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**REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**ELECTION PETITION APPEALS NOS 15 AND 20 OF 2016**  
**(ARISING FROM HIGH COURT ELECTION PETITION NO.011 OF**  
**2016)**

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**1. BWINO FRED KYAKULAGA**  
**2. ELECTORAL COMMISSION :::::::::::::::::::: APPELLANTS**

**VERSUS**

**BADOGI ISMAIL WAGUMA :::::::::::::::::::: RESPONDENT**

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**CORAM: HON. JUSTICE ALFONSE OWINY-DOLLO, DCJ**  
**HON. JUSTICE REMMY KASULE, JA**  
**HON. JUSTICE ELIZABETH MUSOKE, JA**

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*(Appeal from the Judgment and Orders of the High Court of Uganda sitting at Jinja before Hon. Justice Margaret Mutonyi dated 20th June, 2016, in Election Petition No.011 of 2016).*

**JUDGMENT**

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This is a consolidated Election Petition Appeal arising from the Judgment and orders of the High Court at Jinja, where the 1<sup>st</sup> appellant's election as a Member of Parliament for Kigulu North Constituency was set aside and the Parliamentary seat was declared vacant.

**Background to the appeal:-**

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On the 18<sup>th</sup> February, 2016, the 2<sup>nd</sup> appellant conducted National General Parliamentary Elections where the 1<sup>st</sup> appellant, the respondent and six other candidates, contested for the directly elected Member of Parliament seat of Kigulu North Constituency, Iganga District. The 2<sup>nd</sup> appellant declared the 1st appellant the winner of the election with 17,800 votes against the respondent's 15,651 votes and the 1<sup>st</sup> appellant's name was

5 published in the Uganda Gazette of 3<sup>rd</sup> March, 2016, under General Notice No.144 of 2016.

Being dissatisfied with the outcome of the election, the respondent petitioned the High Court at Jinja challenging the election results and raising allegations of non-compliance with the provisions of the electoral laws by the 2<sup>nd</sup> appellant in conducting the election.

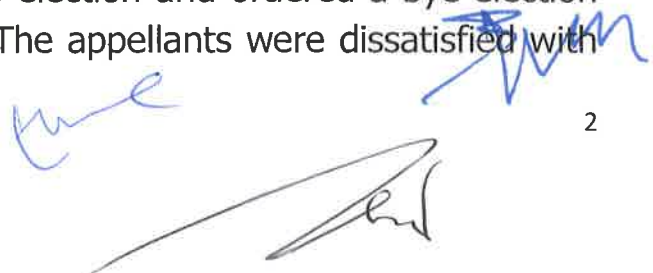
The 1<sup>st</sup> appellant filed an answer to the petition where he denied the allegations raised by the respondent (petitioner) in regard to the election. He maintained that the election was conducted in accordance with the provisions of the electoral laws and that the minor discrepancies, if any, did not affect the results of the election in a substantial manner.

The 2<sup>nd</sup> appellant in its reply to the Petition also contended that the election was conducted in compliance with the electoral laws, and under conditions of freedom, fairness and transparency. In the alternative, the 2<sup>nd</sup> appellant contended that if there was any non-compliance with the provisions/principles laid down in the electoral laws, such non-compliance did not affect the result of the election in a substantial manner.

The following issues were agreed upon for determination:

1. Whether there was non-compliance with the electoral laws in the conduct of the parliamentary elections for Kigulu North Constituency, Iganga District.
2. Whether such non-compliance, if any, substantially affected the results of the election.
3. What remedies are available.

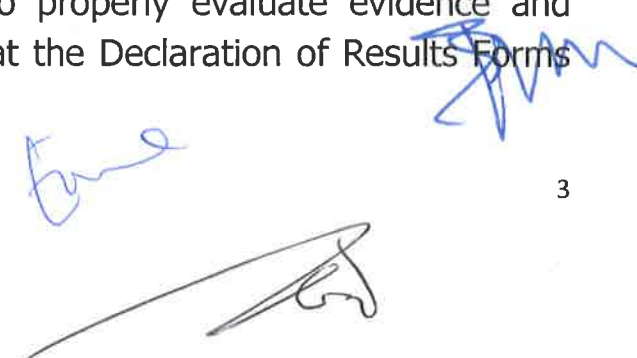
The Learned trial Judge passed Judgment in favour of the respondent on the basis that there was non-compliance with the provisions of the electoral laws in the conduct of the election of Kigulu North Constituency, and that the effect of the non-compliance was substantial. The trial Judge thereupon set aside the 1<sup>st</sup> appellant's election and ordered a bye-election to be conducted in the constituency. The appellants were dissatisfied with



5 the decision and separately appealed to this Court. The 1<sup>st</sup> appellant filed Election Petition No.15 of 2016 while the 2<sup>nd</sup> appellant filed Election Petition No.20 of 2016, which were consolidated.

The Memorandum of appeal filed by the 1<sup>st</sup> appellant raised 9 grounds of appeal as follows:-

- 10 1. The Learned trial Judge failed to properly evaluate the evidence on record and came to the wrong conclusion that Bwino Fred Kyakulaga, the appellant was not validly elected Member of Parliament for Kigulu North Constituency.
- 15 2. The Learned trial Judge erred in law and in fact in finding that the results contained in Declaration of Results Forms that indicated that they were signed at 4:00 pm are invalid.
3. The Learned trial Judge erred in law and fact when she found that the results contained in Declaration of Results Forms that are not signed by the agents of the candidates are invalid.
- 20 4. The Learned trial Judge erred in law and fact when she found that the non-signing of Declaration of Results Forms affected the results of the election in a substantial manner.
5. The Learned trial Judge erred in law and fact when she found that the Declaration of Results Forms that indicated that they were signed  
25 at 4:00pm affected the results of the election in a substantial manner.
6. The Learned trial Judge failed to properly evaluate the evidence and came to a wrong conclusion that the 2<sup>nd</sup> appellant's officials were involved in falsification of results.
- 30 7. The Learned trial Judge failed to properly evaluate the evidence and came to a wrong conclusion that the officials of the Electoral Commission signed Declaration of Results Forms for areas they did not supervise.
8. The Learned trial Judge failed to properly evaluate evidence and  
35 came to the wrong conclusion that the Declaration of Results Forms



5 for several polling stations were not signed by the agents of the respondent.

9. The Learned trial Judge erred in law and fact when she found that in determining substantial effect on an election, numbers do not matter.

10 The 2<sup>nd</sup> appellant raised 5 grounds in its memorandum of appeal as follows:-

1. The Learned trial Judge erred in law and fact when she held that results on the unsigned Declaration of Results Forms by the candidates' agents are invalid.

15 2. The Learned trial Judge erred in law and fact when she failed to properly evaluate all the evidence on record and therefore came to a wrong decision.

3. The Learned trial Judge erred in law and fact when she held that the results on the Declaration of Results Forms were falsified by the appellant's officials.

20 4. The Learned trial Judge erred in law and fact when she held that there was non-compliance with electoral laws by the appellant which affected the results substantially.

5. The Learned trial Judge erred in law and fact when she engaged in assumption and conjectures in her conclusions.

25 The core ground of appeal raised in the consolidated appeal is that the trial Judge failed in her duty to properly evaluate the evidence in regard to the allegations of non-compliance with the Electoral Laws. We shall therefore address the appeal under two broad issues as follows:

30 1. *Whether the trial Judge failed to properly evaluate the evidence on record and came to a wrong conclusion that there was non-compliance with the electoral laws.*

2. *Whether or not the non compliance, if any, affected the results of the election in a substantial manner.*



5 **Representation:-**

At the hearing of the appeal, the 1<sup>st</sup> appellant was jointly represented by Mr. Kiryowa Kiwanuka and Mr. Esau Isingoma, the 2<sup>nd</sup> appellant was represented by Mr. Lule Kennedy Ben, while the respondent was jointly represented by Mr. Alex Luganda and Mr. Kwemala Kafuzi.

10 Counsel for the appellants and the respondent, with leave of court, adopted conferencing notes filed in this Court, and counsel for the 2<sup>nd</sup> appellant associated himself with the submissions made by counsel for the 1<sup>st</sup> appellant. Either counsel made oral highlights of the submissions when the appeal came up for hearing.

15 **Issue 1.**

***Whether the trial Judge failed to properly evaluate the evidence on record and came to a wrong conclusion that there was non-compliance with the electoral laws.***

20 This being an appeal of 1<sup>st</sup> instance, the duty of this Court is set out under section 30 of the Judicature (Court of Appeal Rules) Directions, SI 13-10, as being to reappraise and draw inferences of fact from the evidence adduced at trial. ***See; Banco Espanol Versus Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998.*** In re-examining and re  
25 evaluating the evidence, we, as the court, caution ourselves of the fact that in petitions of this nature, witnesses usually tend to be partisan in giving evidence in support of a candidate of their choice considering that elections are highly politicized contests. ***See; Rt. Col. Dr. Kizza Besigye Versus Yoweri Kaguta Museveni & Anor, Supreme Court Presidential Election Petition No.1 of 2001.*** We also bear in mind the fact that,  
30 unlike the trial Court, we have not had the opportunity to see the witnesses testify so as to be able to observe their respective demeanours: See; ***Selle & Another Vs Associated Motor Boat Company Ltd & Anor [1968] EA 123.***





5 The burden of proof lies on the petitioner (the respondent herein) to prove  
the assertions raised in the petition to the satisfaction of court, and the  
standard of proof required is proof on a balance of probabilities as stated  
under section 61(3) of the Parliamentary Elections Act. **See: Paul Mwiru  
10 Versus Hon. Igeme Nathan Nabeta Samson & 2 Ors, Court of  
Appeal Election Petition Appeal No. 6 of 2011.**

Bearing the above principles of law in mind, we now proceed to address  
the issues raised in the appeal.

**1. Validity of affidavits.**

15 In his submissions, counsel for the 1<sup>st</sup> appellant contended that the trial  
Judge erred in relying on affidavits in support of the petition that offended  
the Oaths Act and the Illiterates Protection Act. He made reference to the  
affidavits of Mulumba George, Kakaire Hassan, Wambi Alex, Kinu Ngobi  
Moses, Kyoterekera James, Kapala Brian and Kisule Andrew, in support of  
20 the petition and submitted that the name of the person who wrote the said  
affidavits was not stated, which offended section 3 of the Illiterates  
Protection Act.

Counsel further submitted that the said affidavits did not conform to the  
requirements of the Oaths Act, considering that they did not have a jurat  
to confirm that the law was complied with. Counsel relied on **Ngoma  
25 Ngime Versus Electoral Commission & Winnie Byanyima, Court of  
Appeal Election Petition Appeal No.11 of 2002**, and submitted that  
the trial Judge erred in relying on the said defective affidavits which did not  
comply with the statutory requirements.

30 In reply, counsel for the respondent submitted that the issue as to the  
competency of affidavits was an attempt by counsel for the 1<sup>st</sup> appellant to  
amend the grounds of appeal and introduce a new ground. He contended  
that no objection was ever raised at the trial, nor was any issue framed in  
regard to the affidavits, and neither of the parties was given an opportunity  
to be heard as to the validity of the affidavits. Further, that the  
35 conferencing in this Court was held inter parties and no indication was

5 made by counsel for the appellant to amend the grounds of appeal so as to include the issue as to the validity of affidavits.

Counsel further submitted that each of the affidavits complained against was properly accompanied with a jurat and a certificate of translation filed by Ngobi Balidawa Moses who commissioned and at the same time translated the affidavits to the deponents. Counsel was of the view that the Illiterates Protection Act was an Act intended for the protection of illiterates and could therefore not be used as a sword against them. In the present case, the deponents of the affidavits were available and neither of them came forward to recant his/her testimony, nor were they cross examined about the contents of those affidavits.

In rejoinder, counsel for the 1<sup>st</sup> appellant submitted that the issue of affidavits was a matter of law and that the Court had the duty to re evaluate the evidence on record to come up with its own decision on the point of law. Further, that it was not necessary to cross examine the deponents of the affidavits in order to confirm whether the affidavits were defective or not.

We have perused the lower Court record as well as the grounds of appeal raised by the 1<sup>st</sup> and 2<sup>nd</sup> appellants before this Court on the issue of validity of the affidavit. It is apparent that no complaint was raised at the trial in regard to the affidavits so that the parties could be given a chance to be heard on the same. We have taken into consideration the submission of counsel for the 1<sup>st</sup> appellant that regardless of the fact that the complaint was not raised at the trial, this Court has a duty and the power to address the issue of a point of law under its overall duty of re-evaluating all that happened at the trial, including points of fact or law or mixed law and fact. However, this Court can only evaluate evidence in regard to matters where the parties were heard and upon which the Court at the trial based its decision. In the present case, the issue as to the validity of affidavits was never raised at the trial, nor did the Court address the same. The trial

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5 Judge in her Judgment made reference to the affidavit of Buyinza Simon as taking an improper form and stated as follows:

*"...the form the affidavit took was a bit irregular but given the liberal approach the superior courts have taken to affidavits in election petitions which decisions bind this court, court allowed it."*

10 However, the trial Judge did not indicate the specific irregularity in form that she referred to with regard to Buyinza Simon's affidavit. Therefore, we accept the submission of counsel for the respondent that the issue as to irregular affidavits was a new matter not addressed at trial and not constituting a separate ground of appeal.

15 Nevertheless, we have carefully looked at the affidavits complained against by counsel for the 1<sup>st</sup> appellant. It was his complaint that contrary to the provisions of the Illiterates Protection Act, the person who wrote the affidavits was not stated. Section 3 of the Illiterates protection Act provides as follows:

20 *"Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true address, and his or her so doing shall*  
25 *imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her."*

We accept the submission of counsel for the 1<sup>st</sup> appellant that the above provision is couched in mandatory terms and that failure to comply with  
30 the above provision renders the document fatally defective. ***See: Kasaala Growers Co-operative Society Versus Kakooza Jonathan & Anor, Supreme Court Civil Application No.19 of 2010.*** We have looked at the affidavits in issue and it is evident that each of the said documents bears a certification by Ngobi Balidawa Moses, a commissioner for oaths,

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*[Signature]*

*[Signature]*



5 indicating that the contents of the documents were read over and translated to the deponents and that they willingly appended their signatures on the affidavits. Even though the certification appears after the postal address of the lawyers who drew the document, it clearly bears the signature and the stamp bearing the name of the person who interpreted  
10 the contents of the document. While the positioning of the certification is irregular, that is a matter of form rather than substance. The Court in ***Kasaala Growers Co-operative Society Versus Kakooza Jonathan & Anor (Supra)***, cited with approval ***Banco Arabe Espanol Versus Bank of Uganda ; Supreme Court Civil Appeal No.8 of 1998***, where it was  
15 held as follows:

*"...a general trend is towards taking a liberal approach in dealing with defective affidavits. This is in line with the Constitutional directive enacted in article 126 of the Constitution that courts should administer substantive justice without undue regard to technicalities  
20 Rules of Procedure should be used as handmaiden of justice but not to defeat it."*

Besides, there is no proof that the deponents were illiterates within the meaning of the law, considering that they were not cross examined.

We are satisfied that the affidavits in issue constituted valid evidence and  
25 we do not find reason to fault the trial Judge in relying on them.

## **2. Non-compliance with the electoral laws.**

At the trial, the respondent herein raised allegations of non-compliance with the electoral laws at various polling stations in Nawandala sub county, Kigulu North constituency, Iganga District. The allegations of non  
30 compliance mainly relate to Declaration of Results Forms (DRF) in the said sub country.

Section 61 of the Parliamentary Elections Act provides for instances where an election of a Member of Parliament may be set aside. Section 61(a)  
provides for one of such instances as follows:



5            *"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."*

10    ***See; Rt. Col. Dr. Kizza Besigye Versus Yoweri Kaguta Museveni & Anor, (Supra)***

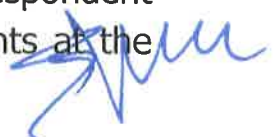
We shall address each of the allegations of non compliance consecutively.

**i. DR Forms unsigned by agents/unknown persons signing DR Forms.**

15    In regard to the issue of DR Forms that were allegedly not signed by agents, counsel for the 1<sup>st</sup> appellant submitted that failure by an agent to sign a DR Form or failure by a presiding officer to write on the form the reasons why an agent did not sign or the non indication on the form the time when the said form has been signed does not invalidate an election.

20    Counsel relied on ***Mujuni Vincent Kyamadidi Versus Charles Ngabirano & Electoral Commission, High Court Election Petition No.05 of 2016***, to support the above submission.

Counsel further submitted that the appellants as well as the respondent submitted DR Forms in their possession; and the results in the said Forms were the same like those on the disputed forms. He contended that there was no dispute as to the results contained in the DR Forms for all the sub counties in the constituency. Further, that if it were proved that indeed the respondent's agents were denied an opportunity to sign DR Forms, they still had a duty to prove that what was contained in the DR Forms was not a true account of the election. He further contended that the respondent had a duty to prove that he had actually appointed polling agents at the respective polling stations.

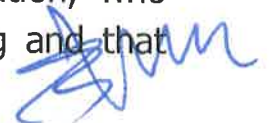


5 Counsel made reference to the evidence of Kakaire Hassan who alleged that the signature appearing on the DR Form of Malobi Primary School did not belong to him, and was therefore, forged. He submitted that in analyzing the signatures of the said witness, the trial Judge wrongly relied on documents that were not attached to his affidavit, and therefore not  
10 part of his evidence. He contended that for an allegation as serious as forgery, the Court ought to have invited an expert to verify the questioned signatures.

In reply, counsel for the respondent submitted that contrary to counsel for the appellant's submission that the trial Judge wrongly made a finding that  
15 results on DR Forms unsigned by agents were invalid, it was instead the learned trial Judge's finding that non-signing of DR Forms could be ignored where the presiding officer stated reasons for the failure by the agents to sign.

With regard to Nawangaiza Catholic Church polling station, counsel  
20 submitted that the DR Forms of the said polling station were rightly impugned by the trial Judge considering the contradictory evidence given by the presiding officer of the polling station. He was of the view that in such circumstances, the trial Judge was right in concluding that the DR Form of the polling station did not reflect the genuine results of the  
25 election.

For Malobi Primary School Polling Station, counsel made reference to the evidence of Kakaire Hassan and submitted that the trial Judge rightly made a finding that his signature was forged and that the 2<sup>nd</sup> respondent's officials were responsible. The basis of his submission was that the  
30 signature attributed to the said Kakaire Hassan on the DR Form differed fundamentally from his known signature appearing on his National Identity Card. In addition, counsel invited Court to consider the evidence of Ikobu Abu, the 1<sup>st</sup> appellant's polling agent at the same polling station, who testified that there were indeed disturbances during the voting and that  
35 Kakaire Hassan indeed raised issues of untallying numbers.



5 Counsel further submitted that the issue of denying the respondent's agents the opportunity to sign DR Forms was also pointed out at the polling stations of Kiringa A polling station, Nawangaiza Primary School polling station and St. Andrew Memorial Primary School. He contended that the respondent had adduced cogent evidence to show that his designated  
10 polling agents namely Kyoterekera James, Wambi Alex and Wakibi Ismail, had been denied the opportunity to sign the DR Forms and other people unknown to the respondent had signed as his agents.

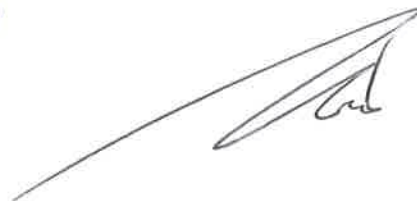
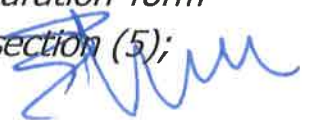
With regard to the submission of counsel for the appellants' that there was no evidence on record to prove that the respondent had appointed agents  
15 at the polling stations in issue, counsel submitted that the evidence on record supported the respondent's argument that he had appointed agents at the polling stations. Further, that the practice was that a candidate appoints agents by a letter addressed to the Electoral Commission (2<sup>nd</sup> appellant). Therefore, in the event that there was a dispute as to whether  
20 there was an agent or not at a polling station, the burden would shift to the 2<sup>nd</sup> appellant to prove that no agent was appointed or otherwise.

We have carefully considered the evidence by the parties in the lower Court, the submissions of counsel and the authorities relied upon by the parties. We have also studied the trial Judge's finding in regard to this  
25 issue.

Section 47 of the Parliamentary Elections Act generally provides for counting of votes at polling stations during an election, and section 47(7) makes provision for candidates or their agents signing of DR Forms. It states as follows:

30 *"(7) The following shall apply in respect of the signing of the declaration and the announcement of the results of voting under subsection (5)-*

*(a) the candidates or their agents shall sign the declaration form before the announcement of the results under subsection (5);*



- 5 (b) where any of the candidates or their agents refuse or fail to sign the declaration form-
- i) the candidates and their agents refusing or failing to sign shall record on the declaration form the reasons for the refusal or failing to sign, and
- 10 ii) Where they refuse or fail to record the reasons, the presiding officer shall record the fact of their refusal or failure;
- (c) Where any candidate or agent is absent, the presiding officer shall record the fact of that absence;
- 15 (d) The refusal or failure of a candidate or agent to sign any declaration form under subsection (5) or to record the reasons for that refusal to sign as required under this subsection shall not by itself invalidate the results announced under subsection (5);
- 20 (e) The absence of a candidate or an agent from signing of a declaration form or the announcement of results under subsection (5) shall not by itself invalidate the results announced."

25 Bearing the above provisions of the law in mind, we shall analyze the evidence adduced by the parties for the allegations at the several polling stations.

The evidence of Buyinza Simon, in support of the petition, was that he together with Baligasiima Bosco were the polling agents of the respondent herein at Nawangaiza Catholic Church Polling Station. He stated that when voting was ongoing at around 11:00 am, they were approached by the 1<sup>st</sup> appellant's agent and offered money in order for them to allow the rigging of the election, which they declined to do. It was his evidence that they were then chased from the polling station and only allowed back at the station when their supervisor arrived and insisted for them to resume their seats. Further, that he refused to sign the DR Form because he had not witnessed part of the voting. On the other hand, Kiwumo Julius, who was



5 the presiding officer of the said polling station, testified that after closure of the voting at the station, all the agents of the candidates at the polling station signed the DR Form without raising any complaint, and that allegations that the agents of the respondent were chased from the polling station were false.

10 We have looked at the DR Form for Nawangaiza Catholic Church polling station that was certified by the 2<sup>nd</sup> appellant and tendered in evidence by the respondent (EXH P1- RR13). Contrary to the evidence of the polling officer that all agents of the candidates signed the DR Form, it is apparent that no agent signed. The presiding officer recorded the reasons for the  
15 failure by the agents to sign as being that the agents were not present. During re-examination, the said presiding officer's explanation for the absence of the agents' signatures was that due to excitement, some agents left the polling station.

In dealing with this issue, the learned trial Judge rightly made a finding  
20 that failure by an agent to sign does not necessarily invalidate results of an election. She then further held at page 33 of the Record of Appeal as follows:

*"However, this is not the case here. It is not a question for refusing or failing to sign. It is a question of lies told under oath by an officer of the 1<sup>st</sup> respondent who is mandated to ensure that elections are conducted in a free and fair environment in compliance with the law.*

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*It is the purity of the Electoral process. The agents did not sign and no reasons were given by the presiding officer which omission raises questions as to the purity of the process at his polling station (sic).*

*It is not believable that even the agents of the winning candidates didn't sign and witness the results. In view of the fact that the 1<sup>st</sup> Respondent's presiding officer lied under oath because his incompetence was put into question and the truth had to suffer, court is convinced that the election at Nawangaiza Catholic Church*

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5            *polling station was not conducted in compliance with the law. Court cannot believe a presiding officer who lies under oath to protect his image that is in question'*

10 We accept the trial Judge's finding that the evidence of the presiding officer contained in his affidavit and during cross examination as to whether the candidates' agents signed on the DR Forms was contradictory, and therefore suspicious. Although there was no direct evidence to prove that when the agents apparently left the station the election was rigged, the act of chasing away the agents after apparently offering them money so that the election could be rigged raised suspicion as to the integrity of the election.

15 We find that indeed the results from this polling station were rendered unreliable considering that the principle of transparency was compromised at the polling station.

20 With regard to the complaint of non-compliance at Malobi Primary School, the evidence was contained in the affidavit of Kakaire Hassan who was the respondent's polling agent at the said polling station. It was his evidence that the total number of ballot papers at the Station was 800, and at the end of voting, the total number of unused ballots was 374. However, that upon completion of voting, the number of votes cast totaled up to 476 yet the total ballots that were counted as used were 426, considering that only 8 booklets had been fully used and only 26 ballot papers had been picked from the 9<sup>th</sup> booklet. Further, on adding up the 374 unused ballots to the 476 used ballots appearing on the DR Form, they all totaled up to 850 ballots, creating an unexplained excess of 50 ballots. Kakaire Hassan testified that he thereupon raised concern to the presiding officer, but he was ignored and a group of people at the station threatened to beat him and his colleague who was a polling agent of Dr. Kiiza Besigye. It was his testimony that he was then chased from the polling station, and as a result he did not sign the DR Form and the signature appearing on the DR Form along his name was not his. He availed a copy of his National Identity card

5 and his identity card from Kaliro Technical Institute to prove that his actual signature differs from that appearing on the DR Form.

On the other hand, Mutadhuba Peter, who was the Parish Supervisor for Namusiisi Parish, testified that voting went on well at Malobi Primary School and that he was personally present at the polling station when the  
10 voting closed and he witnessed the counting of votes and declaration of results. Further, that it was not true that any candidate's agent was beaten or chased away. Kunya Emmanuel, who was the presiding Officer at the said polling station, stated that after counting votes at the polling station, all the candidates' agents, including the respondent's agent signed the DR  
15 Form without raising any complaint.

At the hearing of the appeal, counsel for the 1<sup>st</sup> appellant contended that the learned trial Judge wrongly relied upon the official documents availed by Kakaire Hassan for comparison of the signatures appearing on the said documents and the DR Form. His contention was based on the allegation  
20 that the said documents were not validly admitted into evidence considering that they were not attached to the affidavit of Kakaire Hassan. It is apparent that the said documents were attached to Kakaire Hassan's affidavit in rejoinder, dated 23<sup>rd</sup> May, 2016. We, therefore, find that the contention is without basis and we find no reason to fault the trial Judge in  
25 relying on the documents.

Counsel for the 1<sup>st</sup> appellant also submitted that for an allegation as serious as forgery, the trial Court ought to have invited an expert to verify the signatures of Kakaire Hassan. In comparing the signatures on the documents availed by the said Kakaire Hassan with the DR Form, the trial  
30 Judge relied on ***Mbaghadi Fredrick Nkayi & Electoral Commission Versus Dr. Nabwiso Frank Wilberforce, Court of Appeal consolidated Election Petition Appeals No.14 and 16 of 2011***, and made a finding that where there was a signature for comparison, the Judge may, as an expert of experts, comfortably discern that the questioned  
35 signature was a forgery. We have looked at the above decision and we find

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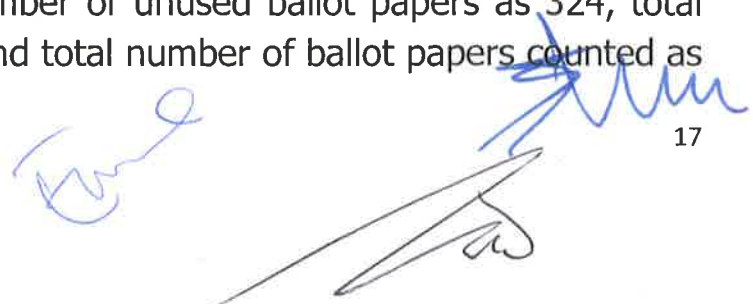
5 that the trial Judge misdirected herself in relying on the same because it holds a contrary view from that held by the Judge in her Judgment. It was held in **Mbaghadi Fredrick Nkayi** as follows:

10 *"Regarding Buwala Store polling station where the signature of the respondent's agent was in question, this matter assumed a criminal element and should have been subjected to expert investigative assessment. With respect, the learned Judge ought not to have arrogated to himself the role of handwriting expert especially when there was nothing to compare the signature with".*

15 However, we find that **Mbaghadi Fredrick Nkayi & Electoral Commission Versus Dr. Nabwiso Frank Wilberforce** is distinguishable from the facts in the present case. We are of the view that it is not in all instances where an allegation of forgery of signatures is raised that the Court has to invite a handwriting expert to verify the signatures. In the present case, the official documents of Kakaire Hassan were tendered in  
20 evidence upon which Court could get the opportunity to make comparison and determine whether the signatures were similar or not. We have compared the said signatures and it is obvious to us that the signatures are different. It was not necessary to engage the opinion of a handwriting expert to determine that the signatures were different. As pointed out by  
25 the trial Judge, the signature appearing on the DRF was clearly and distinctly different and it appeared like writing of the letter H on letter K and adding S to make it appear like a signature.

We, therefore, find that the signature appearing on the DR Form of Malobi Primary School, did not belong to Kakaire Hassan.

30 We have also looked at the DR Form of the same polling station in regard to the allegation that there was an unexplained excess of 50 ballots that were not accounted for, which prompted Kakaire Hassan to decline signing the DR Form. It states the total number of ballot papers issued to the polling station as 800, total number of unused ballot papers as 324, total  
35 number of invalid votes as 12 and total number of ballot papers counted as



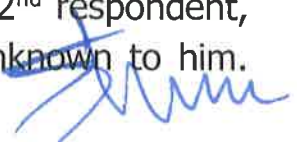
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5 464. This was contrary to the respondents allegations that there was an  
excess of 50 unaccounted for ballot papers. This issue would have been  
best resolved by a recount, which was not done. Without a recount,  
therefore, we are unable to conclude that the evidence of Kakaire Hassan  
alone is enough to prove the allegation that 50 ballot papers were  
10 unaccounted for.

As regards the DR Forms for Kiringa A polling station, Nawangaiza Primary  
School and St. Andrew Memorial Primary School, It was the respondent's  
evidence that his designated polling agents were denied the opportunity of  
signing the DR Forms, and that other people unknown to him instead  
15 signed.

Kyoterekera James testified that he was a polling agent for the respondent  
at Kiringa A Primary School, and that his appointment letter was taken  
away by the presiding officer at the polling station. It was his evidence that  
when the counting of votes was completed, no declaration of results was  
20 filled and that he did not sign the DR Form. Wambi Alex, testified that he  
was the respondent's polling agent at Nawangaiza Primary School, and his  
Co-agent was Mukisa Farouk. He testified that voting and counting of votes  
went on well but the results announced at the Station were later changed  
because the presiding officer refused to produce the DR Form to be filled in  
25 the agent's presence. Wakibi Ismail testified that he was the respondent's  
agent at St. Andrew Memorial Primary School. Further, that voting went on  
well until the presiding officer declined to give him a copy of the DR Form,  
which became an indicator to him that the results could have been  
tampered with.

30 We have looked at the DR Forms for the said polling stations that were  
certified by the 2<sup>nd</sup> appellant as well as those produced by the respondent  
and the 1<sup>st</sup> appellant. The DR Form for Kiringa A Primary School indicates  
Twedede Julius as the agent who signed on behalf of the 2<sup>nd</sup> respondent,  
and the respondent contends that the said person was unknown to him.





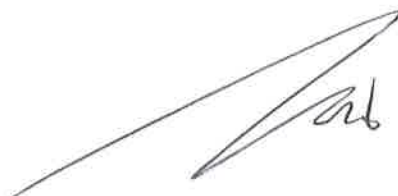
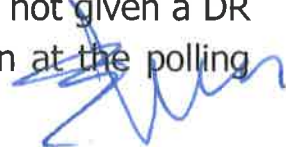
5 The point of contention is whether the said Twedede Julius was the respondent's agent at the polling station.

The Learned trial Judge shifted the burden of proving that the said Twedede Julius was appointed as a polling agent of the respondent, to the 2<sup>nd</sup> appellant, and held as follows:

10 *"The Electoral Commission must however show that the person who signed was indeed the candidate's agent in rebuttal to the allegation that another person other than the agent of a candidate signed. Under section 32(2), the polling agent is appointed in writing and the letter is addressed to the presiding officer. This implies that the*  
15 *presiding officer must have that letter and file it. It is part of his record since the polling agent's work is to guard the interest of the candidate. Where a candidate turns around that the person who signed was not his agent, the letter addressed to the presiding officer is sufficient proof that the candidate appointed the person who*  
20 *guarded his interest".*

We find that the burden of proving that the respondent appointed polling agents at the respective polling stations remained with him. The respondent appointed the said agents and the burden remained on him to prove as such, regardless of the fact that the appointment letters were  
25 addressed to the presiding officers. The burden was upon the respondent to prove that he appointed a polling agent other than the person who signed the DR Form. While Kyaterekera James alleges that he did not sign the DR Form, there is no proof that the respondent had not appointed Twedede Julius as a polling agent as well.

30 The above notwithstanding, the said Kyaterekera James testified that the voting went on well and his only complaint was that he was not given a DR Form to sign. He did not contest the results of the election at the polling Station.



5 In ***Mbaghadi Fredrick Nkayi & Electoral Commission Versus Dr. Nabwiso Frank Wilberforce (Supra)***, the Court stated that the role of the Court was not confined to balancing of the rights and merits of the opposing parties, rather the question was if a valid election was held having regard to the rights of the voters, and we agree. In the present  
10 case, while the respondent's agent could have been wrongly denied an opportunity to sign the DR Form, there were no complaints as to the validity of the results recorded on the said DR Form. It would have been different if the said agent had brought it to the attention of Court that his failure to sign was based on any act that would affect the results at the  
15 polling station as recorded on the DR Form.

With regard to St. Andrew Memorial Primary School the evidence of Wakibi Ismail was that voting went on well until the presiding officer declined to give him a copy of the DR Form. We carefully perused the DR Forms tendered in evidence for the said polling station. On the DR Form tendered  
20 in evidence by the respondent, there are no signatures by any polling agents and the reason stated by the presiding officer for their failure to sign was that 'they did not actually refuse but did not avail themselves at the polling station'. However, the DR Form certified by the 2<sup>nd</sup> appellant has several signatures of polling agents including that of Wakibi Ismail. The  
25 presiding officer, Kwagala Ezeza, testified that all the polling agents at the Station signed the DR Form.

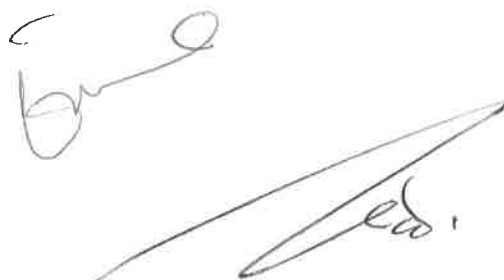
The above contradictory evidence contained in the DR Forms and the evidence of the presiding officer raises suspicion as to whether the agents signed the DR Form or not. However, like at Kiringa Primary school, there  
30 was no contention as to the validity of results contained in the DR Form. The DR Forms contained the same results and the respondent did not allege different results. Thus the failure by the agents to sign proved nothing since as already stated above, failure to sign DR Forms *per se* does not invalidate the results contained in the DR Form.



5 Wambi Alex, who was the respondent's polling agent at Nawangaiza  
Primary School, testified that results announced at the Station were later  
changed because the presiding officer refused to produce the DR Form to  
be filled in the agent's presence. He did not give any evidence as to what  
to him were the correct election results at this polling station. We find that  
10 there was no sufficient evidence to prove that the results were changed.  
We hold the same view, as above, that the failure by agents to sign  
did not invalidate the results.

There was also a complaint that the DR Forms for Nawandala Primary  
School were signed by Birombo Philip who was the presiding officer of  
15 Nawangaiza Primary School. According to the evidence of Bikadho Abbas,  
who was the election supervisor for Nawandala Sub County, at the close of  
polling, he went around the sub county to collect the DR Forms and voting  
materials from the polling stations, and during the process, it was  
established that there had been a mis-packaging of the DR Forms for  
20 Nawangaiza Primary School and Nawandala Primary School A-M. It was his  
testimony that he thereupon took a decision and directed the presiding  
officers to sign the DR Forms and indicate at the bottom of the Form the  
correct name of the polling station. Further, that the results of the polling  
stations indicated by the presiding officers were a true and accurate  
25 representation of the votes cast at the respective polling stations. The  
presiding officer of Nawandala polling station gave the same account of  
events.

The evidence of Philip Birombo, who was the presiding officer of  
Nawangaiza Primary Station, was that he had the correct voting materials  
and that he properly filled in the DR Form of the polling station as such. It  
30 was his testimony that while the DR Form reading 'Nawandala Primary  
School' indicated that he was the one who signed the same, he had not  
signed the said Form and that there was no mix up of the DR Forms as had  
been alleged by Bikadho Abbas.

A handwritten signature in blue ink, appearing to read 'Philip Birombo', is written over a large, light-colored scribble or mark.

5 It is apparent that the DR Form reading "Nawangaizi Pri Sch" was signed by Bulago Fred, and at the foot of the document it indicates the place as being "Nawandala A-M", and the DR Form reading "Nawandala Pri School A-M" was signed by Birombo Phillip, and at the foot of the document it indicates the place as being "Nawangaizi P/S". It was not in dispute that  
10 Bulago Fred was the presiding Officer of Nawandala A-M and not Nawangaizi Pri Sch, and Birombo Phillip was the presiding Officer of Nawangaizi Pri School and not of Nawandala A-M. The respondent drew an inference that the said presiding officers signed DR Forms for polling Stations they did not preside over, and that there was a fraudster who  
15 signed as Birombo Phillip, to which the trial Judge agreed. She held as follows:

*"Serious scrutiny of the DRF for Nawandala signed by Birombo Phillip who has denied it shows that the Birombo Philip who signed was an impositor and fraudster who is very good at forging signatures.*

20 *Since Birombo Philip who was the presiding officer of the 1<sup>st</sup> Respondent has denied signing for Nawangaiza P/S this calls for investigation into this matter.*

25 *In my humble opinion, materials are checked at the beginning of the exercise to ensure that everything is well. It cannot be discovered at the time of filling in the results. If that be the case then it is a manifestation of gross negligence on the part of 2<sup>nd</sup> Respondent's officials which affects the quality of election'*

We have taken into consideration the evidence of the said Birombo Philip that he did not sign the DR Form for Nawandala polling station as alleged  
30 by the appellants and Bikhado Abbas. However, we find that this was one of the instances where the Court ought to have engaged a handwriting expert to scrutinize the signature appearing on the said Form, before reaching a conclusion that the same was forged. We also note that there was no sample signature or documents of the said Birombo Philip on Court  
35 record which could have been compared with the signature appearing on



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5 the DR Form before Court reaching a conclusion that it was forged.  
Further, the DR Forms certified by the 2<sup>nd</sup> appellant as well as the DR  
Forms availed by the respondent contained exactly the same information  
and results. Both forms indicated the right polling station at the foot of the  
documents as was explained by Bikhado Abbas. With respect to the trial  
10 Court's finding, we are of the opinion that the evidence given by the  
appellants and Bikhado Abbas was more believable.

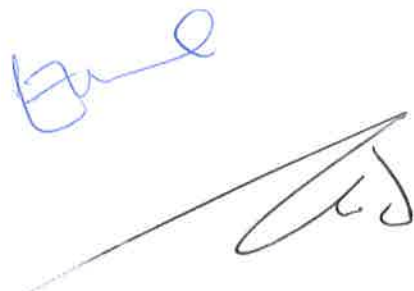
We accept the trial Judge's finding that polling materials ought to be  
checked at the beginning of the exercise to ensure that everything is in  
order. However, it ought to be taken into consideration that human errors  
15 and mistakes, are expected in an election. We are persuaded by the Kenya  
decision in ***Nadimo Versus Independent Electoral and Boundaries  
Commission & Others [2014] 1 EA 355***, that although perfection is an  
aspiration in an election, allowance must be made for human errors, and  
what is paramount is that the ultimate will of the electorate is ascertained  
20 and upheld.

We are convinced that indeed there was a mix up in the packing of the DR  
Forms for the two polling stations of Nawandala A-M and Nawangaizi Pri  
School. However, there is no dispute as to the results indicated in the said  
Forms as being the true account of what actually transpired at the  
25 respective polling stations.

## ii. **Signing DR Forms at 4:00pm.**

This issue is based on the trial Court's finding as follows:

30 *"Court had the opportunity to look at all the DRF's from the  
constituency as supplied by the 1<sup>st</sup> respondent. In many DRF's the  
forms were signed at 4.pm implying that voting ended before 4.pm  
because counting takes some good time. It is not possible to sign the  
DRF at 4.pm sharp... All the above show that they were filled in haste  
or fabricated."*





Counsel for the 1<sup>st</sup> appellant submitted that the time indicated on the DR Forms was not evidence of falsification of results considering that polling officials are bound to apply their understanding of the guidelines differently. He contended that it was possible for some polling officials to incorrectly fill in the time when the polling ended. Counsel brought it to the attention of Court that even in Nambale, Nabitente and Namungalwe sub counties where it was contended by the respondent that the elections were conducted in accordance with the law, some DR Forms are stated as having been signed at 4:00 pm, while others did not indicate the time when they were signed. Counsel relied on ***Mujuni Vincent Kyamadidi Versus Charles Ngabirano & Electoral Commission, High Court Election Petition No.05 of 2016***, and submitted that indication of the time of signing as 4:00 pm was merely an official time at which polling was closed, and could not be taken as proof of fabrication of results.

In reply, counsel for the respondent submitted that in circumstances where DR Forms were grossly mishandled by the 2<sup>nd</sup> appellant's officials, and where the law on filling of the Forms was not adhered to, the trial Judge's decision to construe the said DR Forms as bearing falsified information was justified. He further stated that a DR Form could not be filled and signed before counting of the votes because the DR Form was supposed to show when the presiding officer certified that the DR Form had been filled and the exercise conducted as set out therein. Counsel contended that if the time indicated on the DR Forms by the presiding officers was meant to show when the voting ended, that was an indication of ignorance and incompetence of the 2<sup>nd</sup> appellant's officials.

Counsel further submitted that while the trial Judge criticized the signing of the DR forms at 4:00 pm, she only dwelt on 8 polling stations which had other complaints of non-compliance other than the signing of the DR Forms at 4:00pm. He contended that the signing of the DR Forms at 4:00 pm at the polling stations of Nawangaiza Catholic Church, Malobi Primary School,

5 Kiringa A Primary School, Nawangaiza Primary School, St Andrew Memorial, Nawandala Primary School A-M, Bugongo Primary School and Nawandala Primary School N-Z, just compounded the trial Judge's concerns about the said polling stations.

10 Counsel submitted that ***Mujuni Vincent Kyamadidi Versus Charles Ngabirano & Electoral Commission (Supra)***, was distinguishable from the present case because in the former, the respondents had an opportunity to cross examine the petitioner's witnesses and the Court's findings were aided by the contradictions during cross examination, which was not done in the present case. Further, that for the present case, it was  
15 not only about the signing of the DR Forms but also about the lies told to Court by the officials of the 2<sup>nd</sup> respondent.

It is apparent that the DR Forms of several polling stations state the time of signing as 4:00 p.m. To illustrate the instances where the DR Forms were signed at 4:00p.m, the trial Court sampled out the following polling  
20 stations:

1. Namungalwe H/C 111,
2. Naluko P/S N-Z in Nabitende S/C,
3. Bugongo T/Centre A-M in Nabitende S/C,
4. Kakira Borehole at Nambale S/C,
- 25 5. Nassuti South-Kasango's place in Nambale S/C,
6. Namukumya – Nawandala S/C HQS,
7. Bugongo P/S in Nawandala.

We find that at most of the polling stations where time was stated as 4:00 pm, both parties had appointed polling agents and no complaints were  
30 raised of instances where any candidate was disadvantaged in any way. Neither of the said agents testified that voting closed before 4:00pm. There was no complaint that any voters were disenfranchised due to the early closure of voting at those polling stations. We find that without any further proof, the trial judge was wrong in arriving at the conclusion that



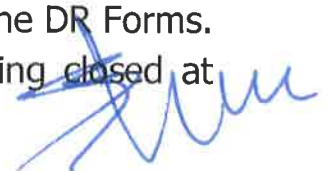
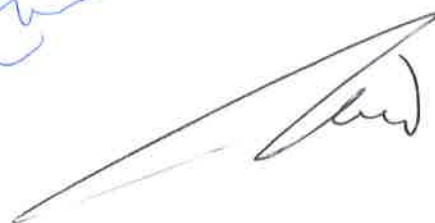

5 the stating of the time of signing as 4:00pm was an indication that the Forms were filled in haste or fabricated.

iii. **Spreading of false propaganda leading to violence, ballot stuffing and multiple voting.**

10 At Bugongo Primary School polling Station, the time of signing was stated as 4:00pm, and the Form was duly filled with details of the results. Bakali Yunusu and Muwangazi D signed as agents of the respondent at the polling station. Kapala Brian testified that he was the respondent's polling agent at the polling station, but he ran away from the polling station at around  
15 3:00pm after a crowd at the polling station became unruly and threatened him with death.

We note that on the same polling day, it was a National General Election day and several elections, including presidential elections were also being conducted at the same polling station. If there was indeed an unruly crowd  
20 at the polling station that chased the respondent's agent from the polling station, there must have been some independent witnesses to state as such. We also find that the respondent did not prove to the satisfaction of Court that he had appointed the said Kapala Brian as an agent at the polling station.

25 With regard to Nawangaiza P/S N-Z, the respondent's polling agent Kintu Ngobi Moses testified that after the voting had closed, a man arrived at the Station demanding that he be allowed to vote, and the waiting crowd insisted for him to vote. At the same time, that a vehicle full of the 1<sup>st</sup> appellant's supporters arrived at the station and forced the presiding officer  
30 to open the ballot box, and all people including those who had already cast their votes, voted again. It was his testimony that at about 7:30 pm when the votes were counted, the crowd forced the agents to sign the DR Forms. The presiding officer of the polling station testified that voting closed at



5 4:00pm but a crowd demanded for him to reopen voting, and voting was resumed till 5:00pm.

The allegation above raised issues of spreading of false propaganda leading to violence during the election, voting after the official polling time and multiple voting at the polling station.

10 With regard to the allegation that voting was allowed beyond the official closing time, we find the evidence Kintu Ngobi Moses and the presiding officer of the polling station believable. A clear account as to the circumstances leading to the re-opening of voting after the official closing time was given by the two witnesses, where people who were not in the  
15 line of voters by 4:00pm were allowed to vote until 5:00pm. The above was attributed to the unruly crowd at the polling station who were spreading false propaganda that the 1<sup>st</sup> respondent's agent had been killed at Nabitende Sub County.

20 Basing on the evidence of the presiding officer and Kintu Ngobi Moses, and taking into consideration the circumstances at the polling station, we are satisfied that there was multiple voting at the polling station contrary to section 31 of the Parliamentary Elections Act.

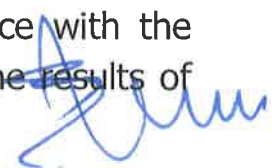


25 We find that the trial Judge rightly invalidated the results of the election at Nawangaiza P/S N-Z on the basis that there was non-compliance with electoral laws.

Accordingly, issue 1 of the appeal partly succeeds.

## **Issue 2.**

*Whether or not the non compliance, if any, affected the results of the election in a substantial manner.*

30 According to section 61(a) of the Parliamentary Elections Act, an election of a Member of Parliament may be set aside for non-compliance with the provisions of the law, and that the non-compliance affected the results of the election in a substantial manner.



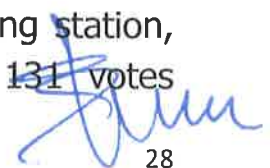
5 The term "substantial manner" has received judicial consideration in the Supreme Court in ***Rt. Col. Dr. Kizza Besigye Versus Yoweri Kaguta Museveni & Anor, Supreme Court Presidential Election Petition No. 001 of 2001***, and the Court cited with approval ***Mbowe Versus Eliuffo (1967) EA 240***, where it was stated as follows:

10 *"In my view in the phrase "affected the result" the word "result" means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first*  
15 *determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules"*

Therefore, it is not sufficient to show that there have been irregularities in  
20 the election, but it must be proved that the non-compliance/irregularities affected the results of the election in a substantial manner. The principle is that an election should not be set aside basing on trivial errors and informalities. ***See; Gunn Versus Sharpe (1974)1 QB 808.***

25 In finding that the non-compliance with electoral laws affected the results of the election in a substantial manner, the trial Court held that in election petitions, it did not matter how many votes one got, but how the votes were obtained and that the bottom line should be the free will of the people who participate in the electoral process. We accept the above finding.

30 In our analysis of the evidence adduced at trial above, we made a finding that the results of Nawangaiza Catholic Church, Malobi Primary School polling station and Nawangaiza P/S N-Z could not be relied upon to determine the will of the people since the elections thereat were conducted in non-compliance with the law. At Malobi Primary School polling station,  
35 the 1<sup>st</sup> appellant obtained 318 votes as compared to the 131 votes





5 obtained by the respondent. At Nawangaiza P/S N-Z, the 1<sup>st</sup> appellant  
obtained 478 votes as compared to 18 votes obtained by the respondent.  
At Nawangainza Catholic Church, the 1<sup>st</sup> appellant obtained 438 votes as  
compared to the 10 votes obtained by the respondent. In total, the  
10 difference in votes obtained between the 1<sup>st</sup> appellant and the respondent  
at the said polling stations was 1,075 votes.

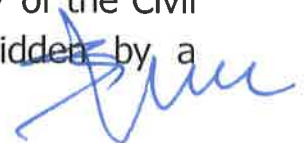
It was not in contention that the 1<sup>st</sup> appellant obtained a total of 17,800  
votes against the respondent's 15,651 votes, creating a difference of 2,149  
votes. In our view, the 1<sup>st</sup> appellants winning margin remains high and  
there is no doubt in our minds that he still remained the validly elected  
15 Member of Parliament for Kigulu North Constituency even after taking  
away from him the votes of the polling stations where voting was not  
properly conducted. As already stated above, for most of the polling  
stations where the respondent raised complaints of failure by his agents to  
sign DR Forms, the results were not contested. In that regard, in our view,  
20 the failure by the agents to sign did not affect the results of the election in  
any way.

In the result, this appeal is allowed. The orders of the trial Court nullifying  
the election of the 1<sup>st</sup> appellant as the validly elected Member of Kigulu  
North Constituency and ordering for fresh elections to be held are set  
25 aside.

On costs of the appeal and petition, these are governed by Rule 27 of The  
Parliamentary Elections (Interim Provisions) Rules S.I. 141-2, which states;

30 ***"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."***

I propose to leave this out because it is contrary to Section 27 of the Civil  
Procedure Act, a substantive Act, which cannot be overridden by a  
subsidiary Rule 270 of the Parliamentary Election Rules.




5 We have considered the record in its entirety and are of the view that the petition was not entirely unmeritorious. Ultimately, the duty of this court is to uphold the interests of justice to all.

10 In respect of the present appeal, therefore, we find that the justice of this case demands that each party meets their own costs here and in the court below.

We so order.

Dated at Kampala this ..... 1<sup>st</sup> ..... day of ..... Nov. .... 2017

15   
Hon. Justice Alfonse Owiny-Dollo,  
**DEPUTY CHIEF JUSTICE**

20   
Hon. Justice Remmy Kasule,  
**JUSTICE OF APPEAL**

25   
Hon. Lady Justice Elizabeth Musoke,  
**JUSTICE OF APPEAL**

30

①

F.P.A. No. 15 of 2016

BUNNO FRED NYABUNHAGA  
& ANOTHER  
VS

BABO: ISMAIL WAGUNA

② ABBA NABER MUYOBE  
for the resp. Resp

is in it.

③ Byebangamba Richard  
is of the appellant

- Appellant absent.

- Admin - claim.  
we are ready to receive the  
appellant's demand in the  
court. There must be above ~~presence~~  
presence of the above ~~presence~~

11/1/17