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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 53 OF 2021

GALISONGA JULIUS:: APPELLANT

VERSUS

10 **1. KATUNTU ABDU**

2. ELECTORAL COMMISSION::::::::::::::::::::::::::RESPONDENTS

(Appeal from the decision of the High Court of Uganda at Jinja before Susan Abinyo J. dated 15th October, 2021 in Election Petition No. 10 of 2021)

15 **CORAM: HON. MR. JUSTICE CHEBORION BARISHAKI, JA**

HON. LADY JUSTICE HELLEN OBURA, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF COURT

20 **Introduction**

This is an appeal to this court arising from the decision of the High Court dated 15th October 2021 whereby Abinyo J. dismissed the Appellant`s Petition in Election Petition No. 10 of 2021.

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5 **Background**

The background to the appeal is that the Appellant was one of the candidates who contested for election as Member of Parliament for Bugweri County Constituency, Bugweri District during the 14th January 2021 general elections. At the end of the election, the Electoral Commission declared and gazetted the

10 1st Respondent as the winner and duly elected Member of Parliament for that seat having obtained 17,813 votes against the appellant`s 9,074 votes. The appellant was not satisfied with the results and petitioned the High Court on the grounds; first that there was non- compliance with the electoral laws and the principles therein which non- compliance affected the results in a substantial

15 manner and secondly that the 1st respondent committed illegal practices and electoral offences personally and through his agents with his knowledge, consent or approval.

The trial court found that no evidence was adduced to prove that the 1st respondent donated tents to induce any person to vote for him. That the

20 evidence on undue influence at Namuvandu by PW1 and on violence did not show whose supporter attacked the other. Further, that the evidence of Obbo Peter and Kisubi Bumali on violence was riddled with so many contradictions to be believed. On defacing the Petitioner`s campaign materials, she held that the evidence adduced by the Petitioner raised doubt whether the incident was

25 attributable to only the 1st respondent, his supporters or to supporters of both candidates. Regarding the accusation that the 1st respondent made false

5 statements regarding the petitioner`s character, she found that there was no evidence to prove that such statements affected the choice of the petitioner as a candidate or affected the results of the election. On the accusation that the 1st respondent interfered with the petitioner`s electioneering activities, she held that the petitioner had failed to prove that the alleged interference had prevented his

10 election. She dismissed the Petition with costs hence this appeal.

The appellant filed the following nine grounds for determination by this court: -

1. *That the learned trial judge erred in law and or in fact when she required that on top of proving the illegal act and or electoral offence of interference with electioneering activities at Idudi, the appellant had to prove that such interference*

15 *affected and or prevented the election of the appellant as a candidate.*

2. *That the learned trial judge erred in law and fact when having found that the appellant had suffered violence at Idudi, went on to hold that the appellant had failed to prove the offences of violence and undue influence and interference with electioneering activities.*

20 3. *That the learned trial judge erred in law and in fact when she found that the appellant had to prove not only that false statements were made against his person but also that the appellant had to prove that the false statements affected the choice of the appellant as a candidate or that the 1st respondent was thereby preferred.*

5 *4. That the learned trial judge erred in law when she considered and relied on the expunged affidavit of Obbo Peter (PW1) to reach the conclusion that Obbo Peters viva voce evidence was incredible.*

5. That the learned trial Judge erred in law and in fact when she relied on the testimony of Kisubi Bumali (PW2) who testified in respect of the events that
10 *happened at Idudi to discredit the testimony of Obbo Peter (PW1) in respect of events that occurred at Namavundu hence reaching the conclusion that the evidence in respect of undue influence and defacement of the appellant's campaign materials is contradictory and could not be relied on.*

6. That the learned trial Judge erred in law and fact when she found that there
15 *were illegal acts of violence and interference in electioneering activities of the appellant but that the said offences did not affect the results of the election in a substantial manner.*

7. That the learned trial judge erred in law and fact when she failed to evaluate the appellant`s evidence in proof of the illegal acts and or of the electoral offences
20 *of interference with electioneering activities at Idudi, undue influence at Namavundu, defacing posters and making false statements hence concluding that the said electoral offences / illegal acts were not proved to the required standard.*

8. That the learned trial Judge erred in law and fact when she failed to make a finding on the 1st respondent`s conduct of interference with the Petitioner`s
25 *witnesses.*

5 *9. That the learned trial Judge wrongly exercised her judicial discretion in the circumstances of the case when she awarded the 1st respondent a certificate of two counsel.*

Representation

At the hearing of the appeal, the appellant was represented by learned counsel
10 John Isabirye and Ivan Wanume while learned counsel Okello Oryem Alfred and Katumba Chrisostom appeared for the 1st respondent. Learned counsel Hilda Kituntu and Baguma John Herbert appeared for the Electoral Commission the 2nd respondent.

The appellant relied on his filed conferencing notes as his submissions and a
15 rejoinder which were adopted while the 1st respondent filed written submissions. The 2nd respondent filed its conferencing notes which were adopted as their main submissions all of which have been considered and relied on by court in reaching this decision.

Submissions of the Appellant

20 The appellant submitted on grounds 1, 2, 6 and 7 in a cluster, ground 4 separately and grounds 3, 5 and 7 together and grounds 8 and 9 separately. I will follow the same pattern in setting out the gist of their submissions.

On grounds 1, 2, 6 and 7, he referred to paragraphs 20, 21, 22 and 23 of the affidavit in support of the petition to demonstrate that the 1st respondent
25 interfered with his electioneering activities. That on the 12th day of January

5 2021, he, according to the campaign schedule was supposed to hold his campaign meeting at Idudi while the 1st respondent was supposed to be at Butende but the 1st respondent interfered with his campaign at Idudi by vandalizing his campaign motor vehicles and causing violence which resulted in his injury and death of one of his supporters Azed. That these allegations
10 were supported by the depositions of Kakaire Japhes and Kisubi Bumali and admission by the 1st respondent. Counsel added that from the record it could be inferred that the learned trial Judge found as a fact that there was violence at Idudi. He however faulted her for not considering the evidence of Kakaire Japhes. That although the learned trial Judge was aware that interference with
15 electioneering was an electoral offence, she erred when she held further that the appellant had to adduce evidence to prove that the alleged interference affected and or prevented the election of the appellant as a candidate.

Counsel referred to Section 61 (1) (c) (1), (11), (111), (1V), (V) and (V1) of the Parliamentary Elections Act (PEA) and submitted that the trial judge erred by
20 not following the provision that once an electoral offence is proved, the Petitioner need not prove its effects. That Section 24 of the PEA makes it an offence for a candidate to interfere with electoral activities of other candidates and the offence is punishable by payment of a fine not exceeding seventy currency points or imprisonment for a period not exceeding 3 years. The learned trial Judge was
25 faulted for not taking into consideration the provisions of Section 61 (1) (c) of the PEA which are to the effect that an election of a Member of Parliament shall be annulled if it is proved to the satisfaction of court that an illegal practice or any

5 other offence under the Act was committed in connection with the election by the candidate personally or with his knowledge and approval. Having proved that there was interference, the learned trial Judge erred to require that the appellant had to prove how that affected the appellant`s election as a candidate.

Under ground 4 of the appeal, counsel for the appellant submitted that the 10 learned trial Judge erred for relying on the evidence of PW1 Obbo Peter when she had expunged this evidence. He referred to **Black's Law Dictionary 5th Edition** for the definition of expunge which means "to erase or destroy" That the evidence of Obbo was erased, none existent and could not be used and by so doing the learned trial Judge had erred.

15 On grounds 3, 5 and 7, learned counsel adverted that the learned trial Judge was wrong to have relied on the evidence of Kisubi Bumali, PW2 whose testimony was in respect of the events at Idudi to discredit the testimony of Obbo Peter PW1 whose testimony was about the occurrences at Namavundu which error made her reach the wrong conclusion that the evidence on undue influence 20 and defacement of the appellant`s campaign materials was contradictory and could not be relied on.

It was submitted for the appellant that the learned trial Judge totally failed to evaluate evidence on electoral offences, interference with electioneering activities at Idudi, undue influence at Namavundu, defacing posters and making false 25 statements thus erroneously reaching the conclusion that the said electoral offences were not proved to the required standard. Specifically, the learned trial

5 Judge was faulted by the appellant`s counsel for holding that it was difficult to discern whose supporters attacked who because they were all mixed up and the petitioner had failed to prove that it was the 1st respondent`s supporters who attacked the Petitioner`s supporters at Namavundu.

The learned trial Judge was faulted by the appellant's counsel for relying on the
10 evidence of PW2 to impute unreliability on the evidence of PW1 and PW3 because the testimony of PW2 was about the events of 12/1/2021 at Idudi while that of PW1 and PW3 was in respect of events which occurred on the 13/11/2020 at Namavundu. He was emphatic that the evidence of PW1 and PW3 was uncontroverted and the 1st respondent did not deny being in Namavundu on the
15 13/11/2020. That the learned trial Judge was at fault to have believed PW2 when the witness said that he was neither a supporter of the Appellant nor the 1st respondent yet the said witness had stated that he was a supporter of the NRM candidate and had repeated the words the 1st respondent had used.

Counsel submitted that the evaluation of evidence on the offence of undue
20 influence while agreeing with counsel for the 1st respondent, the learned trial Judge stated that the evidence of Obbo Peter and Kisubi Bumali were riddled with so many contradictions that no court of justice could safely rely on. This to counsel was erroneous because the testimonies related to different events at two different places on different dates.

25 Counsel argued that the errors in evaluation committed by the learned trial Judge were consistent and not a one off or due to slip and if she had properly

5 evaluated the evidence she would have come to the conclusion that the offences of undue influence and defacement of election materials were proved on a balance of probabilities and in the result she would have allowed the Petition.

Counsel submitted that the 1st respondent and his lawyers interfered with the Petitioners witnesses as testified on cross examination by PW3 Kimera Salifu 10 and in his affidavit PA-3 that the 1st respondent and his lawyer Okello Oryem took him and another witness called Wandera Charles to the lawyer's office in Ntinda and questioned him why he would dare give evidence for the Petitioner. That Kimera was intimidated and given 200,000/= and the lawyers prepared another affidavit for him to recant his earlier evidence but he refused to sign it. 15 That the money was refunded to Counsel Oryem in Court. That regulation 19 of the Advocates (Professional Conduct) Regulations S.I. 267-2 renders such advocate open to disciplinary proceedings for professional misconduct. Counsel asked court to follow the decision in **Kisitu Alex Brandson Vs Electoral Commission and Anor, Election Petition Appeal No. 0064 of 2016** and refer 20 the 1st respondent and his lawyer Okello Oryem to the Law Council to face disciplinary proceedings.

When she dismissed the Petition, the learned trial Judge issued a certificate of costs for two counsel. Counsel submitted that Advocates who jointly undertake to prosecute or defend a lawsuit are entitled to share equally in the compensation 25 for costs unless they have an agreement to the contrary. That costs for more than one advocate may be allowed in matters where the learned trial Judge has

5 certified that more than one advocate was reasonable and proper having regard in the case of a plaintiff to the amount recovered or paid or relief awarded, nature or difficulty of the case and for the defendant the amount sued for or relief claimed, nature, importance or difficulty of the case. Counsel submitted that the learned trial Judge erred for using a general yardstick of the nature,
10 importance and difficulty of a case to decide on costs and not the Petition before her. That she never made a finding that the Petition was over involving, involved complex questions of law or fact, raised very pertinent and important issues or merited considerable research to warrant a certificate for two counsel. That the hearing took slightly over three days and only four of the five affidavits were
15 considered because the rest of the affidavits had been expunged. The award of the certificate for two counsel amounted to a punishment to the appellant which would deter aggrieved parties to seek court redress.

1st Respondents submissions

On grounds 1, 2, 6 and 7 counsel for the 1st respondent submitted that the
20 appellant`s submissions on these grounds were at variance with its pleadings. That the appellant had misunderstood the findings of the learned trial Judge for thinking that she had by inference found that the 1st respondent had committed the electoral offence of interference with electioneering activities of the appellant contrary to section 24 of the PEA. That this was not so because the learned trial
25 Judge found at pages 589- 591 of the record of appeal that the appellant had failed to prove all the offences he alleged to have been committed by the 1st

5 respondent or his agents and the cases of **Musinguzi Garuga Vs Amama Mbabazi, Election Petition No. HCT-05-CV-EPA-0003 OF 2001 & Hon. Katuntu Abdu V Hon Kirunda Kivejinja, Election Petition 7 of 2006** were distinguishable from the instant case.

Counsel submitted that the law does not allow the appellant to depart from the
10 grounds of appeal and there was nothing in the grounds as presented by the appellant to support the submissions which his counsel made on grounds 1, 2, 6 and 7. While the appellant presented his complaint of interference with electoral activities of other candidates under section 24 of the PEA, as an electoral offence under section 61(1) (c) of the PEA he at the same time argued it
15 as a case of non- compliance under section 61(1) (a) of the Act. This explains why the learned trial Judge dealt with the case as a case of commission of an electoral offence as well as complaint of none compliance with provisions of the electoral law.

It was further submitted for the 1st respondent that the appellant conceded to
20 the fact that the learned trial Judge did not hold that there was interference with electioneering activities of the appellant because the appellant in his submissions stated that the learned trial Judge made the finding by inference. Counsel adverted that there is no such thing as a finding of fact by a trial Judge by inference. That this was tantamount to saying that the court made the finding
25 by conjecture.

Counsel further submitted that under the PEA, there are offences intended to ensure the sanctity of the electoral process the commission of which amounts to an electoral offence but the same violation may also amount to violation of a free and fair election and can be evaluated as non-compliance affecting the results of the election. In that case, the matter will call for the application of the substantial effect test. In the present case, the complaint was presented as both and the learned trial Judge was right to handle it as such. After finding that the Petitioner had not proved the offences alleged, she evaluated the incident at Idudi as a complaint of non-compliance conclusively using both quantitative and qualitative tests.

On ground 4 of the appeal, counsel for the 1st respondent submitted that the complaint by the appellant that the learned trial Judge relied on expunged affidavit evidence of Obbo Peter PW1 was superfluous because the affidavits of Obbo Peter had been filed in support of the appellant`s case and were expunged. That the evidence of this witness on cross examination was found to be full of contradictions, inconsistencies, lacked credibility, and the evaluation of the oral evidence of Obbo in relation to the expunged affidavit evidence was proper. Counsel added that the appellant's counsel had not demonstrated in his submissions where the learned trial Judge evaluated the expunged evidence.

On grounds 3, 5 and 6 counsel for the 1st respondent submitted that the assertion that the learned trial Judge mixed up the evidence on the incidents at Idudi and Namavundu which occurred on the 12th and 13th of January 2021

5 respectively had no merit. That the appellant could not authoritatively depone on what happened at Namavudu because he was only at Idudi.

In rejoinder on grounds 1, 2, 6, and 7, counsel for the appellant reiterated his submissions and stated that once an electoral offence was proved, there is no requirement to prove whether the effect is substantial.

10 On ground 4, counsel reiterated his earlier submissions and stated that having expunged the affidavit evidence, the only evidence court could rely on was viva voce evidence.

On grounds 3 and 5, counsel submitted that the 1st respondent admits that the alleged incidents happened at Idudi and Namavudu but states that the same did 15 not tilt the process against the appellant. He contended that when it comes to an offence, once it was proved, the test of substantiality counsel for the respondents relied on could not apply.

On ground 8, it was submitted that the evidence of interference with the appellant`s witness was presented through Kimera Salifu. That courts have been 20 consistent in lambasting unethical conduct of Advocates and their clients in trials aimed at undermining fair trials and justice and courts have recommended that the Law Council investigates. He referred court to **Dr. Sheikh Ahmed Mohammed Kisule v Greenland Bank in liquidation Civil Appeal No. 11 of 2011.**

25 On ground 9, it was rejoined by the appellant that nothing was complicated about the petition to warrant the issuance by court of a certificate of two counsel.

5 In addition, that owing to the respondents` counsel unethical conduct of interfering with witnesses, court ought to have denied them costs.

Analysis

This is a first appeal and the duty of this Court is set out in Rule 30 of the Rules of this Court. The Court has to make its own consideration of the evidence as a

10 whole and come up with its own decision. The Court has a duty to re-hear the case and reconsider all the materials that were before the learned trial Judge and make up its mind after carefully weighing and considering the evidence that was adduced at trial.

If a decision has to be made by the appellate court which witness is to be

15 believed, and resolution of that questions requires reexamining the demeanor of the witness then the appellate court has to be guided by the learned trial Judge who had the benefit to physically see the witnesses at the trial.

There may however, be circumstances apart from the demeanor of a witness which show that a particular statement of a witness may or may not be credible

20 and may warrant court to differ from the finding of the learned trial Judge even on a question of fact touching on the credibility of a witness whom the appellate court did not have the benefit to see.

The appellate court has a duty to re- appraise and re- evaluate both oral testimony of a witness in court as well as affidavit evidence. Where the deponent

25 of an affidavit is not cross examined on the affidavit in court, the issue of

5 demeanor of the witness does not arise. See: **Banco Arabe Espanol V. Bank of Uganda SCCA No. 8 of 1998.**

This being an appeal in an election petition, this court cautions itself that in re-appraising and re- evaluating the evidence adduced at the trial, regard must be had to the fact that witnesses though not necessarily always, tend to be partisan

10 in supporting their candidates against the rivals in the election contest. This may result in deliberate false testimonies or exaggerations and to make the evidence adduced to be very subjective. This calls on court to test the authenticity of such evidence using independent and neutral sources by way of corroboration. See **Nelson V Attorney General & Anor. [1999] EA 160.**

15 **Burden and standard of proof.**

Under section 61(1) and (3) of the PEA, the burden of proof lies on the petitioner to prove the assertions in the election petition on a balance of probabilities. See also **Mukasa Anthony Harris V. Dr. Bayiga Lulume SC Election Petition Appeal No. 18 of 2007.** The petitioner must prove every allegation contained

20 in the petition to the satisfaction of court and the standard of proof is set by statute to be on a balance of probabilities. The petitioner has a duty to adduce credible and cogent evidence to prove the allegations to the stated standard of proof. The evidence must be free from contradictions and truthful so as to convince a reasonable tribunal to give judgment in a party's favor. See: **Matsiko**

25 **Winfred Komuhangi V. Babihunga J. Winnie, Court of Appeal Election Petition No. 9 of 2002**.

5 On what amounts to court being satisfied, Lord Denning in **Blyth V. Blyth [1966] AC 643** held that the courts must not strengthen it, nor must they weaken it. Nor would it be desirable that any kind of gloss should be put on it. When Parliament has ordained that a court must be satisfied only Parliament can prescribe a lesser requirement. No one whether he be a judge or juror would
10 in fact be "satisfied" if he was in a state of reasonable doubt.

I will resolve ground 3 first, 4 second, 5 third, then 1, 2, 6 and 7 together and grounds 8 and 9 separately.

Under ground 3, the learned trial Judge is faulted for having found that the appellant had to prove not only that false statements were made against his
15 person but also that the false statements affected the choice of the appellant as a candidate or that the 1st respondent benefitted from the statements and was thereby preferred.

In paragraph 7 (d) of the petition, the appellant alleged that the 1st respondent used abusive language, character assassinating statements and false statements
20 against him at his respective rallies calling him a pussy cat, a rabbit all of which were calculated to ridicule his candidature. At Paragraph 37 of the 1st respondent`s affidavit in support of the answer to the petition, he stated that he only referred to himself figuratively as a lion of Bugweri constituency on account of his achievements as a 4 time Member of Parliament and described other
25 candidates as small animals on account of not having been members before. He averred that he did not refer to the petitioner as a pussycat as alleged.

5 The learned trial Judge agreed with the petitioner that admitted facts need not be proved as provided under section 57 of the Evidence Act but the burden of proof lay with the petitioner to prove that the statements made by the 1st respondent were within his knowledge or belief to be false and as a result, the election of petitioner was affected. In this case the petitioner and, or his

10 witnesses did not adduce evidence to prove that such statements affected the choice of the petitioner as a candidate or that as a result preference was made to the 1st respondent which affected the results of the petitioner.

Section 73 (1) of the PEA on false statements concerning character of candidates provides that a person who, before or during an election for the

15 purpose of effecting or preventing the election of a candidate, makes or publishes or causes to be made or published by words, whether written or spoken, or by song in relation to the personal character of a candidate, a statement which is false and which he or she knows or has reason to believe to be false; or in respect of which he or she is reckless whether it is true or false, commits an offence and

20 is liable on conviction to a fine not exceeding twelve currency points or imprisonment not exceeding six months or both.

In **Michael Mawanda vs. the Electoral Commission and Andrew MartialCourt of Appeal Election Petition Appeal No.98 of 2016** court held that the offence of uttering false statements is provided under section 73 of the Parliamentary

25 Elections Act, No. 17 of 2005. A petitioner has to set out the statements alleged to be false, malicious or defamatory. Since words derive their meaning from

5 context or background, if such context or background is not provided or a full statement not provided their malicious or defamatory effect may be difficult to discover. The section makes it an offence to publish false statements about a candidate with intent of preventing the election of that candidate. The person making the false statements has to know or have reason to believe that they are 10 false.

The 1st respondent denied the allegation and stated that he only used figurative language and in no way did he specifically refer to the appellant. He submitted that the appellant never quoted the context in which the said words were used, 15 never attended any meeting of the 1st respondent where the impugned statements were made and no person who attended came to testify. That the appellant did not prove the allegations.

In paragraph 7 (d) of the petition where the allegation ought to have come out 20 clearly, the appellant did not give the particulars of his allegations. He merely stated that the 1st respondent used abusive language and character assassinating statements. For instance, in the statement, the appellant alleged that the 1st Respondent referred to him as "a pussy cat or rabbit". The appellant did not state in which context and background the said statement was made 25 neither was it shown that the statement was calculated to prevent his election. He also did not show that this effected his choice as a candidate by the electorate and as a result the 1st respondent was preferred.

5 In view of the foregoing, the learned trial Judge`s holding that the appellant had to prove that the false statements affected the choice of the appellant was of no effect since allegations that false statements were made were not proved.

Furthermore, the 1st respondent`s response at paragraph 37 of his affidavit in support of the answer to the petition did not amount to an admission as alleged 10 by the appellant and held by the learned trial Judge. He was simply explaining on what basis, reasons and in what context he made the statement. The appellant merely made the claim without adducing any evidence to support it. Mere averments cannot suffice to discharge the burden, which lay on him to establish the allegation to the satisfaction of Court.

15 Ground 3 fails.

On ground 4, the learned trial Judge is faulted for having relied on the expunged evidence of Obbo Peter (PWI) to reach the conclusion that it was incredible evidence. Counsel for the appellant submitted that the learned trial Judge having expunged the affidavit of Obbo, the only evidence to be relied upon by court was 20 the viva voce evidence. That what was expunged did not form part of the record and the learned trial Judge ought not to have relied on the same.

It was submitted for the 1st respondent that in no way did the learned trial Judge rely on the expunged affidavit evidence. That the Learned trial Judge evaluated the testimony of Obbo given during cross-examination and it's the only evidence 25 he relied on. That the appellant did not demonstrate how and where the learned trial Judge considered and relied on the expunged affidavits of Obbo Peter.

5 The learned trial Judge held that the affidavits of Kisubi Bumali (PA-1): Kimera Salifu (PA-31): Obbo Peter (PA-5) and the affidavit of Obbo Peter in rejoinder (PAR-5) were considered fatally defective, inadmissible and accordingly expunged. That the said witnesses were subjected to cross examination on the expunged affidavits and their evidence viva voce was valid.

10 At page 569 of the record, the main affidavit of Obbo Peter (PA-5) and in rejoinder (PAR-5) were rendered inadmissible by the trial court on the ground that the jurat did not comply with section 3 of the Illiterates' Protection Act which is couched in mandatory terms. This section requires that the jurat must state the true and full name and addresses of the person who has written the document

15 for, at the request, on behalf or in the name of any illiterate and, failure to comply with it renders the document inadmissible.

The learned trial Judge was alive to the fact that she had expunged Obbo's affidavit from the record and relied on his viva voce evidence. Although this oral evidence on the 1st respondent`s utterances also appeared in the expunged

20 affidavit, the learned trial Judge cannot be faulted for relying on what was given orally. What may have caused some misunderstanding was that the viva voce evidence and what was expunged was about the same evidence. The appellant did not point out where in the decision the learned trial Judge had relied on the expunged evidence of Obbo.

25 The learned trial Judge evaluated the said viva voce evidence at page 313 of the record thus;

5 *"...He then went outside and saw the 1st respondent, the LC1 Chairman and Mr. Kiryowa, and that Mr Wampaka Twaha the LC1 Chairman was beating people but the attacks were directed to those who attempted to protect the petitioner`s banners while the 1st respondent got out of his vehicle and uttered that; "How come that the Youth of Namavudu are failing me by saying that time has gone"*
10 *however, this utterance was neither averred to, in the affidavit (PA-5) of the witnesses nor in the affidavit in rejoinder (PAR-5). I find that the evidence of PW1 is incredible as to the above utterance by the 1st respondent."*

The learned trial Judge erred when she determined that Obbo`s viva voce evidence on the 1st respondent`s utterances ought to have been rooted in the
15 affidavit she had expunged but was correct to have evaluated the evidence given viva voce because it was independent evidence which came up after the affidavits had been expungned.

Ground 4 succeeds in part.

On ground 5 the learned trial Judge is faulted for having relied on the testimony
20 of Kisubi Bumali (PW2) who testified in respect of the events which occurred at Idudi to discredit the testimony of PW1 Obbo in respect of events which occurred at Namavudu. For this reason, she came to the conclusion that the evidence in respect of undue influence and defacement of the appellant's campaign materials was contradictory and could not be relied on.

25 PW2 Kisubi Bumali testified on events which occurred on the road at Idudi on 12/11/20; that he arrived at Idudi around 4:00pm and there was no rally on

that day but chaos occurred between the Church and Kambale road. The witness was at Idudi on Kambale Road and not Namavudu and the learned trial Judge was right to have relied on his evidence for the events of that day at Idudi but not for the events at Namavudu where allegations of undue influence and defacing posters were made.

Regarding the claims of undue influence and defacing posters, PWI Obbo testified during cross-examination that the violence at Namavudu was meted out on people who carried posters of the appellant and the 1st respondent remained in command of what was happening. PW3 Kimera also testified that the 1st respondent and his team removed and defaced posters of the petitioner at Namavundu and beat him and a one Wandera Charles.

The learned trial Judge found the evidence of the two to be contradictory on the aspect of whose supporters attacked the other and vice versa and that court could not safely rely on such evidence. The petitioner had deposed that he was not at Namavudu but was informed by PW1 and PW3. During cross examination PW3 stated that he did not see the 1st respondent personally tearing posters of the petitioner while PW1 stated that the attack by the 1st respondent`s supporters was by those with banners of the petitioner. PW2 appeared to have been a supporter of neither the petitioner nor 1st respondent and stated that he did not know whose supporters attacked the other because they were mixed up.

The learned trial Judge correctly found that the evidence adduced by the petitioner raised doubt as to whether the alleged incident was attributable to

only the 1st respondent and, or his supporters, or it was a scuffle by supporters of both candidates.

Although there was an overlap and as such an error by the learned trial Judge in some instances when evaluating the evidence of PW2 Kisubi on what transpired on the road side at Kambale road in Idudi on 12th January 2021, PW1 Obbo and PW3 Kimera `s viva voce evidence on the events at Namavudu on 13th November 2020, this error was in our view minor. This is because upon our own reevaluation of the events which occurred at Namavudu on the 13/11/20 we find that there was no cogent evidence that the 1st respondent had personally participated in the commission of the offences. There was also no evidence to show that his supporters who were involved in the chaos did so with his consent and approval.

Ground 5 succeeds to the small extent that the learned trial Judge erred in the overlap of her evaluation of the evidence as highlighted above but largely fails.

Regarding grounds 1, 2, 6, and 7, it was submitted for the appellant that the learned trial Judge erred for requiring that the appellant in addition to proving the electoral offence of interfering with electioneering activities of the appellant by the 1st respondent at Idudi, he should also prove that the interference affected or prevented the election of the appellant as a candidate. That although the learned trial Judge had found that the appellant had suffered violence at Idudi, she instead held that the appellant had failed to prove the offence of violence.

5 According to counsel, the learned trial Judge had found that there was violence and interference in electioneering but instead went on to hold that these did not affect the results of the election. This according to counsel was because the learned trial Judge did not properly appraise the evidence before her and ended up finding that the electoral offences which included interference with

10 electioneering activities at Idudi, undue influence at Namavundu, defacing posters and making of false statements by the 1st respondent had not been proved to the required standard.

For the 1st respondent, it was adverted that in addressing these grounds, court may apply both or either qualitative and quantitative tests and in this case the

15 appellant had failed to prove that there was none compliance with electoral laws.

In paragraph 7(b) of the Petition, the petitioner complained that the learned trial Judge failed to determine whether the 1st respondent, with the intention of effecting and preventing the appellant's election personally and through his agents, interfered with the appellant's electioneering activities.

20 It was the appellant`s case that on the 12/1/2021 at Idudi town council the 1st respondent interfered with his electioneering exercise by intruding on his campaign program. In paragraph 20 of the affidavit in support of the petition, the appellant averred that the 1st respondent was supposed to be at Butende but instead came to Idudi to supervise people who were beating the appellant and

25 his supporters. They destroyed the petitioner`s cars and those of his supporters

5 and caused the death of his supporter called Bunoga Azedi. That the appellant himself was injured.

The campaign schedule PE2 on 12/12/2020 showed that the appellant was supposed to have his campaign at Kikuyu Idudi Ward A and D and the 1st respondent was to be at Ibulanku Butende.

10 PW2 Kisubi Bumali, testified that chaos occurred at a place between the Church and Kambale road. He saw one Eriya throw a stone but could not tell who attacked who because supporters for both parties were mixed up. He did not support either the appellant or the 1st respondent. His candidate was Mr. Ibaale. This was clear and specific piece of evidence.

15 The appellant deposed in his evidence that his vehicle was vandalized at Mifumi road as he was travelling to Idudi where his campaign was supposed to be. According to the petitioner`s statement at police DE1-8 the incident happened at Idudi 12/12/20 and stones were thrown at his vehicle and at his supporters by the supporters of the 1st respondent. The 1st respondent denied the

20 allegations.

The learned trial Judge found that the petitioner has adduced cogent evidence that the vehicle he used was damaged and the issue of ownership was immaterial in the circumstances of the case.

Section 20 (2) of the Parliamentary Elections Act provides that each candidate

25 shall give his or her campaign Programme to the returning officer and the

5 returning officer shall ensure that campaign meetings by different candidates do not coincide in one parish.

Section 24 of the same Act on Interference with electioneering activities of other persons provides;

A person who, before or during an election, for the purpose of effecting or

10 *preventing the election of a candidate either directly or indirectly—*

(a) by words, whether spoken or written, song, sign or any other representation or in any manner seeks to excite or promote disharmony, enmity or hatred against another person on grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion;

15 *(b) organises a group of persons with the intention of training the group in the use of force, violence, abusive, insulting, corrupt or vituperative songs or language calculated to malign, disparage, condemn, insult or abuse another person or candidate or with a view to causing disharmony or a breach of the peace or to disturb public tranquillity so as to gain unfair advantage in the election over that*

20 *other person or candidate;*

(c) Obstructs or interferes or attempts to obstruct or interfere with the free exercise of the franchise of a voter or compels or attempts to compel a voter to vote or to refrain from voting;

(d) compels, or attempts to compel a candidate to withdraw his or her candidature;

5 *(e) in any manner threatens any candidate or voter with injury or harm of any kind; or*

(f) induces or attempts to induce any candidate or voter to fear or believe that he or she will suffer illness or will become an object of divine, spiritual or fetish displeasure or censure; commits an offence and is liable on conviction to a fine not
10 *exceeding seventy two currency points or imprisonment not exceeding three years or both.*

While it is true as shown in exhibits PE11 and PE12 and DE1-8 that the vehicles used by the appellant were damaged, there was no evidence led to show that it was the 1st respondent`s supporters who did so with his knowledge, consent
15 and approval. PW2, Kisubi Bumali, testified that when the appellant and 1st respondent`s convoys collided, the supporters started fighting, one Azeedi a supporter of the appellant was attacked and he later died. He further testified that he did not see the 1st respondent throw a stone at the appellant but saw a one Eriya do so. It was not shown whether Eriya was the 1st respondent`s
20 supporter or the appellant's.

It was PW2`s testimony that by the time police came and used teargas one could not tell who attacked who because the supporters were mixed up.

PW2 Kisubi Bumali further testified that the appellant arrived at the campaign rally at Idudi around 4:30pm and that the chaos that occurred on the alleged

date of 12/12/20 did not happen at the venue of the campaign rally but on the road between the Church and Kambale road.

The 1st respondent deponed that on 12th January 2021, at about 5:30 pm 30 minutes to the end of the campaign period as he was returning to his residence in Kikunyu Village, Kukunyu Parish in Idudi Town Council, his entourage met with that of the appellant about 100 meters from his residence and that there were some skirmishes between supporters which was dispersed by police within 5 minutes.

There is no cogent evidence on record showing any sort of violence happening at the campaign rally at Idudi. Even the appellant himself further testified that his vehicles were vandalized at Mifumi road as he was travelling to Idudi. What is clear from the evidence is that chaos erupted out on Mifumi high way, Kambale Road and later about 100m from the 1st respondent`s residence when the convoy of both parties met. What comes out from the evidence is that there was violence perpetrated by supporters of both candidates but this did not happen at the venue of the appellant`s campaign rally. It was on the road.

The appellant also made allegations that the 1st respondent personally supervised his agents who beat him. This was a serious statement that court must treat with caution and ought to have been witnessed by other persons. We have looked at the viva voce evidence of PW1 Obbo Peter, PW3 Kimera Salifu and PW2 Kisubi Bumali and none of them testified to these serious allegations. There is no independent evidence to prove that the 1st respondent organized his

5 supporters and led them to beat the appellant in his presence. In our view, due to the heat up of elections, this was a political statement which court must take with precaution Since the appellant did not lead independent evidence to prove the allegations.

Regarding what happened at Namavundu, PW1 Obbo Peter stated during cross-
10 examination that on 13/12/2020 in Namavundu, he saw the 1st respondent, the LC1 Chairman Mr. Wampaka Twaha and Mr. Kiryowa. That the LC1 Chairman was beating people and the attacks were directed towards those who attempted to protect the appellant`s posters.

PW3 Kimera Salifu stated that he is a resident of Namavundu and that the 1st
15 respondent`s supporters beat him and other persons at the trading Centre while the 1st respondent himself was around and that the chaos happened on 13/12/2020 at around 6:00pm. That he reported the incident to police who requested him to get a letter form the LC1 Chairperson who did not give it to him alleging that what had happened were issues of voting.

20 The learned trial Judge found that the appellant had failed to adduce cogent evidence to prove that indeed, it was the 1st respondent`s supporters who attacked the petitioner`s supporters at Namavundu trading Centre and bearing in mind, the proposition of law that total denial by the respondent is a complete defence in itself. She found that the evidence adduced by the 1st and 2nd
25 respondents was a total denial.

5 The assertion by the petitioner in the affidavit in rejoinder in paragraphs (a-f) was not enough because the petitioner should have adduced cogent evidence to prove that the alleged interference of his electioneering activities by the 1st respondent prevented his election as a candidate.

The law is that electoral offences and irregularities must be proved on a balance 10 of probabilities to the satisfaction of court. The viva voce evidence of PW1 and PW3 was not cogent enough to prove that it was the 1st respondent`s supporters with the consent and approval of the 1st respondent who attacked the appellant`s supporters at Namavundu. Further, no evidence was led to prove that the alleged activities prevented the election of the appellant.

15 The petitioner alleged that the 1st respondent organized violent groups against his supporters at Namavundu trading Centre, Kasozi Parish in Makuutu Sub County.

Section 80 of the Parliamentary Elections Act provides;

(1) Where a person—

20 *(a) directly or indirectly in person or through any other person—*

(i) makes use of, or threatens to make use of, any force or violence;

(ii) inflicts or threatens to inflict in person or through any other person any temporal or spiritual injury, damage, harm or loss upon or against any person, in order to induce or compel that person to vote or refrain from voting, or on account of that
25 *person having voted or refrained from voting; or*

5 *(b) by abduction, duress or any fraudulent device or contrivance, impedes or prevails upon a voter either to vote or to refrain from voting, that person commits the offence of undue influence.*

(2) A person who commits an offence under subsection (1) is liable on conviction—

(a) in case of an offence under subsection (1)(a) or in case of an offence under
10 *subsection (1)(b) where the offence involves abduction, to a fine not exceeding one hundred and twenty currency points or imprisonment not exceeding five years or both; or*

(b) in the case of an offence under subsection (1)(b) which does not involve abduction, to a fine not exceeding forty eight currency points or imprisonment not
15 *exceeding two years or both.*

The learned trial Judge held that the evidence adduced by PW1 and PW2 on the aspect of whose supporter attacked the other, or vice versa, during the alleged incident at Namavundu was contradictory. She agreed with the argument by counsel for the respondents that the evidence of Obbo Peter and Kisubi Bumali
20 were riddled with contradictions that no court of justice could safely rely on it.

As earlier determined, the testimony of PW2, Kisubi Bumali was in regards to events at Idudi on the Road. I will therefore disregard it on matters which occurred at Namavundu.

PW1, Obbo Peter testified that he saw the 1st respondent, the LC1 Chairman Mr.
25 Wampaka Twaha and Mr. Kiryowa in Namavundu and the LC1 Chairman was

5 beating people. The attacks were directed towards those who attempted to protect the appellant`s posters. PW3 Kimera Salifu testified that he and Wandera Charles were beaten so that they could refrain from supporting and voting for the appellant. The 1st respondent put up a denial to the allegations of illegal practices and offences personally or through his agents.

10 On defacing the appellant`s campaign materials, in paragraph 7 (b) (i) of the petition and paragraph 23 of the affidavit in support, the appellant alleged that the 1st respondent and his agents defaced and or removed the petitioner`s posters and banners in Namavundu trading Centre. The 1st respondent categorically denied the allegation that he or his agents defaced or removed the

15 petitioner's campaign materials. That the allegation was false.

Section 82 (2) of the PEA provides that a person who maliciously defaces or removes or tears, any election poster of any nominated candidate, commits an offence and is liable, on conviction to a fine not exceeding twenty four currency points or imprisonment not exceeding one year or both.

20 The appellant averred that the 1st respondent defaced his posters in Kasozi parish in Makutu Sub County. In Paragraph 21 and 34 of the 1st respondent`s affidavit in support of the answer he put up a denial of the allegations.

The learned trial Judge held that the petitioner testified that he was not there when the incidents occurred but was informed by PW1 and PW3. During cross

25 examination, PW3 stated that he did not see the 1st respondent personally tearing posters of the petitioner while PW1 stated that the attack by the 1st

5 respondent`s supporters was meted on those with banners of the petitioner and, PW2 who appeared to be neither a supporter of the petitioner nor 1st respondent stated that he did not know whose supporter attacked the other because they were mixed up. That evidence adduced by the petitioner raised doubt in the mind of court as to whether the alleged incident was attributable to only the 1st

10 respondent and, or his supporters, or it was a scuffle by supporters of both candidates.

From the above evidence, the appellant did not prove that the defacement of his posters and the chaos were attributable to the 1st respondent. All the witnesses stated that they did not see the 1st respondent defacing the posters or beating

15 up the appellant`s supporters. The remaining evidence shows that as the scuffle between the supporters of both parties ensued, they were mixed up and it was difficult to differentiate the supporters of each party. No evidence suggested that indeed the said supporters were for the 1st respondent and that they were acting with his support, consent and approval. We are inclined to agree with the learned

20 trial Judge`s finding that cogent evidence was not led to prove these offences were attributable to the 1st respondent. We therefore find no reason to fault the learned trial Judge.

Regarding the allegations of making false statements against the appellant by the 1st respondent, as earlier determined in ground 3 of the appeal, the appellant

25 did not lead evidence to prove that false statements were made against him and that the same were made with the purpose of preventing his election.

5 After analyzing the evidence on those issues, the learned trial Judge came to the conclusion that the petitioner had failed to prove the offences of; undue influence c/s 80 (1) (a); defacing the petitioner`s campaign materials c/s 82(2); making false statement concerning the character of a candidate c/s 73 and interference with electioneering activities of other persons c/s 24 of the PEA, by the 1st

10 respondent, personally or through his agents with his knowledge and consent or approval, either before or during the election, to the required standard.

We as earlier stated find no reason to fault the learned trial Judge in deciding the way she did.

In paragraph 7 (b) (ii) of the Petition and paragraphs 5, 6, 7, 19, 20, 21, 22, 23,

15 25, 26, 27 & 33 of the affidavit in support, the appellant stated that there was violence and interference with his supporters at Idudi & Namavundu and these irregularities affected the results in a substantial manner.

The appellant complained that there was non- compliance with the provisions of the Parliamentary Elections Act. It is not enough to prove that there could have

20 been non-compliance with the Act as this caters for one limb of the ingredient for nullification of results of an election under section 61 (1) (a) of the PEA. The 2nd limb which is equally important is that it must be proved that the noncompliance affected the results of the election in a substantial manner. Even if the 1st limb of the ingredient of the cause of action is proved, the election will

25 not be nullified unless it is also proved that the non-compliance affected the outcome of the elections in a substantial manner.

5 The outcome of an election is the choice of a candidate as a Member of Parliament because under section 1 (1) of the Parliamentary Elections Act, the term "election" means the election of a Member of Parliament. It therefore has to be shown that the non-compliance either substantially increased votes in favour of the declared winner or substantially decreased votes of the runner up candidate
10 who lost to the winner. For instance, if people did not turn up for elections because of violence and the numbers of people who did not turn up could have been decisive factors in the outcome of the elections, the outcome of the election could have been affected in a substantial manner. This is a question of evidence and not conjecture. It is also a question for the court to determine from materials
15 presented.

The petition raised complaints of both commission of election offences and irregularities leading to non- compliance. In dealing with this issue the learned trial judge found that the inconsistencies and contradictions in the evidence of the petitioner`s witnesses rendered their evidence incredible and unreliable. That
20 the petitioner had failed to adduce quantitative evidence to prove that the alleged irregularities at Idudi and Namavundu, affected the conduct and results of the election in a substantial manner. In her considered opinion, the petitioner failed to prove on a balance of probabilities to the satisfaction of court, that there was noncompliance with the electoral laws and the principles laid down therein; and
25 that the noncompliance affected the results in a substantial manner.

5 It was submitted for the 1st respondent, that in addressing these grounds, court may apply both qualitative and quantitative tests. In this case the appellant had failed to prove that there was non-compliance with electoral laws

Section 61 (1) (a) of the PEA provides that the election of a candidate as a Member of Parliament shall only be set aside for noncompliance with the provisions of
10 this Act relating to elections upon Court being satisfied that there has been failure to conduct the election in accordance with the principles laid down in the law and that the non-compliance affected the result of the election in a substantial manner.

The Supreme Court in **Rt. Col. Dr. Kizza Besigye V. Yoweri Kaguta Museveni,**
15 **Presidential Election Petition No.001 of 2001** cited with approval the case of **Mbowe V Eliuffo (1967) EA 240**, where it was held that in the phrase "affected the result" the word result means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest
20 seems much closer than it appeared to be when first determined. Their Lordships went further to say that when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance with the rules.

25 Odoki CJ in **Amama Mbabazi & another V Musinguzi Garuga James, Supreme Court Election Petition Appeal No.12 of 2002,** while agreeing with the opinion

5 of Grove J. in **Hackey & Morgan V Simpson [1974] 3 ALL ER 722** said that the effect must be calculated to really influence the result in a significant manner. That in order to assess the effect, Court has to evaluate the whole process of election to determine how it affected the results and then assess the degree of the effect. In the process of evaluation, it cannot be said that numbers are not 10 important just as the conditions which produced those numbers. Numbers are useful in making adjustment for irregularities.

Mulenga, JSC went further in the case of ***Kizza Besigye (supra)*** while discussing the qualitative test for determining the effect of non-compliance and answered that in his view, for the petitioner to succeed, the court would have to find that the only irresistible 15 inference to be drawn from the evidence on the several aspects that constituted non-compliance is that the non-compliance affected the result of the election in a substantial manner.

Going by the quantitative test, the appellant obtained 9,074 votes while the 1st respondent scored 17,813 votes. The winning margin between the two parties 20 was 8739 votes. We have already found that the appellant did not adduce evidence to prove election malpractices.

Non-compliance with the electoral laws, if at all, was minimal and in our view did not affect the election results of Bugweri Member of Parliament in a substantial manner.

25 On ground 8, the learned trial Judge is faulted for having failed to make a finding on the 1st respondent`s conduct of interfering with the appellant`s witnesses.

5 Counsel for the appellant submitted that PW3 Kimera during cross examination stated that the 1st respondent and his lawyer Okello Oryem took him and Wandera to the lawyer's office in Ntinda and intimidated him. That they gave him 200,000/= and the lawyers prepared another affidavit for him to recant his earlier evidence but he refused to sign it and he refunded the money to Oryem
10 in Court.

Counsel further submitted that regulation 19 of the Advocates (Professional Conduct) Regulations renders such advocate open to disciplinary proceedings for professional misconduct and court ought to have referred Mr. Oryem to Law Council for disciplinary action.

15 The 1st respondent denied the allegations and submitted that no trial was held on the said claims of interference and none appears on record. This was introduction of fresh issues after closure of pleadings. That neither the 1st respondent nor his lawyer were put to their defense on the said allegations and allowing the same would have been a violation of the 1st respondent`s right to be
20 heard. That the learned trial Judge was right not to make a finding on the same.

We are alive to the decision of this court in **Kintu Alex Bradon versus EC & Anor EPA No. 0064 of 2016** cited by the appellant on advocates who intimidate and try to buy off the adversaries' witnesses in election petitions. In that case, it was held that this type of conduct rendered counsel involved open to disciplinary
25 proceedings for professional misconduct.

5 We have scrutinized the appellant`s pleadings and find that no claim of witness inference was made by the appellant or his deponents in their affidavits. However, in our view, the question of whether the 1st respondent and his lawyers interfered with the trial cannot be a matter of pleading since the trial commences after closure of pleadings. The evidence of witness interference came in the

10 testimony of PW3 Kimera Salifu. It was not a departure from pleadings as alleged by the 1st respondent but rather interference with witnesses during the trial of the petition.

From the record, the learned trial Judge never made a finding on this issue.

Witness intimidation and interfering with witnesses is a serious allegation. PW3

15 Kimera testified that he was intimidated and given UGX 200,000/= to depone a new affidavit in favor of the 1st respondent. In our view, the said allegations were not backed up by any cogent evidence. If the appellant wanted these monies to be captured on record he would have made a prayer to tender it in as evidence but he never did so. We are inclined to accept the 1st respondent`s submission

20 that this whole episode of PW3 Kimera Salifu being intimidated by the 1st respondent and his counsel and the act of purporting to refund money to the 1st respondent`s counsel in court was not intended for court to rely on in adjudicating the matter but for the benefit of the appellant in the eyes of his supporters and the press.

25 How would Court rule out the fact that this might have been a premeditated strategy by the appellant since the 1st respondent was not heard in rebuttal. In

5 any event, had the learned trial Judge determined this, she would have breached the 1st respondent right to a fair hearing.

Regarding the appellant`s allegation on professional misconduct, counsel relied on regulation 19 of the Advocates (Professional Conduct) Regulations that deals with professional misconduct and is not necessarily connected to the election

10 petition. It is a matter of interference with witnesses during trial of the petition. A petition for nullification of the outcome of an election necessarily deals with matters that occurred before or during the elections. Those matters either directly or indirectly affect the elections. The grounds in section 61 (1) challenging the election of a candidate as a member of parliament for

15 noncompliance with the provisions of the Act relating to elections precedes the declaration of the candidate as duly elected. It does not deal with postelection allegations save for qualifications which in a way is also a pre-election matter as a candidate who does not qualify should not participate in elections.

In the premises, a person cannot be disqualified for the alleged conduct after

20 being declared duly elected. What if the conduct occurs during celebrations? There may be grounds for impeachment but not nullification of the outcome of the election. The election period determines with the declaration of a candidate as the duly elected candidate and nothing that occurs thereafter can be a ground for nullification of the election but for some other cause of action.

25 In any event, the question of conduct of a party during the trial of an election petition is a matter of discipline and may lead to other consequences such as the

5 payment of damages or consequences in the litigation itself for professional misconduct of an advocate but not to the cause of action for nullification of the results of the elections.

Ground 8 fails.

On ground 9, the learned trial Judge is faulted for wrongly exercising her judicial
10 discretion when she awarded the 1st respondent a certificate of costs of two counsel.

Rule 27 of the Parliamentary Elections (Interim Provisions) (Election Petitions) Rules provides that all costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by
15 the parties to the petition in such manner and in such proportions as the court may determine.

In **Banco Arabe Espanol vs. Bank of Uganda, Supreme Court Civil Appeal No. 8 of 1998**, court held that an appellate court will not interfere with the exercise of discretion by the trial court unless there has been a failure to exercise such
20 discretion or a failure to take into account a material consideration, or that an error in principle was made while exercising that discretion.

In awarding costs and a certificate of two counsel the 1st respondent, the learned trial Judge after dismissing the petition with costs held that pursuant to the provision of section 27 (1) of the Civil Procedure Act Cap 71 costs follow the event

5 unless for justifiable reasons, the court decides otherwise. He decided to award costs to the 2nd respondent due to its failure to handle the petitioner`s complaint.

She issued a certificate for two counsel for the 1st respondent, in accordance with regulation 41 (1) and (2) of the Advocates (Remuneration and Taxation of Costs) Regulations SI-267-4, taking into consideration the nature and importance of an

10 election petition.

Regulation 41 (1) and (2) of the Advocates (Remuneration and Taxation of Costs) Regulations SI-267-4 provides that;

(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

15 *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.*

20 *(2) A certificate for two counsel may be granted under this rule in respect of two members or employees of the same firm.*

It was submitted for the appellant that the learned trial Judge never gave reasons why she granted a certificate of two counsel. That there was no finding that the petition was over involving, involved complex questions of law or fact, raised

25 pertinent and important issues and merited considerable research as to require representation of the petitioner by two firms. That the hearing of the petition only

5 took 3 days and the learned trial Judge`s holding that the certificate is granted taking into consideration the nature and importance of an election petition is not supported by law or principle.

In response counsel for the respondent submitted that costs follow the event. That in **Akugizibwe Lawrence versus Muhumuza David & 2 others** (Supra) 10 court noted that the non-compliance was largely caused by the Electoral Commission and held that in those circumstances where the winning margin of 718 votes in a constituency where there were a total of 91 polling stations, court held that none of the candidates should be condemned to pay costs.

Counsel contended that none of the said considerations applied to the instant 15 case. That there was no proved noncompliance with electoral laws, no proved electoral offence and the winning margin between the 1st respondent and the appellant who came 4th was 8,739 votes. He contended that this was a proper case for award of costs with a certificate of two counsel.

In **Kadama Mwogezaddembe vs. Gagawala Wambuzi, Election Petition No.1** 20 **of 2001**, court while dealing with the issue of costs in an election petition opined that there was another dimension to such petitions; the quest for better conduct of elections in future...Keeping quiet over weaknesses in the electoral process for fear of heavy penalties of costs in the event of losing the petition, would serve to undermine the very foundation and spirit of good governance.

5 Furthermore, a successful litigant can only be denied costs for good cause, such as when the successful party's conduct prior to or during the course of the suit has led to litigation but for his/her conduct might have been avoided. **(See SDV Transami (U) Ltd V Nsibambi Enterprises (2008) ULR 497 CA).**

No such allegations against the 1st respondent`s conduct were made that this
10 could have been an avoided litigation.

The 1st respondents' case in this court was substantially conducted by two counsel and the reason the learned trial Judge award a certificate was because of the "*nature and importance of an election petition.*" Well as I am alive to the nature and importance of election petitions, I am of the view that the learned
15 trial Judge did not clearly speak to the reasons why she awarded a certificate of two counsel. As submitted by counsel for the appellant, the petition was not over involving, hearing only took three days with only one day for scheduling and 2 days for cross-examination of deponents.

20 We are also alive to the fact that there was no proved non-compliance with electoral laws and no proved electoral offence. In our view, one advocate was reasonable and sufficient to handle the petition since no difficulty of the matter was occasioned during litigation. Indeed, the determination by court on whether a given case was fit for a certificate of two counsel depends purely on the
25 circumstances and nature of the petition before it. In the instant case, it was not

5 reasonable for the learned trial Judge to award a certificate of two counsel to the 1st respondent.

In **Aisha Kabanda Nalule vs. Lydia Daphine Mirembe & 2 others Election Petition Appeal No. 90 of 2016** court cited with approval the dictum of

10 Bamwine PJ in **Kadama Mwogezaddembe vs. Gagawala Wambuzi**, (Supra) where he stated that electoral litigation is a matter of great national importance in which courts have to carefully consider the question of awarding costs. Costs need not deter aggrieved parties with a cause from seeking redress from the court.

15 Bearing in mind that election petitions are matters of national and political importance, and since the instant appeal partly succeeds, each party shall bear its own costs in this court and the court below.

Ground 9 succeeds.

In the result, this petition substantially fails on grounds 1, 2, 3, 6, 7 and 8, and

20 partly succeeds on grounds 4 and 5 and succeeds on ground 9. The election of Abdu Katuntu as Member of Parliament of Bugweri District is hereby upheld.

Consequently, we now make the following orders;

1. The Appeal substantially fails and is hereby dismissed.
2. Since the appeal succeeds only in part, each party shall bear their own

25 costs here and in the court below.

It is so ordered.

5

Dated at Kampala this ......2nd....... day of ....June.............. 2022

Cheborion Barishaki

10 **JUSTICE OF APPEAL**

Hellen Obura

15 **JUSTICE OF APPEAL**

20 **Christopher Madrama**

JUSTICE OF APPEAL