident that the most important thing in vote counting is the number of votes cast in favor of each candidate. The trial Judge having found that there was no alteration of results, it is our considered view that it was erroneous for him to nullify the entire election. The trial Judge's finding that the total number of ballot papers at the end of the day exceeded the ballot papers that had been issued is, in our view, an irregularity which did not affect the actual votes cast. Moreover , no evidence was adduced to suggest that at the time when voting started, there were any ballot papers already in the ballot boxes at the polling stations.

Counsel for the appellants took issue, and in our view rightly so, with the trial Judge's use of DR forms and the method of sampling to reach the conclusion that there were excess ballot papers and that the results were affected in a substantial manner. Counsel submitted that the trial Judge should have used the packing list. Section 27 of the PEA which deals with distribution of election materials provides that;

Within forty-eight hours before polling day, every returning officer shall furnish

each presiding officer in the district with—

(a) a sufficient number of ballot papers to cover the number of voters likely to vote at the polling station for which the presiding officer is responsible;

(b) a statement showing the number of ballot papers supplied under paragraph (a) with the serial numbers indicated in the statement; and

(c) any other necessary materials for the voters to mark the ballot papers and complete the voting process.

While dealing with the allegation of ballot stuffing in the 2001 Presidential Election Petition ***No. 1 of 2001 Kizza Besigye v Yoweri Museveni,*** Odoki CJ made the following analysis and conclusion: *"it seems to me that the theory was adopted and put forward without any attempt at verification, the commission had in use forms on which the ballot papers issued to each polling station were counted for recording inter earlier the serial numbers. If in the course of his analysis Frank Mukunzi had taken time off to verify the figures recorded on the results forms with those recorded on the accountability forms, his analysis report would most probably have been different and carried more credibility. Similarly my impression is that the petitioner and other witnesses who subscribed to the theory must have examined the results form rather superficially. Be that as it may, I was not satisfied that declaration of results forms produced in court amounted to evidence from which the court could infer ballot stuffing or multiple voting or at all"*

Following the provisions of section 27 of the PEA and the decision in ***Kizza Besigye versus Yoweri Kaguta Museveni (Supra)*** the trial Judge should have relied on the provisions of S.27 (b) to determine the exact number of ballot papers and their serial numbers that had been issued to every polling station in order to reach a conclusion on the excess ballot papers and not the DR forms which do not show the serial numbers of ballot papers delivered at a polling station.

On sampling, the trial Judge held that *"I have randomly picked these figures from the DR forms which are 203 in number and I find the anomaly in figures of unused ballot papers so big that it renders the whole exercise a mockery"*. From his judgment, he randomly picked DR forms of five polling stations i.e. Atia Primary school, Ajesa -Olio Primary School, Akisim polling station, Kyeri township polling station and Oculura Primary school polling station.

Cross - sectional studies or sampling are aimed at finding out the prevalence of a phenomenon, problem or issue by taking a snap shot . There are many methods of sampling such as simple random , stratified , cluster and systematic sampling . The trial judge appears to have applied the simple random method as he states at page 9 of the judgment that; "A random look at the declaration of results revealed that either the returning officers took their own ballot papers to the station in addition to those issued officially or had a deficiency in issues of simple addition and subtraction". Respectfully before applying the simple random method, the trial judge should first have

addressed his mind to the criteria for selecting the samples ; the number of the DR forms and their spread in the constituency. He never took this necessary initial step.

We are of the view that though sampling is not a wrong method per se, sampling 5 out of 203 DR forms that were available on court record was not sufficient to determine the effect that they could have had on the election.

At the hearing of the Petition, the petitioner had submitted that 14,457 ballot papers could not be accounted for. The Judge found that the unused ballot papers were in the hands of polling assistants and that they could only have been brought in by the polling assistants themselves. That one would suspect that it is the voters who secretly brought the papers in but that would mean finding them in the ballot boxes. He concluded that there was non compliance with the electoral laws and process. In our view where a specific irregularity has been proved and the number of votes affected by such irregularity has been established, then adjustments should be made and if the successful candidate still retains victory , the irregularity cannot be said to have affected the result of the election in a substantial manner. In the instant case, the excess ballot papers were neither cast nor taken into consideration in determining the poll results. They therefore had no affect on the result of the election. Further, even if the 14,457 ballot papers in issue were 'wrongfully' given to the 1st appellant in order to bolster her results and in that vein this Court now had to order that the votes in contest be taken away from the

appellant, the appellant would still be in the lead by 333 votes. Be that as it may we are not persuaded by the trial Court's findings of noncompliance and ballot stuffing.

There was an assertion of procuring the signing of blank declaration forms prior to the holding of the elections. We find that this submission was not supported by cogent evidence and we decline to accept it.

The trial judge, having found that there was no evidence of tampering with the results, coupled with the fact that declaration of results forms had been signed by the candidates' agents thus authenticating the results, should not have held that there was complete non compliance with the electoral laws and process.

Therefore grounds 1 and 2 of the appeal succeed.

Regarding the third ground of appeal, the trial Judge held that *"The issue of harassment and arrests is well established in the evidence of RW4 Major Justin Engwau. He deposed in his affidavit that he did not vote in Serere but that on 17th February 2016 at 11:00am he went back to Serere from Soroti where he received information that a veteran called Olila Sam was harassing people. That he went and arrested him and also recovered army uniforms. That he also carried out patrols on the voting day to detect and prevent any breach of peace... In my view, this is an indication that the military was involved in the harassment and arrest of supporters of the Petitioner. This very RW4 told court that he carried out patrols all over Server and having confirmed to court that he arrested*

Sam Olira because he was campaigning for the Petitioner, one can only conclude that his traversing the constituency was for similar activities".

Having evaluated the evidence the court is of the view that the arrest of Sam Olira was an isolated case and indeed a one-off incident , which did not amount to generalized violence and intimidation by the army .We note that only one arrest was made, that of Sam Olira by Maj. Engwau. Although the District Police Commander (DPC) Ogalo admitted to requesting for 26 soldiers to beef up Police man power, in Serere District we have found no evidence that the 26 soldiers that were provided made any arrests of the respondent's supporters. From the evidence on record, we are unable to find merit in the claim that the respondent's supporters were intimidated and harassed by the military through out Serere District as she alleged. Ground 3 of the Appeal also succeeds.

Regarding grounds 4 and 5 of the appeal, the trial Judge while referring to admission of acts of bribery in Muhwana's affidavit held that "*These were not acts of a restricted polling area but acts across the whole constituency because as Muhwana stated they moved from place to place. The Respondent opted not to cross examine this witness and therefore his evidence remained unchallenged".*

We accept counsel for the 1st appellant's submission that evidence in election Petitions is by way of affidavit . Evidence in rebuttal is by way of affidavit in reply. We have studied the record of Appeal and found that on 10th of June,

2016, the 1st appellant filed an affidavit in reply. Of particular interest are paragraphs 2- 5 which we reproduce here below;

> *2. I do not know the said Ramathan Okiria, Paul Osakan, Arnold Okedi, Simon Ourien and Cephas Muhwana and have never met them as alleged. I did not personally or through my agents with my knowledge or consent appoint Paul Osakan, Arnold Okedi, Simon Ourien, Cephas Muhwana or anyone else as commandos/commanders to fight any body or cause any kind of violence or at all as alleged*
>
> *3. I did not instruct the said persons to distribute money, soap, salt and sugar to voters or at all as alleged*
>
> *4. It is not true as alleged in the above mentioned affidavits that I paid out a sum of UGX 2,000,000/= (Two million) to a team of ten commanders and UGX 200,000/= to Cephas Muhwana. I did not have any commanders during my campaigns or at all.*
>
> *5. The contents of the above affidavits are false and full of deliberate lies.*

From the above affidavit in reply, it is clear that Cephas' evidence was rebutted. Further, even if the 1st appellant had not filed an affidavit in reply, the respondent still had the burden to prove her case to the required standard. This was the decision of the supreme court in ***Election Petition No. 1 of 2001 Col. Kizza Besigye Vs Yoweri Museveni.***

The trial Judge relied on the following part of Cephas' affidavit in support of the Petition.

"9. *That when we arrived at the school, Isaac told us he was going to call Hellen Adoa and other members of her campaign team to come and address us on what we were supposed to do.*

10. *That at around 10:00pm some people came who addressed us.*

11. *That in their address they welcomed us and informed us that we were to work as commandos/commanders to fight anybody who was becoming an obstacle to Hellen Adoa's success in the election.*

12. *That we were also told that our work included the distribution of money, soap, salt and sugar wherever we would be sent to take them within the district.*

13. *That on Tuesday 16th February 2016, I and Isaac were made to be the bodyguards of a man who I later learnt to be a brother of Adoa Hellen who was in charge of giving money to the different teams which were in turn to distribute the same to the people in the villages.*

14. *That after distributing money to groups at Toto Adoa Nursery and Primary School, we later went to Serere Township Primary school at about 5:00pm and met other groups who were also given money to distribute. After which we returned to Toto Adoa Nursery and Primary School at about 7:00pm.*

15. *That at around 10:00pm, I was picked up together with some dark man by a man whom I later learnt to be the administrator of Halycon Secondary school. We were taken to Halycon Secondary school in Soroti to guard the school.*

16. *That while we were guarding the school, we observed that in one of the buildings, there were ballot boxes which were being filled with ballot papers, but since our role was to offer security, we did not inquire.*

17. *That in the morning of 17th February 2016, we were picked up at about 7:30am by the same administrator and taken back to Toto Adoa Nursery and Primary School at Serere.*

18. *That at about 1:00pm, we joined the Electoral Commission team in the process of distributing electoral materials to different sub-counties and that at every sub-county where we left two (2) commanders to take care of Hellen Adoa's interests.*

19. *That I and the dark man I had, were left at Kyere sub-county headquarters where we stayed till 11:00pm when we were picked and taken back to base at Toto Adoa Nursery and Primary School where we stayed till morning.*

20. *That on voting day of 18th February 2016 at about 6:30am I left together with Isaac and others to do patrol work in the different polling stations where we distributed money to the voters along the routes.*

21. *That after the announcement of results we escorted Hellen Adoa up to her home in Soroti town.*

22. *That it was at Hellen Adoa's residence in Soroti town where I was paid my Ugx 200,000/= (Two Hundred Thousand Shillings) and I left for home in Tororo. "*

Section 68 of the PEA which criminalizes bribery provides that ;

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 offense of bribery..

Given the gravity of the offense of bribery in elections, it is necessary that persons said to have committed the offense and those said to have been bribed are identified clearly and such evidence is corroborated. Paragraphs 12 and 13 of the affidavit of Cephas Muhwana as reproduced above, relate to the alleged commission of the offense.

Counsel for the respondent argued that Cephas Muhwana was not cross examined and his evidence should be taken as unchallenged . We follow the decision of the Supreme Court in ***Uganda Breweries Limited Vs Uganda Railways Corporation, SCCA NO. 6 of 2001*** where Justice Oder JSC (RIP) while discussing the effect of the evidence of a witness who had not been cross examined held thus; *" In the circumstances of this case , I think that failure by the appellant to cross - examine DW2 on the matter , does not necessarily mean that it accepted these figures"*

The evidence of Cephas Muhwana stated above does not show who was actually bribed and cannot be the basis of a finding that voters were bribed.

Further Cephas Muhwana does not give clear particulars of the persons he claims to have been part of the electoral malpractice for instance Cephas mentions people like Isaac, administrator of Halycon Secondary school and

Hellen Adoa's brother without giving full details. Such description leaves doubt as to which Isaac, Cephas was talking about or whether Hellen Adoa has one brother among other things.

It is now well established that the standard of proof in election petitions is higher than that which is applied in ordinary civil cases i.e on a balance of probability although it is not equal to the standard of proof beyond reasonable doubt that is applied in criminal cases

We are therefore, of the view that the trial Judge misdirected himself and erred when he found that Cephas Muhwana's evidence was unchallenged. He also erred when he used Cephas Muhwana's affidavit as basis for his conclusion that the 1st appellant had committed the electoral offence of bribery.

There was disagreement between counsel as to whether Cephas Muhwana was an agent of the 1st appellant. An agent is a person who in most cases is authorized by another to act for him, one who undertakes to transact some business or manage some affair for another by the authority or on account of the other. There are many categories of agents , some are specially appointed to undertake special or specific assignments while others may be public. While some agents may be appointed, others can be ostensible or apparent. From evidence on record , it is not shown what type of agent Cephas Muhwana was. We are not persuaded that the respondent provided sufficient evidence to prove that Cephas Muhwana was the 1st appellant's agent.

Therefore grounds 4 and 5 of the appeal succeed.

The issue of the donation of an ambulance is covered in grounds 6,7,8,9 and 10 of the appeal . Section 68(7) and (8) of the PEA provide;

> ***(7) A candidate or an agent of a candidate shall not carry on fundraising or giving donations during the period of campaign.***
>
> ***(8) A person who contravenes (7) commits an illegal practice***

The trial Judge held that *"In the instant case, one cannot say that the 2nd Respondent was merely honoring an old pledge. Honoring a pledge made close to a year ago, 16 days from the election is manifestly clear that the donation was honored with intention of corruptly influencing the voters of Serere;* ***Odo Tayebwa V Nasser Basajjabalaba & Anor, Election Appeal 13/2001.*** *Handing over the motor vehicle "to coincide with the campaign period raises doubts as to the bonafides" of the 2nd Respondent;* ***Fred Badda & Anor V Prof Muyanda Mutebi, Election Petition Appeal 25/2006*** *. In my view, the ceremony conducted on 2nd February 2016 close to the election day was illegal and in breach of Section 61(1)(c) of the PEA".*

We have looked at documents attached to the 1st appellant's affidavit in reply relating to the ambulance that she donated. We note that on 3rd April, 2015, she wrote to the CAO about her intention to donate an ambulance to Serere District. The Permanent Secretary Ministry of Health requested for tax exemption on the ambulance on 19th of November, 2015. He clearly indicated in that letter that it had been donated by Mrs Hellen Adoa and family to Serere Health Centre IV. Wazir Auto Trading Co (u) Ltd that had imported the vehicle .

transferred it to the Ministry of Health in 2015 showing that the 1st appellant never had possession of the ambulance at all. On 1st December 2015, the ownership of the vehicle changed to Ministry of Health. Thereafter the vehicle was registered as belonging to Serere District Local Government on 29th January 2016 and the same was delivered, at the request of the CAO, to the district on 1st February 2016 with a public handover ceremony that took place on 2nd February 2016.

We are satisfied from the documentary evidence that the ambulance was donated by the 1st appellant to the District by 19th of November, 2015 as confirmed by the letter of the Permanent Secretary to the Ministry of Health. Further, we are satisfied that the 1st appellant was not responsible for delivery of the vehicle to the District on 1st of February, 2016.

The trial Judge also held that *"The use of this government ambulance was with the full knowledge of the 2nd Respondent herself, supported by the LCV RW7 who was also on her campaign team and went on all her campaigns with her. There is therefore no doubt that she committed this offence with impunity".*

During cross examination of the LCV (RW7), when asked about his joint rallies with the 1st appellant, he said it was not a joint rally. Further, he answered thus;

"Excuse me, you are telling me...You are giving me your word, take my words; and my words are; remember even the time I was campaigning I was still the chairman LC5, so I organized that function in the capacity of chairman LC5 to"

hand over the ambulance to the people of Serere donated by Hellen Adoa and family and always before I receive a vehicle I have to test it, I tested that ambulance from Oriyoi Primary School."

Later on, he testified thus;

"Whenever asked, it was not part of my manifesto, at rallies I give people my manifesto not telling them ambulances but when people asked about ambulances I had to tell them."

From the LCV's response, we are satisfied that he was not part of the 1st appellant's campaign team, but he was campaigning for himself for the position of LCV chairman.

Regarding the issue of the photo of the ambulance appearing in Etop Newspaper, the trial Judge had this to say *"Photographs of this vehicle were exhibited including an Etop newspaper clipping of the week 4th – 10th February 2016. The pictures showed an ambulance with posters of the 2nd Respondent and the words "ADOL DONI ABOL"on the side of the vehicle and also the words "AJELE ISE"*

The Respondent on cross examination told court the meaning of these words; that *"ADOL DO ONI ABOL"* meant *"TIME TO DEVELOP"* while *"AJELE ISE"* meant *"DOVE OF SERERE." Asked who the dove was, she said a dove is a saver so both can be the donor and the vehicle. By these words she meant that the donor of the vehicle was the saver of the people; she was the donor. In a community like Serere where RW6 Agum Moses who was the Principal Assistant*

Secretary, acting as Deputy Chief Administrative Officer said, there was lack of sufficient ambulances, handing over a motor vehicle ambulance on the 2nd of February 2016, 16 days from the elections was certainly a big vote puller".

The trial Judge held that *"Hundreds of people must have read and jubilated the words on the ambulance "ADOL DO ONI ABOL" meaning "TIME TO DEVELOP"which gave the electorate hope for development if they elected the 2nd Respondent. Every first letter is written in capital letters and when put together, they spell the 2nd Respondent's name "ADOA". The writings on the vehicle also showed that she was "AJELE ISE - DOVE OF SERERE" the saver as explained by herself. Further more, Etop newspaper which circulates the whole of Teso and also had the picture of this ambulance splashed in it, must have been read by many voters because such a matter would be a hot item in any media".*

We have perused the Record of Appeal and found no evidence from any witness to show that they voted for the 1st appellant after reading the words on the ambulance or seeing photographs of the same in the Etop Newspaper. We are therefore of the considered view that the trial Judge's findings were a result of conjecture and speculation.

Regarding the use of the ambulance, the trial Judge held that *"The use of this government ambulance was with the full knowledge of the 2nd Respondent herself, supported by the LCV RW7 who was also on her campaign team and went on all her campaigns with her. There is therefore no doubt that she committed this offence with impunity".*

From the Record of Appeal, when asked whether he had ever instructed anybody that the ambulance should be used at rallies, during cross examination, the LCV (RW7) answered as follows:

"Not a particular ambulance, I remember during rallies in Kateta, some people died, when there were rallies around Atira, there was a woman, I was called as a sitting chairman, a woman had collapsed, so the directive I gave to the office of the CAO was to make all the 4 ambulances including but not limited to that one but also the one donated by Hon.Alice Alaso, the one donated by Ochola and the one that was donated to the District under the Safe Motherhood program and also the one donated by Adoa, so all the four ambulances were working and servicing the rallies, in case there are accidents these ambulances are available."
[Emphasis added]

From the foregoing, we are satisfied that the 1st appellant did not have control over the use of the ambulance. It was the LCV chairman who gave directives to the CAO on the use of the ambulance and other ambulances in Serere District. We therefore find that the trial Judge misdirected himself in concluding that the ambulance was used with the full knowledge of the 1st appellant. Accordingly grounds 6,7,8,9, 10 and 11 of the Appeal succeed.

In light of our findings in grounds 1-11, it naturally follows that grounds 12 and 13 are answered in the affirmative. We find that the trial Judge misdirected himself in reaching the conclusion that the election for the woman MP Serere District was conducted in non-compliance with the law, that the 1st

appellant committed electoral offenses and was not validly elected as woman MP for Serere District. Therefore, ground 12 and 13 of the Appeal succeed.

This court had a duty to consider and determine the evidence adduced by the parties to the election Petition bearing in mind the fact that the election that was sought to be nullified was in respect of an exercise of the right by the 80,000 voters of Serere District to elect a representative of their choice. The court could not interfere with the democratic choice of the voters where the appellant had polled 48,762 votes and the respondent 32,651 the margin being 16,111 votes unless it was established to the required standard of proof that there were such irregularities and electoral malpractices that would render the said election null and void and therefore subject to nullification. It was not sufficient for the respondent to only establish that irregularities or electoral malpractices did occur. She had a duty to establish that the said electoral malpractices were of such magnitude that they substantially and materially affected the out come of the electoral process. She failed to do so.

In the result, the appeal succeeds. The orders of the lower court nullifying the election of the 1st appellant, ordering the 2nd appellant to hold fresh elections and the granting of a certificate for two counsel are set aside. We make the following orders;

1. The declaration by the 2nd appellant that the 1st appellant is the duly elected Woman member of parliament for Serere District is upheld

2. The respondent shall bear the costs of the Appeal and those at the Court below.

We so order.

Dated at Kampala this 10th day of February 2017

.....

HON. MR. JUSTICE S.B. K KAVUMA, DCJ

.....

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

.....

HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA

10/2/2017
Kiryowa Kiwanuka for 1st Appellant
Katigo Richard & Kenneth Kagwa for 2nd Appellant
Komakech Geoffrey for Respondent
1st Appellant

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