THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEALS NO.S 0045 AND 0046 OF 2016

(ARISING FROM ELECTION PETITION NO. 3 OF 2016)

1. IGEME NATHAN SAMSON NABETA
2. THE ELECTORAL COMMISSION } :::::::::::::::::: **APPELLANTS**

VERSUS

MWIRU PAUL :: **RESPONDENT**

CORAM:
HON. JUSTICE S.B. K. KAVUMA, JA
HON. JUSTICE RICHARD BUTEERA, JA
HON. JUSTICE PAUL. K. MUGAMBA, JA

JUDGMENT OF THE COURT

Introduction

This Election Petition Appeal is against the Judgment of Lady Justice Lydia Mugambe in Jinja High Court Election Petition No. 003 of 2016.

Background

The 1st appellant, Igeme Nathan Samson Nabeta and the respondent, Mwiru Paul, contested in the elections for Member of Parliament for Jinja Municipality East Constituency held on 18th February 2016 wherein the 1st appellant was declared winner and was gazetted as such by the 2ndappellant. Dissatisfied with the

results, the 1st respondent petitioned the High Court at Jinja vide Election Petition No. 003 of 2016 challenging the results on grounds that the tallying of the results at Danida (A-D) community polling station was not conducted in compliance with the electoral laws thus affecting the result in a substantial manner. It was alleged also that the results returned during tallying by the Returning Officer regarding Masese 11 and Danida(A-D) community polling stations were falsified. The respondent sought a declaration that the 1st appellant was not validly elected as Member of Parliament for Jinja Municipality East Constituency; an order annulling the declaration of the 1st appellant as elected Member of Parliament; a declaration that the respondent was the duly elected Member of Parliament for the constituency, costs and such other reliefs as court would consider just and appropriate in the circumstances.

The High Court allowed the Petition and made the following declarations and orders:

(i) The 1st respondent was not validly or duly elected Member of Parliament for Jinja Municipality East Constituency.

(ii) The 1st respondent's said election is accordingly nullified.

(iii) The 1st respondent should vacate the MP seat under S.63 (6) (b) (i) of the Parliamentary Elections Act.

(iv) The petitioner was the validly and duly elected direct MP for Jinja Municipality East Constituency and was thereby declared as such.

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(v) Costs for the petitioner were to be paid equally by the 1st and 2nd respondents.

This appeal results from the above orders of the High court. The appellants appealed individually under Election Petition Appeal No.0045 of 2016 and Election Petition Appeal No.0046 of 2016 which were later consolidated and heard together with Igeme Nathan Samson Nabeta as the first appellant and the Electoral Commission as the second appellant.

Representation.

Mr. Kiryowa Kiwanuka, Mr. Ambrose Tibyasa, Mr. Esau Isingoma, Mr. Ojok Geoffrey and Mr. Ochieng Evans were counsel for the 1st appellant. Mr. Ddungu Henry was counsel for the 2nd appellant. The respondent was represented by Mr. Peter Walubiri, Mr. Caleb Alaka and Mr. Edward Kyeyago.

The 1st appellant in his Memorandum of Appeal presented the grounds of appeal as follows:

1. ***The learned trial Judge failed to properly evaluate the evidence on record and came to a wrong conclusion that:***

(i) The Appellant was not validly elected as Member of Parliament for Jinja East Constituency.

(ii) It is the Petitioner that the majority of voters in Jinja East Municipality chose as their MP.

(iii) Mr. Baise Suleiman is a son or relative of the late James Nabeeta – the father to the Appellant.

(iv) The evidence of Mr. Baise Suleiman was not reliable and credible.

(v) Mr. Baise Suleiman had a conflict of interest.

(vi) Annex B is a typical Memento Calendar that is distributed at funerals to all and sundry on death of someone.

(vii) The evidence of Police constable Kabanda on record was credible and without contradiction.

(viii) At least twenty five people did not vote at Danida (A-D) polling station.

(ix) The results for Danida (A-D) polling station were contained in OA3 and PW3 Exh 3.

(x) The investigations of the police were credible.

2. The learned Judge erred in law in finding that Mr. Baise Suleiman should not have been presiding officer at Danida A-D polling station.

3. The trial Judge erred in law in holding that Kirunda Mubaraka was entitled to receive and have possession of the DR Form for Masese Danida A-D polling station.

4. The Learned trial Judge erred in law and in fact in finding that by the Appellant analyzing or comparing OA3 and PW3 exhibit 3 was giving evidence from the bar.

5. The learned trial Judge failed in law in failing to evaluate and compare OA3 and PW3 exhibit 3.

6. The learned trial Judge failed to properly evaluate the evidence on record, erred in law and came to a wrong

conclusion that the complaint by the respondent was not addressed by the Returning officer.

7. ***The learned trial Judge failed to properly evaluate the evidence on record, erred in law and came to a wrong conclusion that the tamper proof envelope for Danida A-D polling station was not opened in accordance with the law.***
8. ***The learned trial Judge failed to properly evaluate the evidence on record, erred in law and came to a wrong conclusion that the contents in the ballot box for Danida A-D polling station had been compromised.***
9. ***The learned trial Judge failed to properly evaluate the evidence on record, erred in law and came to a wrong conclusion that the agents did not have to return the declaration of results forms to the Presiding officer.***
10. ***The Learned Trial Judge erred in law in relying on fresh facts raised in rejoinder inconsistent with the Respondent's earlier pleadings.***

The 2nd Appellant in his Memorandum of Appeal presented the grounds of appeal as follows:

1. ***That the Learned trial Judge erred in law and fact when she held that the results on the Declaration of Results Form were falsified or PW3 Exhibit 4 was tampered with.***
2. ***The Learned trial Judge erred in law and fact when she held that there was no mandatory requirement to rely on***

the contents of the register book and ballot box to determine the outcome of an election.

3. ***The learned trial Judge failed to properly evaluate the evidence on record, erred in law and came to a wrong conclusion that the complaint by the respondent was not addressed by the Returning officer.***
4. ***The learned Trial Judge failed to properly evaluate the evidence on record, erred in law and came to a wrong conclusion that the tamper proof envelope for Danida A-D Polling station was not handled in accordance with the law.***

The Respondent raised three grounds of affirmation of the learned trial Judge's Judgment as follows:-

1. **That the falsification of the Declaration of Results Form (PW.3 Exhibit 4) was confirmed by the unchallenged handwriting expert's report of Mr. Ezati Samuel (annexture F to Paul Mwiru's Supplementary Affidavit).**

2. **That the document marked '15' which counsel for the appellant herein attempted to compare with PW3 exhibit 3 (OA3) was not part of the exhibits or other documents tendered before court and is a forgery at submission stage.**

3. **That the falsification of the Declaration of results form is further proved by the illegal change and tampering with the seals on the black box from seal No. 7738637 to seal No. 1901940 as confirmed by PW3 exhibit 7.**

Counsel for both the appellants and the respondent framed the following issues for determination:

1. ***Whether or not the 1st appellant was validly elected MP for Jinja East Constituency.***
2. ***Whether or not Baise Suleiman is a relative of the 1st appellant and if so whether he is a credible witness.***
3. ***Whether or not the evidence of Kabanda and the investigation of the police was credible and without contradiction.***
4. ***Whether at least 25 people did not vote at Danida A-D polling station.***
5. ***Whether the results for Danida A-D polling station were contained in exhibit P3 and OA3.***
6. ***Whether Kirunda Mubarak was entitled to receive and have possession of the DR form for Danida A-D polling station.***
7. ***Whether the 1st appellant was entitled to compare, to analyze OA3 and PW3 exhibit 3.***
8. ***Whether or not the complaint raised by the respondent was addressed by the Returning officer.***
9. ***Whether or not the tamperproof envelope for Danida A-D polling station was opened in accordance with the law.***
10. ***Whether or not the contents of the ballot box for the Danida A-D polling station had been compromised.***

11. ***Whether or not the agents were required to return the declaration of results form to the presiding officer.***

12. ***Whether the learned trial Judge was entitled to rely on fresh facts raised in rejoinder inconsistent with earlier pleadings.***

13. ***Whether the falsification of results from PW3 exhibit 3 was confirmed by the unchallenged hand writing expert report of Mr. Ezati Samuel and annexture F to Paul Mwiru's supplementary affidavit.***

14. ***Whether document marked 15 was part of the record which was with PW3 exhibit 3.***

15. ***Whether the falsification of declaration of results form is furthered by the illegal change and tempering with the seals on the ballot box from seal number 7738637 to seal number 1901940 as confirmed by PW3 exhibit 7.***

16. ***Whether the learned trial Judge erred in law and fact when she held that there was no mandatory requirement to rely on the contents of the register book and ballot box to determine an outcome of an election.***

Appellants' counsel opted to argue the issues in the order presented. Respondent counsel adopted a similar procedure.

This being the first appeal in this matter, this court has a duty to re-evaluate the evidence before it and come up with its own conclusion bearing in mind that it did not see or in any way perceive the witnesses as they testified in the court of first instance. See **Rule 30 of the Judicature Court of Appeal Rules, Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No. 10 of 1997 and Selle and Another v Associated Motor Boat Company Ltd and others [1968] EA 123.** We shall subject the entire evidence on record to strict scrutiny and carefully consider the submissions of counsel for both appellants and the respondent and the Judgment before coming up with our own conclusions.

The contention in Issue 1 is as to whether or not the 1st appellant was validly elected as MP for Jinja East Municipality Constituency. We find this issue deserves to be resolved last after determining all other aspects of the appeal. As such we will resolve it together with issue 5.

Issue 2 concerned the evidence of Baise Suleiman and its credibility in this case. Counsel for the 1st appellant submitted that the trial Judge was wrong to rely on annexture B, a memento calendar distributed at the funeral of the late James Nabeta to come to the conclusion that Baise Sulaiman was a relative of the late James Nabeta and that basing on that, found the evidence of Mr. Baise incredible, which led to the conclusion that Mr. Baise had a conflict of interest. Counsel argued that inclusion of a person in a memento calendar per se does not make that person a relative. He went on to

say that no evidence of the source of the calendar was adduced in court nor was the maker of the calendar brought before court to test the credibility and authenticity of that evidence. He submitted further that contrary to section 48 of the Evidence Act no person either a member of the family or otherwise with special knowledge of the relationship was called to inform court of the relationship between Baise Suleiman and late James Nabeta. Counsel added that notwithstanding the alleged relationship, there was no law that a relative to a candidate should not be a presiding officer and that it does not follow that even if Baise were related to the 1st appellant, he would not necessarily be truthful. Counsel asked court to find Mr. Baise a credible witness. For the 2nd appellant, counsel associated himself with the submissions of counsel for the 1st appellant and said he adopted and relied on his conferencing notes on record.

Counsel for the respondent submitted that the 1st appellant does not dispute the existence of 'Annexture B' the memento calendar, but that what they question are the learned trial Judge's conclusions based on the memento calendar. Regarding the source of the calendar, respondent's counsel submitted that it was clear that it was distributed at the funeral of the late James Nabeta, a fact the appellants do not deny. He added that the respondent attached that calendar to his affidavit and the only way the 1st appellant could challenge its existence was through an affidavit or cross examination of the respondent on the same but that this was not done. Counsel for the respondent argued also that section 48 of

the Evidence Act which was relied on by the 1st appellant was not applicable to affidavit evidence.

Analysis

The trial Judge when testing the credibility of the evidence of the Presiding officer for Danida (A-D) polling station, Mr. Suleiman Baise, considered Annexture B a calendar which was distributed at the funeral of the late Nabeta James where Mr. Baise appeared with his picture listed among the children of the late Nabeta. The Judge relied on that calendar and stated that Mr. Baise admitted the picture was his but denied being a son to the late Nabeta which denial the Judge rejected and found that Mr. Baise would not ordinarily be included as one of the children of the late Nabeta were he not a child or close relative in some way. We note that the only evidence of a relationship between Mr. Baise Suleiman and the late Nabeeta is the said calendar. Its existence and authenticity were not in question. What Mr. Baise denied was the relationship between him and the late Nabeeta. The trial Judge therefore based on only appearance of Mr. Baise on the said calendar to conclude that Mr. Baise was a close relative of the 1st appellant. We do not consider this conclusive evidence in proof of a relationship. When court has to form an opinion on proof of a relationship between persons, it is important to consider evidence of a person with knowledge of the existence of such relationship. Section 48 of the evidence is to such effect. It states that when the court has to form

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an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of the relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact. The trial Judge should have considered the provision of section 48 of the Evidence Act instead of just relying on the calendar as conclusive proof of the said relationship. In the absence of any other evidence in proof of a relationship, we cannot find that Mr. Baise was a son or relative of the late Nabeeta.

The trial Judge considered Mr. Baise an incredible witness because of the alleged relationship. She rendered him a partial and partisan witness and going by that concluded that Mr. Baise in his position as presiding officer had a conflict of interest. The Judge's conclusion followed allegations that Baise had used his position to benefit his relative, the 1st appellant, to the prejudice of the respondent.

This implication of the position taken by the trial Judge is that relatives of candidates cannot serve as electoral officers or that such witnesses would automatically be presumed untruthful when giving evidence. We disagree with the trial Judge's position above. Court considers evidence before it for its value to a case and a relative to a candidate can be a credible witness in a case. We disagree also with the Judge's finding that Mr. Baise had a conflict of interest.

Black's Law Dictionary, 8th edition, defines conflict of interest as a real or seeming incompatibility between one's private interests and one's public or fiduciary duties. Conflict of interest can also be generally looked at as any situation in which an individual or corporation is in a position to exploit a professional or official capacity in some way for their personal or corporate benefit. It is often founded on the existence of a fiduciary relationship. This kind of relationship cannot be seen to exist in the circumstances of the current case. We do not think that a relative of a candidate serving in the electoral process automatically taints the election. In considering the evidence of Mr. Baise, we note that Mr. Baise despite being an employee of the 2nd appellant and a key player in the election with knowledge of what actually transpired, came to court as a witness of the 1st appellant with evidence supporting the 1st appellant's case. With his position Mr. Baise would have been expected to be impartial as a witness for the 2nd appellant. We do not find his evidence partial in solving the issues of this case. We do not agree with the position of the trial court in this regard.

Issue 3 is in respect to the evidence of Police Constable Kabanda, the investigation of the police and its credibility. Counsel for the 1st appellant faulted the trial Judge for finding such evidence credible and without contradiction. Counsel pointed to court that Kabanda during his oral testimony in court stated that he could not hear the results for each candidate because people were jubilating and he had to control the crowds. However, he contradicted himself in his statement to police where he said he recalled the results to be 226

for the respondent and 187 for the 1st appellant. To counsel this was a major contradiction and that the trial Judge should not have found such evidence credible and without contradiction. In addition counsel for the 1stAppellant submitted that the police investigation was not conclusive and that the Judge should not have relied on it. Counsel referred court to the evidence of George Ochola relating to the police investigations which revealed that police did not visit the scene and that it neither questioned the returning officer nor the 1st appellant's agents. According to counsel for the 1st appellant this rendered the investigation inconclusive. Counsel for the respondent in response stated that the witness made the statement at the police on 25th February 2016, a few days after the elections in which he stated the votes of each candidate clearly. Counsel finds that this evidence was corroborated by other witnesses including Mr. Baluwe Octavious. Counsel added that the witness's testimony in court was on the 16th of May 2016 three months later and that the lapse in time could have affected the witness' memory. In counsel's view since the witness never denied his statement at police, there was no contradiction. On the investigations by police counsel for the respondent pointed out that the trial Judge found that the said police investigation was on going and exercised all necessary caution in dealing with it. The trial Judge stated that she would not rely on the police report because the investigations were not completed yet. That in her view did not mean the report/investigations so far or the testimony of PW3 were not credible.

What counsel for the 1st appellant refers to as contradictory in the evidence of Kabanda was his statement at police where he stated that he recalled the results of Danida (A-D) Polling Station to be 226 for the respondent and 187 for the 1st appellant but later during the hearing of the petition he stated in his testimony that he could not hear the results for each candidate because people were jubilating and he had to control the crowds. When he was shown his statement in court, Mr. Kabanda acknowledged he had recorded the statement and that he had read through it and confirmed it was correct. He said he had signed it on every page. The witness stated:

> *'I confirmed the truth in this statement and then I signed at the end.'*

We find this contradiction minor and without substantial effect on the case as a whole. The witness's admission of the contents in the police statement as the truth cured any uncertainties in his evidence. As to the credibility of the investigation by police, the trial Judge considered the evidence of Batte Daniel and Ochola George Willy alongside the evidence of Rogers Kabanda. She referred to all police officers who testified in the case. From their testimonies in court, which involved extensive cross examination, the Judge was satisfied that they diligently carried out their work. The Judge considered the investigation report PW3 Exhibit 6 as credible and reliable and acknowledged the fact that the police investigation was still ongoing. The trial Judge also considered the evidence of Mutungha Kepher the police officer who arrested Kirunda who in

his statement stated that he was instructed by another police officer Issebaidu Alex Musoke. Issebaidu Alex Musoke disappeared after Kirunda was taken to police which conduct by a police officer the Judge found suspect. The trial Judge opted not to rely on the police report and the police findings so far as the investigations were still ongoing. The Judge stated that this did not mean the report/investigations were incredible. On reviewing the testimonies of the police personnel and the evidence of PW3, Kabanda, we find what the police revealed from their investigations was credible and the Judge erred in no way in coming to that conclusion. She did not rely on the Police report and as such no further discussion on the issue is necessary. We answer this issue in the affirmative.

Issue 4 faults the trial Judge for finding that at least 25 people did not vote at Danida A-D polling station. Counsel for the 1st appellant referred court to the Judgment where the trial Judge concluded that, for a total of 740 votes in PW3 Exhibit 4 to have been realized, only 7 people of the 747 total registered voters did not come out to vote for directly elected MP. The trial Judge used this conclusion according to counsel to disregard PW3 Exhibit 4. He argued that based on that, the trial Judge did not consider the voters' register which indicated the number of people that voted but rather relied on the affidavits of people who deponed that they never voted. He stated that this was not true because there was evidence to show that some people who claimed not to have voted actually voted. Counsel further submitted on the issue of the variance in the total number of voters for Woman MP, directly elected MP and the

President for Danida A-D polling station contending that that only raised suspicion but was not ground for nullification of results. He referred court to Annexture B2 to the Petitioner's affidavit in support, a copy of a tally sheet for the result for the directly elected MP for Masese III (K-M) Bethel Primary School where the total number of voters for the directly elected Member of Parliament were 394 while those cast for President were 451. Based on that counsel stated that that variance in totals was not queried and was not in issue and that accordingly the variance in the number of votes for the directly elected Member of Parliament and those of the President and Woman Member of Parliament for Danida A-D polling station should also be ignored. He added that there was no legal requirement that the total number of voters at a given polling station willing to cast votes for one category of candidates necessarily had to be the same as the number of voters of another or other categories of candidates. He went on to say that the trial Judge should not have considered Mr. Wakida's agent's book to reflect the total number of people that voted because that agent's book was not an official record and none of the appellants or their agents participated in its creation.

It was argued for the respondent that the errors pointed out by counsel for the 1st appellant had no merit. He said that the Judge correctly analysed all the evidence concerning the voting patterns and concluded that on the face of PW3 exhibit 4 it was inconceivable that only 7 voters out of the 747 registered voters did not vote for the directly elected Member of Parliament. Counsel

submitted that the trial Judge erred in no way on basing her conclusion on who voted and who did not vote.

We note that the total number of registered voters for Danida (A-D) community polling station for directly elected MP in both DR Forms PW3 Exhibit 3 and PW3 Exhibit 4 reflects the voters to be 747. The 2nd appellant attached as part of Exhibit 8 a list reflecting the total number of voters for Danida (A-D) polling station to be 747. The trial Judge considered the affidavits of Ariokot Beatrice, Akello Alice, Adoch Santina, Amali Juliet, Budali Stephen, Bodyo Priscikila, Achom Ketty, Acen Lillian, Birabwa Mariam, Akumu Christine, Akullo Margaret, Akidi Sande Vicky, Acio Elizabeth, Bisobye Frank, Bukenya James, Bishobire Robert, Akia Loy, Apanga Stephen, Achieng Mary Victoria, Balinda Moses, Abim William, Apio Molly, Adong Mary and Ajok Jackline who deponed that for various reasons they never voted even though they were registered voters. The Judge also considered the affidavits of Anyeko Rose and Diya Catherine who deponed that Akello Adeke Stella and Anyanzo Karai who appeared on the register had died. The Judge believed that the said witnesses did not vote and that this evidence was not challenged. She found that out of the 747 registered voters for Danida (A-D) polling station, about 25 people who were registered voters at Danida (A-D) did not vote on 18th February 2016. The Judge in arriving at the number of people that did not vote analysed all the available evidence. She rightly rejected the evidence of those who swore conflicting affidavits and correctly accepted the affidavits of those she found truthful. The Judge

clearly had a good basis for her finding which we have no ground to fault. Counsel for the respondent both at hearing of the petition and the appeal argued that the correct number of total votes cast at Danida (A-D) polling station was 418 as reflected in PW3 exhibit 3. Counsel implored court to compare the 419 and 418 total votes cast for the Presidential election and Woman MP election respectively to the 420 votes in PW3 exhibit 3 and the 740 in PW3 exhibit 4. We find the totals in PW3 within the same margins as those for Presidential election and Woman MP election as the election occurred on the same day and at the same time. We acknowledge as the trial Judge did that there is no mandatory requirement for voters at a station to vote in all categories. However we must apply simple logic that the totals of people who vote in each different category ought to be related to a reasonable extent as we observe in PW3 exhibit 3 with 420 votes compared to the 419 and 418 total votes cast for the Presidential election and Woman MP election respectively. On the other hand a total of 740 votes stretches the mind beyond reasonable relatable margins. No one will seriously believe that an extra 320 people showed up to vote only for a directly elected MP. This inevitably raises doubt on the authenticity of PW3 exhibit 4. We answer issue 4 also in the affirmative.

The contention in issue 6 was whether Kirunda Mubarak was entitled to receive and have possession of the DR form for Danida A-D polling station. Issue 11 is whether or not the agents were required to return the declaration of results form to the presiding officer. We shall resolve these two issues together.

Counsel for the 1st appellant argued that Mr. Kirunda Mubarak was not known to the 2nd appellant as an agent of the respondent and therefore was not entitled to act on behalf of the respondent. That it was an error on the part of the Judge to have found Mr. Kirunda Mubarak an agent when he lacked an appointment letter. He submitted that Kirunda was therefore not entitled to receive and possess the DR forms. On the issue of the agents not having to return the Declaration of Results form to the presiding officer, counsel submitted that since polling agents are supposed to report to the presiding officer, they should return the DR forms to the presiding officer after signature for further management. It was counsel's submission that the DR form purportedly taken by Mubarak for photocopying was not handled in accordance with the law and in case it was ever issued to him for purposes of photocopying he ought to have returned it to the presiding officer for further direction since the process was not yet complete.

In response counsel for the respondent refuted the claims and affirmed that Mr. Kirunda Mubarak was an appointed agent of the respondent and was duly authorized to receive the copy of the DR form. Concerning the argument that the agents ought to have returned the DR form to the Presiding officer for further management counsel submitted that the agents were each entitled to a copy of the DR forms and that there was no need to return the copy to the presiding officer.

Mr. Mubarak Kirunda deponed an affidavit in support of the petition wherein he stated that on the 15th day of February 2016 he was appointed as Electoral supervisor for Masese II and Masese III Parish by the respondent. He stated that on the 18th day of February 2016, while at the Danida (A-D) polling station, Wasswa Martin gave him a copy of the DR form for directly elected MP relating to the said polling station for transmission to the respondent. He deponed that he attached his appointment letter as 'annexture A' to his affidavit. We find it fishy that the appellants left out this page from the record they filled which can only have been done to enable them support their argument that Mr. Mubarak had no appointment letter. Filling an incomplete record by the appellants is an abuse of court process. We find that it was an attempt to mislead court. This court will not condone such. The correct affidavit of Mr. Mubarak with all its attachments was filed in the supplementary record and a copy of his appointment letter is attached. The letter gave Mr. Mubarak power to coordinate and supervise the electoral process including colleting all the DR forms in that parish from all polling agents after the elections. The said copy was signed by the respondent and was accepted as part of the record before the lower court. Mubarak's duties as a supervisor were well spelt out in his appointment letter. One of the duties was collection of the DR forms from the agents. He was therefore within his mandate to receive and possess the DR form for Danida (A-D) polling station. As for the issue of the agents having to return the DR forms to the presiding officer, the position of the law is that

immediately after the close of poll, the presiding officer proceeds to count the ballot papers of the polling station and to record the votes cast in favour of each candidate. The presiding officer and the candidates or their representatives then sign and retain a copy of the declaration of results. See **Article 68(4)** of the Constitution of Uganda and section 47(4) and (5) of the Parliamentary Elections Act. Just as the trial Judge found, we too find that there was no need for the returning officer to take back all the copies of the DR forms after they were signed. He is only required to retain other copies for the tamper proof envelope, public display, report book and the ballot box. Apparently there were not enough DR forms at this polling station contrary to the strict provisions of section 50 of the Parliamentary Elections Act. Perhaps this is the origin of the present dispute. This issue we answer in the negative.

Issue 7 and 14 raise contentions as to whether the 1st appellant was entitled to compare, to analyze OA3 and PW3 exhibit 3 and whether a document marked 15 was part of the record tendered. Counsel for the 1st appellant found fault with the trial Judge's finding in her Judgment where she stated that counsel gave evidence from the bar, in making comparative analysis of OA3 and PW3 exhibit 3 but this counsel disputes saying it was not evidence from the bar given that counsel had relied on evidence tendered in court and exhibited to make an analysis in his submission of the said documents. Counsel added that he was entitled to analyse the inconsistencies in the respondent's evidence and to him A3 was not a photocopy of the original DR form obtained from Mubarak Kirunda. Counsel for

the 1st appellant argued that an original copy of a DR form differed from the annextures O1-O45 as presented by the respondent.

In reply counsel for the respondent submitted that three documents were exhibited. He referred to the original DR form, which was the original PW3 exhibit 3 recovered from Mubarak Kirunda by police, Exhibit OA3, the certified copy of PW3 exhibit 3 and the document marked 15. Counsel submitted that this issue was premised on a document marked 15 which was a strange document tendered in court by counsel for the 1st appellant at submission stage. Counsel submitted that court rightly compared the relevant documents to PW3 exhibit 3 and settled the issue after determining that PW3 exhibit 3 was reliable.

During submissions counsel for the 1st appellant laboured to differentiate to court the documents to wit the Original marked 15 and the photocopy marked OA3 which they attached to their submissions. Counsel for the respondent referred to the document marked 15 as a strange copy introduced at the stage of submissions by counsel for the 1st appellant. The document referred to as Original marked 15 is neither an exhibit nor is it attached to any affidavit on record. It also does not form part of the police file. Since it was not tabled before court for consideration during hearing it cannot be smuggled in at the stage of submissions. That document marked 15 was not part of the record and it should be treated as such. Counsel for the 1st appellant finds fault with the trial Judge's finding that by the 1st appellant making comparative analysis of the

two documents in their submissions, counsel descended into the arena taking the place of an expert at documents. It was the judge's finding that the analysis by counsel for the 1st appellant was evidence from the bar. She opined that if the 1st appellant had seen it fit he should have brought an actual expert to testify or swear an affidavit as part of the evidence at hearing. There may be merit in this position but as observed earlier the comparison was between documents 'Original' marked 15 and Photocopy marked OA3. We find that the document 'Original' marked 15 was not part of the Court record. We therefore find no value in discussing the comparison by the 1st appellant of a document which was not part of the court record. It should be disregarded. We answer issues 7 and 14 both in the negative.

Issues 8, 9, 10, 15 and 16 hinge around the occurrences after voting and at tallying. We find them related and shall consider them together. They appear as follows:

(8) Whether or not the complaint raised by the respondent was addressed by the Returning officer.

(9) Whether or not the tamperproof envelope for Danida A-D polling station was opened in accordance with the law.

(10) Whether or not the contents of the ballot box for the Danida A-D polling station had been compromised.

(15) Whether the falsification of declaration of results form is further by the illegal change and tempering with the

seals on the ballot box from seal number 7738637 to seal number 1901940 as confirmed by PW3 exhibit 7.

(16) Whether the learned trial Judge erred in law and fact when she held that there was no mandatory requirement to rely on the contents of the register book and ballot box to determine an outcome of an election.

Counsel for the 1st appellant submitted that Mwaitwa Anthony, the returning officer, in his affidavit revealed that he opened the tamper proof envelope in the presence of the candidates and their agents. Counsel stated the irrefutable facts in the petition to be; that voting for the directly elected MP was peacefully carried out to completion at Masese II/Danida (A-D) community centre polling station and that the votes were counted, that declaration of results forms were filled and signed by the agents and the presiding officer, that a copy of the DR form containing the results was sealed in a tamper proof envelope in the presence of all the agents for transmission to the tally centre, that the tamper proof envelope was received by the returning officer and that in the presence of the petitioner and the 1st respondent, the returning officer opened the envelope and tallied the results recorded in the DR Form, enclosed in the tamper proof envelope. Counsel for the 1st appellant refuted claims of any tampering with the said envelope and that the results announced by the returning officer at tallying were the same results as those announced by the presiding officer at the polling station. Counsel contended that the chain of transmission of the polling material to

wit the ballot box and the tamper proof envelope was not compromised.

Counsel for the respondent submitted that the respondent raised a complaint to the returning officer as to the mode of declaring the results and the eventual results declared which complaint the returning officer put on hold and opted to consult his supervisors in Kampala, which the respondents contend was not sufficient attention to the complaint. Counsel stated that the returning officer could have resolved the complaints raised in respect to the two DR forms that came up by referring to the official report book or by opening the ballot box to determine which of the D R Forms was authentic. Counsel further submitted that the trial Judge rightly found that the tamper proof envelope was not opened in accordance with the law and that the contents of the ballot box had been compromised. He contended that the tamper proof envelope was not opened by the Returning officer but by one Sandra Arwaho. Counsel submitted further that the seals on the ballot box had been illegally changed and new seals that were not on the dispatch list were put on the ballot box instead. Counsel concluded that this could only point to falsification of the contents of the ballot box.

It was stated in the petition that after polling was completed on the 18th February 2016 and polling material had been forwarded to the tally centre, the following day during the tallying of the results at the Electoral Commission offices in Jinja, the returning officer Mr. Mwaita Anthony read out the results of Danida (A-D) community

centre polling station. According to the petition the results read were: 507 votes for the 1st appellant and 226 votes for the respondent. Seven votes were read as invalid. It was stated also that at that point the respondent objected to the results of that polling station saying that they were not correct and that he stated the correct results to be 226 votes for the respondent and 187 votes for the 1st appellant, 5 invalid votes and 2 spoilt votes. Results given by the respondent gave the total number of votes cast to be 418 as appears in the copy of the DR form he obtained from Police. The original had been exhibited at Police. The respondent also objected to the signatures of his agents on the DR form relied on by the returning officer. It was stated also that the returning officer upheld the respondent's objection and put on hold the announcement of results till the next day so that he could consult his supervisors in Kampala. According to the petitioner the following day the returning officer proceeded to use his copy of the DR form and announced the 1st appellant as winner. The returning officer in his affidavit more or less states the same occurrences at tallying where he states that he was told by the legal department of the 2nd appellant to rely on the DR form which was sealed in the tamper proof envelope to announce the results.

It is not in doubt that the respondent raised a complaint at tallying regarding the results declared by the retuning officer. The trial judge faulted the returning officer for not investigating the complaint thoroughly given that the complaint questioned the credibility of the DR Form in the tamper proof envelope.

The procedure according to the electoral laws is that the returning officer at tallying is supposed to open the tamper proof envelope in the presence of candidates and their agents and proceed to add up the number of votes cast for each candidate. Where the tamper proof envelope does not contain the results of the poll, the returning officer refers to the report book. If the report book does not contain the declaration of results form, the returning officer in the presence of a police officer not below the rank of Inspector of police opens the ballot box in order to obtain the declaration of results form for purposes of adding up the results of the poll. Sections 50 and 53 of the Parliamentary Elections Act are relevant in this respect.

The circumstances of this case were that the complaint arose at the point of announcing the results from the copy of the DR form obtained from the tamper proof envelope. The Parliamentary Elections Act provides for complaints during counting of results or at polling before the presiding officer but does not specifically provide for complaints raised at the stage of tallying before the returning officer where a candidate objects to the results announced. The options discussed under section 53 apply when the DR form is missing in the tamperproof envelope or in the agent's book.

Section 59 of the Parliamentary Election Act deals with declaration of results and reports by the Commission. Subsection 3 provides that for the purpose of a report under subsection (2), every candidate at an election and every official agent of any candidate

has the right to send to the Commission a statement in writing containing any complaint that he or she may wish to make with respect to the conduct of the election or of any election officer and any suggestion with respect to such changes or improvements in the law or in the administration arrangements as he or she may consider desirable. Section 59 invites complaints to the commission after the results and the winning candidates have been declared. Section 60 refers the aggrieved party who may petition court. With all this said, the returning officer had no mandate to handle a complaint such as the one which was eventually brought to court as Election Petition No. 3 of 2016. The returning officer was posed with a complaint he could not resolve hence his reference to the legal department of the Electoral Commission. He therefore never attended to the complaint at all.

The appellants contend that the learned trial Judge erred in law and fact when she held that there was no mandatory requirement to rely on the contents of the register book and ballot box to determine the outcome of an election.

Ballot boxes and agent books are part of the material distributed to be used in an election. The Electoral Commission also provides candidates or political organizations/parties with serial numbers of seals affixed to and enclosed in the ballot boxes supplied to all polling stations. The procedure after voting is concluded is that the presiding officer counts the votes and fills in the DR forms. A copy of the DR form is deposited in the ballot box and sealed with a seal

provided for that purpose by the Commission. Sections 27, 28 and 50 of the Parliamentary Elections Act are relevant in this respect.

The sealed ballot box containing one duly signed DR form, the ballot papers received by each candidate tied in separate bundles, the invalid ballot papers tied in one bundle, the spoilt ballot papers tied in one bundle, the unused ballot papers, the voters' roll used at the polling station and the report book are immediately after close of polls delivered to the sub county headquarters to the returning officer. Results are then declared relying on the DR form found in the tamper proof envelope. The respondent raised a complaint as to the results declared which were different from the results contained in his copy of the DR form.

We observed earlier that section 53 of the Parliamentary Elections Act directs the returning officer to refer to the report book and ballot box for a copy of a DR form in case one is missing in the tamper proof envelope. This alone means the contents of the ballot box are necessary in resolving a discrepancy that may arise and that is why the law mandates that copies of the DR form are placed therein. It is however not mandatory to rely on the contents of the register book and ballot box to determine the outcome of an election where other evidence like the original DR form itself exists. Court has the discretion to analyse all the evidence on record to determine the true outcome of an election.

On the issues of whether the tamper proof envelope was opened in accordance with the law and whether or not the contents of the

ballot box for the said polling station had been compromised, It was the evidence of the presiding officer, Baise Suleiman that he sealed up one copy of the signed DR Form in the tamper proof envelope and put another in the ballot box. Sandra Arwaho the sub county supervisor for the 2nd appellant stated in her affidavit that she received the tamper proof envelope together with other polling materials from the polling station and delivered the same to the tally centre and that the materials were then handled by the returning officer. She further stated that it was the returning officer who proceeded to open the tamper proof envelope for Danida (A-D) polling station together with the envelopes for other divisions and read out the results to all candidates, agents and members of the public. We find the evidence of the returning officer contradicting that of Sandra Arwaho and contrary to the submission of 1st appellant's counsel. The respondent argued that it was Sandra Arwaho who opened the envelopes. The returning officer stated in his affidavit that the sub county supervisor, Sandra Arwaho, cut and unsealed all the envelopes including that for Danida (A-D) polling station in the presence of all candidates and their agents at the District tally centre and then passed on to him the results which he announced. The Parliamentary Elections Act is strict on who should open the envelope. Section 53(1) provides:

> **'After all the envelopes containing the declaration of results forms have been received the returning officer shall, in the presence of the candidate or their agents or such of them as wish to be present, open the envelopes**

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and add up the number of votes cast for each candidate as recorded on each form.' Emphasis added.

The returning officer states that he did not personally open the tamper proof envelope but says that Sandra Arwaho did. The lower court found as such and decided that it was in contravention of section 53 of the Parliamentary Elections Act. We are unable to find otherwise given the existence of a clear admission by the concerned Retuning Officer that he did not open the envelope. Suffice it to say the tamper proof envelope was not opened in accordance with the law.

As to whether or not the contents of the ballot box were compromised, we noted earlier the requirement that once voting is completed the ballot box is filled with items such as a copy of the signed DR form, the ballot papers received by each candidate tied in separate bundles, the invalid ballot papers tied in one bundle, the spoilt ballot papers tied in one bundle, the unused ballot papers, the voters' roll used at the polling station and the report book and sealed with a seal provided for that purpose by the Commission. These are delivered to the returning officer at the sub county headquarters. Wakida James, the polling agent of the respondent gave evidence that he inspected the voting materials and noted the serial numbers used on the ballot box as (1738639) on arrival of the materials, (1738624, 1738629, 17338628) during voting and 1738637 after voting. His evidence was corroborated by that of Baluwe Octavious and Wakida James. On the other hand, the

presiding officer, Mr. Baise Suleiman, in his evidence stated that after putting all the remaining material in the ballot box he affixed a seal with a serial number beginning with 190.... The 2nd appellant through Mwaita Anthony, the Returning Officer, in PW3 Exhibit 7 stated that the seal serial number on the ballot box bearing the contents of directly elected Member of Parliament, Jinja Municipality East Constituency, Masese II/Danida(A-D) Community Centre Polling Station was 1901940.

The trial Judge found that the existence of two different sets of serial numbers for Danida (A-D) demonstrate that either the petitioner or the 2nd respondent was falsifying the serial numbers presented and that it was difficult to gain consensus from the petitioner and respondents on the reliability of the contents of the ballot box for purposes of verifying any DR form. She found the contents of the ballot box unreliable.

The Parliamentary Elections Act obliges the Electoral Commission to provide candidates or political organizations/parties with serial numbers of seals affixed to and enclosed in the ballot boxes supplied to all polling stations which serial numbers were accordingly availed to the candidates' agents. The respondent's agents claimed the seal on the ballot box was 1738637 which was contrary to what the presiding officer testified to. The essence of the contents of the ballot box would be to determine which copy of the two DR Forms presented was genuine. As earlier observed, section 53 directs the returning officer to refer to the report book and ballot

box for purposes of verifying and declaring the right results. Where any of the ballot boxes presented are found to be open or unsealed, the purpose of making such reference to the contents in the ballot box is not achievable. Certainly the evidence may have been tampered with and the exercise rendered useless. Similarly, we are of the view that where such seals are alleged to have been altered and different seal numbers are being presented by different parties the contents therein cannot be considered reliable and this defeats any reliance on the same. The seal serial numbers as presented by both sides differ and clearly appear to be from different dispatch lists of seals. In the absence of any satisfactory explanation for the discrepancies in the seals by the 2nd appellant, we agree with the trial Judge that the contents of the ballot box had been compromised. Having found as we have above, we resolve issue No. 15 in the affirmative that the illegal change and tampering with the seals on the ballot box from seal number 1738637 to seal number 1901940 only pointed to the fact that the declaration of results form had been falsified.

The complaint in issue 12 is whether the learned trial Judge was entitled to rely on fresh facts raised in rejoinder which were inconsistent with earlier pleadings. Counsel for the 1st appellant submitted that the respondent belatedly adduced evidence in form of rejoinder through his affidavit in rejoinder and that evidence was fresh. He added that the appellant had no right to reply to it and that the trial Judge erroneously considered it. Counsel for the 1st appellant objected to facts challenging the integrity of the

tamperproof envelope and stated that the respondent should not be allowed to set up a case, which he did not plead. He relied on the case of **Bakaluba Peter Mukasa vs Nambooze Betty Bakireke Election Petition Appeal No. 04 of 2009.** Counsel for the respondent defended the trial Judge's reliance on the said affidavit in rejoinder stating that the evidence was on record by the time of conferencing and hearing and that no new facts were introduced as the facts were directly related to the falsified DR forms in issue. The trial Judge considered this complaint and rejected it stating that it was the substance of the Petitioner's claim in pleadings, at hearing, final submissions and determination in Judgment. Court held that use of different words to say the same thing cannot be introduction of a new matter in rejoinder in the circumstances of the petition.

The fresh facts that were introduced by the respondent in rejoinder which counsel for the1st appellant finds inconsistent with earlier pleadings are disclosed. One is that the respondent in his affidavit in rejoinder particularly in respect to Mwaitwa Anthony Ambrose's affidavit in reply stated that the returning officer was not present when the tamper proof envelope was being sealed and that he did not have custody of the electoral materials when they were being transported to the tally centre. Secondly, that the tamper proof envelopes remained in the custody of the 2nd respondent for more than 48 hours before the purported opening so that the petitioner had no access and would not know whether they were not tampered with. Third that the tamper proof envelopes were cut at a distance where the petitioner was not in position to see whether they were

not tampered with or exchanged. Fourth that at one point the respondent objected to the sub county supervisor cutting the tamper proof envelope instead of the returning officer which objection was ignored.

We should observe that ordinarily, a party's departure from his/her pleadings is a good ground for rejecting the evidence.

In **Gandy –Vs- Caspar Air Charter Limited (1956) 23 EACA 139**, Sir Ronald Sinclair said:-

> 'The object of pleadings is of course, to ensure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent.'

We find the above holding persuasive on us and trite. The impugned evidence however surrounds the same issue raised on the authenticity of the DR Form and the objections raised as to the opening of the tamperproof envelope. We find these issues embedded in the entire case and do not consider them new facts. The respondent in no way departed from his earlier pleadings and did not raise a new case. The authority relied by counsel for the 1st appellant of **Bakaluba Peter Mukasa v Nambooze Betty Bakireke, Election Petition Appeal No.4 Of 2009 [2010] UGSC 1**where the **authority of Uganda Breweries Ltd –Vs- Uganda Railways Corporation [2002] 2 E.A. 634**, shades light on the issue of

departure from pleadings and the test for determination of the same. Therein court held:

> *"To my mind, the questions for decision under ground 2(i) of the appeal appears to be whether the party complaining had a fair notice of the case he had to meet; whether the departure from pleadings caused a failure of justice to the party complaining; or whether the departure was a mere irregularity, not fatal to the case of the respondent, whose evidence departed from its pleadings."*

The circumstances of this case do not fall under the bracket of departure from pleadings. It cannot be said that the other party was not given fair notice to answer to the pleadings. What we observe is perhaps a mere change of words from what was earlier stated which is not fatal. Alternatively the 1st appellant could have sought leave of court to responded and/or filed extra affidavits. We find the argument inconsequential.

Issue 13 concerns the evidence in the handwriting expert's report written by Mr. Ezati Samuel which is annexture F to Paul Mwiru's supplementary affidavit concerning whether it confirmed the falsification of results from PW3 exhibit 3. Counsel for the respondent argued that the learned trial Judge did not consider the evidence of Ezati, the hand writing expert, who examined the signatures on PW3 Exhibit 4 and found them forged. Counsel contended that the Judge should have considered that further evidence of falsification. For the appellants it was argued that the

author of the hand writing report should have come to court to present the evidence and that the report on its own could not stand.

This particular report was presented to court through the supplementary affidavit of the respondent as annexture 'F'. The respondent stated in his supplementary affidavit that the certified DR forms forwarded to his lawyers by the 2nd respondent had signatures of his agents which was not the case at tallying. It was contended also that at tallying one of the contentions for objecting to the DR forms was because the respondent's agents had not signed the particular DR form and that was the reason he instructed his lawyers to seek a hand writing expert's opinion on the alleged signatures appearing on the certified copies of the DR forms for Danida (A-D) polling station. It was the respondent's evidence that the Regional OC CID Kiira the Forensic Department of the Uganda Police was instructed to investigate the contested signatures which he did. It was testified further that a report (annexture F to the respondent's supplementary affidavit) followed stating the findings that the handwritings of the Presiding officer, Waswa Martin and Wakida James were different from the specimens offered and that this meant that they were authored by different persons. We note that the respondents in their submissions before the learned trial Judge made reference to the said report but that the trial Judge only dealt with the hand writing report attached to Mr. Ochola's affidavit which she rejected. We can only assume that the trial Judge when dealing with the first handwriting expert report intended the same finding to apply to the

second report by Mr. Ezati. This however was a different piece of evidence which deserved to be dealt with independently. The said report was presented to court through the affidavit of the respondent with its findings being conclusive that the signatures of the certified copies presented were forged. We consider this to be important evidence in addition to evidence already available pointing to PW3 exhibit 4 being a forged document. The trial Judge ought to have found this relevant. The mode of presenting or bringing evidence to court in election petitions is through affidavits. This report was brought through an affidavit. The appellants were at liberty to rebut the evidence in question through affidavits in rebuttal or by seeking court to summon the author of the report for cross examination which was not done. The objections of the appellants were not proved. The trial Judge ought to have given this evidence due consideration as additional evidence in support of the other evidence on falsification. Accordingly we answer issue 13 in the affirmative.

The complaint in issue 1 is whether or not the 1st appellant was validly elected as Member of Parliament for Jinja East Constituency.

Counsel for the 1st appellant faulted the trial Judge for finding that the results at Danida (A-D) were falsified in the DR form that the returning officer read from at tallying. Counsel argued that the Judge erred in finding as such because there was no evidence of falsification of results. He added that, the results for Danida A-D polling station could only be established by reliance on the

Declaration of Results Form contained in the tamper proof envelope as was relied on by the returning officer rather than results from a copy of the DR Form supplied to the agents of the candidates at the polling stations. Counsel for the 1st appellant refuted claims of falsification of results and stated that the witnesses who testified to the mode of receipt of the results namely Sandra Abaho and the returning officer were available for cross examination but were not cross examined and that this left that evidence unchallenged. Counsel added that in the absence of any evidence to the contrary, the returning officer was entitled to rely on those results and that the Judge had no basis for nullifying the 1st appellant's election. Concerning Issue 5 as to whether the results for Danida A-D polling station were contained in PW3 exhibit 3 and OA3, Counsel for the 1st appellant faulted the trial Judge for considered PW3 Exhibit P3 and OA3 which were not certified by the Electoral Commission and that there was no evidence of how the said documents ended up in the hands of the respondent. He prayed that court be pleased to find that the 1st appellant was duly elected having received the highest number of votes and that the results as were tallied for Danida A-D polling station were the results legally supposed to be tallied.

Mr. Walubiri for the respondent on issue 1 contended that the results on the DR form in the tamper proof envelope had been tampered with or falsified. It was counsel's submission that PW3 exhibit 4, the form that gave the 1st appellant the winning margin, was a falsified document. He added that the evidence on record

shows that the movement of the results from the polling station, their storage when they arrived at the tally centre, and the opening of the tamper proof envelope and the declaration of results left room for tampering and falsification and actually contravened the law. Counsel also argued that the envelopes were not opened by the returning officer but rather they were opened by Sandra Arwaho who had been one of those mishandling the DR forms and that this was contrary to section 53(1) of the Parliamentary Elections Act. He added that the authentic DR form was PW exhibit 3, as the learned trial Judge rightly traced its chain of movement.

The results declared by the returning officer wherein the 1st appellant was declared winner of the election were disputed by the respondent. The main contention was in respect to the results declared for Danida (A-D) Community polling station where the 1st appellant was announced to have received 507 votes against the respondent's 226 votes. These results were announced by the returning officer reading from the DR Form obtained from the tamper proof envelope (PW3 Exhibit 4). The respondent in his objection presented a second copy of the DR form which was retrieved from Mubarak Kirunda, his supervisor for Masese II and III reflecting the results to be 226 for the respondent and 187 for the 1st appellant (PW3 exhibit 3).

With the existence of two different DR forms for the same polling station bearing different results, the implication is that one of the two copies had falsified results. The trial Judge considered the

evidence presented in support of each of the two DR forms and found the evidence of PW1 Kabanda Rogers, Wasswa Martin, Wakida James and Octavious Baluwe in support of the results in PW3 Exhibit 3 to be credible but found the evidence of Baise Suleiman, Phiona Amukuje, Isabirye Allan, Munyirwa Ivan and the 1st appellant in support of PW3 Exhibit 4 as lacking credibility. The trial Judge found Baise Suleiman unreliable and found the evidence of Baluwe Octavious, the 1st respondent's polling assistant more credible, reliable and consistent. Court found this evidence was corroborated by the contents of PW3 Exhibit 3, PW3 and PW2's evidence, the evidence of Wakida James, Wasswa Martin, Kabanda Rogers, the respondent and Kirunda Mubarak. The trial Judge also found further corroboration in the allegations by Wasswa and Wakida that their signatures on PW3 Exhibit 4 were forged. On the other hand the trial Judge disbelieved the evidence of Mwaita Anthony and Arwaho Sandra on the integrity of the DR forms being intact when there was evidence by Arwaho of some DR forms that were mishandled. The trial Judge found the integrity of polling materials including the ballot box and the tamper proof envelope in the hands of Baise and Arwaho suspect. The mode of transmission of the said DR form from Mubarak to the Police who later exhibited it in court was clear. OA3 was a copy extracted from PW3 Exhibit 3 bearing the same contents. Our findings on PW3 Exhibit 3 therefore apply to OA3. Clearly the 2nd appellant failed in carrying out its mandate.

As to the authenticity of PW3 Exhibit 4, we earlier found that the tamper proof envelope was not opened in accordance with the law. It was opened by someone other than the returning officer. This was a serious breach affecting the contents of the said envelope to wit PW3 Exhibit 4. In addition we considered the evidence presented relating to the difference in margins in the total number of voters in PW3 exhibit 3 at 420 votes compared to the 419 and 418 total votes cast for the Presidential election and Woman MP election respectively with PW3 Exhibit 4 at a total of 740 votes. We found the later totals in PW3 Exhibit 4 unreasonable and irresistibly pointing to the falsification of PW3 exhibit 4. In further corroboration, the agents of the respondent denied the signature of PW3 exhibit 4 as forged and the same were forwarded for further examination by a handwriting expert. On analyzing all the above evidence, the trial Judge concluded that the DR form used by the returning officer at tallying was tampered with. We are in agreement with the trial Judge's finding. PW3 Exhibit 4 was tampered with and its contents cannot be relied on to reflect the results for Danida (A-D) polling station.

The trial Judge noted the importance and sanctity of DR forms in the electoral process and commented on the imperative of complying with the provisions of the law relating to them, something not done in the said elections at Danida (A-D) polling station. She concluded that the said non compliance had a substantial effect on the results and applied the non compliance substantiality effect. We agree with the trial Judge's findings as

such and find that the 1st appellant was wrongly declared winner. He was so declared in contravention of section 58 of the Parliamentary Elections Act. He is not the validly elected MP for Jinja East Constituency.

We have painstakingly perused the evidence adduced in support and arguments presented faulting the trial Judge's findings. We are equally mindful of the provisions of section 61 of the Parliamentary Elections Act. The learned trial Judge correctly set aside the election of the 1st appellant as directly elected Member of Parliament. That far we agree with her. The trial Judge however proceeded to analyse the results and determined that the 1st respondent attained the highest votes and was therefore the validly elected candidate. We respectfully disagree with her conclusion as such. With the existence of all the irregularities in the electoral process at Danida A-D Community Polling station as discussed in issues 8,9,10, 13, 15, and 16 above, we find that the integrity of the results has been tainted. The 2nd appellant failed to comply with the law in conducting elections for this polling station putting the results of the station in doubt. We cannot therefore be seen to refer to such results to ascertain the true results for that polling station. Needless to say this affects the results for the entire constituency. We therefore go on to declare the seat vacant.

In the result we make the following orders:

1. The seat for directly elected Member of Parliament for Jinja East Constituency is vacant.

2. The 2nd appellant is ordered to hold fresh elections for Member of Parliament for Jinja East Constituency.

3. The respondent is entitled to costs of this appeal and in the High Court.

Dated at Kampala this .....day of 2017

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HON. JUSTICE S.B. K. KAVUMA

JUSTICE OF APPEAL

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HON. JUSTICE RICHARD BUTEERA

JUSTICE OF APPEAL

.....

HON. JUSTICE PAUL K. MUGAMBA

JUSTICE OF APPEAL

We ready to receive the judgment.

Court: Judgment in the Green Court.

We ready to
receive the judgment.

Court: Judgment
delivered in the
open court.