

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 0060 OF 2016

ARISING FROM ELECTION PETITION NO. 006 OF 2016

APOLOT STELLA ISODO:.....APPELLANT

vs.

AMONGIN JACQUILINE:.....RESPONDENT

CORAM: HON. MR. JUSTICE ALFONSE OWINY DOLLO, DCJ HON. LADY.

JUSTICE ELIZABETH MUSOKE, JA HON. MR. JUSTICE CHEBORION

BARISHAKI, JA

JUDGMENT Introduction

This is an Election Petition Appeal arising out of the Judgment of Kainamura, J, delivered on the 25th day of July, 2016 in which he upheld the election of the respondent as Woman Member of Parliament for Ngora District and dismissed the petition with costs.

Background

The facts giving rise to this Appeal as accepted by the learned trial Judge are that the Petitioner and the respondent contested for election as Woman Member of Parliament for Ngora District which in an election held on the 18th February 2016. The respondent polled 24,539 votes and the petitioner polled 19,766 votes. The petitioner being dissatisfied with the declaration of the respondent as winner by the Electoral Commission filed this petition.

In the petition, the petitioner prayed for a declaration that the elections for Woman Member of Parliament for Ngora District were not conducted and held fairly to the detriment of the Petitioner, that the respondent was not validly elected as Woman Member of Parliament for Ngora District, that the said election be cancelled and the seat for Woman Member of Parliament for Ngora District be declared vacant and fresh elections conducted. The petitioner also prayed for costs of the petition.

The petition was supported by 38 affidavits. The respondent's answer to the petition was supported by affidavits while the answer to the petition by the Electoral Commission was supported by 1 affidavit. The petitioner filed 33 affidavits in re-joinder.

The respondent filed an answer to the petition denying each and every allegation of fact contained in the petition, that the allegations were mere falsehoods, fabrication, conjectures and hearsay and further, in particular, that the distribution of hand hoes was a government program under NAADS and office of the Prime Minister. The Electoral Commission also filed an answer to the petition contending that the elections were conducted in accordance with the provisions of the electoral laws.

The main thrust of the petitioner's case was that the respondent either personally or through her agents with her knowledge, consent and approval 10 committed numerous election offences and illegal practices when she bribed voters contrary to Section 68 [1] and 4 of the Parliamentary Elections Act 2005 as amended. Further that the Electoral Commission conducted and held the elections in contravention of the electoral laws thereby affecting the result of the election in a substantial manner to the benefit of the 1st Respondent.

Judgment was given in favour of the respondent in the terms enumerated above. Being dissatisfied with the decision, the appellant appealed to this Court.

Grounds of Appeal

The grounds of appeal as they appear in the memorandum of appeal are;

1. The learned trial judge erred in both fact and law when he failed to properly appraise and

evaluate the evidence on record judiciously, and in particular with regard to:-

a) Distribution of hoes by the 1st respondent at various places in Ngora County including Okoboi, Osigiria, Oluwa, Atiida Idoga, Ajesa Primary School, Juwai Catholic Church and Tilling PAG Church

b) Donation of Ushs. 700,000 (Uganda Shillings Seven Hundred Thousand) and a saucepan by the 1st Respondent at Kabakuli Pentecostal Church;

c) Donation of 50(Fifty) iron sheets by the 1st respondent at Atapar Catholic Church;

d) Donation of one boat by the 1st Respondent at Atapar-Agule and Kopege villages respectively;

e) Donation of 16(sixteen) iron sheets by the 1st respondent to Oteteen Primary School;

f) Donation of a set of football jerseys, 2 footballs and a whistle by the 1st Respondent to Oteteen FC.

- 2. The learned trial Judge erred in law and fact when he failed to hold that the 1st Respondent committed acts of bribery during the campaign period between 12th December, 2015 and 15th February, 2016 and wrongly declared the 1st Respondent as validly elected Woman Member of Parliament for Ngora District.*
- 3. The learned trial Judge erred in law and fact when he set the standard of proof on the petitioner which was higher than that provided by law.*
- 4. The learned trial Judge erred in law and fact when.*

- a) *He failed to find that the 1st Respondent made a bare denial to allegations of bribery made against her on specific days*
- b) *He failed to find that the 1st Respondent instead created a parallel case relating to acts that took place on different dates.*
- c) *He denied the Appellant's counsel opportunity to cross examine some of the 1st respondent witnesses*

Representation

At the hearing, the appellant was represented jointly by M/S. Obore, Engulu Advocates and M/S Isodo & Co. Advocates while the respondent was represented jointly by Tebusweke Mayinja, Okello & Co. Advocate and M/S Luzige, Lubega, Kavuma & Co. Advocates.

Submissions of counsel for the appellant

Counsel for the appellant adopted their conferencing notes and skeleton arguments that were filed. He argued grounds 1, 2 and 4 of the appeal together. He submitted that the respondent committed bribery at Super Mix bar in Okoboi on the night of 12th of December 2015 and that there was direct evidence of 3 witnesses which was unchallenged. Further, counsel for the appellant submitted that the respondent merely denied the allegations against her instead of giving convincing answers. Counsel argued that the affidavits of the respondent's witnesses Otim Richard and Julius did not adduce evidence regarding their whereabouts on the night of 12th December 2015. Counsel relied on Michael Mawanda vs. EC and Andrew Marshal, Election Petition Appeal Number 98 of 2016 to support his submission.

Counsel for the appellant submitted that the learned trial judge rejected the appellant's evidence without justification. Further, he argued that if he had evaluated the appellant's evidence, he would have found that bribery was actually committed at the different venues.

Counsel for the appellant faulted the learned trial judge in his evaluation of

distribution of hoes. He argued that the hoes were meant for Ngora Development Association of Farmers Network and the farmers came directly to State House under the leadership of the respondent as evidenced by the letter from the Minister of Agriculture. Counsel contended that the hoes under NAADS had already been distributed by 22nd October, 2015 which was outside the period alleged by the appellant.

Regarding the second ground of appeal, counsel for the appellant submitted that the respondent distributed items such as hoes and iron sheets within the campaign period albeit she claimed that it was done under a government program (NAADS). Counsel referred to the evidence of the Resident District Commissioner (RDC) in vol. 1 page 232 lines 22-26 wherein he admitted that the hoes they distributed at the time were the same hoes the appellant was complaining about. Secondly, counsel made reference to a complaint written by the appellant dated 14th December, 2015 in vol. 2 page 416 and 417

describing the alleged events. Thirdly, counsel argued that all the respondent's witnesses save one concur that the distribution of government hoes was between October and November 2015 but do not point out any particular date, which counsel opined was quite odd. Fourthly, counsel submitted that no witness of the respondent adduced evidence that they received a hoe in October or November of 2015. He contended that the said witnesses were the respondent's accomplices whose evidence needed corroboration because their credibility was questionable.

Counsel for the appellant submitted that the respondent was evasive in her response to the petition in five instances to wit; the appellant averred that bribery took place at Kabuin Catholic Church while in the response, the respondent's witnesses averred that the distribution took place in Juwayi Catholic Church; the appellant deponed that bribery took place in Atiga Edoga while the respondent deponed that it was in Atida Atama; the appellant mentioned Super Mix bar in her petition while the respondent mentioned Paradise bar in her response.

Counsel for the appellant submitted that this Court should believe the evidence of the appellant for the following reasons:- First and foremost, the respondent's participation in the petition had a dishonest foundation and Court should have looked at the resolution of issue 1 regarding service of Court process on the 25 respondent. Counsel submitted that the respondent was served on the 8th of April, 2016 but she appended her signature on the petition and dated it 12th of April, 2016 and defended it at the trial. Secondly, the respondent convinced the Minister of Agriculture to amend a written Presidential Directive to include items the president never asked to be included and thus, nothing could stop her from convincing the 31 witnesses to depone falsehoods in their affidavits in reply.

Counsel for the appellant contended that evidence was led in the lower Court to show that iron sheets were received at Atapar Catholic Church yet the same was not reflected in the accountability presented by the respondent.

Counsel prayed that the appeal be allowed, the orders of the lower Court be quashed and set aside and the election of the 1st respondent be set aside and for costs of the appeal here and the Court below.

Submissions of counsel for the respondent

Counsel for the respondent adopted their legal arguments in the conferencing notes, and submitted that the burden of proof in election petitions lies on the petitioner and never shifts to the respondent. He relied on *Odo Tayebwa V Nasser Basajabalaba and Anor Election Appeal 13/2001* where it was held that *“it is incumbent upon the petitioner to prove or to produce cogent evidence to prove this allegation and not to rely on the weakness of the respondent’s case”*. Counsel contended that the appellant failed to discharge the burden of proving the allegation of bribery. He further submitted that regarding bribery using hoes, Mr, Ojangole Joseph who is alleged to have driven the car that transported the hoes averred that he was hired by BOGIS Company and the hoes were distributed under NAADS program. Counsel submitted that some of the petitioner’s witnesses like Ogwang Edison and Rev. Martin Odi failed to enter appearance in Court for cross examination and their affidavits were expunged.

Regarding loopholes in accountability, counsel for the respondent submitted that the respondent was not an Accounting Officer and therefore not answerable.

Regarding bribery using hoes, Counsel submitted that the respondent led evidence to rebut the said allegation such as the evidence of Mr. Oboi Andrew, Opolot the Deputy CAO and the RDC.

On the issue of reporting the matter to Police, counsel for the respondent submitted that Mr. ASP Atolomu the DPC of Ngora District deponed that the evidence of appellant was prior to the events she alleged. He averred that his investigation into the matter revealed that the hoes were distributed between October and November 2015.

Counsel submitted that the learned trial Judge analyzed all the evidence before him in his judgment and it should be upheld.

He prayed that this Court upholds the judgment of the lower court, dismisses the appeal and awards costs both here and in the Court below.

Submissions in rejoinder

In response to failure to produce some witnesses for cross examination, counsel for the appellant submitted that there were 6 instances where the appellant alleged bribery using hoes and there were about 21 affidavits sworn in that respect but no deponent was called for cross examination in respect of hoes. Counsel argued that Ogwang Edison's evidence was in respect of football jerseys while that of Rev. Martin was in respect of Kabakuli Pentecostal Church but they were not the only eye witnesses to the alleged events of bribery. Regarding Eumu's evidence, it was in respect of uttering malicious statements which is not a subject of the Appeal.

In reply to shifting of burden of proof, counsel for the appellant reiterated that once a prima facie case has been made out by the petitioner, the respondent must respond and if they do not, Court will have nothing to evaluate on the allegation.

Counsel submitted that it was erroneous for counsel for the respondent to conclude that the witnesses gave evidence in bad faith without cross examining the deponents. He relied on **H.B Haina & Associates Inc (1978) 28 CBR** to support his submissions.

In reply to distribution being done by BOGIS Company, counsel for the appellant submitted that the evidence of the Oboi Andrew and Ojangole Joseph were not connected.

In reply to bribery at Kabakuli Pentecostal Church, counsel for the appellant faulted the learned trial Judge for disregarding the evidence of the deponents who were not cross examined. Counsel also submitted that it was conjecture for the trial Judge to imagine that there was a donation and receipt book in the church for purposes of receiving donations from people. He contended that the 10 Judge had sufficient evidence on which to determine the petition.

Counsel reiterated his earlier prayers.

Court's decision

We have studied the record of Appeal and the judgment of the lower Court. We have also considered the conferencing notes of both parties, oral submissions 15 of counsel for both parties and the authorities that were availed to Court.

This being the first and final Appellate Court for election matters, it has a duty to subject the evidence adduced at the trial to a fresh and exhaustive reappraisal, scrutiny and then decide whether or not the learned trial judge came to correct conclusions, and if not then this Court is entitled to reach its own conclusions.

It is now trite law in election petitions that the petitioner must adduce cogent evidence to prove their case to the satisfaction of Court. In Masiko Winifred Komuhangi v Babihuga J. Winnie Election Petition Appeal No.9 of 2002, Justice Mukasa-Kikonyogo DCJ, as she then was held in her lead judgment that "As I have already stated above, the decision of Court should be based on the cogency of evidence adduced by the party who seeks judgment in his or her favour. It must be that kind of evidence that is free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's favour.

Black Law Dictionary 6th Edition defines the word "*cogent*" to mean *compelling or convincing*.

Before delving into the merits of the Appeal, we would like to deal with the submission of counsel for the respondent on the issue of affidavits in rejoinder deposed by the appellant's witnesses that were "supposed" to be expunged which the learned trial judge did not address. We note that counsel for respondent did not cross-appeal on the above issue which implied that the respondent was satisfied with the way it was handled. Be that it may, we find that the impugned affidavits in rejoinder such as those sworn by Opolot Gabriel Calvin, Okello Anthony and Oringa David were not relied upon by the learned trial Judge in evaluation of evidence in his judgment. We are therefore of the considered view that there was no miscarriage of justice occasioned on the respondent.

The main thrust of the Appeal concerns bribery which the appellant alleged to have taken place in various locations to wit: Okoboi, Osigiria, Oluwa, Atiida Idoga, Ajesa Primary School, Juwai Catholic Church and Tilling PAG Church using hoes, Atapar-Agule and Kopege village using boats, Oteteen Primary School using iron sheets and jerseys, and Atapar Catholic church using iron sheets.

Counsel for the appellant argued that the trial Judge did not scrutinise the evidence in respect of each venue and generally dismissed it without giving any judicious reasons for doing so. Further, he contended that the respondent did not specifically respond to the above allegations.

Bribery is defined "as the offence committed by one who gives or promises to give or offers money or valuable inducement to an elector, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, or as a reward to the voter for having voted in a particular way or abstained from voting". (See Blacks Law Dictionary 6th Edition)

Section 68 (1) of the P.E.A 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 offence of bribery and is liable on conviction to a fine not exceeding seventy two currency points or to imprisonment not exceeding three years or both".

In Col. (Rtd). Dr. Besigye Kizza V. Museveni Yoweri Kaguta & Anor. Election Petition No. 1 of 2001, Court outlined the 3 ingredients of the offence of election bribery. There ought to be evidence that; a gift was given to a voter, the gift was given by a candidate or his agent and that was given with the intention of inducing the person to vote.

From the above definitions, it is clear that an allegation of bribery must be proved by unequivocal evidence, not mere suspicion. It is also a well-known principle in law is that there is no specific number of witnesses required to prove a given fact. Even one witness can prove a case if he or she is credible (*See Kikulukubyu Faisal v Muwanga Kivumbi Muhammed EPA No.44 of 2011 and Mukasa Anthony Harris v Dr. Bayiga Michael Lulume SCEPA No 18/2007*)

We have studied the judgment of the lower Court and note that the learned trial Judge evaluated the incidents of bribery using hoes in Okoboi, Osigiria, Oluwa, Atiida Idoga, Ajesa Primary School, Juwai Catholic Church and Tilling 15 PAG Church. In addition, he evaluated incidents of bribery using boats in Atapar-Agule and Kopege village, Oteteen Primary School using iron sheets and jerseys, Atapar Catholic Church using iron sheets. In disregarding the evidence of the appellant's witnesses, the learned trial Judge relied on the time the incidents were alleged to have occurred which he described as odd; and the number of people said to have been bribed. This was evident in the following excerpt of his judgment;

“To my mind these allegations squarely fall in the category where truth has been sacrificed for the sake of establishing an adverse claim against the 1st Respondent. To mobilize the numbers of people mentioned in the affidavits at the odd hours of 10:00pm, 11:30pm, 6:00am etc is to say the least stretching the truth if not outright lying. All the affidavits tendered in evidence relating to the said events held at night are silent on the basic minimum requirements. The conveners of the rallies would have been expected to put in place basics like tents and chairs and ensuring the venues are well lit. There is no indication in the evidence before court that this was done. Doesn't this mean that the evidence has failed the credibility test. I think so.

Accordingly, without cogent independent evidence to support the alleged distribution of hoes at odd hours of the night I am unable to rely on this type of evidence”.

However, with respect we are of the considered opinion that the learned trial Judge misdirected himself in referring to the various meetings averred by the appellant’s witnesses as rallies. It was conjecture for him to refer to chairs, tents and lights which had not been an issue in contention. Be that it may, we shall reappraise evidence adduced by both parties in respect of bribery in each of the venues mentioned in ground 1 of the Appeal.

Bribery using hoes

In Okoboi, the appellant relied on the evidence of Omongin James and Ogullu George Peter who deponed that they were present at Super Mix Bar on 12th December 2015 which started at 10:00pm where the respondent was welcomed by Otim Richard (LC 11) and Ejoku Julius Emokol and she distributed to them hand hoes. Omongin James averred that they were about 300 people (para 4 of his affidavit in support). He and Ogullu deponed that they were split into groups of 10. The respondent denied the allegation and also filed an affidavit deponed by Ejoku Julius Emokol. He averred that he never attended any night meeting at his late father’s place and that it is not called Super Mix Bar as alleged and that he had never welcomed the respondent to any such meeting to distribute hoes and such claims were malicious allegations[^] *see para 4 of his affidavit in support*). Further, he averred that as the administrator of his late father’s place, he did not know of any meeting that ever took place there and that he never authorized any meeting in that home by the respondent. *See para 9 of his affidavit in support*). The LC 11 chairperson Otim Richard refuted claims that he welcomed the respondent at the home of Emokol Julius.

In Osigiria, the appellant averred that she personally found people loading hand held hoes on Julius Ongodia’s vehicle Reg No. UAP 655U. In addition, Olaboro Suleiman and Okolimong Joseph deponed that the respondent bribed them and about 300-500 others with hoes at the home of Mr.Ochom Joseph

alias TABU on 13th December, 2015 at about 8:00pm. They averred that the hoes arrived in the same vehicle of Julius Ongodia and the respondent was welcomed by Mzee Oumo and Okur.

Julius Ongodia admitted to transporting and delivering hand hoes to various villages including Osigiria village in Western Ward with Ojangole Joseph and Opolot George Robert but between October and November 2015. Ojangole Joseph deponed that he obtained the services of Ongodia Simon Julius and Mr. Omino Fidelis to help with transportation of hand hoes to different villages including Osigiria village in Western ward.

In Oluwa, the appellant relied on the evidence of Osikei James Peter and Okiria Stephen who deponed that they were bribed with hoes at the home of the late S.K Okurut which the respondent personally distributed on the night of 13th December 2015 at around 11:30pm. Osikei James Peter averred that he personally called the respondent on her phone number 0772364994 when she delayed to reach the venue and when she arrived at 11:30pm, she was welcomed by Emorut Orinyo Charles, the LC 1 chairperson. Julius Ongodia admitted to transporting and delivering hand hoes to Obosai village in Oluwa Parish but between October and November 2015. Ojangole Joseph deponed that boxes of hand hoes were delivered to Obosai village in Oluwa parish between late October and November 2015 under NAADS program, not by the respondent. In Atiida Idoga, the appellant relied on the evidence of Okodoi William and Okanya Geoffrey who averred that the respondent personally bribed voters by distributing hoes to over 700 people at about 2:00am. Okanya averred that the respondent was welcomed by Edimu Simon Peter. Edimu refuted the said claims and averred that he had never campaigned for the respondent. He deponed that he together with Opolot Daniel mobilized masses during the month of November, 2015 between 10:00am and 12:00pm at Atiida Atama where officials from the District Farmers' Network distributed hoes to the people including Okodoi William and Okanya Geoffrey. Opolot Daniel who deponed that he was the chairperson of NRM in Kapir subcounty also refuted Okanya and Okodoi's allegations. He averred that he mobilized the masses to receive hoes at Atiida Atama in November, 2015 from NAADS.

In Ajesa Primary School, the appellant relied on the evidence of Ebedu Julius and Otai David averred that the respondent personally distributed hoes on 15th February 2016 at 6:00am. Ebedu Julius' affidavit was expunged. Otai deponed that the respondent was welcomed by Ekadit Richard. Ekadit Richard denied the allegations in his affidavit and stated that the only hoes that were distributed in Kapir Sub County were before the beginning of 2015/16 general campaigns under NAADS.

In Juwai, the appellant relied on the evidence of Opolot Moses and Opolot George William who deponed that the respondent personally distributed hoes to them at Juwai Catholic Church on 23rd January, 2016 at about 9:00pm. Opolot Moses the LC 1 chairperson of Juwai village deponed that he welcomed people (about 200) at Kobwin Catholic Church and he invited Oreete Sam the LC 11 chairperson and Opolot Kokas to address the gathering and they called upon the people present to vote for the respondent. He averred that Omaido LC 111 chairperson Ngora Town Council was present and forbade them from taking pictures. Opolot Kokas, the Chairperson of the farmer's Association of Juwai village refuted the above claims. He deponed that in October 2015 Oreete Samuel, the chairperson Kobuin subcounty Farmers Association contacted him to mobilize farmers of his village at Juwai Catholic Church and they distributed to them hoes that had been brought by district officials, not the respondent. Oreete Samuel reiterated Opolot Kokas' position and added that the only hoes distributed in Juwai village were done on 28th October, 2015 under NAADS.

From the record of proceedings of the lower Court, counsel for the appellant opted not to cross examine Oreete Samuel even after he was availed by the respondent yet he was the main witness at Kobwin Catholic Church where some of the hoes were said to have been distributed. We are therefore, inclined to believe the evidence of the respondent's witnesses. We are of the considered view that that the appellant failed to prove bribery using hoes at Kobwin Catholic Church.

In Tilling PAG, the appellant relied on the evidence of Eretu Francis and Ikara John Michael who deponed

that the respondent personally distributed hoes to them at Tilling PAG Church at 6:00am on 22nd January, 2016. Eretu averred 20 that the respondent called Emario Emmanuel aside and asked him to mobilize people to assemble at Tilling PAG church at 4:00am because she was coming to bring hoes. That she was welcomed by Emario and Ojakol Tom. Ikara's deponed that he got information about the meeting from Ogugu Martin that the respondent was coming to distribute hoes and asked them to assemble at Tilling PAG at 4:00am which he did. Emario and Ojakol both denied the above allegations. They deponed that in November 2016 Samuel contacted them and asked them to mobilize farmers of Omoo parish at Omoo PAG Church and he together with other district officials distributed hoes under NAADS. They further alleged that the distribution took place between 10:00am and 12:00pm.

Bribery by donation of money and a saucepan

Regarding bribery by donation, Oluka James, Apio Sarah, Rev Martin Odi and Okure averred that the Respondent donated Ushs. 700,000 (Uganda Shillings Seven Hundred Thousand) and a saucepan at Kabakuli Pentecostal Church on 31/1/2016 and the said money and saucepan were received by Pastor Osello Michael. The respondent denied the allegations. She also relied on the evidence of Okiror James William, Okalebo Jackson and Aluka Rose who averred that they were members of the church and refuted the said allegation. They deponed that Apio Sarah was not a member of the church but rather a member of St Phillip Anglican Church and an agent of the appellant. They also deponed that Rev. Martin Odi was a staunch supporter of the appellant and openly told his congregation that he would do anything to overturn the respondent's victory. During cross examination. Apio Sarah testified that the 700,000/=donation was announced by the respondent after her speech and handed to Pastor Osello who went outside. She testified that she was a member of the church, it was her husband who was a member of St Phillip Anglican

Church. She denied being an agent of the appellant.

We have analyzed the evidence in regard to the above allegation. In para 31(c) of the respondent's answer to the petition she deponed thus; *"Framing the 1st Respondent to have donated UGX 700,000/= at Kabakuli Pentecostal Church the day she attended church service knowing it to be false."* This would imply that she was in church on the alleged date of the donation. However, she refuted the allegation during cross examination. We note that Rev. Martin Odi who averred that he was the preacher for the day was not produced for cross examination. Counsel for the appellant prayed for his affidavit to be expunged because it could not be relied on. In H.B Haina & Associates Inc (supra) which counsel for the respondent relied on, it dealt with consequences to an affiant/deponent who refuses to be cross examined on his or her affidavit. It was held that *"... the principles applicable in those cases where a party fails to submit himself or herself for cross examination are applicable, the basis for rejecting the affidavit is that there is no means of confronting the deponent or of ascertaining the truth of the statements were made. Even if the affidavit is technically admissible, evidence of this nature is of little weight that it cannot materially assist the party relying on it."* There is no evidence of deliberate refusal by Rev. Martin Odi to submit himself for cross examination. However, his evidence was of little weight to the respondent. Pastor Osello Michael who is alleged to have received the donation did not swear an affidavit in support and 25 neither was evidence led to show that he was a registered voter. We are of the considered view that his evidence would have been more credible.

Counsel for the appellant submitted that the learned trial Judge avoided discussing the ingredients of bribery as stated in *Odo Tayebwa (supra)*. He argued that if the learned trial Judge had judiciously evaluated the evidence on record, he would have found that the evidence was adduced by registered voters, who attended the meeting convened by the respondent and witnessed the distribution and/or received hoes. Furthermore, all donations were between 12th December, 2015 and 15th February, 2016 and that none of the deponents were cross examined.

Upon perusal of the said judgment, we note that the learned trial Judge addressed the issue of the ingredients of bribery in his judgment. He stated thus;

It is now well settled that there are three ingredients of bribery which are;-

- 1. A gift was given to a voter*
- 2. The gift was given by a candidate or his agent and that*
- 3. It was given with the intention of inducing the person to vote.*

(See Col (Rtd) Dr. Besigye Kizza Vs Museveni Kaguta and Anor. Election Petition No. 1 of 2001)

He further noted counsel for the Petitioner/appellant's argument that the evidence adduced showed that all the donations were delivered and distributed by the respondent personally save for iron sheets and football jerseys in Oteteen Primary School, that she asked the beneficiaries to return and that all these acts were done between 12th December 2015 and February 2016 within the gazetted campaign period.

It is not in dispute that the witnesses who adduced evidence were registered voters. However, as rightly noted by the learned trial Judge, election petitions are highly partisan and supporters are likely to go to any length to seek to establish adverse claims and therefore it is important to look for cogent independent and credible evidence to corroborate claims to satisfy Court that the allegations made by the petitioner are true. (See Kabuusu Moses Wagabo Vs Lwaiga Timothy Mutekanga & EC Election Petition No. 15 of 2011)

Bribery using a boat

Regarding bribery using a boat at Atapar-Agule and Kopege-Agule villages, the appellant relied on the evidence of Otekat Juma, Esemu Bernard, Oiko Moses, Epau Tom, Erau Didimos who averred that the respondent personally donated one boat each to the two villages. Odeke Simon deponed that he took photographs of the boats.

Epau Tom averred that on 14th February, 2016, the boat for Kopege-Agule village was handed over to Olinga Charles who asked people to vote for the respondent and kept at Onyait Pius' sugarcane garden. He averred that the boat was painted yellow with the inscription '*Donated by Hon. Amongin Jacqueline*' and had a tick, thumb print sign on both sides. During cross examination, Epau Tom maintained his deposition in the affidavit. Olinga and Onyait ddi not dispute receiving a boat donated by the respondent but contended that they received it in September, 2015 at ICOUSO trading centre Agule village at around 6:00pm. During cross examination, the respondent testified that all items donated by her bear her name.

We accept counsel for the respondent's submission that the photographs were taken after declaration of results. Odeke Simon averred that after declaration of the results, he met the appellant at Ogolden Center in Ngora Town Council and she expressed interest in having photographs of the boats that had been donated by the respondent at Atapar-Agule and Agule villages. He further deponed that Epau Tom and Esemu Bernard guided him and he took photographs of the boats which he printed and handed to the appellant. The respondent's witness Atai Betty, a resident of Atapar deponed that the photographs of the boat were taken on 24th February, 2016 when District Council elections were held. She averred that counsel Isodo Samuel picked Esemu Benard from the polling station at around 11am and when he returned, he told them that he had taken counsel to take photos of the boat donated by the respondent in September, 2015.

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

We note from Erau Didimos' affidavit that he did not personally witness the said donation by the respondent. In para 4 of his affidavit in support, he averred that he did not follow the convoy but asked people about the vehicle the next morning and was told that it was the respondent who had brought a boat for the fishing village. This was hearsay evidence which we cannot rely on.

We are also of the considered view that Odeke Simon's evidence does not lend credence to the appellant's case because it does not prove that the said allegation to the satisfaction of Court. The photographs would have been more credible if they were showing the respondent handing over the boats and bore the date of the said donation.

Odeke Peter, the LC 1 chairperson of Atapar-Agule village admitted to receiving a boat from the respondent as fulfillment of her pledge in September 2015. He refuted allegations from the appellant's witnesses that the boat was donated on 12th February 2016 at 8:00pm. Ounene Simon and Atai Betty corroborate Odeke Peter's evidence that the boat was donated in September 2015.

Bribery using iron sheets

In regard to the above, the appellant relied on the evidence of Epeduno Julius and Opio Stephen who deponed that the respondent personally donated 16 iron sheets at Oteteen Primary School for roofing teachers' houses at the request of Ijala Simon, the chairperson PTA. From the record of proceedings of the lower Court, we find that Epeduno Julius disowned his affidavit and was subsequently expunged. This left Opio Stephen as a single identifying witness whose evidence needed corroboration.

During cross examination, Ijala Simon testified that in August 2014, he requested Ngora District officials to provide iron sheets for building teachers' houses because they had a shortage of money. He testified that he received 16 iron sheets from CAO's office in September, 2015. He testified that he was called by the RDC of Ngora District who referred him to the sub-county headquarters to pick the iron sheets which he did and had not yet used them due to shortage of timber. Obai Michael also refuted going to pick iron sheets from the respondent's home or being a member of the PTA of Oteteen Primary School.

Regarding Atapar Catholic Church, the appellant relied on the evidence of Oriokot Patrick and Ekemu Juventine who alleged that on 27th December, 2015 during church service a pledge of iron sheets by the respondent was announced. That on 3rd January, 2016 the respondent spoke in church and 20 announced the fulfillment of her pledge and handed over 50 iron sheets. That by the time of filing the petition the iron sheets had not yet been used. The respondent denied the allegation and relied on the affidavit of Atai Betty a resident of Atapar village who deponed that the 50 iron sheets were delivered in 2015 by the RDC Ariong John Henry, not 3rd January, 2016. She also averred that the respondent did not donate iron sheets in their church (Atapar Catholic Church)

From the evidence on file, we note that the CAO, Ngora District through a letter dated 27th June, 2014 made a request to the Office of the Prime Minister for roofing materials to replace roofs that had been blown off of some schools and churches within school premises that were used as classrooms. Atapaar Primary School (church used as classroom) was 23rd on the list attached as one the schools affected. In a report dated 19th November, 2015 the CAO submitted accountability of distribution of 3200 iron sheets that were received and Atapaar is among them. On the said accountability, Atai Betty and Ijala Simon received iron sheets on behalf of Atapar Catholic Church View P/S and Oteteen Primary School respectively. Though the accountability is not dated, it was received by the Office of the Prime Minister on 20th November, 2015 which places distribution of the iron sheets outside the campaign period.

Therefore, we are of the considered view that the appellant failed to prove allegation of bribery using 16 iron sheets at Oteteen Primary School and iron sheets at Atapar Catholic Church to the required standard.

Bribery using jerseys

Regarding donation of jerseys to Oteteen FC, the appellant relied on the *evidence of Okwele, Ogwang Edison and Epunduno Julius* who averred that the respondent donated to their football club jerseys. The appellant also relied on the evidence of Odeke Simon who photographed the jerseys. Okwele Tonny who deponed that he was the captain of Oteteen FC testified during cross examination that he did not personally witness the respondent handing over

the jerseys. He testified that he got to know about the donation on 11th February 2012 when Ependuno Julius collected the jerseys and handed them to him as team captain. As stated earlier, Ependuno Julius' affidavit was expunged because he disowned it and this weakened the appellant's case. Secondly, Odeke Simon who took photos of the jerseys testified during cross examination that it was the appellant who told him about the donation of the jerseys to the team. The appellant also testified during cross examination that she did not witness most of these acts of alleged bribery personally and was relying on the evidence of her agents who swore affidavits in support. Ogwang was not produced for cross examination and thus his affidavit was of little weight to the appellant's case.

We are of the considered view that the appellant failed to prove that the respondent donated football jerseys to Oteteen FC.

On ground 2 of the Appeal, counsel for the appellant faults the learned trial Judge for holding that the respondent did not commit the alleged acts of bribery during the campaign period.

As rightly observed by the trial Judge, the crux of counsel for the Petitioner/appellant's argument was that the evidence adduced by the appellant showed that all the donations were delivered and distributed by the respondent personally save for iron sheets and football jerseys in Oteteen Primary School, that the respondent asked the beneficiaries to vote for her in return and that all these acts were done between 12th December, 2015 and February 2016 within the gazetted campaign period".

Further, the learned trial Judge observed that "So for the 1st Respondent to fall within the ambit of S 68 (i) & (4) of PEA the alleged acts of bribery should be post 3rd December 2015. In the same vein for the 1st Respondent to demonstrate that the donations she made are not proscribed by the electoral laws, she has to show that they were made before nomination. Indeed that is, in sum the evidence tendered by Petitioner and the 1st Respondent in support of and in rebuttal of the allegation respectively."

After disregarding the evidence of the appellant's witnesses on bribery as discussed above, the learned trial Judge believed the evidence of the respondent which placed distribution of the hoes outside the

campaign period. He held thus:-

“I am more persuaded to believe the explanation offered by the 1st Respondent- that the hoes were distributed between the months of September and October 2015 as part of a Government Programme. The 1st Respondent through her evidence and that of the District Agricultural Officer Oboi Andrew (1st resp. answer pg 34), the Dy Chief Administrative Officer - Opolot Apollo (1st resp. answer pg 41) and Ariong John the Resident District Commissioner (1st resp. answer pg 46) have been able to demonstrate that the hand hoes were procured by government and the contact person was the 1st Respondent. Accordingly in my view there is no scintilla of evidence pointing to the 1st Respondent having bribed voters with hand held hoes (sic)”.

We have studied the affidavits of the respondent, Oboi Andrew (DAO), Opolot Apollo (Ag DCAO) and Ariong John (RDC) and their testimonies during cross examination. The total sum of their evidence was that members of Ngora District Development Network of which the respondent is a part went to State House and requested the President for items such as hand hoes, croel chicks, seedlings and oxen. The request was honored and the items were procured by NAADS Secretariat. They were subsequently delivered to Ngora District Local Government and received by the District Agricultural Officer on 22nd October 2015 who verified and cleared BOGIS Company to distribute the items to the intended beneficiaries in conjunction with Agricultural Officers at the sub county. The RDC monitored the said distribution of hoes which started one week after delivery and was concluded at the beginning of November, 2015. The respondent officiated in Angoda, Omadtok and Ajeluk after an invitation by Ojangole Joseph, the coordinator of Ngora District Development Network.

During cross examination by Court, the RDC testified that it occurred to him that the hoes that the appellant complained about in the petition were the same as those they were distributing. We are therefore unable to fault the trial Judge for finding that the hoes were distributed before campaign period. As already discussed earlier, distribution of iron sheets at the alleged venues was done by 20th November, 2015 which was outside the campaign period.

Counsel for the appellant submitted that the appellant reported the various acts of bribery to Police and Electoral Commission but no action was taken. Upon perusal of the appellant's affidavit in support and further affidavit in support, she attached evidence of reporting two cases under reference SD

63/14/12/15 and 08/14/12. However, upon perusal of the appellant's letter dated 14/12/2015 to the Regional Police Commander Mid-Eastern, she indicated that she had reported cases of distribution of hoes in Okoboi and Osigiria villages by the respondent and night campaigns. In the said letter she complained against the DPC Ngora's inaction and requested for the RPC's indulgence in the matter. There was also a letter dated 29th March 2016 to the O/C CID Ngora where the appellant requested for certified copies of the Station Diary extract which was received on 4th April, 2016. The same were not produced in evidence which the appellant attributed to the OC CID's reluctance to release the same. There was also a letter to the Returning Officer/ District Registrar Ngora dated 30th January, 2016 but there is no evidence of receipt which the appellant in her affidavit attributed to Electoral Commission refusal to acknowledge receipt thereof.

The DPC Ngora, SP Esau Atorom Opio admitted that the appellant on several occasions reported to his office that the respondent was distributing hoes but only one was recorded under the earlier mentioned references. During cross examination, he clarified that it was an error in serial numbering but it was one case reported on 14/12/15. However, he contended that the appellant and her agents refused to record down statements. Nevertheless, he investigated the matter and found that the hoes she was complaining about were distributed between the months of October and November, 2015. He averred that he called a meeting between the appellant and respondent but the former did not show up and instead attacked one of his officers, Inspector Ojangole Fau stine.

We are therefore unable to fault the learned trial Judge for finding that holding that the alleged acts of bribery were not committed during the campaign period.

Therefore, grounds 1 and 2 of the Appeal fail.

On ground 4 of the Appeal, counsel for the appellant faulted the learned trial Judge for failing to find that the respondent made a bare denial to allegations of bribery made against her on specific days and

instead created a parallel case relating to acts that took place on different dates.

As already discussed in this judgment, the burden of proof in election petitions lies with the petitioner, not the respondent. In *Odo Tayebwa (supra)*, it was held that “*it is incumbent upon the petitioner to prove or to produce cogent evidence to prove this allegation and not to rely on the weakness of the respondent’s case*”. *Further*, it is trite law that toto denial is a complete defence in itself. The learned trial Judge need not have made a specific finding about the respondent’s denial of allegations against her. We also note that the alleged “parallel case” created by the respondent was after denial of allegations on the different dates. We do not find merit in counsel’s argument.

Counsel also faulted the learned trial Judge for denying the Appellant's counsel opportunity to cross examine some of the respondent witnesses. From the record of proceedings of the lower court, during scheduling the appellant's counsel submitted that the petitioner/appellant was going to cross examine 11 people from the respondent's list of witnesses which the Judge did not object. He only sought for clarification since the witnesses cut across both respondents then. In a letter date 25/5/2016 addressed to the Assistant Registrar, High Court Soroti, counsel for the appellant requested to cross examine two additional witnesses of the respondent (Atai Betty and Ounene Simon) to be produced on 3/6/2016. From the record of proceedings, counsel for the appellant did not seek leave to cross examine the additional witnesses. On the contrary, he informed Court about alleged harassment of their witnesses by the respondent. We also note that counsel for the appellant opted not to cross examine two of the respondent's witnesses at the end of the case. We therefore find no merit in counsel's contention.

Therefore ground 4 of the appeal fails.

On ground 3 of the appeal, counsel for the appellant faulted the learned trial judge for setting the standard of proof on the petitioner which was higher than that provided by the law.

S.61 (3) of the PEA provides the standard of proof in parliamentary election petitions to be to the satisfaction of Court, on a balance of probabilities. In *Odo Tayebwa (supra)*, it was held that "*in sum the standard of proof is slightly higher than proof on a preponderance of probabilities but short of proof beyond reasonable doubt* "

In Rt Col. Dr. Kizza Besigye v Electoral Commission Presidential Election Petition No.1 of 2006, it was held that "the standard of proof is higher than in an ordinary civil case and is similar to standard of proof required to establish fraud but it is not as high as in criminal cases where proof beyond reasonable doubt is required

Counsel submitted that the learned trial Judge bemoaned lack of evidence of tents, chairs and proper lighting at the venues where hoes were distributed at night and ignored the reports of the appellant to police. Counsel also took issue when the learned trial judge decried the non-production of a receipt

of the 700,000/= and an entry in the record book for donation yet there was very compelling evidence of eye witnesses.

As discussed earlier in this judgment, the learned trial Judge misdirected himself when he called the meetings the witnesses alleged as rallies thus his reference to chairs and tents. Regarding non-production of the receipt, we are of the considered view that it was conjecture for the trial Judge to assume that the church had such documents for purposes of recording donations and the like. Be that it may, we find that the trial judge did not set a higher standard of proof. In light of our findings on grounds 1, 2 and 4 of the Appeal, we find that the appellant failed to prove her case to the required standard.

Therefore ground 3 of the appeal fails.

In conclusion, the Appeal fails. The judgment and orders of the lower Court are upheld. The Appellant shall bear 50% of the costs of the Appeal in this Court and the Court below.

We so order.

Dated this 24th day of May 2018

**HON. MR. JUSTICE OWINY-DOLLO
DEPUTY CHIEF JUSTICE**

**HON. LADY JUSTICE ELIZABETH MUSOKE
JUSTICE OF APPEAL**

MR. JUSTICE BARISHAKLCHEBORION JUSTICE OF APPEAL