THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

CORAM: OWINY - DOLLO DCJ, CHEBORION AND TUHAISE JJA.

ELECTION PETITION NO 1 OF 2019

(Appeal from the judgment of Wolayo J; in High Court Election Petition No. 30 of 2016)

SSENKUBUGE ISAAC ..... APPELLANT

VERSUS

TAMALE JULIUS KONDE..... RESPONDENT

JUDGMENT OF OWINY - DOLLO; DCJ

I had the opportunity to read, in draft, the judgment of my learned sister, Tuhaise, JA. I am in agreement with her that this petition should be dismissed.

Since Cheborion, JA also agrees, this petition therefore fails; and the orders proposed by Tuhaise JA in her judgment are hereby issued.

Dated, and signed at Kampala this 3rd day of March 2020.

Alfonse C. Owiny - Dollo

Deputy Chief Justice

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO.1 OF 2019

(Coram: Owiny-Dollo, DCJ, Cheborion Barishaki & Percy Tuhaise, JJA)

SSENKUBUGE ISAAC:::APPELLANT

VERSUS

TAMALE JULIUS KONDE:::RESPONDENT

(Appeal arising from the judgment of Henrietta Wolayo, J delivered on 21st January, 2019 in High Court Election Petition No.30 of 2016)

JUDGMENT OF CHEBORION BARISHAKI, JA

I have had the benefit of reading in draft the judgment of my learned sister Percy Night Tuhaise, JA and I agree that this petition should be dismissed for the reasons she has set out therein.

I also agree with the orders made.

Dated at Kampala this 3rd day of March 2020.

Cheborion Barishaki

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Election Petition Appeal No. 1 of 2019

Coram: Owiny-Dollo, DCJ; Barishaki Cheborion; & Tuhaise; JJA

Ssenkubuge Isaac ..... Appellant

Versus

Tamale Julius Konde ..... Respondent

[*Appeal arising from the judgment of Henrietta Wolayo J, delivered on the 21st of January 2019 in High Court Election Petition No. 30 of 2016]*

Judgment of Percy Night Tuhaise, JA

The brief background to this appeal is that, on 9th March 2016 the Electoral Commission (referred to as the "EC" in this judgment) conducted Local Government Council elections for the Chairperson, Bweyogerere Division Kira Municipality, Wakiso District. The appellant and the respondent, together with Kiberu Patrick, Kitaka Kavulu Badru, Mugalula Apollo Mujabi and Nsubuga Ali, were all candidates. The EC declared the appellant as the validly elected winner with 2188 votes. He was gazetted as the duly elected Chairperson Bweyogerere Division, Kira Municipality, Wakiso District. The other candidates scored as follows; Kiberu Patrick (2016), Tamale Julius Konde Billy (respondent) (1873), Mugalula Apollo Mujabi (1293), Nsubuga Ali (726), and Kitaka Kavulu Badru (194).

The respondent was aggrieved by the outcome of the election. He petitioned the High Court challenging the said election on grounds that the EC failed in its duty to organize a free and fair election as there was non-compliance with the Electoral

Commission Act cap 140, the Parliamentary Elections Act No. 17 of 2005 , the Local Governments Act cap 243, and the principles governing a free and fair election.

The respondent alleged in his petition that the appellant colluded with the officials of the EC to forge and falsify the results of the eight contested polling stations to ensure that the appellant wins the elections; and that the said non-compliance affected the final result of the election in a substantial manner. He prayed that he be declared as the validly elected chairperson for Bweyogerere Division, Kira Municipality, Wakiso District.

The learned trial Judge gave judgement in favour of the respondent. She found that the non-compliance with the electoral laws affected the results of the election in a substantial manner; that the issuance of different results and the highly probable alteration of results, and errors when tallying results, demonstrated failure to conduct a free and fair election which affected the final results in a substantial manner; and that, in particular, the issuance of different results to agents of candidates compromised the integrity of the elections.

The learned trial Judge consequently allowed the petition and set aside the election. She also ordered the EC to hold a bye-election and pay the costs of the petition.

The appellant, being dissatisfied with the judgment and orders of the High Court, appealed to this Court. He raised five grounds of appeal, that:-

1. The learned trial Judge erred in law and fact when she held that the inconsistencies and contradictions in the evidence of the petitioner/respondent were minor and did not go to the root of the petition.

2. The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record but rather resorted to speculations, surmises and conjecture thus coming to a wrong conclusion that the election was not held in compliance with the law and that the non-compliance affected the results in a substantial manner.
3. The learned trial Judge erred in law and fact when she failed to properly subject the right standard of proof in determining whether the election was conducted in contravention of the electoral law through forgery of results, falsification of results and whether the compliance affected the results in a substantial manner.
4. The learned trial Judge erred in law and in fact by heavily relying on the petitioner's evidence as opposed and or in isolation of the 1st and 2nd respondent's evidence in finally deciding the above petition.
5. The learned trial Judge erred in law and fact by answering the pleaded case and holding that the EC issued two different sets of DR forms at the contested polling station as opposed to the allegation that the EC falsified, tampered with, swapped and altered results of the contested polling stations without any evidence.

The EC did not appeal against the judgment of the trial court.

Representation

At the hearing of this appeal, the appellant was represented by learned Counsel Nyonyintono Asuman, Mwigye Allan and Musimenta Samantha. The respondent was represented by learned Counsel Katumba Chrysostom. Both parties filed written submissions.

Submissions for the Appellant

On ground 1, the appellant's counsel submitted that the respondent petitioned court contesting the results of eight polling stations but he did not adduce any evidence regarding four polling stations; and that the evidence of the other four polling stations was full of contradictions and inconsistences, which the learned trial Judge considered to be minor and hearsay.

Counsel also submitted that PW1, Mwesigwa Deo contradicted himself on the time when voting ended and the time he signed on the Declaration of Results Form (referred to as the "DR form" in this judgment), which is a major contradiction; and that PW1 had different signatures on all the various documents presented to court. He further submitted that PW2 Nansaasi Angella also contradicted herself during cross examination, regarding the allegedly original DR form presented by the respondent stating that on the day of the elections, they had no crossing, yet the DR forms presented to court had crossings. Counsel contended that two sets of DR forms were presented to court, and their authenticity was not proved since the respondent brought totally different original DR forms.

On ground 2, the appellant's counsel submitted that, much as the learned trial Judge rightly rejected the biased evidence of Chelangat, the handwriting expert (PW3) to prove the forgery, she failed to evaluate the evidence on record and relied on surmises, conjectures and speculations in evaluating evidence and concluding about the forgery claims.

Counsel also submitted that, considering the burden and standard of proof in forgery claims, there was no independent evidence to prove that the DR forms were forgeries. According to Counsel, the learned trial Judge did not evaluate the evidence that all the witnesses alleging forgery had not complained to police or to any authority about their signatures being forged on the DR forms,

which is a grave offence as rightly stated by the learned trial judge.

On ground 3, Counsel submitted that the learned trial Judge speculated the number of polling stations to be 27, which figure was not supported by any evidence; and that, in actual fact, the number of polling stations was 64.

Counsel contended that non-compliance in four polling stations of the sixty four (64) cannot justify nullification of an election and disenfranchising the voters of the 61 (sixty one) polling stations; that the learned trial Judge erred in law and fact when she considered six polling stations on an assumption that the total polling stations were 27 (twenty seven) to establish substantial manner, yet the total number of polling stations is 64 (sixty four); and that, as such, the learned trial Judge never evaluated the evidence efficiently.

He also argued that the DR forms were filled in accordance with the law and the basic requirements for validity of declarations of result forms as was discussed in the case of **Toolit Simon Aketcha V Oulanya Jacob COA Election Appeal No. 19 of 2011.** Further, that the mismatched results that were admitted by Hajjat Sarah Bukirwa (DW2) would not make the respondent victorious, in addition to the fact that they affected both the appellant and the respondent.

Finally, he contended that notwithstanding the faults and shortcomings of the EC in conducting the elections, the non-compliance did not affect the results in a substantial manner.

On ground 4, Counsel submitted that the learned trial Judge failed to establish how the petitioner could have won without comparing all the votes for all the candidates, plus all the mistakes of mismatched votes admitted by the Returning officer.

He contended that the learned trial Judge did not consider the evidence of the appellant and the EC, that she evaluated the evidence of the respondent in isolation of the appellant's evidence and the evidence of the EC.

On ground 5, Counsel submitted that the respondent's case was that the appellant had colluded with the EC officials to falsify results, yet the learned trial Judge, in her decision, faulted the EC for wrong entries. He submitted that the respondent alleged collusion by the appellant, but did not adduce any evidence to prove the collusion. He finally submitted that the respondent did not present any evidence which placed the appellant in contact with any of the EC officials or election material.

Submissions for the Respondent

On ground 1, the respondent's counsel submitted that the learned trial Judge properly evaluated the evidence when she found that the inconsistencies and contradictions in the evidence of the petitioner/respondent were minor and did not go to the root of the petition. He also argued that the respondent properly adduced cogent and coherent evidence regarding the eight contested polling stations, and the evidence so adduced was not hearsay, neither was it marred by glaring inconsistencies and contradictions.

Counsel referred this Court to the evidence of Mwesigwa Deo (PW1) who contended that, much as PW1 contradicted himself during cross examination regarding the time when the voting exercise ended, there is no nexus between the time at which voting ended, the time of signing, and the forgery of his signature. According to Counsel, what was in issue is that the signature of PW1 was forged, and not the time, and the same witness ably explained the variance in his signatures. Counsel concluded that

the contradictions in the evidence of PW2, Nansaasi Angella, did not go to the root of the petition.

On ground 2, Counsel submitted that the learned trial Judge properly evaluated the evidence on record and did not engage in conjecture and/or speculation in arriving at the conclusion that there was non-compliance in the election laws and principles of a free and fair election, which affected the final result of the election in a substantial manner.

Counsel submitted that the learned trial Judge never concluded that the signatures were forged as contended by the appellant. He submitted that, after dismissing the evidence of Chelangat the handwriting expert (PW3), the learned trial Judge considered other available evidence, and it was after evaluating the same that she arrived at a finding that, indeed, there was non-compliance which affected the final result in a substantial manner.

Counsel referred this Court to the evidence of DW2, Hajjat Sarah Bukirwa, who, in cross examination, admitted that there were cases of entry of wrong results in the tally sheet, denial of the votes the respondent actually polled, and giving the appellant free votes that he did not actually get. He submitted that the learned trial Judge properly applied the right standard of proof in determining whether the election was conducted in contravention of the electoral law through forgery and falsification of results; and that she arrived at a correct decision that the compliance affected the results in a substantial manner.

On ground 3, Counsel submitted that the learned trial Judge applied the correct standard of proof in Parliamentary election petitions, as set out in the case of **Rt. Col. Kiiza Besigye V Electoral Commission, Presidential Election No. 1 of 2006**. He argued that, for the learned trial Judge to have compared the

votes for all candidates and the mistakes of mismatched votes the returning officer admitted, was untenable and misconceived. According to Counsel, there was no need for the learned trial Judge to venture into the votes obtained by all the candidates to form a basis of her decision when there was over whelming evidence of non-compliance.

Counsel maintained that the respondent filed the petition against the appellant based on clear grounds, and court only considered those grounds before reaching the final decision that there was non-compliance with the electoral laws.

Counsel prayed this Court to disregard the appellant's argument that the respondent would not have won the election despite the errors and disparity and/or mismatch in the DR forms. He maintained that it was indeed the result of the non-compliance, as admitted by the Returning Officer, which had the effect of gifting the appellant with 311 extra votes, and denying the respondent his victory. According to Counsel, had it not been for the aforementioned non-compliance, the respondent would have been declared the winner of the election.

On ground 4, Counsel submitted that the learned trial Judge treated all the evidence relating to the petition before making her decisions and conclusions on the petition; and that the EC chose not to appeal the decision seemingly conceding to the findings of the trial court.

On ground 5, Counsel submitted that the collusion pleaded in the petition was based on the fact that the DR forms for the eight contested polling stations that were certified by the EC had the same results as those in possession of the appellant, while those, in their original form, that were given to the respondent's polling agents at various polling stations had different results, but with

the same serial numbers. According to Counsel, that alone is puzzling, and leads to only one conclusion, which is that the appellant connived and/or colluded with the EC to falsify the DR forms for the eight (8) contested polling stations.

Counsel invited this Court to find that the appellant has not proved his case, to dismiss the appeal with costs, and to uphold the judgment of the lower court.

Submissions in Rejoinder for the Appellant

The appellant's counsel prayed this Court, under rule 4 (a) of the Juducature (Court of Appeal Rules) Directions, to expunge the respondent's submissions from the court record because the respondent filed his written submissions more than a month after the deadline set by this Court. Further, he prayed this Court to expunge the respondent's conferencing notes and written submissions for not being signed or stamped by Counsel.

In the alternative, the appellant's counsel more or less reiterated his earlier submissions on each of the five grounds of appeal.

Consideration of the appeal

The duty of this Court as a first appellate court is to re-evaluate the evidence and come up with its own conclusion as provided in Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions SI 13-10 (referred to as "Rules of this Court" in this judgment).

This position of the law is also reflected in **Banco Arabe Espanol V Bank of Uganda, Supreme Court Civil Appeal No. 8 of 1998**, where it was held that a first appellate court has power and ultimate duty to re-evaluate the evidence before the trial court, subject it to fresh scrutiny and come to its own conclusion; that while doing so, the court should be mindful that, unlike the trial court, it does not have the privilege of physically observing the

witnesses testify, their response to one's questions, and observing their demeanour.

Thus, this Court, as a first appellate Court, has a legal duty to re-evaluate and analyse the evidence before the trial court, and arrive at its own independent conclusion. However, this Court must always be aware of, and give allowance for, the fact that the trial court had the advantage of hearing the parties fully on the facts, as well as observing their demeanour as they testified.

I will first resolve the preliminary point of law (PO) raised by the appellant that the respondent's submissions be expunged for being filed out of time and for not being signed and stamped by counsel.

This PO was raised by the appellant's counsel in his submissions in rejoinder. The record shows that they were received in this Court on 16th May 2019. There is nothing on record to show that the PO was served on the respondent or his counsel, which could explain why there is no response on the same by the respondent or his counsel.

I would in that connection, in the interests of justice, hesitate to deliberate on a preliminary point of law which has not been defended by the other side, disposing on it in that manner would tantamount to resolving it *ex parte*, without evidence of service to the other party.

Secondly, the appellant's counsel refers to some correspondence to support the PO. The record before me does not have any such correspondence.

The foregoing notwithstanding, however, and without prejudice, much as the record shows that, indeed the respondent's submissions were filed in this Court on 7th May 2019, which was outside the time schedules set by this Court, the record before me

contains signed written submissions from both sides, though all the said submissions are not stamped, including those of the appellant's Counsel.

I would, in the interests of justice, dismiss the PO on basis of the stated two grounds above, and also, taking into consideration the provisions of Article 126 (2) (e) of the Constitution of Uganda, which provides that substantive justice shall be administered without undue regard to technicalities. Having done that, I will now proceed to consider the appeal on the merits.

On ground 1, the appellant faulted the learned trial Judge for her findings that the inconsistencies and contradictions in the petitioner's (respondent's) evidence were minor and did not go to the root of the petition.

The appellant contends that, of the eight polling stations that were in contention, the respondent did not adduce evidence for 4 stations, namely Namataba (A-A), Namataba (ND-SH), Bweyogerere Health Centre II (NAL-N), and Hassan Tourabi (A-K). He also contends that the respondent's evidence on the remaining four polling stations, namely Bukasa (NAT-Z), Kirinya Main (N-Z), Kito A (L-NAK) and Kito A (M-NAM), is hearsay, and full of contradictions and inconsistences.

He also maintained that the contradictions and inconsistencies in the evidence of PW1 Deo Mwesigwa and the discrepancy in his signatures should not have been regarged as minor inconsistencies by the learned trial Judge since they went to the root of correctness and authenticity of the respondent's evidence.

The respondent disputes the appellant's contentions. On the question of variance of signatures, he contends that the appellant never produced any evidence to the effect that the signatures of Mwesigwa Deo (PW1) were not his.

Regarding the question of the respondent's evidence being hearsay, the record shows that the evidence for Namataba (A-A), Namataba (ND-SH), Bweyogerere Health Centre II (NAL-N) and Hassan Tourabi (A-K) was clearly hearsay. The respondent simply deponed in his affidavit that he was told by his polling agents like Mababazi Norah and Dongomwizo Nicholas at the respective stations. The said polling agents did not swear affidavits nor were they called as witnesses in Court. This affected the value attached to the evidence regarding Namataba (ND-SH) and Namataba (A-A) where the two were polling agents for the appellant.

This evidence was correctly evaluated and analysed by learned trial Judge in her judgement at pages 10 and 11 when she stated that, regarding Namataba (A-A) and Namataba (ND-SH), the respective polling agents did not swear affidavits although the petitioner attached their Declaration of Results (DR) forms which he relied on in his petition.

Regarding the question of contradictions and inconsistencies in the respondent's evidence, the record shows that, indeed, the learned trial Judge found the inconsistencies to be minor. According to the learned trial Judge, the inconsistencies:-

> *"did not detract from the glaring existence of two DR forms with same serial numbers but different results."*

This finding was, however, not the basis upon which the petition was allowed, neither was it an evaluation of the case in its entirety. It was merely a conclusion regarding the evidence of Ssebuma, a polling agent for the respondent, in respect of a DR form from Kito A Mandela College School (L-NAK) polling station. The contradiction or inconsistency was that, though Ssebuma stated that he signed all the DR forms, the certified form (E8), does not have his signature. The learned trial Judge's finding on

this aspect was in respect of one polling station, not on the entire case, as the appellant's counsel seems to suggest.

This contradiction, as correctly found by the learned trial Judge, is minor, compared to the evidence of two sets of forms bearing the same serial numbers but with different results.

The appellants also contends that the evidence of Mwesigwa Deo (PW1) was full of major contradictions, in that he stated two contradictory times as to when the voting process closed. The respondent's counsel conceded that PW1 contradicted himself on when the voting ended, but maintained that the said witness never stated the time he signed the DR forms.

In paragraph 6 of his affidavit, PW1 averred that voting closed at 6.30 pm, but during cross examination, he stated that voting closed at 4 pm. Counsel for the appellant submitted that this was a major contradiction, considering the respondent's allegations that the appellant connived with the EC to forge his signature on the DR form containing false results scored by the various candidates.

The learned trial Judge resolved that much as the witness stated two different times in his affidavit and MD3, the aspect of time when the election ended was never an issue for the determination of court, and, consequently, she considered it to be minor.

The record shows that PW1 never stated the time when he signed the DR forms in his testimony. He only testified about the time when voting ended. The issue in contention was whether the signature of PW1 on the DR forms was forged, not time when voting closed. The contradiction did not relate to the issue at stake, which was whether the signature of PW1 on the DR forms was forged.

I would therefore not fault the learned trial Judge for holding as she did, that the contradiction or inconsistency in the evidence of PW1 regarding the time when voting ended was minor.

The appellant's counsel also questioned the credibility of PW1 Deo Mwesigwa, a polling agent for the respondent, based on the fact that he had varying signatures.

The record shows that PW1 was examined in court. He acknowledged that the signatures on the National identity card, affidavit, and some DR forms, were his. The only signature he challenged was that on a particular DR form, which he stated to have been forged.

In that respect, the learned trial Judge rightly concluded that there was no issue with the varying signatures, because the witness acknowledged his signatures. The signature that was denied by the witness was submitted to a handwriting expert (PW3) for analysis, and a report was made. The record shows that, in fact, the learned trial Judge declined to rely on the evidence of PW3, for lack of other independent corroborrative evidence.

The appellant's other contention is that the evidence of PW2, Nansaasi Angella, was contradictory, in that she testified that the DR forms she was given by a polling agent had no crossings or errors, yet the one NA2 presented to court by the same witness was full of crossings which were not explained. The respondent's Counsel maintained that the contradictions in the evidence of PW2, Nansaasi Angella, did not go to the root of the petition.

From the above findings which I have subjected to fresh scrutiny, it is my considered opinion that the learned trial Judge had evaluated the evidence before Court and she rightly came to the conclusions that she made.

This ground of appeal fails.

On ground 2, the appellant faults the learned trial Judge for not properly evaluating the evidence on record but rather resorting to speculations, surmises and conjecture, consequently arriving at a wrong conclusion that the election was not held in compliance with the law, which non-compliance affected the results in a substantial manner.

The gist of the appellant's contention was that, much as the learned trial Judge was right in rejecting biased evidence from PW3, the handwriting expert who was to prove forgery of the signature of PW1, she never obtained independent evidence to conclude that the said signature was forged.

The respondent, on the other hand, maintained that the learned trial Judge properly evaluated the evidence and did not engage in conjecture or speculation before arriving at the conclusion that there was non-compliance with the electoral laws which affected the results in a substantial manner.

The appellant cited the case of **Kamba Saleh Moses V Hon. Namuyangu Jennifer, Court of Appeal Election Petition Appeal No. 0027 of 2011** to support his submissions that the learned trial Judge ought to have sought some independent evidence to prove the allegations of forgery, rather than relying on surmises, speculations and conjectures.

I note however, that this Court, when deliberating on the case of **Kamba Saleh Moses V Hon. Namuyangu Jennifer**, was addressing the issue of proof of bribery of voters, where it expressed a need to look for independent evidence from a non-partisan and independent witness to corroborate the evidence of a partisan witness.

The issue in the instant case is not bribery, but forgery. It is settled law that allegations of forgery require proof beyond balance of probabilities though not beyond reasonable doubt. Nonetheless, this Court appreciates the need for independent evidence in election petitions as a general rule, especially where such evidence is given by a partisan witness in favour of a party, regardless of whether it is in relation to alleged bribery, forgery or falsification of records, or any other electoral malpractice or wrong.

The appellant's contention in this ground of appeal is that the learned trial Judge did not evaluate the evidence of all the witnesses alleging forgery of their signatures on the DR forms; and that she did not evaluate the evidence on record that, apart from PW1, no other signatory complained of their signature being forged, or reported any case to police alleging forgery. The appellant also contended that, much as the learned trial Judge heard the testimony of PW3, who noticed the variance in the signature of PW1, she did not evaluate this testimony.

The record shows that the learned trial Judge did evaluate the evidence of Chelangat, the handwriting expert (PW3). However, she did not rely on it for the reason that PW3 was called by the petitioner, and there was no other independent expert evidence on the issue. At page 8 of her judgment, the learned trial Judge stated:-

> *"Chelangat was called by the petitioner and although I do not doubt her objectivity, I will not rely on her expert evidence for the reason that she is the only expert witness and I did not have the benefit of hearing from another expert. Fortunately there is other evidence on which I am able to arrive at conclusions on whether there was compliance or non-compliance with electoral laws."*

The evidence of PW3 was that she examined the signature of PW1 Deo Mwesigwa on the contested DR Form and found it was not his.

In my considered opinion, based on the words used by the learned trial Judge quoted above, her declining to rely on the evidence was because she would have desired a second opinion from an independent witness. The learned trial Judge was taking caution, rightly so, in line with the principle that in cases of this nature where a witness is partisan, there is need to seek independent evidence to corroborate the evidence of such witness. Having failed to get such independent evidence, the learned trial Judge chose not to rely on the lone expert evidence of PW3.

The appellant, in his submissions, seems to suggest that the learned trial Judge held that the signature of PW1 Deo Mwesigwa was a forgery. However, this is not a correct position. It is apparent from the record that the learned trial Judge simply declined to rely on evidence adduced by the appellant on this issue for the stated reasons above.

The record shows that since the case did not relate to forgery, but rather, to non-compliance with electoral laws, the learned trial Judge chose to rely on other evidence which she analysed under issue number 2 on pages 3 to 13 of her judgment, before concluding that there was non-compliance with electoral laws. To that extent therefore, the appellant's contentions that the learned trial Judge relied on speculation surmise and conjecture to conclude that there was non-compliance with electoral laws were not correct.

It was also the appellant's contention that the learned trial Judge was being speculative when she stated that of the twenty seven

(27) polling stations, six (6) polling stations were compromised. The learned trial Judge stated on page 14 of her judgment that:-

> *"Of the 27 poling (sic) stations, the integrity of the electoral process was compromised at six polling stations out of 27 polling stations...given that the 1st respondent won the election by a margin of 315 votes, it is more probable than not that the petitioner could have won the election."*

There is no evidence on the court record to indicate that there were twenty seven (27) polling stations. The appellant contended that there were 67 polling stations. However DW1 testified under cross examination, on page 65 of the record of appeal, that there were about sixty four (64) polling stations, while DW2 a returning officer in the election, testified at page 115 of the same record, that there were sixty five (65) polling stations in the Division. The evidence on record, as reflected by the tally sheet, shows that there were indeed sixty five (65) polling stations.

Thus, based on the adduced evidence on record, the learned trial Judge's reliance on the existence of twenty seven (27) polling stations, which fact is not supported by any evidence, was speculative. On that aspect, the learned trial Judge erred in fact.

The appellant also faulted the learned trial Judge for finding that the results were altered during the process of recording the results on the DR forms. He contends that this finding is not supported by any evidence. He argued that neither the respondent, nor his witnesses mentioned that they observed the appellant and/or his agents and/or the officials of the EC falsifying or tampering with the results.

The learned trial Judge, after her analysis of evidence, held as follows on page 13 of her judgment (page 463 record of appeal):-

1. *"**Presiding officers** for Bukasa, Kirinya, Kito A and Kito Mandela issued different sets of results of the candidate's agents **and the Returning Officer entered results that were obviously disputed owing to the existence of original DR forms with same serial numbers but different results. This leads me to conclude the results were altered during the process of recording results on the DR forms which, is done manually by the presiding officer**. The alteration of results is an offence contrary to section 150(1) (a) of the Local Government Act;*
2. ***The returning officer entered wrong results for Bweyogerere and Hassan Tourabi in the system** to the detriment of the petitioner;*
3. ***The DR forms for all the four polling stations (Bukasa, Kirinya, Kito A and Kito Mandela) were missing from the ballot boxes of all the stations** contrary to section 136 (1) (d) of the Local Government Act Cap. 243 ..."* (emphasis added).

DW2 confirmed to the trial court hat indeed there were errors in recording on the DR forms. This would sufficiently explain the entry of wrong results in the tally sheet. It was the evidence of DW2 that the EC was responsible for the mistakes. DW2 also confirmed that at the time of tallying the final results, she did not have the DR forms that were supposed to be included in the ballot box.

In that connection, based on the evidence of DW2, the learned trial Judge concluded that the results were tampered with at that point, and consequently that the election was not conducted within the electoral laws and principles of a fair election. Thus, in light of the adduced evidence on record, the conclusion reached by the learned trial Judge cannot be said to have been based on speculation, surmise, or conjecture as argued by the appellant.

However, as correctly submitted by the appellant's counsel, there is no adduced evidence on record to show that the appellant or his agents, or the EC, at any stage, tampered with or falsified the DR Forms. The learned trial Judge did not also state in her judgment that the appellant or his agents or the EC tampered with or falsified the DR forms. The evidence is clear that the presiding officers and returning officers were responsible for the errors.

This ground of appeal partially fails, but succeeds to the extent that the number of polling stations alluded to by the learned trial Judge as being twenty seven (27), was not supported by evidence on record.

On ground 3, the appellant faulted the learned trial Judge for failing to properly subject the right standard of proof in determining the framed issues at the trial. He also faulted the learned trial Judge for considering six polling stations on a wrong assumption that the total polling stations were twenty seven (27), yet they were sixty four (they were actually sixty five) hence, implying that she never evaluated the evidence efficiently. He further faulted the Returning Officer for not filling in all the details of the DR Forms.

The appellant contended, however, that non-compliance with electoral laws *per se* does not mean the results were affected in a substantial manner, or that the mismatched results that were admitted by DW2 still would not make the respondent victorious. He cited the cases of **Achieng Sarah Opendi & Electoral Commission V Ayo Jacinta, Court of Appeal Election Petition Appeal No. 59 of 2016;** and **Akugizibwe Lawrence V Muhumuza David & 2 Others, Court of Appeal Election Petition Appeal No. 22 of 2016** to support his contentions.

The respondent did not agree that the learned trial Judge did not apply the correct standard of proof to the adduced evidence, or that non-compliance with the electoral laws affected the results of

the election in a substantial way. He also maintained that there was no need for the learned trial Judge to venture into the votes obtained by all the candidates to form a basis of her decision in this petition, yet there was over whelming evidence of non-compliance.

The standard of proof in election petitions is well settled. Section 61 (3) of the Parliamentary Elections Act No. 17 of 2005, states that the standard of proof in parliamentary election, is on a balance of probabilities. 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 suit and not as high as in criminal cases where proof beyond reasonable doubt is required.

The learned trial Judge, held on page 14 of her judgment that the issuance of different results and highly probable alteration of results, combined with errors when tallying results, demonstrates a failure to conduct a free and fair election which affected the result in a substantial manner.

In **Akugizibwe Lawrence V Muhumuza David and 2 Others, Court of Appeal Election Petition Appeal No.22 of 2016,** this court found that:-

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

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

The evidence of DW2 is that the errors affected the performance of both the appellant and the respondent. DW2 further clarified that, even with errors at two polling stations, Mr. Ssenkubuge (appellant) would still win by 257 votes, and Mr. Kiberu would still be in second place. This evidence was not discredited by the respondent.

The learned trial Judge's conclusion that non-compliance with the electoral laws affected the election in a substantial way was, in my opinion, based on her erroneous finding of fact, analysed earlier, that the total number of polling stations was 27. It is already my finding, after fresh scrutiny of the adduced evidence at trial, that the actual number of polling stations was 65; and that, even with errors at two polling stations, the appellant would still win the poll by 257 votes, Mr. Kiberu, who is not party to this appeal, would still be in second place.

In the case of **Rtd. Colonel Kiiza Besigye V Museveni Yoweri Kaguta & Another, Supreme Court Election Petition No. 1/2001;** and **Kakooza John Baptist V Electoral Commission and Yiga Anthony, Supreme Court Election Petition Appeal No. 11 of 2007,** Odoki CJ defined the phrase "substantial manner" as follows:-

"....The effect must be calculated to really influence the results in a substantial manner. In order to assess the effect, the Court

has to evaluate the whole process of the election to determine how it affected the result and then assess the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important, just as the conditions which produced those numbers. Numbers are useful in making adjustments for the irregularities. The crucial point is that there must be cogent evidence not only to the effect of non-compliance or irregularities but to satisfy the Court that the effect was substantial."

In this case there were 65 polling stations, of which eight were alleged to have been compromised. The adduced evidence, however, revealed that the compromised polling stations were six, as correctly found by the learned trial Judge. The fact that the the polling stations were 65, and not 27 as erroneously found by the learned trial Judge, would consequently change the ratio set by the learned trial Judge.

Thus, after applying the *criteria* set out in **Rtd. Colonel Kiiza Besigye V Museveni Yoweri Kaguta & Another, Supreme Court Election Petition No. 1/2001**, and considering that the number of polling stations was 65 not 27, I would not agree with the learned trial Judge that the election was compromised in a substantial way, especially since the compromised polling stations were only about one-eighth of all the polling stations in the Division.

In my considered opinion, by cancelling the election results of only six polling stations when the results of the other 59 polling stations were not challenged, tantamounts to disenfranchising the people in remaining 59 polling stations, not to mention the tension among the population that is normally experienced during campaign and election time, plus the financial pressure

exerted on the national, and personal economies of the candidates.

Secondly, based on the evidence of DW2 which was not seriously disredited, the errors affected the performance of both the appellant and the respondent; and that, even with errors at two polling stations, the appellant would still have won by 257 votes while the second contestant would still be in second place.

After applying the definition of the phrase "substantial manner" by Odoki CJ as set out in the authorities cited above, it is my considered opinion, that, after evaluating the whole process of the election and accessing the degree of effect as analysed above, the non-compliance and irregularities did not affect the results in a substantial manner.

This ground of appeal succeeds.

On ground 4, the appellant faults the learned trial Judge for heavily relying on the petitioner's (now respondent) evidence as opposed and or in isolation of that of the 1st respondent (now appellant) and the 2nd respondent (EC) in finally deciding the petition.

The appellant contended that the learned trial Judge's erroneous conclusion that that the polling stations were 27, infers that she neither evaluated the appellant's evidence, nor considered the appellant's evidence concerning the details of the DR forms, or the evidence of the EC concerning the filling in of the such forms, or the number of sets of such DR forms that were available. The appellant further contends that the learned trial Judge did not consider the fact that there existed various DR forms; and that she restricted her judgment to only the respondent's DR forms which she found to be correct.

The respondent, on the other hand, maintained that the learned trial Judge treated all the adduced evidence before she made the conclusion as she did. According to the respondent, the EC's choosing not to appeal the decision of the learned trial Judge inferred that they conceded to the findings of the trial Court. He argued that the polling stations that formed the basis of the respondent's petition were eight and there was no justification for the learned trial Judge to venture into the remaining polling stations, since they were uncontested.

I have already made a finding above that there was an error by the learned trial Judge regarding the number of polling stations. Nonetheless, the record shows that the learned trial Judge duly evaluated all the adduced evidence in the course of deliberating whether there was non-compliance with the electoral laws or not.

This ground of appeal fails.

On ground 5, the appellant's grievance was that though the respondent pleaded that the appellant had colluded with the EC officials to falsify results, the learned trial Judge instead, in her findings, faulted the EC for wrong entries. He also maintained that the respondent did not adduce any evidence to prove his allegations of collusion against the appellant and the EC; and that the the respondent did not present any evidence which placed the appellant in contact with any of the EC or election material. He argued that, in absence of such evidence, the learned trial Judge ended up answering a different question from the one pleaded.

The respondent's contention, on the other hand, is that the learned trial Judge properly handled the petition in arriving at the conclusion that the EC issued two different sets of DR forms at the contested polling station, and finding that the EC had made wrong

entries in respect to the tally sheet and some DR forms, that this fact was admitted by the returning officer (DW2).

The respondent pleaded in paragraph 6 of the petition that the 2nd respondent's (EC) election officials colluded with the 1st respondent (now appellant) or his polling agents and made false entries of results in the declaration forms for eight named polling stations. The respondent's evidence is that the DR forms for the eight contested polling stations that were certified by the EC had the same results as those in possession of the appellant, while the original forms that were given to the respondent's polling agents at various polling stations had different results, yet had the same serial numbers. According to the respondent, such situation was puzzling, and only leads to only one conclusion that the appellant connived and/or colluded with the EC to falsify the DR forms for the eight contested polling stations.

The framed issues did not directly focus on whether there was collusion between the two respondents in the petition. The issue which would probably cover the alleged collusion was issue number 2 which was questioning whether the election process complied with the electoral laws and principles governing fair elections.

The findings of the learned trial Judge, on page 463 of the record of appeal, were briefly that the results were altered during the process of recording results on the DR forms which is done manually by the presiding officer; that the returning officer entered wrong results for the polling stations of Bweyogerere and Hassan Tourabi to the petitioner's (now respondent) detriment; and that the DR forms for four polling stations of Bukasa, Kirinya, Kito A and Kito Mandela were missing from the ballot boxes of all the stations. Based on the said findings, the learned trial Judge concluded, in favour of the petitioner (now respondent) that the

election was not conducted in accordance with the electoral laws and principles of a fair election.

Thus, based on the foregoing, I would agree with the appellant, first, that the respondent did not adduce any evidence to prove the collusion allegations he pleaded against the appellant and the EC; second, that the the respondent did not present any evidence which placed the appellant to be in contact with any of the EC or election material; and third, that in absence of such evidence, the learned trial Judge ended up answering a different question from the one pleaded. I can only add that the learned trial Judge never endeavoured to make any finding on whether or not the two respondents in the petition colluded to fasify the election results as alleged or pleaded by the petitioner (now respondent).

This ground of appeal suceeds.

In conclusion, it is my finding that the adduced evidence on record was duly evaluated by the learned trial Judge, who came to the correct conclusion that there was non-compliance with electoral laws and principles of a fair election, on the part of the presiding officers who were employees or agents of the 2nd respondent (EC). However, given that not all polling stations were affected, in that, of the 65 polling stations in the Division, only 6 were compromised, it cannot be said that the election was compromised in a substantial manner. This situation would, in my considered opinion, based on the relevant authorities cited above, not be sufficient reason for the election to be set aside.

Consequently, I would allow this appeal on ground 3, and ground 5, and, partly, ground 2. I would dismiss it on ground 1, ground 4, and, partly, ground 2. I would accordingly dismiss the petition and set aside the orders of the High Court in election petition number 30 of 2016.

The respondent will pay two thirds of the costs of this appeal.

Dated at Kampala this 3rd **day of** March **2020.**

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Percy Night Tuhaise
Justice of Appeal