THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Madrama & Luswata, JJA]

ELECTION PETITION APPEAL NO.0056 OF 2021

(Arising from Election Petition No.006 of 2021 at Kampala)

BETWEEN

Gaddaffi Nassur ==========Appellant

AND

Sekabira Denes========== Respondent No.1

Electoral Commission ==========Respondent No.2

(On appeal from the judgment of the High Court of Uganda (Apiny, J.,) delivered on the 14th day of October 2021)

JUDGEMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

[1] The appellant, respondent no.1 and 5 others were candidates for the seat of Member of Parliament for Katikamu County North Constituency in the general elections held on 14th January 2021. The Electoral Commission (respondent no.2) returned respondent no.1 as the validly elected Member of Parliament for the constituency. Dissatisfied, the appellant filed Election Petition No. 006 of 2021 at High Court in Kampala challenging the outcome of the election on the grounds that respondent no.1 was not validly nominated because his name does not appear on the voters' register and that he committed acts of bribery before and during the elections. The learned trial judge delivered judgment in favour of the respondents and dismissed the petition with costs.

[2] 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 and fact in holding that the High Court, as a court of first instance, lacked jurisdiction to hear and determine contestations regarding the legality of the first Respondent's nomination.
>
> 2.The learned trial Judge erred in law and fact when she held that the Appellant's key evidence in support of his petition was inadmissible and thus expunged it from the record, which occasioned a miscarriage of justice.
>
> 3.The learned trial judge erred in law and fact when she held that the Appellant's witnesses were not registered voters.
>
> 4.The learned trial judge erred in law and fact in holding that the first Respondent did not commit any acts of bribery either personally or through his agents with his knowledge, consent and approval.
>
> 5.The learned trial Judge erred in law and fact when she failed to find that the parliamentary elections in Katikamu County North Constituency, were conducted by the second respondent in contravention of, non-compliance with and contrary to the provisions and the principles of the law.
>
> 6.The learned trial judge erred in law and fact when she failed to fairly, justly and properly evaluate all evidence on record thereby arriving at a wrong conclusion.'

[3] The respondents opposed the appeal.

Submissions of Counsel

[4] At the hearing, the appellant was represented by Mr. Asuman Nyonyintono, Mr. Tumwesige Francis Ateenyi and Mr. Wambi Andrew. Respondent no.1 was represented by Mr. Luyimbazi Nalukoola, Mr.

Bazekuketta Derrick, Mr. Kabuye Lawrence and Mr. Emmanuel Ndegwe. The respondent no.2 was represented by Mr. Kayondo Abubaker. The parties filed and relied on their written submissions on record.

[5] Counsel for the appellant set out the duty of a first appellate court as was stated in Banco Arabe Espanol v Bank of Uganda [1991] UGSC 1. Counsel then submitted that there is uncontroverted evidence on record that respondent no.1 is not a registered voter. Counsel referred to annexure D to the appellant's affidavit in support of the petition containing a letter wherein respondent no.2 stated that it was not in possession of any voter registration in the name of Sekabira Denes. Counsel for the appellant submitted that respondent no.1 admitted in his affidavit in answer to the petition that he appears as Sekabira Denis in the voters' register yet the person nominated and elected is Sekabira Denes who are two different people.

[6] Counsel for the appellant also submitted that the character of respondent no.1 is questionable given the multiple falsehoods, contradictions and inconsistences in his statutory declarations and deed pool concerning his name.

[7] Counsel for the appellant further submitted that the learned trial judge erred in holding that the trial court was not clothed with jurisdiction to hear a complaint regarding nomination of a candidate as a court of first instance. Counsel submitted that section 61(d) of the Parliamentary Elections Act of 2005 (as amended) stipulates that the election of a candidate can be set aside on the grounds that the candidate was at the time of the election not qualified for election as a Member of Parliament. This is premised on the requirements under Article 80 of the Constitution which was operationalised by section 4 of the Parliamentary Elections Act.

[8] Counsel contended that the facts in Kasirye v Bazigatirawo & Anor [2019] UGCA 457 which the learned trial judge relied upon are distinguishable from the facts in this appeal. Whereas in Kasirye v Bazigatirawo & Another (supra) the appellant was aware of the irregularities in the

nomination prior to the elections, the appellant in this case discovered the illegalities after the election was completed and thus could not proceed under section 15 of the Parliamentary Elections Act. The only option available to the appellant was to lodge a petition challenging the election under section 60 and 61 of the Parliamentary Elections Act of 2005. Counsel relied on Otada v Tabani and Another [2017] UGCA 224 to support the submission that section 15 of the Parliamentary Elections Act was not intended to oust the jurisdiction of the High under section 61 of the Parliamentary Elections Act.

[9] Counsel submitted that election petitions are matters of public interest whose trials are by way of inquiry under section 63(4) of the Parliamentary Elections Act. Counsel for the appellant submitted that considering section 4 and 61(1)(d) of the Parliamentary Elections Act, it was erroneous for the learned trial judge not to inquire into the matter of illegalities in the nomination of respondent no.1 relying on technicalities.

[10] On ground 2, counsel for the appellant submitted that it was rightly noted by the learned trial judge that all the documents attached to the affidavits of the appellant were properly proved by way of secondary evidence and were not contested by the respondents at the point of scheduling. It was also rightly noted by the learned trial judge that the facts and documents agreed upon during scheduling are part of the record and should not be disputed. Counsel for the appellant submitted that respondent no.1 had an opportunity to inquire into the authenticity of the impugned documents but he did not do so during the trial court.

[11] Counsel submitted that the learned trial judge should not have expunged documents contained in annexures E1- E10, G1-G6, H1-H10 and the supporting paragraphs in the appellant's affidavits from the record because the information was obtained legally through valid court orders that were granted by the chief magistrates' court at Kakiri. Counsel submitted that the fact that the respondents did not challenge the court orders, the call logs, mobile money transactions and the subscriber information proves that the information is true. Counsel for the appellant relied on Mayanja &

Anor v Katuramu & Anor [2017] UGCA 15 where this court held that mobile money transaction print outs are admissible as evidence. Counsel argued that the facts in this case are similar to that case because in that case the appellant obtained mobile money print outs on court orders that had been obtained after the appellant filing a complaint at police.

[12] Counsel for the appellant further submitted that the learned trial judge ought to have addressed her mind to the ruling of the High Court in Miscellaneous Application No. 13 of 2020 Sekabira Denes v Uganda with regard to the legality of evidence annexed to the appellant's petition wherein respondent no.1 sought a declaration that the proceedings in Miscellaneous Applications no. 1746, 1745, 1744, 1743 and 1742 of 2021 by the magistrate court of Kakiri were illegal, irregular, improper and should be altered and or reversed. Counsel for the appellant submitted that this court should take into consideration the ruling of the Privy Council in Kuruma son of Kaniu v The Queen (1954) EACA 197 where it was held that the test to be applied to determine if evidence is admissible is whether it is relevant to the matters in issues. If it is, it is admissible, and the court is not concerned with how the evidence was obtained.

[13] O ground 3, counsel for the appellant submitted that it is trite knowledge that voter slips are documents which are issued by respondent no.2 which is mandated to keep the voters' register. The appellant wrote to respondent no.2 through a letter marked annexure 'I' to verify the registration of his witnesses but did not receive a response to the letter to date. Counsel submitted that the evidence which the learned trial judge faulted the appellant for not adducing is within the possession and knowledge of respondent no.2 who is the custodian of the voters' register in Uganda as set out in section 18(1) of the Electoral Commission Act. Counsel relied on Kikulukunyu v Muwanga [2012] UGCA 23 to support this submission.

[14] Counsel submitted that by failing to confirm whether the deponents were registered voters, the burden shifted to respondent no.2 to prove that the witnesses were registered voters. Counsel further submitted that the deponents proved that they were voters by their voters' slips and their

national identity cards and deponed in their affidavits that they were registered voters as was the case in Kikulukunyu v Muwanga (supra). Counsel contended that respondent no.1 also only attached voters slip as proof of registration of his witnesses and that since the documents were agreed upon during scheduling, respondent no.1 is constrained from challenging the same later on during trial.

[15] On ground 4, counsel for the appellant submitted that there was irrefutable evidence of mobile telephone transactions that respondent no.1 committed several acts of bribery personally and through his agents. Counsel contended that respondent no.1 through his agents distributed money and soap to registered voters for purposes of soliciting votes. Counsel reiterated his submissions in ground 3 regarding proof of registration of voters by voter slips to support the submission that the witnesses were registered voters.

[16] On grounds 5 and 6, counsel for the appellant reiterated his submissions in ground 1. During the hearing, counsel for the appellant abandoned ground 6.

[17] In reply, counsel for the respondent no.1 raised objections to grounds 5 and 6 of the appeal. Counsel for the respondent prayed that ground 6 be struck out because it offends rule 86(1) of the court of appeal rules. Counsel relied on Attorney General v Baliraine [2013] UGCA 9 for the submission that grounds of appeal must concisely specify the points which are alleged to have been wrongly decided. Counsel also relied on Celtel Uganda Ltd t/a Zain Uganda v Karungi [2021] UGCA 93 and Ranchobhai Shivabhai Patel Ltd & Anor v Wambuga & Anor [2017] UGCA 7 that set out the rationale of rule 86(1).

[18] Counsel for respondent no.1 contended that the issue relating to non-compliance with electoral laws contained in ground 5 of the memorandum of appeal was not part of the issues that were determined by the trial court. Counsel submitted that the appellant abandoned the allegation that the election was conducted in contravention of and in noncompliance with the

provisions and principles of the law, that no issue was framed and no argument was raised regarding the manner in which the election was conducted. Counsel argued that it is therefore unfair and unreasonable to fault the trial court for not making a finding on an issue that was not framed for determination. It is equally unfair for the appellant to raise the issue on appeal and that the appellant is therefore estopped from raising fresh issues on appeal.

[19] Further, counsel for respondent no.1 contended that the appellant's submissions in respect of the respondent no.1's nomination offends rule 102(a) of the Court of Appeal rules because no ground was raised in that regard in the memorandum of appeal. Counsel contended that the appellant merely framed a ground on whether the trial court had jurisdiction to hear and determine issues regarding the legality of respondent no.1's nomination in ground 1 but failed to frame an issue regarding whether respondent no.1 was validly elected. Counsel contended that it is duty of the appellant and his counsel to properly raise grounds for determination by court and the appellant failed in this duty. Counsel relied on Muljibhai Madhvani & Co. Ltd & Anor v Francis Mugarura & 35 Ors [2010] UGSC 21 to support this submission. Counsel for respondent no.1 prayed that the appellant's submissions concerning the validity of respondent no.1's nomination be ignored because they offend rule 102(a) of the Court of Appeal Rules.

[20] In reply to counsel for the appellant's submissions on ground 1, counsel for respondent no.1 submitted that this court has had the opportunity to address itself on the issue of the jurisdiction of this court to hear complaints regarding nominations in the cases of Akol Hellen Odeke v Okodel Umar [2021] UGCA 7 and Kasirye v Bazigatirawo & Anor [2019] UGA 457 where this court considered the implication of Article 61(1) (f) and 64(1) of the Constitution together with section 15 of the Electoral Commission Act. As was the case in Kasirye v Bazigatirawo (supra), the appellant did not challenge the nomination of respondent no.1 before the Electoral Commission and there is no evidence on record to prove that the appellant was denied access to inspect the nomination papers before the

election. Counsel submitted that considering the above, the learned trial judge was right to conclude that in the absence of a complaint for non-provision of information, the only conclusion was that the appellant was provided with the information and did not act upon it and only chose to contest the same after election. Counsel submitted that this court emphasized the rationale for the strict rule that issues of nomination must be resolved before the election and that the trial court cannot be faulted for following the decision of this court.

[21] Further, counsel for respondent no.1 submitted that counsel for the appellant cited the decision in Otada v Tabani & Anor (supra) out of context. Counsel for respondent no.1 submitted that this court did not consider the effect of Article 61(1) (f) of the Constitution in Otada v Tabani & Anor (supra) as it did in Akol Hellen Odeke v Okodel Umar (supra) and that this court has long since moved away from its position in Otada v Tabani & Anor (supra). Counsel contended that the recent decisions of this court do not oust the jurisdiction of courts but simply enforce constitutional and statutory provisions that provide for a better mechanism of addressing issues regarding nomination so that complaints are not belatedly lodged after the electorate has pronounced itself through the election results.

[22] Regarding the validity of respondent no.1's election, counsel for the respondent submitted that respondent no.1 was validly elected. Counsel submitted that the returning officer of Luweero district, Nabasa Nathan testified on oath that respondent no.1 is a registered voter and his testimony was never disputed. Counsel submitted that the appellant did not adduce any evidence to show that there exists another person in the names of Sekabira Denis. Counsel submitted that all the photographs in the evidence on record are for the respondent and that in respect of the allegations for bribery, the appellant concedes that the Sekabira Denes and Sekabira Denis are one and the same person. Counsel for respondent no.1 argued that the appellant cannot be allowed to choose to consider respondent no.1 as one and the same person as Sekabira Denis when it suits him. Counsel submitted that it would be self defeating and testing the

abilities of this court for the appellant to allege that Sekabira Denis is different from Sekabira Denes but adduce evidence with respondent no.1's photographs in the name of Sekabira Denis to prove that respondent no.1 Sekabira Denes is the one who committed bribery.

[23] Counsel for respondent no.1 submitted that the discrepancy in respondent no.1's name is explained by the statutory declaration of the respondent wherein he stated that his name Sekabira Denes was misstated as Sekabira Denis and that those two names refer to the same person. Counsel relied on Mandera v Bwowe [2017] UGCA 37 to support the above submissions. Counsel submitted that the use of statutory declarations to verify or clarify discrepancies or misspellings in names has been confirmed in various cases such as Kamurali Jeremiah Birungi v Electoral Commission & Anor Election Appeal No. 18 of 2020 (unreported) and Sembatya v Muwanga [2018] UGCA 5. Counsel submitted that although respondent no.1 executed and published a deed poll in the gazette, it was not necessary and that there is no proof that name Sekabira Denis was registered for purposes of name change. Counsel submitted that it now well settled law that failure to follow the proper procedure in changing names does not change the identity of the person. Counsel relied on Sulaiman v Onega [2021] UGCA 116 to support this submission.

[24] Counsel submitted that the appellant seeks to rely on statutory declarations which bear different signatures from that of respondent no.1 and that the appellant has not proved that the declarations were executed by respondent no.1. Counsel for respondent no.1 further submitted that even if there are contradictions, the same are not grave to the extent of creating or bringing into existence another person other than respondent no.1. Counsel argued that the appellant's submissions that respondent no.1 illegally changed his names are misconceived because the respondent only clarified the discrepancy in his name.

[25] On the other hand, counsel for respondent no.1 denied having issued annexure D. Counsel contended that the document is not certified as required by sections 73, 75 and 76 of the Evidence Act. In rejoinder,

counsel for the appellant submitted that neither the respondents nor the trial court required the appellant to produce the original document which is in the custody of the appellant. Counsel submitted that there are a number of cases that this court has handled matters concerning illegalities in the nomination of candidates without recourse to section 15 of the Electoral Commission Act. Counsel referred to Otada v Tabani and Another (supra), Mulindwa v Lugudde [2017] UGCA 126, Wakayima Musoke Nsereko v Kasole Robert Election Petition Appeal No. 50 & 102 of 2016 (unreported) and Serunjogi v Lule [2007] UGCA 70.

[26] In reply to ground 2, counsel for respondent no.1 submitted that the impugned evidence was expunged from the record due to falsehoods that had been discovered in the evidence. The learned trial judge found that the appellant had deliberately lied that he obtained the statements through court orders but it was found that the appellant had obtained the same through a police officer. Counsel submitted that from the record, respondent no.1 objected to and challenged the admissibility of the appellant's documentary evidence. Counsel submitted that the appellant does not dispute the trial judge's finding that he deliberately lied on oath and he does not challenge the learned trial judge's decision of expunging the offending paragraphs. With the offending paragraphs expunged, the impugned documents would not and cannot be sustained without supporting paragraph's in the appellant's affidavits. Counsel submitted that they are fortified in their submissions by rule 15(1) of the Parliamentary Elections (Interim Provisions) Rules which provides that all evidence in election petitions shall be by way of affidavit.

[27] In rejoinder, counsel for the appellant reiterated his submissions.

[28] In reply to ground 3, counsel for respondent no.1 submitted that it has been held by this court in Kasirye v Bazigatirawo (supra) and Kassaja v Ngobi and Another [2018] UGCA 237, Lanyero & Anor v Lanyero [2012] UGCA 28 and Kabuusu Moses Wagaba v Lwanga Timothy Election Petition Appeal No. 53 of 2011(unreported) that proof of one being a registered voter is by production of a voter's register and not by declaration

of a voter's number or production of a national ID or Voter's Information Slip. Counsel for respondent no.1 further submitted that it is inconceivable that the appellant seeks to shift the burden of proof that his witnesses are registered voters to respondent no.1. Counsel submitted that it is not true that the parties agreed to the witnesses' voter's slips, the documents were in issue and the respondent raised objections in this respect. Counsel contended that even if the voters' slips were agreed upon, it was never an agreed fact that the appellant witnesses were registered voters. Counsel for respondent no.1 submitted that the appellant had the duty to prove that the witnesses were registered voters and that he erroneously chose to prove this using voters' slips instead of producing a voters' register.

[29] On the other hand, counsel for respondent no.2 in addition submitted that the appellant was in possession of the voters' register and that the voters slips ought to have been certified since they are public documents. Counsel relied on Mushate Magomu Peter v Electoral Commission and Sizomu Gershom Rabbi Wambedde Election Appeal No.47 of 2016 (unreported) to support his submissions. Counsel relied on Kassaja v Ngobi and Anor (supra) for the submission that the affidavits of Sebirumbi Bosco and Mugerwa Fred should be rejected because it is indicated in their national identification cards that they cannot sign but their affidavits were signed.

[30] On ground 4, counsel for respondent no.1 submitted that that the affidavits of Sebirumbi Bosco and Mugerwa Fred, which the appellant relies on to support his allegations of bribery were expunged from the record. Counsel for respondent set out the law on the standard of proof for allegations of bribery in election petition matters while relying on Amama Mbabazi v Kaguta Museveni & 2 Ors [2016] UGSC 4, Kalemba Christopher & Anor v Lubega Drake Francis Election Petition Appeal No.32 of 2016 (unreported), Kamba Saleh Moses v Namuyangu Jennifer [2012] UGCA 8. Counsel for respondent no.1 submitted that the evidence on record was insufficient to prove the allegations of bribery made by the appellant to the required standard.

[31] Counsel submitted that in addition to failing to prove that his witnesses were registered voters, the appellant failed to prove that the motive was to influence the witnesses to vote for the respondent no.1 or to refrain from voting the opponents. Counsel relied on Hon Kevina Taaka Wanaha Wandera v Macho Geoffrey & 2 Ors [2020] UGCA 57 to support this submission. Counsel for respondent no.1 submitted that the alleged acts of bribery were not corroborated and the electronic evidence relied upon by the appellant was expunged from the record.

[32] Regarding the alleged bribery of Kamya Enos, counsel submitted that Kamya Enos was a self-confessed accomplice which raises doubt as to the credibility of his evidence. Counsel submitted that the appellant did challenge respondent no.1's evidence that the witness was angry at the respondent for failing to treat his wife after the election. The appellant failed to prove that the money allegedly sent to Kamya Enos was intended to induce him to vote in favour of respondent no.1. Counsel submitted that there is no corroborative evidence to prove that the witness was given money to influence him to vote for the respondent. Counsel submitted that instead, the affidavits of respondent no.1 and Salim Lemu indicate that the money was meant for fuel. Counsel further submitted that there is no independent evidence to corroborate Kamya Enos' version of the motive or purpose of the alleged bribe as required in Lanyero & Anor v Lanyero (supra).

[33] Regarding the alleged bribery of Edith Nakaweesa, counsel for respondent no.1 submitted that the appellant failed to prove that Edith Nakaweesa was an agent of respondent no.1 and that the evidence that the appellant sought to rely on to corroborate the allegation of bribery was accomplice evidence which was not proved to be truthful or credible. Counsel contended that on the other hand respondent no.1 testified that the money was sent by his personal assistant Salim Lemu to Edith Nakaweesa, his girlfriend at the time for personal use. Concerning the alleged bribery of Juuko Erik Zimbe, counsel for respondent no.1 submitted that that it was not proved that he was an agent of the respondent and that it was alleged that Juuko Erik bribed Mugerwa Fred and Sebirumbi Bosco whose affidavits were

expunged from the record. Concerning the alleged bribery of the community with soap through Kamya Enos, counsel for respondent no.1 submitted that that there is no proof that the members of the community were registered voters. Counsel relied on Besigye Kiiza v Yoweri Kaguta Museveni Yoweri and Anor [2001] UGSC 3 where it was held that allegations of bribery must be specific and particulars must be given.

[34] On the other hand, counsel for respondent no.2 submitted that the Electoral Commission was not aware of any bribery by respondent no.1 and reiterated the submissions of respondent no.1. in rejoinder.

[35] In reply to ground 5, counsel for respondent no.1reiterated his submissions in the preliminary objection against the ground. Counsel for respondent no.1 reiterated his submissions in ground 1. In rejoinder, counsel for the appellant submitted that the issue was agreed upon and the issue was before the trial court. Counsel contended that the ground goes to the root of the case since it deals with the validity of the nomination of respondent no.1.

Analysis

[36] As a first appellate court, it is our duty to re-evaluate the evidence on record as a whole and arrive at our own conclusion bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses which we do not have, where that is the applicable. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S I 13-10, Banco Arabe Espanol v Bank of Uganda [1999] UGSC 1, Rwakashaija Azarious and others v Uganda Revenue Authority [2010] UGSC 8 and Omunyokol v Attorney General [2012] UGSC 4.

Ground 1

[37] Counsel for the appellant contended that it was erroneous for the learned trial judge to hold that the trial court lacked jurisdiction to hear a complaint of nomination of a candidate as a court of first instance.

[38] Article 61 of the constitution provides the functions of the electoral commission. Article 61(f) mandates the Electoral Commission to hear and determine election complaints arising before and during poling. Section 15(1) of the Electoral Commission Act grants the commission power to resolve complaints before and during the nomination process. Section 15(1) of the Act provides:

> '(1) Any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at a lower level of authority, shall be examined and decided by the commission; and where the irregularity is confirmed, the commission shall take necessary action to correct the irregularity and any effects it may have caused.'

[39] Section 15 of the Parliamentary Elections Act provides:

> **'15. Inspection of nomination papers and lodging of complaints**
> Any voter registered on the voters roll of a constituency may—
> (a) during office hours on the nomination day at the office of the returning officer, inspect any nomination paper filed with the returning officer in respect of the constituency;
>
> (b) after the closure of the nomination time and during such period as may be prescribed, inspect any nomination paper in respect of the constituency at such time and subject to such conditions as may be prescribed; and lodge any complaint with the returning officer or the Commission in relation to any nomination in respect of the

constituency challenging the qualifications of any person nominated.'

[40] Article 64(1) of the constitution and section 15(2) provide that appeals from the decision of the Electoral Commission while exercising its powers above lie to the High Court and Article 64(4) stipulates that the decision of the High Court is final.

[41] After considering the above law and decisions of this court on the matter, the learned trial judge concluded that:

> 'For the foregoing reasons and the fact that this court is bound by the decisions of the court of Appeal in **Akol Hellen Odeke Vs Okedel Umar's** case (supra) and **Kasirye Zzimula Fred Vs Bazigatirawo Kibuuka Francis Amooti and Electoral Commission** (supra), I find that this court is not clothed with jurisdiction to hear a complaint regarding nomination of a candidate as a court of first instance. Therefore, this petition would have been struck out had this been the only complaint.'

[42] I would agree with the above decision of the learned trial judge. This matter was exhaustively handled by this court in Akol Hellen Odeke v Okodel Umar [2021] UGCA 7. Kibeedi Mutangula, JA stated:

> 'The crux of the Appellant's submission on ground 7 is that the High Court does not have the "original jurisdiction" mandate to hear and determine complaints regarding validity of nominations and other election related complaints arising before and during polling. That such mandate is vested in the Electoral Commission and that the High court is vested only with appellate jurisdiction over decisions made by the Electoral Commission.
> The respondent disagreed.

It is true that jurisdiction is a creature of statute. The original jurisdiction of the High Court and the Electoral Commission in respect of election related disputes arising before and during polling emanates from the Constitution of the Republic of Uganda, 1995. As such, it is important to set out all the provisions of the Constitution which have a bearing on the resolution of the issue of the mandate of both Constitutional bodies in order to effectively determine the scope of the "unlimited original jurisdiction" of the High Court. This is in accordance with the cardinal rule of constitutional interpretation to the effect that in interpreting the Constitution the entire Constitution must be read as an integrated whole with no particular provision destroying the other but each sustaining the other so as to promote harmony of the constitution- see Dr. Paul K. Semogerere and 2 others Vs. A.G. Constitutional Appeal No. 1of 2002.

The following provisions of the Constitution have a bearing on the mandate of the Electoral Commission and the High Court with regard to disputes arising before and during polling:

- Article 61(1)(f) – one of the Constitutional functions of the Electoral Commission is "to hear and determine Election complaints before and during polling".
- Article 64(1) – "Any person aggrieved by a decision of the Electoral Commission in respect of any of the complaints referred to in article 61(1)(f) of this constitution may appeal to the High Court".
- Article 139(1) – "The High Court shall, **subject to the provisions of this Constitution**, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law". (Emphasis added)

  The Supreme Court of Uganda in URA Vs Rabbo Enterprises (U) Ltd & Anor, SCCA No.12 of 2004 had occasion to consider at great length the scope of the "unlimited original jurisdiction" of the High Court in respect of settling tax disputes in light of Article 152(3) of the Constitution which required Parliament to make laws to establish tax tribunals for the purposes of settling

disputes. In the leading judgment of the Hon. Justice Dr. Prof. Lillian Tibatemwa – Ekirikubinza, JSC, with the concurrence of other Justices of the Supreme Court stated as follows:

"Article 139 (1) of the Constitution provides that, the High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.

My understanding of the above Constitutional provision is that the High Court exercises its unlimited jurisdiction subject to other provisions of the Constitution. One such provision envisaged in Article 139 (1) is Article 152 (3) of the Constitution which provides for Tax Appeals Tribunals.

The establishment of Tax Tribunals is rooted in the Constitution - Article 152 (3) of the Constitution - which not only gives name to these quasi-judicial tribunals but also envisages their establishment through an Act of Parliament. The Article also specifically empowers the said entities to handle taxation disputes.

It is in line with this that Parliament enacted the Tax Appeals Tribunals Act…

I also respectfully disagree with the holding of the Court of Appeal that a litigant can choose whether to take a tax matter to the High Court as a court of first instance or to the Tax Appeals Tribunal. It must be noted that under Section 3 of the Tax Appeals Tribunal Act: a person is not qualified to be appointed chairperson of a tribunal unless he or she is qualified to be appointed a judge of a High Court. Furthermore, under Section 30, a person cannot be appointed a registrar of the Tax Tribunal if she or he is not qualified to be a registrar of the High Court. I opine that it would be bizarre that our legal regime would give power to an individual to choose where to lodge a complaint by offering choices between institutions equally qualified to handle the matter."

Much as the decision in *URA Vs Rabbo Enterprises* (above) was dealing with settlement of tax related

disputes, it is equally applicable to the determination of the scope of the "unlimited original jurisdiction" of the High Court in respect of Election related disputes arising before and on polling day with the necessary modifications. I opine that the "unlimited original jurisdiction" conferred upon the High Court by Article 139(1) of the Constitution is, first and foremost, subject to Article 61(1)(f) of the Constitution. The import of this is that the mandate to hear and determine election complaints arising before and during polling as a "court" of first instance is vested in the Electoral Commission.

Article 139(1) of the Constitution is also subject to Article 64(1) of the Constitution which expressly vests the High Court with jurisdiction to hear appeals from decisions of the Electoral Commission made pursuant to Article 61(1)(f) of the Constitution.
Accordingly., it is my finding that the High Court siting Soroti did not have jurisdiction to hear and determine the Respondent's application as a court of first instance.'

[43] In Kasirye v Bazigatirawo & Anor [2019] UGCA 457, this court while considering the implication of section 15 of the Electoral Commission Act and section 15 of the Parliamentary Elections Act regarding irregularities before and during nomination stated:

'From the reading of the above provisions of the law, it appears to us that the intention of the legislature in enaction section 15 of the Electoral Commission Act was to ensure that all disputes arising prior or during nominations before voting are resolved with finality before the election date, except where the law otherwise specifically provides. Timely complaints will avoid undue expense and inconvenience to the parties inclusive of the electorate who do not have to vote where nomination is contested. Issues of nomination should be resolved before elections.
It appears to us that, the appellant waived his rights to complain when he failed to bring the complaints within the stipulated period and as such would be estopped from doing so after the election.'

[44] Counsel for the appellant submitted that the illegalities and irregularities in respondent no.1's nomination were discovered after elections. Therefore, the appellant could not act under section 15 of the Electoral Commission Act. The only course of option available to the appellant was to lodge a petition to the High Court under sections 60 and 61 of the Parliamentary Elections Act. In particular, counsel for the appellant relied on Otada v Tabani and Another (supra) for the contention that section 15 of the Parliamentary Elections Act was not meant to oust the jurisdiction of the High Court from investigating complaints concerning illegal nomination of candidates.

[45] Section 15 of the Parliamentary Elections Act permits any registered voter on the voters' roll of the constituency to inspect on the nomination day and after nomination time any nomination paper filed with the returning officer in respect of the constituency. This is intended to give the registered voter an opportunity to ensure that the persons contesting in the constituency are qualified. It is through such inspection that there is discovery of any irregularities or illegality in the nomination papers so as they are challenged before the Electoral Commission at the earliest time possible. I find the appellant's submission that the irregularities were discovered after elections unfounded. The appellant ought to have exercised due diligence by inspecting respondent no.1's nomination papers prior to the elections. Annexure D is a response from the Electoral Commission to a letter from the appellant's advocates requesting for the particulars of the respondent. The letter indicates that the appellant made the request on 12th February 2021 which was after the general elections that were held on 12th January 2021. It is evident that the appellant only inquired about the particulars of the appellant after having lost the election.

[46] The learned trial judge while dealing with this issue stated:

> 'Be that as it may, this court is convinced that the intention of the framers of the law in enacting Articles 61(1)(f), 64(1) and S.15(1) of the Electoral Commission Act, Cap

140 was to guard against the possibility of the electorate voting for a candidate who is not qualified to stand. To guard against that, the complainant, like the petitioner in this case was expected to lodge such complaints at the earliest opportunity possible before conducting an election where nonqualified candidates are likely to participate. It would as well be improper for the complainant, like the petitioner in this case, to withhold such information at the time when he is supposed to raise it, and later brings it up to challenge the will of the electorate.

In my view, with the exception of the information of voter bribery, the argument that the irregularities were discovered after competition of the electoral process is unsustainable in as far as it relates to a candidate not being a registered voter because the petitioner had an opportunity to inspect the nomination papers before polling.

In the absence of a complaint against the 2nd respondent for non-provision of that information, the only logical conclusion would be that it was provided and not acted upon by the petitioner, who chose to wait for the electoral process to come to an end and then file a petition to contest the same.'

[47] The learned trial judge cannot be faulted for this holding. The case of Otada v Tabani and Another (supra) is distinguishable from this instant case. The issue of whether the High Court has original jurisdiction to hear and determine matters regarding validity of nominations and other election related complaints arising before elections was not considered by this court. Counsel for respondent no.2 merely submitted that the appellant did not make any complaint to the Electoral Commission concerning the nomination of the 1st respondent as required by section 15 of the Parliamentary Elections Act and that was the end of the matter. This court only dealt with the issue of whether the 1st respondent was qualified for nomination and election as Member of Parliament for Kibanda North County, Kiryandongo District.

[48] However, in that case, this court underscored the importance of general elections. It stated:

> 'A general election is a very important exercise in every democratic country. It is the time when the people of a nation choose the leaders to govern them. They ought to be regarded very highly and handled with utmost diligence, for failure to do so can plug the country into civil strife. In the same vein, election Petitions are regarded as special proceedings with special laws and rules of procedures which must be strictly adhered to. Failure to adhere to the rules can result in the 'playing field being rendered unlevelled' or 'shifting of goal posts when the game is being played. The rules of the game must be set before the game starts and strictly followed until the game ends.'

[49] Article 61(f), 64(1) and section 15 of the Electoral Commission Act and Parliamentary Elections Act set out the procedure to be followed for lodging complaints arising before and during nomination before voting. The law is specific that such complaints are raised before the Electoral Commission and appeals from the decision of the Electoral Commission lie with the High Court which is the final appellate court in such matters. It would defeat the purpose of the law if complainants are allowed to choose when and where to lodge such complaints. Ideally, complainants can only proceed under section 61(1)(d) of the Parliamentary Elections Act under exceptional circumstances which is not the matter in this case.

[50] I would find that ground 1, with respect, has no merit.

Ground 2

[51] Counsel for the appellant contended that the learned trial judge erred in law and fact when she expunged from the record the appellant's key evidence on the ground that it was inadmissible. The learned trial judge expunged from the record annexures F3-1 to F3-3. She severed paragraphs 21, 22, 23 and 23 of the petitioner's affidavit in rejoinder and paragraph 7 of the

petitioner's affidavit in support of the petition and as a result annexures marked E1-E10, G1-G6, JI-J4 that were attached to the paragraphs were expunged from the record.

[52] The gist of the appellant's argument was that all the documents that were expunged from the record were properly proved by way of secondary evidence and that they were admitted into evidence during the joint scheduling therefore their admissibility cannot be disputed by the respondents. The appellant insisted that the information that was expunged from was obtained legally through valid court orders.

[53] Annexures E1-E10 and JI-J4 contained call logs, annexures F1-F10 and F3-1 -F3-3 contained mobile money transaction print outs, annexures G1-G6 contained the court orders and the application for the orders and annexures H1-H10 contained statements. The appellant contended that he obtained the documents in the annexures from the service providers through court orders from the Chief Magistrates' Court at Kakiri.

[54] While arriving at the decision to expunge the above documents and the corresponding paragraphs in the affidavits from the record, the learned trial judge stated:

> 'The statements complained of in the affidavit are in respect of the assertions that the petitioner obtained the said court orders whereas not. However, it is evident on the record that the documents attached do not indicate that the petitioner applied for and obtained them, instead the said court orders appear in the names of a police officer described as No. 59865 DC Komakech Samuel. It is my conclusion that the statement to the effect that he applied and obtained the said order in the petitioner's affidavit in support of the petition is a falsehood.
>
> I am in agreement with counsel for the respondents' proposition that the said documents were only supposed to be tendered in court by the police officer to whom they were issued. This court considers it a deliberate lie for the petitioner to state that he applied for that information

whereas not. In my view, whatever is presented by counsel for the petitioner describing how the petitioner lodged a complaint with the police which was later investigated and the court orders issued to the investigating officer is what ought to have been stated in the petitioner's affidavit in which he would disclose his source of information as the investigating officer. It was the petitioner's responsibility to ensure that the said investigating officer depones an affidavit to introduce the said documents.

However, the above notwithstanding, court has discretion to server a defective part of an affidavit as opposed to throwing out the entire affidavit. (see **Odo Tayebwa Vs Gordon Kakuuma Arinda and Electoral Commission, EPA 86 of 2016** and **Abala David Vs Acayo Juliet Lodou and Electoral Commission, High Court (Soroti) Election Petition No.04 of 2021)**

In light of the above, the information provided under paragraph 7 of the petitioner's affidavit in support of the petition remains as hearsay. Similarly, paragraphs 21, 22, 23, 24 of the petitioner's affidavit in rejoinder and the annexures attached thereto is treated as hearsay.

It therefore follows that the impugned paragraphs 21, 22, 23 and 24 of the petitioner's affidavit in rejoinder and paragraph 7 of the petitioner's affidavit in support of the petition are hereby severed from the said affidavits and the annexures attached and marked as **E1-E10, G1-G6, J1-J4** and **H1-H10** are consequently expunged.'

[55] The petitioner deponed under paragraph 7 of his affidavit in support of the petition and paragraph 21 of his affidavit in rejoinder that it was him who obtained the court orders but the evidence of the record states otherwise. Upon perusal of annexures G1-G6, it is clear that it was a one No. 59865 DC Komakech Samuel who made an application to a magistrate to inspect and obtain photocopies of the stated documents and the application was granted on 18th March 2021. The learned trial judge was right in finding that the appellant deliberately lied to court on how he obtained the expunged documents. The officer who applied for the court orders and

obtained the copies of the documents should have sworn an affidavit to that effect otherwise the evidence amounts to hearsay.

[56] Concerning annexures F3-1 to F3-3, the learned trial judge stated:

> 'I note that Annexures F3-1 to F3-3 bears a stamp from the MTN Security Department, dated 11th March 2021, which in essence means that said documents were obtained 7 days before the court was issues. Surely, this makes the said documents questionable and as such cannot be relied upon by this court. The said annexures are therefore expunged from the record.'

[57] It is questionable as to how the above documents were obtained given the fact that the record shows that the court orders to inspect and obtain copies of the documents were granted on 18th March 2021 whereas the documents were obtained from MTN on 11th March 2021. I would not fault the learned trial judge.

[58] It was open to the appellant when he became aware of the record at the Chief Magistrates' Court at Kakiri to apply for a certified copy of that record as court records are public documents and then use the said record in the proceedings before the High Court, providing evidence of the request for the record, payment for the same and the action of the Chief Magistrates Court at Kakiri. Such records would then be usable in the possible cross examination of witnesses and be considered by the trial court for what they were worth. He chose not to do so and opted to tell a lie as to how he came by the said documents. He has only himself to blame for the situation he found himself in.

[59] I would reject ground 2.

Grounds 3, 4 and 5

[60] Grounds 3 ,4 and 5 shall be handled together since they are inter-related. Regarding ground 3 counsel for the appellant contended that the learned

trial judge erred in law and fact in holding that the appellant's witnesses were not registered voters. For ground 4, counsel for the appellant contended that the learned trial judge erred in law and fact in holding that respondent no.1 did not commit any acts of bribery.

[61] While considering the issue of whether respondent no.1 committed any acts of bribery, the learned trial judge arrived at the conclusion that the appellant failed to prove that there was any registered voter who was bribed by the respondent directly or through his agents with his consent.

[62] The petitioner had alleged that respondent no.1 was guilty of bribery through giving out money and soap to various people in his constituency. He relied on the affidavits of Edith Nakaweesa, Kagimu Richard, Matovu Moses Kato, Tumwine Robert and Kamya Enos to prove the allegations. The petitioner attached photocopies of the national identity cards and voter information slips of the deponents to prove that they were registered voters.

[63] Section 68(1) of the Parliamentary Elections Act provides for the offence of bribery. It states:

> '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.'

[64] In Kizza Besigye v Kaguta Museveni [2001] UGSC 3, Odoki CJ (as he then was) stated:

> 'I accept the submission of Mr. Bitangaro that the petitioner must prove the following ingredients to establish the illegal practice of offering gifts:
>
> - That a gift was given to a voter
> - That the gift was given by a candidate or his agent

- That the gift was given to induce the person to vote for a candidate.'

[65] The learned trial judge was alive to the burden and standard of proof in cases of allegation of bribery. She stated:

> 'As earlier stated, the burden of proof in election petitions lies on the petitioner and the standard of proof is to the satisfaction of court. In **Muyanja Simon Lutaaya Vs Keneth Lubogo** and EC (supra) it was held that;
>
> "where allegations of bribery are made in an election petition, it is essential for the petitioner to prove to the satisfaction of court all elements of the illegal practice of bribery on the balance of probabilities. The commission of bribery, once proved to the satisfaction of court, is sufficient in itself to set aside the election of a candidate as a Member of Parliament."'

[66] In order to prove the allegation of bribery, the petitioner must prove that the person who was bribed was a registered voter. Section 1(1) of the Parliamentary Elections Act defines a registered voter as a person whose name has been entered on the voters' register. In Kassaja v Ngobi and Another [2018] UGCA 237, this court stated:

> 'In other words, the conclusive proof that a person is a voter is by evidence of that person's name on the National Voters' Register and not by the voter slips or National Identification as was the case here.'

[67] Also, in Kasirye v Bazigatirawo & Anor (supra), this court stated that:

> 'The definition of a registered voter is clear. Having national identity card is not sufficient on its own to qualify a person as a registered voter. A registered voter must have registered as such and his or her name must appear clearly in the national voters' register.'

[68] Counsel for the appellant contended that respondent no.2, being the custodian of the national voters' register ought to have adduced the same in evidence considering the fact that the appellant had written to it to verify whether the witnesses were registered voters but the respondent did not reply. It is correct that the appellant through his advocates in a letter to the Chairman of the Electoral Commission dated 17th March 2021 and marked 'I' requested for confirmation whether the deponents except Twine Robert were registered voters. There is no evidence on record to show that respondent no.2 responded to the letter.

[69] As noted above, the burden of proof in election petitions lies on the petitioner. The appellant should have applied to court seeking orders to compel respondent no.2 to produce the voters' register in court but he did not take the step. In any case, section 24 of the Electoral Commissions Act allows the public to access the voters roll at the office of the returning officer in the constituency for purposes of inspection and of making photocopies of the registers. It states:

> **'24. Inspection of constituency voters' rolls, printing of the rolls and use of the printed rolls.**
> (1) The voters roll for every constituency shall be open to inspection by the public, free of charge, at the office of the returning officer during office hours and shall also be made available at the sub-county headquarters and at each polling station within the constituency.
> (2) A person inspecting the voters roll for a constituency may, without payment of any inspection fee, make copies of the roll or make extracts from it in each case at his or her expense during office hours but without removing the roll from the office of the returning officer.
> (3) The commission shall cause the voters roll for each constituency to be printed, and any person may obtain from the commission, on payment of such charges and subject to such conditions as may be prescribed, copies of any voters roll for the constituency or for a parish or ward within it.

> (4) Where the voters roll for any constituency has been printed under subsection (3) immediately before a general election or a by-election or an election to the office of the President or a local government election, and it contains the names of the voters who will be entitled to vote at that election, the commission shall publish a notice in the Gazette declaring that the printed voters roll shall be used for the purpose of the identification of voters at that election.'

[70] In my view, the learned trial judge was justified to find that the appellant had not proved to the satisfaction of court that there was any registered voter who was bribed.

[71] I would dismiss grounds 3, 4 and 5 for lack of merit.

[72] Counsel for the appellant abandoned ground 6 during the hearing.

Decision

[73] As Madrama and Luswata, JJA, agree, this appeal is dismissed with costs.

Dated, signed and delivered at Kampala this 05th day of May 2022.

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: EGONDA NTENDE, MADRAMA AND LUSWATA JJA)

ELECTION PETITION APPEAL NO 0056 OF 2021

(Arising from Judgment of Apiny, J. dated 14th October 2021 in Election Petition No 006 of 2021 at the High Court in Kampala)

BETWEEN

GADDAFFI NASSUR} ..... APPELLANT

VERSUS

1. **SEKABIRA DENES}**
2. **ELECTORAL COMMISSION} .....RESPONDENTS**

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the Judgment of my learned brother Hon. Mr. Justice Frederick Egonda – Ntende, JA in Election Petition Appeal No. 0056 of 2021.

I agree with the judgment and orders proposed and for the reasons given. I would only like to briefly highlight one point relating to ground 1 of the appeal.

Section 15 (1) of the Electoral Commission Act, cap 140 provides that any complaint submitted in writing alleging any irregularity with any aspect of the electoral process at any stage, if not satisfactorily resolved at the lower level of authority shall be examined and decided by the Electoral Commission.

Under section 15 (2) of the Electoral Commission Act, an appeal lies to the High Court from a decision of the Commission and as noted in the lead

judgment, the decision of the High Court shall be final under section 15 (4) of the Electoral Commission Act.

The importance of pre-polling complaints being resolved before the polling date is that elections do not have to be held before a resolution of the complaint. In other words, the High Court has powers to grant interim reliefs pending resolution of the complaint. This saves the public money in conducting the elections. It also saves the parties expenses before the polling date. Where the matter is raised after polling, and the High Court reverses the election on the basis of a pre-polling complaint or a complaint which ought to have been raised before the polling date, the process of polling may have to be repeated at double cost to the public coffers and perhaps additional expenses to the candidates.

To avoid such mischief, the names of candidates and their nomination ought to be examined and contested after nomination. Raising such matters after polling is prejudicial to the people in terms of additional public expenditure.

Granted, a complaint about the names can be made in the guise of contesting the qualifications of the nominated candidate or elected candidate under section 61 (1) (d) of the Parliamentary Elections Act, 2005 which gives it as a ground for setting aside an election on the basis that the candidate was disqualified for election as a member of Parliament. However, the question of qualifications is not necessarily a question about misnomer in names or nominations or whether a candidate is a registered voter. Such a complaint can be handled by the Electoral Commission and when decided, their decision is final unless appealed to the High Court whose decision would also be final. In other words, the High Court would exercise appellate jurisdiction.

For emphasis paragraph 5 (a) of the appellants petition clearly averred that the petitioner contended that the 2nd respondent illegally nominated the 1st respondent on the ground that he does not appear in the voters' register and was not eligible for nomination. The question of whether a nominated candidate appears in the register of voters gives rise to a pre-polling

complaint that ought to be considered and determined before the person is elected.

In the premises, I agree with the judgment of my learned brother and I have nothing useful to add.

Dated at Kampala the 6th day of May 2022

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Madrama, Kawuma JJA]

ELECTION PETITION APPEAL NO.0056 OF 2021

(Arising from Election Petition No.006 of 2021 at Kampala)

BETWEEN

Gaddaffi Nassur ==========Appellant

AND

Sekabira Denes========== Respondent No.1

Electoral Commission ==========Respondent No.2

(On appeal from the judgment of the High Court of Uganda (Apiny, J.,) delivered on the 14th day of October 2021)

JUDGMENT OF LUSWATA KAWUMA, JA

I have had the opportunity to read in draft the judgment of my brother, Egonda-Ntende, JA. I agree with him and have nothing useful to add.

Dated, signed and delivered at Kampala this 06 day of May 2022

EVA K. LUSWATA

Justice of Appeal