THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO. 52 OF 2021

AKUGIZIBWE LAWRENCE::APPELLANT

VERSUS

1. MUHUMUZA DAVID
2. BAGUMA R DANIEL
(RETURNING OFFICER KYENJONJO DISTRICT)
3. ELECTORAL COMMISSION::::::::::::::::::::::::::::::RESPONDENTS

(Appeal from the decision of the High Court of Uganda at Fort Portal before Katamba, J. delivered on 11th October, 2021 in Election Petition No. 03 of 2021)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE IRENE MULYAGONJA, JA
HON. LADY JUSTICE MONICA MUGENYI, JA

JUDGMENT OF THE COURT

This appeal is against the decision of the High Court (Katamba, J) dismissing a Petition filed by the appellant to challenge the return of the 1st respondent as the duly elected Member of Parliament for Mwenge County North in Kyenjojo District in elections conducted by the 3rd respondent on 25th January, 2021 and overseen by the 2nd respondent.

Background

The appellant and the 1st respondent were among the four candidates who contested the election for Member of Parliament for Mwenge County North which was held on 25th January, 2021. The results from the elections, as published by the Electoral Commission in the Gazette on 17th February, 2021 indicated that the 1st respondent obtained the highest votes – 19,933, and the appellant was the runner up with 17,754 votes. The appellant was dissatisfied and filed a Petition challenging the election results. The appellant also sued the 2nd respondent, the Returning Officer, who was responsible for overseeing the relevant elections.

The appellant claimed in his amended Petition that the elections were conducted in a manner that violated several provisions of the various relevant governing electoral laws. He cited incidents of failure of the 3rd respondent to properly use biometric voter identification machines; and cases where agents of the 3rd respondent condoned voting malpractices. The appellant also claimed that there were incidents of eligible voters being prevented from voting at various polling stations; and incidents of multiple voting and ballot stuffing by agents of the 1st respondent with connivance of electoral officials. In some other cases, delivery of election material was either done too early or too late; there were incidents of early closure of polling stations; and incidents of failure of the electoral officials to control the use and distribution of voting materials. The appellant also claimed that at some polling stations, the electoral officials made incorrect reports in respect to the ballot papers used during the elections.

The appellant further claimed that the 1st respondent personally or through his agents, committed several electoral offences and also engaged in illegal acts, which tainted the elections. That there was commission of offences including bribery and/or illegal donations, intimidation, harassment and meting violence against agents of the appellants. Further that, the 1st respondent personally or through his agents, committed the illegal practices of defacement of the appellant's campaign posters, and also the offence of sectarianism. The appellant also claimed that there was mass rigging of votes in favour of the 1st respondent. The appellant, therefore, prayed that the High Court sets aside the election of the 1st respondent and orders for fresh elections.

The respondents denied the allegations contained in the appellant's Petition and asserted that the elections were not only free and fair but were also carried out in compliance with all electoral laws. The 1st respondent denied having committed any electoral offences or illegal practices as alleged in the Petition.

After hearing the evidence, the learned trial Judge found that the appellant failed to prove any of the allegations of non-compliance, illegal practices or electoral offences set out in the Petition. She also found that the relevant election was free and fair and was also conducted in accordance with all the

governing electoral laws. The learned trial Judge dismissed the appellant's Petition with costs to the respondents.

Being dissatisfied with the decision of the learned trial Judge, the appellant now appeals to this Court on the following grounds:

"1. **The learned trial Judge erred in law in finding that the standard of proof in election petitions must be slightly higher than the balance of probabilities as in ordinary suits hence leading to a miscarriage of justice.**

2. **The learned trial Judge erred in law and fact when in resolving the issue of whether the elections were conducted in compliance with the law, she established an unconventional test of linking the 1st respondent to the non-compliance with provisions of the law hence leading to a miscarriage of justice.**

3. **The learned trial Judge erred in law and fact when she held that there was insufficient evidence of non-compliance with electoral laws to substantially affect the electoral results hence leading to a miscarriage of justice.**

4. **The learned trial Judge erred in law and fact in finding that there was no evidence to prove illegal practices and electoral offences hence leading to a miscarriage of justice.**

5. **The learned trial Judge erred in law and fact when she declined to grant the remedies sought by the appellant and instead dismissed the petition with costs.**

6. **The learned trial Judge erred in law and fact in finding that the petition was a complex matter and in awarding a certificate to three counsel thereby occasioning a miscarriage of justice."**

The appellant prayed that: 1) the appeal be allowed; 2) the judgment and decree of the learned trial Judge be set aside and substituted with judgment allowing the Petition and granting the prayers stated thereunder; 3) he be granted the costs of the appeal and those of the proceedings in the Court below.

The respondents opposed the appeal.

Representation

At the hearing, Mr. Caleb Alaka, Mr. Samuel Muyizi Mulindwa, Mr. Paul Kakande and Ms. Lydia Nakyejwe, all learned counsel, jointly appeared for the appellant. Mr. Ronald Tusingwire, Mr. Amos Masiko, and Mr. Sadam Solomon, all learned counsel, jointly appeared for the 1st respondent. Mr. Enock Kugonza, learned counsel appeared for the 2nd and 3rd respondents.

The parties were permitted to rely on their Conferencing Notes as Written Submissions in support of their respective cases.

We noted that in the submissions for the appellant, five issues were proposed to assist in addressing the six grounds of appeal. However, counsel for the 1st respondent and his counterpart for the 2nd and 3rd respondents addressed the grounds of appeal, as set out in the Memorandum of Appeal, which created disorganization in the presentation of the parties' respective arguments. In this judgment, we shall address the grounds of appeal and not the issues raised by the appellant.

Appellant's submissions

Ground 1

It was submitted for the appellant that the learned trial Judge erred in considering that the standard of proof in election petitions was "slightly higher than the standard of balance of probabilities as in ordinary suits". Counsel pointed out that the standard of proof in election petitions is proof to the satisfaction of Court on a balance of probabilities, as stipulated under **Section 61 (1) and (3)** of the **Parliamentary Elections Act, 2005**. Counsel cited two authorities of this Court – **Mukasa Anthony Harris vs. Dr. Bayiga Michael Philip, Election Petition Appeal No. 18 of 2007 (unreported)** and **Hashim Sulaiman vs. Onega Robert, Court of Appeal Election Petition Appeal No. 01 of 2021 (unreported)** for the interpretation of the statutory provisions on the standard of proof in election petitions.

It was further submitted that the learned trial Judge's application of a higher standard of proof was prejudicial as the appellant was required to satisfy a higher test to prove his allegations than was required under the law, and

that the learned trial Judge's findings and conclusions must be taken to have been highly influenced by the erroneous standard of proof applied. Counsel cited the authority of **Paul Mwiru vs. Igeme Nabeta, Court of Appeal Election Appeal No. 06 of 2011** in support of his submissions on this point. Counsel urged this Court to find that the application of an erroneous standard of proof occasioned a miscarriage of justice and to allow ground 1 of the appeal.

Grounds 2, 3 and 5

Counsel for the appellant submitted that the appellant adduced sufficient evidence to support his case that during the relevant elections, there were various incidents of non-compliance with the relevant governing laws, and that those incidents of non-compliance had affected the results of the relevant elections to a degree sufficient to have the election set aside under **Section 61 (1) (a)** of the **Parliamentary Elections Act, 2005**. He pointed out that the incidents of non-compliance cited in the appellant's Petition included ballot stuffing, intimidation of voters and numerous other illegalities, and that the appellant brought witnesses who gave sufficient evidence proving those incidents.

With regard to the evidence of ballot stuffing, counsel submitted that the learned trial Judge erred to consider that it was necessary for ballot stuffing to be attributed directly to the 1st respondent. It was further submitted that under **Section 61 (1) (a) of the Parliamentary Elections Act, 2005**, it was immaterial, who benefitted from the non-compliance as long as the same affected the results in a substantial manner. In counsel's view, the learned trial Judge's error in requiring non-compliance to be attributed to the 1st respondent affected her conclusions on ballot stuffing. It was further contended that there was evidence of alterations in the computation of votes, with the learned trial Judge also noting discrepancies in DR forms at two polling stations namely Nyanurara Catholic and Kagima Primary School, which further supported the allegations of ballot stuffing. Counsel further contended that there was further evidence showing that a motor vehicle No. UBA 073 U that was linked to the 1st respondent was seen carrying pre-ticked ballot papers, and submitted that the learned trial Judge erred when she

rejected that evidence merely because there was no report made to the police in the aftermath of that incident.

As for intimidation, counsel submitted that the appellant adduced cogent evidence through several witnesses namely Asaba Paulus, Basaba Kyaligonza, Byomuhangi Donozio, Anthony, Kato Lawrence, Balisanyuka Thomas and Akwetereiho Patrick, that there was intimidation during the relevant elections by soldiers and agents as well as supporters of the 1st respondent. Various presiding officers had reported the incidents of intimidation but the responsible returning officer (2nd respondent) did not take any action. The 2nd respondent instead coerced those presiding officers into retracting the affidavits filed. It was further submitted that the incidents of intimidation, although they were not recorded on the DR forms, had been mentioned in written reports filed by the presiding officers a day after polling day. Those written reports were not rebutted or denied by the 2nd respondent and should have been believed by the learned trial Judge. In addition, the learned trial Judge also wrongly considered that the acts of intimidation had to be linked to the 1st respondent, whereas not.

Counsel submitted that the learned trial Judge failed to properly evaluate the evidence adduced for the appellant and also misdirected herself on the law, in finding that it was not proved that non-compliance with the relevant laws affected the elections in a substantial manner. In counsel's view, under both the qualitative and quantitative tests, the incidents of non-compliance highlighted above affected the results in a substantial manner and rendered the relevant election, a sham election that was liable to be annulled. It was submitted that grounds 2, 3 and 5, ought to succeed.

Grounds 4 and 5

Counsel submitted that the appellant adduced sufficient evidence to prove his case that several illegal practices and/or electoral offences, namely; bribery, illegal donation, intimidation, harassment, violence and sectarianism were committed by the 1st respondent personally or through his agents. Counsel referred to the evidence of Kwesigwa Francis Anaclet, Kisembo Edward and Kyomuhendo Robert as proof that the illegal practice of bribery within the meaning of Section of **68 (2) of the Parliamentary Elections Act, 2005** was committed by the 1st respondent. It was further submitted

that the evidence of Kwesigwa Francis proved that the 1st respondent sent money to the witness, who was his agent for purpose of illegally soliciting for votes. The 1st respondent had acknowledged that Kwesigwa was his agent and that he had sent the latter money during the campaign period, which in counsel's view showed that the 1st respondent substantially admitted the offence of bribery.

It was further submitted that in the alternative, the appellant adduced evidence proving that the 1st respondent made illegal donations during the campaign period within the meaning of **Section 68 (7)** of the **Parliamentary Elections Act, 2005**. The evidence of Kwesiga indicated that the 1st respondent gave money in Kyembogo Sub County to SACCOS, and at funerals, to influence people to vote for him. There was also evidence from Kisembo Edward that the 1st respondent gave the former Ug. Shs. 50,000/= to induce him to vote for him and this was in the presence of one Opio.

Counsel contended that the learned trial Judge's finding that there was insufficient evidence of illegal practices and/or electoral offences was influenced by her application of a higher standard of proof in the case, and moreover, the learned trial Judge assigned no reason for refusing to believe the appellant's witnesses. Counsel cited the authority of **Oddo Tayebwa vs. Nasser Basajjabalaba, Court of Appeal Election Appeal No. 013 of 2011 (unreported)** to reiterate the legal principle that proof of a single illegal practice or electoral offence to the satisfaction of Court is sufficient to set aside an election. Counsel urged this Court to find that the 1st respondent was liable for commission of illegal practices and electoral offences and to allow grounds 4 and 5.

Ground 6

Counsel submitted that the learned trial Judge's decision to grant costs to the 1st respondent with a certificate of three counsel was improper in the circumstances of this case, for several reasons. First, the costs order deviated from the principles under **Rule 41** of the Advocates **(Remuneration and Taxation of Costs) Rules, S.I 267-4**. Second, the respondents did not make a prayer for a certificate of three counsel, which showed that counsel acknowledged that they had joint instructions and were

entitled to equally share the costs. Third, the costs order was influenced by the fact that the 1st respondent retained three different advocates to represent him, but to counsel, this was not a primary consideration for awarding a certificate of three counsel. Fourth, there was no evidence that the election petition was so complex or so difficult as to require three different advocates. Moreover, election petitions which are very vital to the democratic process are usually commenced by persons of modest means and not large corporations and thus huge costs orders, that would deter institution of election petitions, should not be awarded. Counsel contended that one advocate was adequate to represent the 1st respondent and thus, the learned trial Judge had erred in awarding a certificate for three counsel which was excessive in the circumstances. Counsel urged this Court to allow ground 3.

1st respondent's submissions

In reply, counsel for the 1st respondent argued the grounds in the following order; ground 1 independently, grounds 2 and 3 jointly, and each of grounds 4, 5 and 6 independently.

Ground 1

It was submitted for the 1st respondent that the learned trial Judge rightly considered that the standard of proof in election matters was higher than on a balance of probabilities as in ordinary civil cases. Counsel pointed out that under **Section 61 (1) of the Parliamentary Elections Act, 2005**, an election petition may only be allowed upon proof of any of the enumerated grounds to the satisfaction of Court. In the case of **Amama Mbabazi vs. Yoweri Museveni, Presidential Election Petition No. 1 of 2006**, it was stated that the standard of proof required to satisfy the Court is above a balance of probabilities, but does not reach beyond reasonable doubt. On the basis of that authority, the learned trial Judge applied the correct standard of proof, and thus ground 1 ought to be disallowed.

Grounds 2 and 3

In reply to the appellant's submissions on ballot stuffing, counsel for the 1st respondent submitted that the learned trial Judge rightly found that there

was insufficient evidence to prove the appellant's allegations of ballot stuffing, and accordingly disbelieved them. The evidence indicated that neither the appellants nor his agents complained of ballot stuffing on polling day, and this was borne out by the fact that the relevant DR forms, totaling 132, did not contain any reports about ballot stuffing. In counsel's view, the failure to raise the issue of ballot stuffing on polling day meant that the appellant was estopped from raising it in an election petition.

It was further submitted that the appellant's evidence to prove ballot stuffing given by witnesses like Birungi Michael, Richard Baguma, Gumisiriza Gordan, Katebarirwa John and Namanya Turyamureeba, was wholly unsatisfactory as it was largely uncorroborated, was hearsay, contradictory and partisan. Birungi's evidence related to information received from a third party called Kajula who was not called as a witness, and thus could not be verified. The evidence of Baguma was that the presiding officer at Hansanju Polling Station issued pre-ticked ballot papers, but there was no independent evidence to verify Baguma's claims. Moreover, the appellant's polling agents signed the DR forms for Hansanju polling stations without making any allegation of ballot stuffing. Further still, it was pointed out that Baguma's evidence was partisan as he was a polling agent for the appellant and his evidence needed to be corroborated, as per the guidance articulated in several authorities – **Nakate Lilian Segujja and Another vs. Nabukenya Brenda, Court of Appeal Consolidated Election Petition Appeals Nos. 17 and 21 of 2016 and Betty Muzanira vs. Masiko Winnifred and Others, Court of Appeal Election Appeal No. 65 of 2016 (both unreported)**. Counsel further submitted that the evidence of Gumisiriza that Kajalua unlawfully inserted ballot papers into the ballot box at Kayanja Progressive Primary School Polling Station was also not corroborated by independent evidence. Additionally, Katebarirwa's evidence that one Mugasa engaged in ballot stuffing was also not corroborated. In the same vain, Namanya's evidence that one Muhumuza David picked ballot papers from his car and handed them to one brown was also not corroborated.

It was further submitted, relying on the authority of **Epetait Francis vs. Dr. Ismait Abrahama, Court of Appeal Election Petition Appeal No. 12 of 2011 (unreported)**, that the appellant was required to adduce evidence to prove that the votes cast at any polling station were over and

above the number of registered voters in order to justify the allegations of ballot stuffing but this was not the case. Counsel also relied on the authority of **Toolit vs. Oulanyah, Court of Appeal Election Petition Appeal No. 19 of 2011 (unreported)**.

As for the submissions on intimidation of voters, counsel contended that the appellant's allegations of intimidation were not supported by cogent and credible evidence. Moreover, there were no reports of intimidation recorded on the DR forms on polling day, and thus the appellant's claims of intimidation were raised as an afterthought. Counsel contended that it could not be ruled out that the witnesses presented for the appellant had manufactured evidence to support the allegations of intimidation. Counsel referred to the case of **Kyamadidi vs. Ngabirano and Others, Election Petition Appeal No. 84 of 2016 (unreported)** where this Court observed that in election disputes, most witnesses are motivated by the desire to secure victory for their candidates and may resort to peddling falsehoods. It was pointed out that most of the appellant's witnesses were either his polling agents, or supporters and had an interest in the appellant's intended victory and could have manufactured evidence. Counsel urged this Court to find that the allegations of intimidation were not proven.

It was submitted for the 1st respondent, that in any case, even assuming that there were incidents of non-compliance, there was no evidence that the same affected the results of the election in a substantial manner. Counsel relied on the authority of **Besigye vs. Museveni, Presidential Election Petition No. 1 of 2001 (unreported)** for the principle, re-echoed in **Mbabazi vs. Museveni, Presidential Election Petition No. 1 0f 2016 (unreported)**, that there was a requirement for evidence of re-adjustment to show that the irregularities affected the election results in a substantial manner. In the present case, counsel pointed out that the vote differential between the 19,933 votes obtained by the 1st respondent and the 17,754 votes obtained by the appellant was 2,179 votes, and it was necessary for the appellant to show that he lost more than 2,179 votes due to the relevant incidents of non-compliance.

Counsel concluded by submitting that the appellant failed to prove his allegations of non-compliance, and in the alternative if this Court finds that

there were any incidents of non-compliance, those incidents did not affect the results of the elections in a substantial manner.

Ground 4

It was submitted that the allegation that the 1st respondent offered bribes in exchange for votes was not proved by sufficient evidence, and that the evidence of Kwesiga relied on to prove the acts of bribery was unreliable. Counsel contended that Kwesiga was an untruthful witness who lied to Court that he swore an affidavit in an office at the 4th Floor of the Fort Portal High Court, yet that Court did not have a 4th floor. It was further submitted that contrary to the directives laid down by the Supreme Court in **Besigye vs. Museveni, Presidential Petition No. 1 of 2006 (unreported)** that the evidence must prove that the purpose of giving the bribe was to secure votes, in the present case, it was not shown that the money sent to Kwesiga was for securing votes. Counsel pointed out that the evidence indicated that some of the money that the 1st respondent gave to Kwesiga was advanced before election campaigns even started. The evidence did not indicate that the reason for the 1st respondent sending money to Kwesigwa was to secure votes for him but the reasons were indicated as "U" or as for "amabugo". The evidence also indicated that the 1st respondent and Kwesiga were business associates for a period of over 8 years which ruled out the allegations of bribery.

It was further submitted that in line with the observations made in **Kamba vs. Namuyangu, Court of Appeal Election Petition Appeal No. 27 of 2011 (unreported),** allegations of bribery should be subjected to a high-level of scrutiny. In the present case, Kwesiga was asked by the trial Court whether he was happy that the 1st respondent won the relevant election and he stated "No", which in counsel's view showed that Kwesiga's evidence was a witch hunt, was partisan and not credible.

Counsel contended that the evidence of the 1st respondent was that he did not, personally or through agents, give any bribes, and this was not challenged. Other allegations that the 1st respondent gave bribes to Kisembo and Kyomuhendo were not proven, and neither were allegations of illegal donations to SACCOs or to Mparo Church. Counsel submitted that ground 4, ought to also fail.

Grounds 5 and 6

In respect to ground 5, counsel submitted that the appellant failed to discharge the burden to satisfy court to find in his favour on all the issues framed for determination in the trial Court, and thus it was inevitable that his petition would be dismissed.

On ground 6, it was submitted that the learned trial Judge's order on costs was a justified and lawful exercise of discretion under **Rule 27** of the **Parliamentary Elections (Interim Provisions) Rules S.I 141-2**. Counsel contended that the petition involved doing substantial research, and a significant amount of other tasks such as interviewing witnesses, compiling evidence and documents, and a lengthy trial taking 5 days including a weekend, that could not be performed by one advocate. Accordingly, it was justified to award a certificate for three counsel. Counsel cited a similar case of **Mutembuli vs. Nagwomu, Court of Appeal Election Petition Appeal No. 43 of 2016 (unreported)** where a certificate for more than one counsel was granted.

Counsel submitted that both grounds 5 and 6 should also fail.

2nd and 3rd respondents' joint submissions

The submissions for the 2nd and 3rd respondents on all grounds of the appeal merely repeated the submissions made for the 1st respondent, and thus we have not found it necessary to set them out here.

Appellant's submissions in rejoinder

On the submission that on the authority of **Mbabazi vs. Museveni (supra),** the standard of proof in parliamentary election petitions is higher than the balance of probabilities standard in ordinary civil cases, counsel for the appellant submitted that the highlighted case states the standard of proof in presidential election petitions and not in parliamentary election petitions. In the latter case, the standard of proof as stipulated under **Section 61 (3)** of the **Parliamentary Elections Act, 2005** is on a balance of probabilities. Counsel insisted that the appellant adduced cogent evidence to prove his case on a balance of probabilities.

As for the submission that the appellant's evidence on ballot stuffing was not corroborated by independent evidence, counsel pointed to the evidence of six witnesses, namely Basaba Kyaligonza, Mwesige Columbus, Balisanyuka Thomas, Kato Lawrence, Asaba Paulus and Akweteheiro Patrick, who were presiding officers and therefore independent and impartial witnesses, who stated that shortly after polling day, they wrote to the electoral commission to report incidents of ballot stuffing. Counsel contended that those witnesses ought to have been believed.

It was further submitted that the submission that there was need to adduce independent evidence to support the evidence of Gumisiriza Gordon who saw one Kajalua illegally insert ballot papers into a ballot box at Kayanja Progressive Primary School polling station could not stand, as under **Section 133** of the **Evidence Act, Cap.6**, there is no particular number of witnesses required to prove a fact. In counsel's view, what matters is the quality of evidence, and Gumisiriza's evidence which was of high quality should have been believed.

In response to the submissions on voter intimidation, counsel submitted that several presiding officers reported incidents of voter intimidation to the district returning officer and their evidence was not controverted.

It was further submitted, in rejoinder to the 1st respondent's submission that the test for substantial effect is exclusively an arithmetic test, that the test for substantial effect also envisages a qualitative test where scrutiny is made having regard to all phases of the election process, to test whether the elections were free and fair. Counsel relied on the Kenya Supreme Court case of **Karanja Kabage vs. Joseph Kiuna Kariambegu Nganga and 2 Others (no citation offered)**.

In response to the 1st respondent's submissions on bribery, counsel rejoined that the money that the 1st respondent gave to Kwesiga was bribe money, as it was distributed to voters so that they would vote for the 1st respondent. The money was given to SACCOS, churches and at funerals. Further, considering that the money was handed out during the election season, it amounted to an illegal donation. Counsel urged the court to believe Kwesiga's evidence and ignore any technical challenges raised against it by the 1st respondent.

On the granting of costs with a certificate of three counsel, counsel for the appellant reiterated his earlier submissions.

Resolution of Appeal

We have carefully studied the record of appeal, and also considered the submissions of counsel for the respective parties and the law and authorities cited in support thereof. We have also considered other relevant authorities that were not cited.

This is a first appeal, and on such appeals, this Court is required, under **Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) S.I 13-10**, to reappraise the evidence and draw inferences of fact. In **Kifamunte vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)**, it was stated that that on first appeal, the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses.

We shall bear the above principles in mind as we resolve the respective grounds of appeal. We shall consider the grounds in the following order; grounds 2 and 3 jointly, followed by ground 4 independently, then ground 1 independently, and lastly grounds 6 and 5, independently.

Grounds 2 and 3

The gist of the complaints under grounds 2 and 3 of the appeal is that the learned trial Judge erred in finding that the evidence adduced for the appellant did not prove non-compliance with the relevant governing laws to a degree sufficient to set aside the election of the 1st respondent.

We observe that under **Section 61** of the **Parliamentary Elections Act, 2005**, a person aggrieved with the election of a person as Member of

Parliament can file a petition before the High Court to challenge the relevant election and have it set aside. The aggrieved person is required to prove the existence of several enumerated grounds, including under Section 61 (1) (a), that there was non-compliance with the provisions of the Act relating to elections. The aggrieved person must satisfy the Court that there has been failure to conduct the election in accordance with the principles laid down in the provisions of the relevant governing laws and that the non-compliance and the failure affected the result of the election in a substantial manner. The appellant relied on the grounds set out in Section 61 (1) (a) in his Petition in the lower Court, but the learned trial Judge found against him, hence the complaints in grounds 2 and 3 of the appeal. On this appeal, the appellant limits his allegations of non-compliance to incidents of ballot stuffing, voter intimidation and illegalities. We have reappraised the relevant evidence.

In respect to ballot stuffing, the contention is that the appellant adduced sufficient evidence to prove his allegations of ballot stuffing, and the learned trial Judge ought to have decided in his favour. Counsel for the appellant referred to the evidence of Birungi Michael that the witness received information from one Adam Birungi that a vehicle UBA 073 U occupied by appellant and his agents, was seen near Hakitahurize Polling Station carrying pre-ticked ballot papers. There was also evidence of Richard Baguma that the presiding officers at Hasanju Polling Station handed out pre-ticked ballot papers to voters, and evidence of Gumisiriza Gordan that there was evidence of pre-ticked ballot papers at Kayanja Polling Station. There was also evidence of Katebarirwe that he was approached by certain persons namely, Kajalua, Muhumuza and Owen, with pre-ticked ballot papers in favour of the 1st respondent.

The case for the appellant was that the 1st respondent, personally or through his agents and with the connivance of electoral officials, participated in ballot stuffing at several polling stations namely, Kibangari-Itambiro, Kayanja C.O.U, Kasaba HQ North, Mparo Primary School L-Z, Katambale, Nyantonzi.

We have considered the evidence adduced for the appellant in support of the allegations regarding ballot stuffing. The evidence was contained in the affidavits of several persons, all registered voters in Mwenge North

Constituency, who claimed to have witnessed the incidents of ballot stuffing. Birungi Michael claimed that he saw a group of persons, including the 1st respondent, one Kajula and soldiers seated in a Rav 4 Model Car, Registration No. UBA 073 U, that contained pre-ticked ballot papers. Gumisiriza Gordan stated that he was at Kayanja Polling Station and saw one Turyamureeba Kajalua stuff ballot papers into a ballot box. There was also evidence of Richard Baguma that he was at Hansanju Polling Station on polling day and he saw presiding officers give pre-ticked ballots to some voters. The evidence of Katebarirwe John was that he saw one Mukasa, an agent of the 1st respondent handing out pre-ticked ballot papers to voters. None of these witnesses were cross-examined.

We note that a party wishing a Court to make a finding of fact in his or her favour must adduce reliable evidence through credible witnesses. In election petitions, questions of reliability of evidence and credibility of witnesses require more scrutiny considering that most of the witnesses are interested in the case. In **Besigye vs. Museveni and Another, Presidential Election Petition No. 01 of 2001 (unreported)**, Oder, JSC made the following remarks:

> **"Another general observation I wish to make at this stage about the affidavit evidence in this case is that the deponents of nearly all the affidavits could not be described as independent because they were supporters of one party or another. The election was hotly contested. The necessity that the side of a deponent of an affidavit should win must have been a high motivation for testifying the way he or she did. There were, indeed, some apparently independent witnesses. These were few. The vast majority of witnesses may be described as partisan, because they supported the side for which they swore the affidavits. In this case, as nearly in all litigations in our jurisdiction, where the adversarial system of litigation is the norm, a person normally gives evidence favourable to the party which has called him or her as a witness and according to what is within the knowledge of the witness. His or her evidence may be honest and truthful but it is given to enable the party calling the witness to win in the dispute. A witness called by his or her employer or boss in an office, department or organization is far less likely to be an independent witness than the one not in a similar position. The witness has to protect his or her office. Similarly, there is no way a witness who is alleged to have committed a criminal offence or**

malpractice in an official or personal position is going to own up such an accusation."

The above remarks allude to the danger that the evidence of witnesses in election petitions is most likely partisan and is motivated to support the person calling the witness than for establishment of the truth. Thus High Court Judges, trying petitions face significant difficulty, in determining the reliability of the evidence and the credibility of the witnesses giving it. The case law alludes to the desirability of other evidence to corroborate the allegations set out in the affidavits. Thus in the **Besigye case (supra)**, Oder, JSC mentioned the need for independent witnesses to support the often partisan evidence of the witnesses. In **Bakaluba vs. Nambooze, Supreme Court Election Appeal No. 04 of 2009 (unreported),** Katureebe, JSC (as he then was) approved the need for corroboration of allegations in affidavits deponed in election petitions and upheld the learned trial Judge's decision to reject some unsatisfactory evidence for the petitioner which was uncorroborated. We also wish to refer to the observations of Goff, LJ in **Armagas Limited vs. Mundogas S.A. [1984] EWCA Civ J1018-2,** where he stated that:

"...I have found it essential...when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case..."

We agree with the above statement. In election petitions, where the credibility of most witnesses is questionable, it is necessary that the Court tests the veracity of the evidence of the witnesses against other reliable evidence, whether it be evidence of independent witness or reliable documentary evidence. Thus, we have had to consider whether the allegations contained in the affidavits in support of the appellant's petition were given by independent/non-interested witnesses. If not, we have considered whether there was any independent evidence to corroborate the evidence of the seemingly partisan witnesses called for the appellant. We have formed the view that the evidence adduced for the appellant to prove ballot stuffing was given by partisan witnesses and there was no independent evidence to corroborate it, and that evidence was neither reliable nor cogent.

We have considered counsel for the appellant's submission that the evidence of ballot stuffing was corroborated by the reliable evidence of six presiding officers, namely Basaba Kyaligonza, Mwesige Columbus, Balisanyuka Thomas, Kato Lawrence, Asaba Paulus and Akweteireho Patrick. The evidence of Asaba Paulus was that he saw soldiers deployed at Katambale Parish Headquarters polling stations, where he was the presiding officer. He saw the soldiers intimidating voters to vote for the 1st respondent. He also saw agents of the 1st respondent unlawfully interfering with the election process by standing in the gazetted areas at their polling stations. The witness further stated that he reported the incidents to officials of the Electoral Commission but no action was taken, and consequently, he later filed a formal complaint to the Chairperson Electoral Commission through the District Registrar. Mwesige Columbus stated that he was the presiding officer at Mparo Primary School L-Z polling station, and he claimed that the ballot box at that polling station was brought and taken away by soldiers instead of the electoral officials. He claimed that the army was involved in voting by conversing with the agents of the 1st respondent and other voters. He also claimed that the soldiers pointed their guns at presiding officers during vote counting. Basaba Kyaligonza stated that he witnessed many irregularities at Nyaluziga Church of Uganda polling station where he was presiding officer. However, that he was prevented from writing the irregularities on the DR forms by an electoral commission officer. Nevertheless, he later filed a complaint to the Chairperson Electoral Commission through the District Registrar. Kato Lawrence's evidence was similar to that of Basaba, that he witnessed many irregularities at Kasaba Church of Uganda, where he was presiding officer, and that he was prevented from noting the irregularities on the DR forms, but later filed a complaint with the District Registrar.

In his affidavit of 19th March, 2021, the 1st respondent refuted the evidence of the six presiding officers. He stated that witnesses should have recorded the anomalies they alleged on the relevant DR forms but did not do so. He further stated that the witnesses endorsed the relevant DR forms that indicated that the elections were conducted in a proper manner. The 1st respondent further stated that the complaint letters written by the six witnesses were suspicious. They were all dated 26th January, 2021, and did not bear evidence of a stamp that they were received by the Electoral

Commission. The 1st respondent stated that the logical inference was that the letters were prepared for purposes of supporting the appellant's petition.

We have considered the evidence of the six presiding officers, and have formed the view that those witnesses could not be considered as independent witnesses as counsel for the appellant claimed in his submissions. The witnesses were called by the appellant and their affidavits were prepared by the same counsel the appellant instructed to prosecute his petition. As rightly stated by the 1st respondent, the complaint letters of the six presiding officers appear to have been prepared for purposes of the appellant's petition. We are unable to take them as the gospel truth, as apart from bearing the same date, there was no evidence of receipt by the Electoral Commission. Moreover, the complaint letters did not allege ballot stuffing but alleged military interference in the elections. They could not therefore, be considered as corroboration for ballot stuffing as counsel for the appellant alleged.

Further, as to allegations of ballot stuffing, there was no evidence from any of the stated polling stations that the ballots counted exceeded the number of people who voted.

We think that the evidence adduced to support the appellant's allegations of voter intimidation must suffer the same fate. The appellant claimed that there were incidents of intimidation, harassment and violence whereby some of the appellant's agents like Balisigara Kagoro, Baguma Richard, Niwaha Erickson and Byaruhanga Innocent, were assaulted by supporters of the 1st respondent and by army officers on the instruction of the Deputy Resident District Commissioner. The appellant alleged that the incidents were reported at police. Niwaha stated in his affidavit that he faced violence and was pulled out of the line when he went to vote at Nyamwezi Polling Station. Baguma Richard stated in his affidavit that the 1st respondent organized a mob to beat him up when he went to vote at Hansanju Polling Station. Balisigara Kagoro stated that he was beaten by supporters of the 1st respondent when he went to vote at Hansanju-Itambiro Polling Station, and that the beatings had been so severe that he became unconscious and was taken to Nyankwazi Health Centre III. The evidence of the above witnesses was not corroborated by other independent evidence and could therefore

not be verified. Balisigara Kagoro in particular could have presented documentary proof from the Health Centre he attended to prove his claims, but he did not.

We have also considered the other allegations of illegalities committed during the relevant allegations as set out in the affidavits in support of the appellant's petition, namely – electoral officials preventing voters from voting at Kyamutunzi Trading Centre, Buhunga Catholic Church, Nyamwezi and Hansanju Polling Stations; electoral officers refusing to use Biometric Voter Identification Machines at Mparo Primary School L-Z; illegal movement of ballot papers as early as 4:00 a.m in Mabira Town Council, Kifuka Town Council and Kanyegaramire Polling Stations, among others; later delivery of polling materials in areas where the appellant commanded a huge support base, such as Kyamutunzi, Kakindo-Itambiro, Kyembogo Primary School, Kyembogo Catholic Church; early closure of polling stations, and failure to control the efficient use of ballot papers. However, we are of the view, that the allegations were not verified for lack of independent supporting evidence.

In our view, one other aspect that affected the reliability of the appellant's evidence was the failure of his polling agents to have the above incidents of non-compliance recorded on the Declaration of Results (DR) Forms prepared on polling day. In our view, recording of incidents of non-compliance on DR Forms constitutes useful contemporaneous evidence necessary to support the veracity of allegations made in an election petition. We accept the submissions of counsel for the 1st respondent that the failure to report the non-compliances on polling day put the reliability of the appellant's evidence into serious doubt.

The learned trial Judge was not satisfied with the allegations in the appellant's petition regarding the incidents of non-compliance during the relevant elections. She noted the failure by the appellant and his agents to report any anomalies on the relevant DR Forms during the elections, and concluded that the allegations of ballot stuffing, voter intimidation and other illegalities, were an afterthought. We understand this to mean that the learned trial Judge found the evidence adduced in support of the appellant's allegations to be unreliable and the appellant's witnesses to be lacking in credibility. After re-evaluating the evidence, we are unable to fault the

learned trial Judge's findings of fact. Of course, had those cases of non-compliance been proved by reliable evidence, it would not have been necessary to link them to the 1st respondent before assessing the degree of effect they had on the relevant elections, as erroneously held by the learned trial Judge. Thus counsel for the appellant was right in his criticism of the learned trial Judge in that regard. However, counsel's point is only of academic significance, as in our view, the learned trial Judge rightly found that the allegations of non-compliance within the meaning of Section 61 (1) (a) of the Parliamentary Elections Act, 2005, contained in the appellant's petition were not sufficiently proven. Grounds 2 and 3 must therefore, fail.

Ground 4

It was alleged in ground 4 of the appeal that the learned trial Judge erred in finding that the appellant did not adduce sufficient evidence to prove the allegations of commission of illegal practices or electoral offences against the 1st respondent. While at the start of his submissions on this ground, counsel for the appellant referred to several electoral offences such as bribery, illegal donation, intimidation, harassment, violence and sectarianism, he only really made lengthy submissions concerning bribery and illegal donations, and it is the latter electoral offences that we have considered.

The offence of bribery is provided for under **Section 68** of the **Parliamentary Elections Act, 2005, (as amended)** which stipulates:

> **"68. Bribery**
>
> **(1) A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy-two currency points or imprisonment not exceeding three years or both.**
>
> **(2) A person who receives any money, gift or other consideration under subsection (1) also commits the offence under that subsection.**
>
> **(3) Subsection (1) does not apply in respect of the provision of refreshments or food—**

(a) offered by a candidate or candidate's agent who provides refreshments or food as an election expense at a candidates' campaign planning and organisation meeting; or

(b) offered by any person other than a candidate or a candidate's agent who, at his or her own expense provides the refreshments or food at a candidates' campaign planning and organisation meeting.

(4) An offence under subsection (1) shall be an illegal practice.

(5) Every candidate or candidate's agent who, by himself or herself or any other person, directly or indirectly, before the close of polls on polling day offers, procures or provides or promises to procure or provide any alcoholic beverage to any person commits an illegal practice.

(6) A person who during the campaign in respect of an election, solicits from a candidate or a candidate's agent any money, gift, alcoholic beverage or other consideration in return for directly or indirectly influencing another person to vote or refraining from voting for a candidate or in consideration for his or her voting for the candidate or not voting for another candidate, commits an illegal practice.

(7) A candidate or an agent of a candidate shall not carry on fundraising or giving of donations during the period of campaigning.

(8) A person who contravenes subsection (7) commits an illegal practice.

(9) For purposes of this section fundraising shall not include the soliciting of funds for candidates to organise for elections."

It was submitted for the appellant that sufficient evidence was adduced to support the allegations in the appellant's petition that the 1st respondent paid bribes to cause voters to vote for him or made illegal donations during the campaigning period. The relevant witnesses were said to be Kwesiga Francis Anaclet, Kisembo Edward and Kyomuhendo Robert. Kwesiga Francis Anaclet stated in his affidavit that he had been an agent of the 1st respondent in the lead up to the election date and had received money from the 1st respondent to pay bribes to secure the votes of several voters. He stated in his affidavit sworn on 2nd March, 2021 as follows:

"That during the election campaign, the 1st respondent used to send me money via mobile money to give voters so that they vote him. (A copy of

the mobile money transcript is hereto attached and marked annexure "C")

That I distributed the money Muhumuza David used to give me to voters, SACCOs, Church, and at funerals. Muhumuza had instructed them to vote for him."

The 1st respondent denied Kwesiga's allegations. He stated in his affidavit of 26th March, 2021 that Kwesiga had been his longtime friend since 2015, and had helped him carry out projects involving identification of good investment opportunities. The 1st respondent claimed that the money advanced to Kwesiga was meant to cover expenses Kwesiga incurred while doing that work for him. The 1st respondent further claimed that on one occasion – 16th January, 2020, he had sent money to Kwesiga as condolence money after the latter earlier informing him that he had lost his uncle.

Kwesiga swore another affidavit dated 9th April, 2021 responding to the claims in the 1st respondent's affidavit. He denied the claim that the 1st respondent had extended to him financial assistance in respect to joint business dealings and insisted that the money given to him was bribe money. Kwesiga further claimed that Donozio Karyarugoku, the person that the 1st respondent alleged to have died and in respect to whom he claimed to give condolence money, was actually still alive. Kwesiga attached a list of persons who received bribe money from the 1st respondent on that affidavit.

Both Kwesiga and the 1st respondent were cross-examined on their claims. Kwesiga maintained in cross-examination that the 1st respondent gave him money to bribe voters. He said that he sometimes recorded which of the voters he had paid the bribe money to, but he did not keep any record on other occasions, but insisted that he paid money to many voters. Kwesiga was also asked to state the particular SACCOs he had paid bribe too, and he respondend that he had paid money to the Secretary of Galiraya Busese SACCO, but had not kept a record. He said that the Secretary could verify his claims if he was called to testify.

In further cross-examination, it was put to Kwesiga that the 1st respondent had paid monies to him on 14th July, 2020, before the election period commenced, and on 29th January, 2021 after election day, which suggested that there was a personal relationship as claimed by the 1st respondent.

Kwesiga stated that the money advanced before elections was to bribe voters in the primary elections, and the money paid after elections was to pay outstanding bribe money to some voters.

Kwesiga was also cross-examined by Court and was asked whether he had canvassed for votes for the 1st respondent and he responded "Yes". He was also asked if he was happy with the 1st respondent's victory and he responded "No" for the reason that "after the elections, he (the 1st respondent) did not meet my (Kwesiga's) expectations.

The 1st respondent was also cross-examined about his relationship with Kwesiga. He was asked whether he had on several previous occasions sent money to Kwesiga, and he responded that he did. He recalled one incident when Kwesiga lost an uncle and he sent him condolence money.

In re-examination, the 1st respondent was asked about the purpose of sending money to Kwesiga as recorded on the mobile money service, to which he responded that on some occasions the purpose was recorded as "U" and on others as "amabugo".

In our view, the evidence in support of the allegations that the 1st respondent paid bribes through Kwesiga was not very satisfactory either. The evidence left it highly probable that the Kwesiga had been advanced the money as allowances for helping the 1st respondent in other business projects. Moreover, Kwesiga admitted to having issues with the 1st respondent after the elections, which, as counsel for the 1st respondent submitted, could have motivated the evidence he gave against the 1st respondent. The evidence could not be verified by any other independent evidence, and some independent evidence in fact went against it. For example, the reasons for sending the money as recorded in the mobile money, that we alluded to earlier, suggested that the money was for Kwesiga's personal use and was not bribe money. We therefore agree with the learned trial Judge's assessment of the evidence of Kwesiga, that it was unreliable as the credibility of Kwesiga was doubtful.

We have also considered the submission of counsel for the appellant that the evidence adduced for the appellant proved that the 1st respondent made illegal donations during the campaigning period. Under **Section 68 (7) of**

the Parliamentary Election Act, 2005 (as amended), it is forbidden for a candidate or an agent of a candidate to carry on fundraising or giving of donations during the period of campaigning. The **Merriam-Webster Dictionary** defines a "donation" as the making of a gift to somebody. The 1st respondent stated that the money he sent to Kwesiga was intended as an allowance in consideration for the help Kwesiga had extended to him to identify good projects to invest in, in the area. We also found that the monies were advanced before and after the period of campaigning, and in that respect, the monies did not constitute a donation during the campaigning period, within the meaning of Section 68 (7).

We wish to further observe that the appellant did not bring any evidence to show that the people allegedly given money by Kwesiga were registered voters. There was need for the voter registration cards of whoever he (Kwesiga) gave money to be attached as evidence that they were registered voters who had the capacity to vote.

Finally, assuming Kwesiga's evidence were true, it showed that he accepted to receive money from the 1st respondent and use it to pay bribes to voters, which amounted to an admission by Kwesiga that he engaged in illegal practices. In our view, Kwesiga, was himself a person guilty of engaging in illegal practices, and thus his evidence against the 1st respondent, the person he allegedly worked for can only be taken with a pinch of salt.

Ground 4 of the appeal, too, must fail.

Ground 1

It was alleged in ground 1 that the learned trial Judge erred by considering that the appellant needed to prove the allegations contained in his petition on a standard higher than the balance of probabilities applied in ordinary civil cases. According to counsel for the appellant, the standard of proof in election cases is to the satisfaction of the Court on a balance of probabilities, the same standard of proof applicable in ordinary civil cases. On the other hand, counsel for the 1st respondent contends that a court can only be satisfied with the allegations in election petitions if a standard higher than the balance of probabilities in ordinary civil cases is met. He relied on the

authority of **Mbabazi vs. Museveni and Others (supra)** as establishing that principle.

We observe that under the Parliamentary Elections Act, 2005, allegations of existence of any of the grounds which render an election liable to be set aside, must be proved to the satisfaction of Court on a balance of probabilities (**See: Section 61 (1) and (3) of the Act)**. In our view, this means that the allegations must be proven according to the balance of probabilities as in ordinary civil cases. However, we have read a passage from the judgment of the Supreme Court in the **Mbabazi vs. Museveni case (supra),** which has been relied on by counsel for the 1st respondent as imposing a higher standard of proof, where the Court stated:

> **"Burden and Standard of Proof**
>
> **Section 59 (6) of the Presidential Elections Act authorises the Court to annul an election only if the allegations made by the petitioner are proved to the satisfaction of the Court. An electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner to place credible evidence before court which will satisfy the court that the allegations made by the petitioner are true. The burden is on the petitioner to prove not only noncompliance with election law but also that the noncompliance affected the result of the election in a substantial manner. Once credible evidence is brought before the Court, the burden shifts to the respondent and it becomes the respondent's responsibility to show either that there was no failure to comply with the law or if there was any noncompliance, whether that noncompliance was so substantial as to result in the nullification of the election.**
>
> **Where a petitioner in a Presidential Election Petition brings allegations of noncompliance with electoral laws against the electoral body on the one hand and allegations of electoral offences and/or illegal practices against a candidate declared as the President Elect on the other, as is in the matter before us, varying standards of proof exist within the same case. For the Court to be satisfied that an electoral offense was committed, the allegation must be proved beyond reasonable doubt. On the other hand, the standard of proof required to satisfy the Court that the Electoral Commission failed to comply with the electoral laws is above balance of probabilities, but not beyond reasonable doubt."**

We note that the relevant provisions under the Presidential Election Act, 2005, with which the above decision was concerned, do not explicitly provide that the grounds for setting aside of an election should be proved on a balance of probabilities, as is the case in Section 61 (3) of the Parliamentary Elections Act, 2005 with which the present appeal is concerned. This is a crucial distinction. We note that under Section 61 (1) of the Parliamentary Elections Act, 2005, it is stipulated that grounds such as non-compliance with the relevant laws or commission of bribery, in order to lead to the setting aside of the election of a person as Member of Parliament, must be proved to the satisfaction of Court. But in our view, Section 61 (1), when read in conjunction with Section 61 (3), means that the court must be satisfied on a balance of probabilities. This was the view expressed in the case of **Mukasa Anthony Harris vs. Dr. Bayiga Michael Philip, Supreme Court Election Appeal No. 18 of 2007 (unreported)**, where it was held that the standard of proof in parliamentary Election cases is on a balance of probabilities. Tsekooko, JSC, who wrote the lead judgment in that case, stated as follows:

> **"Learned counsel is certainly aware of the existence of Section 61(3) of the PEA, 2005, for he alludes to it towards the end of his written arguments. Throughout his submissions, appellant's counsel relied on the opinion of my learned brother, Katureebe, JSC., in Kiiza Besigye Election Petition (supra) notwithstanding the fact that the Presidential Election Act, 2005 does not itself have a provision similar to Section 61(3) of the PEA, 2005, which very clearly prescribes the standard of proof required in a parliamentary election petition."**

We guided by the opinion of Tsekooko, JSC, which in our view reflects the position as laid out in the relevant statute. In our opinion, therefore, the applicable standard of proof in parliamentary election petitions is on the balance of probabilities. We therefore accept the submissions of counsel for the appellant, that it was erroneous for the learned trial Judge to consider that the applicable standard of proof was one higher than on a balance of probabilities.

Having said that, in our view, the evidence adduced for the appellant was incapable of proving the allegations set out in his petition, even when the standard on the balance of probabilities is applied. As we found when re-

evaluating the evidence, the appellant's evidence was hugely unreliable and the credibility of most of the appellant's witnesses was doubtful. The learned trial Judge had a similar view. Accordingly, we are unable to accept the invitation of counsel for the appellant to find that the appellant's case would succeed on a balance of probabilities.

Ground 1 of the appeal is therefore disposed of accordingly.

Ground 6

The appellant, in ground 6, alleges that the learned trial Judge's decision to grant costs to the 1st respondent with a certificate of three counsel was erroneous and ought to be set aside. The granting of costs in election petitions is governed by **Rule 27 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules, S.I 141-2**, which provides:

> **"Costs.**
>
> **All costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the court may determine."**

We note that while it is a general rule that costs will be granted in respect of one advocate, in exceptional circumstances, a trial Court, may, pursuant to **Regulation 41** of the **Advocates (Remuneration and Taxation of Costs) Rules, S.I 267-4** grant costs in respect of more than one advocate. **Regulation 41** provides:

> **"41. Costs of more than one advocate to be certified by the judge.**
>
> **(1) The costs of more than one advocate may be allowed on the basis hereafter provided in causes or matters in which the judge at the trial or on delivery of judgment shall have certified under his or her hand that more than one advocate was reasonable and proper, having regard, in the case of a plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case and,**

in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case."

In our view, the determination of whether a case is a fit one for a certificate for more than one advocate must be dependent upon the appreciation by the trial Court of the nature of the matter. **(See Pollok House Ltd v Nairobi Wholesalers Ltd (No. 2) [1972] 1 EA 172).** The Court will take into consideration such matters as the amount recovered, the importance and difficulty of the case, among others. In the present case, the learned trial Judge stated:

"The 1st respondent is hereby issued with a certificate of three counsel as the matter was complex and voluminous hence necessitating the hiring of three lawyers."

We wish to observe that electoral litigation is a matter of great national importance in which courts should avoid awarding excessive costs that may deter the filing of election petitions. **(See: Akugizibwe Lawrence vs. Muhumuza David and 2 Others, Court of Appeal Election Petition Appeal No. 22 of 2016 (unreported))**. However, this should be balanced with the need for a successful respondent to be compensated for incurring costs for hiring several advocates to defend an election petition, where it is necessary.

We have considered the pleadings and the accompanying documents in the present case, and we are not convinced that the present case was too complex as to require the 1st respondent to instruct three separate advocates, to defend the petition on his behalf. The learned trial Judge merely stated that the petition was "complex and voluminous" and thus necessitated the award of costs that she made, but she did not give any reasons for arriving at that conclusion. The learned trial Judge took the matter of granting costs with a certificate of three advocates, lightly, yet the matter required serious scrutiny. We cannot endorse the learned trial Judge's approach, as, to do so, would set a bad precedent, and would encourage the tendency of litigants in election petitions to retain more than one advocate, even where it is unnecessary to do so. In our view, the 1st respondent failed to prove the complexity of the present case, such as would justify the granting of costs with a certificate of three counsel. Counsel for

the 1st respondent merely stated in their submissions in the trial Court that the matter was complex and involved a substantial amount of research. Accordingly, we hereby set aside the learned trial Judge's order on costs of the petition in respect of the 1st respondent, and substitute it with an order for the 1st respondent to be granted costs of the petition, for one advocate. Ground 6 of the appeal therefore succeeds.

Ground 5 must also fail. The appellant failed to prove his case, and therefore, could not be granted the remedies he prayed for in his petition.

For the above reasons, the appeal substantially fails and is dismissed with costs to the respondents. However, the learned trial Judge's order on costs of the petition in respect to the 1st respondent, is set aside and is substituted with an order for costs for one advocate.

We so order.

Dated at Kampala this ..... day of ..... 2022.

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Elizabeth Musoke

Justice of Appeal

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Irene Mulyagonja

Justice of Appeal

.....

Monica Mugenyi

Justice of Appeal