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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CONSOLIDATED ELECTION PETITION APPEAL NO 31 OF 2021 AND MISCELLANOUES APPLICATIONS NO 12 AND 15 OF 2022

(Arising out of Election Petition No. 007 of 2021 at the High Court in Mbarara)

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BETWEEN

TUMWESIGYE ANTHONY .... APPELLANT

AND

1. **ARINAITWE RAUBEN**
2. **ELECTORAL COMMISSION .... RESPONDENTS**

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CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

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JUDGMENT OF COURT

This is an appeal against the decision of Moses Kazibwe Kawumi.J delivered on the 22nd September, 2021, at the High Court in Mbarara in Election Petition No 007 of 2021 in which he gave judgment in favor of the 1st Respondent Arinaitwe Rauben and awarded him 80% of the taxed costs and the 2nd respondent 20% of the taxed costs.

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Background Facts.

On the 14th January, 2021, the 2nd Respondent organized elections for the position of Member of Parliament for Isingiro West Constituency. The Petitioner, the 1st Respondent and two other candidates contested for the position. The 1st Respondent was

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declared the winner with 7,992 votes while the Petitioner polled 7,795 votes. A difference of 17 votes separated the two.

35 The Petitioner filed an application for a recount of the votes in the Chief Magistrate's court but the Application was dismissed. The Petitioner filed a petition in the High Court of Uganda at Mbarara contending that there was non-compliance with the provisions of the electoral laws and failure to conduct the elections in accordance

40 with the principles in the electoral laws which affected the results in a substantial manner. The Petitioner sought that the election of the 1st Respondent be annulled or in the alternative the second Respondent be ordered to conduct fresh elections.

The learned trial Judge dismissed the petition and the Appellant

45 filed this appeal for this court to set aside the lower Court's decision. The Appellant raised the following grounds on appeal;

1. The learned trial Judge erred in law and fact when he held that the respondent did not ague the first issue relating to the competence of the petition and that the presumption

50 was that the first issue had been abandoned thereby leading him to award full costs to the Respondents who had raised and argued the 1st issue as preliminary objection and had the same dismissed which occasioned a miscarriage of justice.

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2. The learned trial Judge erred in law when he held that the non-certification of the declaration of results form for Kabuyanda Adventist Church Polling station rendered the evidence relating to the coerced signing and filling thereof inadmissible which caused a miscarriage of justice.

3. Having rejected the Declaration of the Results form for Kabuyanda Adventist Church Polling station for non-certification the learned trial Judge erred in law to accept the results on that form and to rely on entries thereon which caused a miscarriage of justice.
4. The learned trial Judge erred in law and fact when he held that some of the 1st Respondent's witnesses didn't contradict themselves and or that the contradictions were not so serious which occasioned a miscarriage of justice.
5. The learned trial Judge erred in fact when he held that PW2 swore two contradicting affidavits over the same event thereby branding PW2 not a believable witness which caused a miscarriage of justice.
6. The learned trial Judge erred in law and fact when he held that the election was conducted in accordance with the electoral laws and principles governing elections hereby occasioning a miscarriage of justice.
7. The learned trial Judge erred in law when he held that when all candidates are given zero votes none of them is disadvantaged which caused a miscarriage of justice.
8. The learned trial Judge erred in law and fact when he held that there was no cogent evidence implicating the 1st Respondent and or his agents in the alleged violence against the petitioner thereby reaching wrong conclusions.
9. The learned trial Judge erred in law and fact when he held that there was no credible evidence to fault the 2nd Respondent for having issued two different return forms for transmission of results which caused miscarriage of justice.
10. The learned trial Judge erred in law and in fact when he held that the return form for transmission of results where the vote difference was 103 votes was not formally issued to any candidate thereby reaching wrong conclusions.

11. The learned trial Judge erred when he held that save for Kakoni C.O.U Polling Station and St. Mary's Primary school polling station elections at all other polling stations were smooth and in compliance with the laws and principles governing elections which caused a miscarriage of justice.
12. The learned trial Judge erred in law and fact when he held that there was no satisfactory evidence to place the 1st Respondent or his agents at any of the stations where illegal practices or election offences were committed on polling day thereby reaching wrong conclusions.
13. The learned trial Judge erred in law and fact when he held that in assessing the effect of non-compliance the court is required to consider the effect of each category of non-compliance individually and assess the effect as against the entire electoral process which occasioned a miscarriage of justice.
14. The learned trial Judge erred in law and fact when he held that the Petitioner had failed on a balance of probabilities and to the satisfaction of court to prove that the winning majority if the 1st Respondent would have been reduced in such a way as to put the victory of the election in doubt which occasioned a miscarriage of justice.
15. The learned trial Judge erred in law and fact when instead of comparing the number of voters who were disenfranchised with the winning margin he compared it with the total number of registered voters in the entire constituency thereby reaching wrong conclusions.
16. The leaned trial Judge erred both in law and fact when he held that the 1st Respondent was validly elected Member of Parliament for Isingiro west constituency after having failed to properly and correctly evaluate the evidence on record thereby reaching wrong conclusions.

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17. The learned trial Judge erred both in law and fact when he relied on conjecture and on extraneous matters rather than relying on the actual evidence on record thereby reaching wrong conclusions.
18. The learned trial Judge erred in law and fact when he held that to prove an election offence, corroboration of the allegation was required and further erred in law when he held that there was no corroboration that the 1st Respondent had incited his agents to smash the Petitioner's car.
19. The learned trial Judge erred in law and fact when he held that to prove the commission of an illegal practice or election in an election petition the Petitioner has to first adduce evidence of conviction in a criminal trial which caused a miscarriage of justice.
20. The learned trial Judge erred in law and fact when he held that it had not been proved that the persons who interfered with the smooth counting of votes at Kabuyanda were agents of the 1st Respondent thereby reaching wrong conclusions.
21. Having resolved the 1st, 2nd, and 3rd issues in favor of the Petitioner the trial Judge erred in law to award the Respondents full costs and further erred to award the 2nd Respondent costs when it had failed in its duty which caused a miscarriage of justice.

The Appellant prayed to court for orders that;

1. This appeal be allowed.
2. The judgment of the trial court be quashed and the orders therein be set aside.
3. The court declares that the 1st Respondent was not validly elected.
4. The Appellant be declared the winner of the election.

And in alternative;

5. A fresh, free and fair election be conducted using different Returning Officer and Evaluation Officers.
6. The Respondents be condemned to pay the costs of this appeal and in the lower court

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Representations.

At the hearing of the appeal, Mr. Ngaruye Ruhindi Spencer, Mr. Justus Niwamujuni, Mr. Enock Kakuru appeared for the Appellant. Mr. Eric Sabiiti and Dr. Akampumuza appeared for the Respondents.

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Consideration of the Application.

Mr. Arinaitwe Rauben the Applicant / 1stRespondent filed **Election Application No.12 of 2022**, seeking that **Election Petition Appeal No. 31 of 2021,** is struck out on the ground that there was no appeal against him. He stated that the Respondent failed to take essential steps to appeal and prosecute the appeal within the time prescribed by the law.

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The Electoral Commission Applicant/ 2nd Respondent filed **Election Application No. 15 of 2022**, seeking to strike out **Election Petition Appeal No. 31 of 2021.** It stated that the Respondent failed to take essential steps to prosecute the appeal as prescribed by law. With consent of both counsel, the two Applications were consolidated.

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The Applicants sought for orders that;

180 1. The Respondent's Notice of Appeal and Memorandum of Appeal in Election Petition Appeal No. 31 of 2021 be struck out.
2. Costs of the application be provided.

It is the submission of Counsel for the Applicants that the
185 Respondent failed to take essential steps in the prosecution of the Election Petition Appeal No. 31 of 21. The argumentative averments in paragraph 15 of the Respondent's Affidavit in reply are tacit admissions that the Respondent failed to take essential steps within the prescribed time. It is in the interest of justice that the appeal is
190 struck out.

In response to the application Counsel for the Respondent averred that the appeal was filed within the prescribed timelines in the law.

Court's finding.

We have read the submissions from all parties and we have
195 considered them as we write this ruling. We now consider the application.

Rule 82 of the Judicature (Court of Appeal) Rules SI 13-10 provides that;

> "A person on whom a notice of appeal has been served may
> 200 at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed
> 205 time."

In **Geoffrey Omara v. Charles Angiro Gutomoi Abacacon and Anor Election Petition Appeal No.106 of 2016,** while relying on **Bakaluba Mukasa Peter and Anor vs. Nalugo Mary Margaret Sekiziyivu**, this court held that;

210 > "The rule provides for two instances where a person served with a Notice of Appeal can move court to strike out the Notice of Appeal or the appeal itself. The first, is where, according to the one served with the Notice of Appeal, no appeal lies. The second is where the person served claims
215 > that the intending appellant has not taken an essential step at all in the proceedings or has taken the same but outside the time prescribed by the rules. The same court quoted **Electoral Commission and another v. Piro Santos Civil Application NO. 022 of 2011,** which relied on the Kenyan
220 > Case of **Muiya Vs. Nyagah and others, [2003] 2 EA 616,** where it was held that;
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> "On this strictness, this court has one thing or two to say elections are serious matters of state with its citizens. As elections are held, the outcome announced, the electorate
225 > must know their political leader quickly and assuredly. There must be limited or no uncertainty about this. The roles of elected representatives are many and diverse *vis-à-vis* their electors to perform the roles well, the elected must be sure of his post and the elector of his leader. And the
230 > sooner the better to give that certainty. So either the election is accepted at once or when challenged, that challenge must be moved along to the end swiftly enough to restore certainty. And for that, election petitions are governed by this Act with its rules in a very strict manner.
235 > Election petition law and the legal regime in general, is a unique one and only intended for elections."

Rule 30 (b) of The Parliamentary Elections (Interim Provisions) Rules. SI 141-2 , provides that;

> "In a case where a written notice of appeal has been given
240 within........... seven days after the filing by him or her of
> the memorandum of appeal"

The Rules stipulate that the appeal must be filed within 7 days if there is a written Notice of Appeal. In order to ascertain whether the appeal was filed within the given timelines, court has to follow the
245 computation laid down under **Rule 4(a) of the Judicature (Court of Appeal Rules) Directions, SI 13-10**, which provides that;

> "Any Period of time fixed by these Rules or by any decision of the court for doing any act shall be reckoned in accordance with the following provisions;
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250 (a) a period of days from the happening of an event or the doing of any act or thing shall be taken to be exclusive of the day on which the event happens or that act or thing is done."

The Appellant filed the Memorandum of Appeal in the Court of
255 Appeal registry on the 05th October, 2021, and it was endorsed by the Registrar on the 06th October, 2021. This was within the prescribed time under **Rule 30 (b) of the Parliamentary Elections (Interim Provisions) Rules**. According to the timelines the Appellant filed the Memorandum of Appeal one day before the
260 deadline. He filed it on 06th October, 2021, when the deadline was 07th October, 2021. It has been held by the Supreme Court that the most important date of filing a Notice of Appeal or Memorandum of Appeal is the final day when the Registrar signs the Notice of Appeal

or Memorandum of Appeal. In **Global Capital save 2004 Ltd and another v. Alice Okiror and Anor Supreme Court Civil Application No. 57 of 2021, Justice Mike Chibita** held that;

> "It is safe to say that the process of filing the notice of appeal started on 7th with the payment of the requisite fees, receiving and stamping the documents with the court stamp and culminated in the final act of being dated and signed by the Registrar as duly lodged on 9th July 2020. The date that is of essence, therefore, is the final date of the process, which in the instant case is the 9th of July, 2020."

Considering the facts of this case, the Memorandum of Appeal was filed within the prescribed time.

We therefore find that **Miscellaneous Applications 12 and 15 of 2022, arising from Election Petition Appeal 031 of 2021,** were without merit and are hereby dismissed.

Consideration of the Appeal.

Before consideration of the Appeal, the 2nd Respondent also raised a preliminary objection that the grounds of appeal offend **Rules 86(1) of the Court of Appeal Rules**, which requires that the Memorandum of Appeal shall set forth concisely and under distinct heads, without arguments or narrative, the grounds of objection to the decision appealed against specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make.

Conversely the Appellant submitted in reply and stated that the grounds are specific.

290 We have looked at the submissions of both Counsel, we agree with the 2nd Respondent that the grounds are too general and do not specify how the learned Judge erred. They offend **Rule 86(1) of the Judicature (Court of Appeal Rules) Directions, S113-10.** It has become common for appellants in Election Petition Appeals to list a 295 several grounds that are argumentative and yet similar in nature. Yet concentration and simplification of them would lead to about one or two real issues.

Despite the above caution, in the interest of justice and given the importance of elections in the governance of our country we shall 300 exercise our discretion and determine the appeal. In this appeal, there are 21 grounds of appeal which we shall couple them up.

Duty of court

This being the first Appellate and final Court in Parliamentary Election matters it is the duty under Rule 30 of the rules of this 305 court to re-evaluate the evidence before and come up with its own conclusion bearing in mind that it did not see or see the witnesses as they testified in the court of first instance. **(See Kifamunte Henry vs. Uganda , Supreme Court Criminal Appeal No. 10 of 1997 and Selle and Another v. Associated Motor Boat Company** 310 **Ltd and others [1968] E.A 123.)**

In election petitions like all civil matters the Petitioner bears the burden of proof to prove their case on a balance of probabilities to the satisfaction of court. See **Col. Rtd. Dr. Kizza Besigye v. Museveni Yoweri Kaguta S.C.E.P No. 1 of 2001** and **Mbaghadi**

315 **Fredick Nkayi and Another V. Dr. Nabwiso Frank Wilberforce, Election Petition Appeals No.14 and 16 of 2011.**

Ground 2 and 3

The learned trial Judge erred in law when he held that the non-certification of the Declaration of Results Form for Kabuyanda Adventist Church Polling station rendered the evidence relating to the coerced signing and filling thereof inadmissible which caused a miscarriage of justice.

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And

Having rejected the Declaration of the Results form for Kabuyanda Adventist Church Polling station for non- certification the learned trial Judge erred in law to accept the results on that form and to rely on entries thereon which caused a miscarriage of justice.

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Appellant's submissions.

Counsel for the Appellant submitted that the trial Judge misdirected himself when he held that because the Declaration of Results Form for Kabuyanda Adventist Church Polling Station was not certified it rendered any evidence relating to the alleged signing through coercion inadmissible. That the Declaration of Results Form in issue was not a contested document as both contestants were relying on it and annexed it to their affidavits.

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335 Counsel argued that if the trial Judge had analyzed the said form he would also have found that it offended **Article 68(2),(3)** and **(4) of the Constitution, 1995** and **S.47(1) of The Parliamentary Elections Act**, as it was signed at a place other than the polling station

340 **1st Respondent's submissions**

It was submitted for the 1st Respondent that in these grounds the Appellant was required to produce certified documents of the National Voters Register for Isingiro West Constituency and copies of Declaration Results Forms.

345 Counsel for the Appellant sought to rely on unsubstantiated Affidavits which were based on falsehoods, hearsay, not accompanied by any certified copies Declaration of Results Form and other public documents. That the Appellant attached unauthentic Transmission of Results (TOR) Forms with no voters 350 register attached to his petition. Furthermore, the uncertified Declaration of Result Form, were not filed or stamped by court and oddly appear in vol. 2 pages 40-44; 68-199 of the record of appeal.

2nd Respondent's submissions.

Counsel for the 2nd Respondent argued that the trial Judge properly 355 held that they could not rely on uncertified documents. He relied on **John Baptist Kakooza vs. Electoral Commission and Yiga Anthony Supreme Court Election Appeal No11 of 2007**.

Rejoinder by the Appellant

The appellant counsel firmly submitted that there was no need for 360 certification since the document was not contested.

Consideration of Court

It is not in dispute by both the Petitioner and the Respondents that the said Declaration of Results Form for Kabuyanda Adventist

Church Polling Station was uncertified. What is in dispute for the
365 Appellant was that the Judge misdirected himself when he held that since the said documents were not certified, any evidence relating to them is inadmissible. For the Appellant, counsel submitted that since the same Declaration of Results Form was attached by the 1st Respondent in Reply to the petition, court should not have
370 disregarded the fact that it was not certified.

The law on proof of public documents is provided for under **Sections 73, 75 and 76 of the Evidence (Act Cap 6)**. Section 76 specifically provides that,

> "Such certified copies may be produced in proof of the
> 375 contents of the public documents or parts of the public documents of which they purport to be copies."

Supreme Court in considering the above provisions and assertions by the appellant in **John Baptist Kakooza vs. Electoral Commission and Yiga Anthony Supreme Court Election Appeal**
380 **No. 11 of 2007**, Held that;

> ***"A non-certified Declaration of Results Form cannot be validated by the mere fact that it is annexed to an affidavit.*** A Declaration of Results Form is a public document within the meaning of section 73(a)(ii) of the
> 385 Evidence Act. It requires certification if it is to be presented as an authentic and valid document in evidence. Consequently, I agree with Okello, J.A. where in his lead judgment he opines that Rules 15 of the Parliamentary Elections (Election Petitions) Rules, 1996, does not prohibit
> 390 or indeed conflict with section 76 of the Evidence Act which provides that the contents of public documents or part

> thereof are to be proved by certified copies. The uncertified copies of Declaration of Results Forms annexed to the affidavits were inadmissible as evidence" **(Emphasis added)**

395 In the circumstances, a public document ought to be proved as required by law. The said document cannot be validated because it is an attachment to an affidavit. The purpose for certification of public documents as required under section 73, 75 and 76 is proof that the said document is true, reliable and authentic copy of the 400 primary document. The essence of this is to protect the unsuspecting public from fraudulent acts that would occasion a miscarriage of justice.

It has to be noted that without such certification, such documents cannot prove any fact which is sought to prove. Therefore, the 405 evidence that there was coerced signing of the Declaration of Results Forms for Kabuyanda Seventh Day Adventist polling stations, cannot be relied on because it required certified Declaration of Results Form. Having failed to certify the said documents, court has no option but to render such evidence 410 inadmissible.

The only time court can look at uncertified Declaration of Results Forms is when the party can prove that a letter was written requesting for them and the Electoral Commission failed to avail the same.

415 This Court in **Tamale Julius Konde vs. Ssenkbuge Isaac and Anor Electoral Petition Appeal No. 75 of 2016** while referring to

John Baptist Kakooza vs. Electoral Commision & Yiga Anthony (*supra)* at page 11 held that,

> "the Supreme Court had opportunity to consider the issues
420 of admissibility of uncertified Declaration of Results Forms in **John Baptist Kakooza vs. Electoral Commission and Yiga Anthony** (supra) Kanyeihamba, JSC who wrote the lead judgment in that case had agreed with the opinion of this court which upheld the decision of the trial court that
425 uncertified Declaration of Results Forms annexed to the affidavit of the appellant were inadmissible as evidence , However , Mulenga , JSC (RIP) and Katureebe , JSC (as he then was) wrote dissenting judgments on that point and Odoki, CJ (as he then was) concurred with them. The
430 import of the majority decision on that point was that there are exceptional circumstances under which uncertified Declaration of Results Forms can be admitted in evidence pursuant to sections 64 (1)(a) and 65 of the Evidence Act."

It is our finding therefore that the appellant's assertion that the 1st
435 Respondent attached the same document did not present an exceptional circumstance where uncertified Declaration of Result Forms should have been admitted in evidence for purposes of facilitating further investigations by court. Having failed to position himself in the said exception this court cannot fault the trial Judge.

440 Ground 2 and 3 fail.

Ground 7

445 **The learned trial Judge erred in law when he held that when all candidates are given zero votes none of them is disadvantaged which caused a miscarriage of justice.**

Appellant's submissions

Counsel for the Appellant submitted that the 1st Respondent
450 targeted the polling stations where the Appellant was popular and had won in the NRM primaries. The votes having exceeded registered voters at 3 polling stations is a *prima facie* case of malpractice. It is not true that returning a result of zero to all candidates did not disadvantage any party.

455 Counsel further submitted that it is not true that returning a result of Zero did not disadvantage any party, that resort should be made to **Section 45 of The Parliamentary Election Act** and fresh elections should be organized.

1st Respondent's submissions.

460 Counsel for the 1st Respondent argued that the Appellant misconstrued the Judge's finding and therefore his submissions should be disregarded.

2nd Respondent's submissions

Counsel for the 2nd Respondent submitted that it was false for the
465 Appellant to assume that since he won NRM primaries in those stations he could still win the national elections. These were two

different electoral processes and cannot be used to evaluate each other.

Court's consideration.

470 According to the record of appeal, the computer system designated to tally the results could not accept the results because the indicated number of votes exceeded the number of registered voters. In resolving this issue the lower court held that;

> "Mr. Mukundane RW2, who was the Returning Officer,
> 475 explained to court that there was no evidence of ballot stuffing at the three stations but alteration of the entries on the Declaration of Results forms which showed an excess of votes compared to the registered voters at the polling stations
>
> 480 Pw2 attributed the malpractice to the Petitioner but adduced no evidence to support the assertions. I gave no attention to the said accusation since no cogent evidence to link the Petitioner to the malpractice was adduced.
>
> Doubtful entries in the Declaration of Results Forms render
> 485 the results therein recorded unreliable because the Forms are a safeguard against fraud and other impropriety in the electoral process.
>
> I cannot fault the 2nd Respondent for excluding the results for the three polling stations from the finally tally. This was
> 490 in line with the principle of impartiality and transparency governing elections"

The appellant did not adduce any evidence to show that the assertions by the PW 2 were false. Such results became unreliable in the circumstances. It was therefore right for the 2nd respondent

495 to take a decision within its power to bring all candidates to the same level.

It was submitted for the Appellant that instead of returning the candidates with zero, recourse would have been made **to Section 45 of The Parliamentary Elections Act.** We do not agree with this 500 submission by the Appellant. **Section 45,** is to the effect that, where there is an interruption by a riot or violence or any other event while they are other voters who have not completed the polling process, the Presiding Officer is required to adjourn. In the said stations, there was no evidence of riot or violence or any event 505 that happened while the voting process was still ongoing. The reason for cancellation was that the votes declared exceeded the registered voters and not the enlisted reasons in Section 45. Section 45 was not applicable in the circumstances.

Ground 7 fails.

510 **Grounds 6, 11, 13 and 15**

The learned trial Judge erred in law and fact when he held that the election was not conducted in accordance with the electoral laws and principles governing elections hereby occasioning a miscarriage of justice.

The learned trial Judge erred when he held that save for Kakoni C.O.U Polling 515 Station and St. Mary's Primary school polling station elections at all other polling stations were smooth and in compliance with the laws and principles governing elections which caused a miscarriage of justice.

The learned trial Judge erred in law and fact when he held that in assessing the effect of non-compliance the court is required to consider the effect of each

520 **category of non-compliance individually and assess the effect as against the entire electoral process which occasioned a miscarriage of justice.**

The learned trial Judge erred in law and fact when instead of comparing the number of voters who were disenfranchised with the winning margin he compared it with the total number of registered voters in the entire
525 **constituency thereby reaching wrong conclusions.**

Appellant's submissions

It was submitted by Counsel for the Appellant that there was confusion that took place at Kabuyanda Adventist Church Polling station. The vote counting was interrupted by the agents of the 1st
530 Respondent. The Presiding Officer at this station was abducted and taken to a place other than the polling station, where figures were dictated to her.

Counsel further stated that the trial Judge ignored the evidence of RW2 Mukundane David, he mentioned of three polling stations
535 where voting was interrupted and candidates given zero. This was because the votes exceeded the registered voters and he specified the 3 stations as Nyabugando Trading Centre, Migyera Primary School and Ruborogota polling stations. Coupled with what happened at Kabuyanda, the trial Judge should not have held that
540 apart from Kakoni and St. Mary's the elections at other polling stations were smooth.

It was submitted that it was not right for the trial Judge to assess each malpractice individually because he would fail to evaluate the general impact on the elections. Further that instead of comparing
545 the number of people who had been disenfranchised with the vote

margin of 17 votes he compared it with the registered voters in the whole constituency. That the rationale for this approach is that the winning margin can change depending on whether or not there are irregularities or malpractices in an election.

550 **1st Respondent's submissions.**

Counsel for the 1st Respondent submitted that the Appellant misquoted the Judge's finding about non-compliance at a few polling stations. An election is not set aside on trivialities. The Returning Officer –Rw2 explained that the system automatically 555 nullified the polling stations with excess votes that are Ruborogota, Nyabugando and Migyera. At these polling stations each candidate was given 00 votes which was in compliance with the principle of impartiality and transparency governing elections.

2nd Respondent's Submissions

560 It was Counsel's submission that the cancellation of results in the affected polling stations did not affect the results in a substantial manner. There was no violence at the three polling stations, therefore the election was free and fair. Court should not annul an election on trivial matters since in other polling stations all election 565 principles were observed.

Counsel for the 2nd Respondent submitted that they led evidence of the Returning Officer and the Petitioner agreed with him when they relied on the gazzeted Form in presenting this petition.

It was Counsel for the 2nd Respondent's submission that the
570 Appellant is unable to provide the proof of actual votes obtained on the polling stations. The assertions of the Appellant are false because Court held that assessing the effect of the non-compliance, it required to consider the effect of each category of non compliance individually and also assess the effect on the entire election

575 Counsel submitted that they led unchallenged evidence of Mukundane David (RW2) who explained the events that resulted in excluding the results of the three polling stations from the final tally. The 2nd Respondent properly omitted the results from three polling stations and the return of 00 votes to each candidate was
580 fair and in compliance with the principles of impartiality and transparency governing elections. RW2 explained that there was no evidence of ballot stuffing but rather alteration of the entries on the Declaration of Results Forms which showed an excess of votes compared to the registered voters at the polling station.

585 **Consideration of court**

Section 61(a) of the Parliamentary Elections Act, provides that,

> "non –compliance with the provisions of this Act relating to elections if the court is satisfied that there has been failure to conduct the election in accordance with the principles
590 laid down in those provisions and that the non-compliance and failure affected the results of the election in **a substantial manner"**

This Court in **Ninsiima Boaz Kasirabo and The Electoral Commission vs. Mpuuga David Election Petition Appeal No. 55**

595 **of 2016**, Court while relying on **Gunn vs. Sharpe (1974)1 QB 808** held that,

> "Therefore, it is not sufficient that there have been irregularities in the election, but it must be proved that the non-compliance/ irregularities affected the results of the
> 600 election in a substantial manner. The principle is that an election should not be set aside basing on trivial errors and informalities."

Under this provision the appellant/ petitioner has the obligation of satisfying court that there was failure in conducting the elections in
605 accordance with principles laid down in the provisions. This means that the appellant must be specific with the particular principles considered to be defaulted. Not every non-compliance will lead to the election being set aside but there must be proof of substantial effect.

610 The key word in the above provision is **"substantial manner"** the Petitioner must prove to the satisfaction of court that this non-compliance has affected the results in a substantial manner.

It is not in dispute that the results of Nyabugando Trading Centre, Migyera Primary School and Ruborogota polling stations were
615 cancelled and did not benefit any candidate. The reason for cancellation was not non-compliance to the electoral laws but as evidenced, it was because the voters cast exceeded the number of registered voters. This cannot be said to be non-compliance of electoral laws.

With regard to Kabuyanda polling station, Tumwine Perpetua the polling assistant, whose evidence was corroborated by Byabasheija Rauben, testified that there was no alleged abduction of PW2, and that the election went on smoothly. The appellant's agent did not make any indication of the said abduction in the Declaration of Results Forms neither did he sign the Declaration of Results Forms. The reasons for not signing the Declaration of Results Forms were not indicated by the Appellant's agents. Hence there's no evidence to show that at this station there was non-compliance of the electoral laws.

We agree with the analysis of the lower court concerning the non-compliance of the Constitution and electoral laws at St Mary's and Kakoni Primary schools. The lower court noted that the 2nd Respondent failed to secure polling materials for the said polling stations and also failed to organize fresh elections for the same. This Court in **Akuguzibwe Lawrence vs. Muhumuza David, Mulimira Barbra and The Electoral Commission, No 22 of 2016** held that;

> "Non-compliance ,as found by the trial judge in two out of ninety one polling stations should not ,in our view , justify a nullification of an election. Nullifying such an election would disenfranchise he people in the remaining 89 polling stations"

In assessing the non- compliance the trial Judge applied the principle of the "substantial manner and came to the conclusion that there was no such effect. The Judge evaluated the total

number of voters who failed to vote in the said stations as 677 out of the 33,958 as to have no effect on the total outcome of the election in a substantial manner. We agree and identify with the conclusion of the lower court.

650 **These grounds therefore fail.**

Grounds 9 and 10

The learned trial Judge erred in law and fact when he held that there was no credible evidence to fault the 2nd Respondent for having issued two different return forms for transmission of results which caused miscarriage of justice.

655 **The learned trial Judge erred in law and in fact when he held that the return form for transmission of results where the vote difference was 103 votes was not formally issued to any candidate thereby reaching wrong conclusions.**

Appellant's submissions

Counsel for the Appellant refers to the Return Forms annexture 01
660 and 02 to the Petition. Both were signed and stamped by the Returning Officer and were issued at the same time on 15 January, 2021 at 4pm, though the results of the forms are different. One shows a winning margin of 17 votes and the other 103 votes. It cannot be said that the elections were free and fair where there are
665 two return forms generated.

1st Respondent's submissions.

For the 1st Respondent counsel stated that both the Return forms complained about by the Appellant never prejudiced him as they respectively put the 1st Respondent in the lead by 103 and 17 votes.

670 The Appellant does not allege that either of the Return Forms put him in the lead.

2nd Respondent's submissions.

Counsel submitted that the learned trial Judge found no credible evidence to fault the 2nd Respondent since no certified copy of the
675 impugned form was adduced in evidence. The Returning Officer led evidence to the effect that no such form was formally issued and that explains why it had no tally sheets attached to it. He stated that the Petitioner agreed with him when he relied on the gazzeted Form in presenting this petition.

680 **Consideration of court.**

The evidence on record demonstrates that RW2 clearly explained the reason for the existence of the two forms. The 2nd Respondent explained that the Return Form with 103 was never officially issued by it. This evidence was not disputed by the Appellant. We therefore
685 agree with the findings of the lower court that what is officially attributable to the 2nd Respondent and what the petition is based on are the results that were published in the gazette by the 2nd Respondent. With this the lower court cannot be faulted.

Ground 9 and 10 fail.

690 **Grounds 8, 12, 18 and 19**

The learned trial Judge erred in law and fact when he held that to prove an election offence, corroboration of the allegation was required and further erred in law when he held that there was no corroboration that the 1st Respondent had incited his agents to smash the Petitioner's car.

695 **The learned trial Judge erred in law and fact when he held that there was no cogent evidence implicating the 1st Respondent and or his agents in the alleged violence against the petitioner thereby reaching wrong conclusions.,**

The learned trial Judge erred in law and fact when he held that to prove an election offence, corroboration of the allegation was required and further erred
700 **in law when he held that there was no corroboration that the 1st Respondent had incited his agents to smash the Petitioner's car.**

And

The learned trial Judge erred in law and fact when he held that to prove the commission of an illegal practice or election in an election petition the
705 **Petitioner has to first adduce evidence of conviction in a criminal trial which caused a miscarriage of justice.**

For the Appellant, counsel submitted that the 1st Respondent targeted the polling stations where the Appellant was popular and
710 had won in the NRM primaries. The votes having exceeded registered voters at 3 polling stations is a *prima facie* case of malpractice. It is not true that giving zero to all candidates did not disadvantage any party

Counsel for the Appellant averred that the trial Judge wrongly held
715 that to prove an election offence in an election petition one has to first adduce evidence of conviction in a criminal trial and that there has to be corroboration.

1st Respondent's submissions.

Counsel for the 1st Respondent argued that the Appellant misquoted
720 the Judge's finding and his submissions should be dismissed.

2nd Respondent's submissions

Counsel for the 2nd Respondent submitted that it was false for the Appellant to assume that since he won NRM primaries in those stations he could still win the national elections. These were two
725 different electoral processes and cannot be used to evaluate each other.

Counsel submitted that in proving an election offence the standard is high since proof of one can lead to nullification of an election. The trial Court was alive to the fact that the Petitioner failed to adduce
730 evidence to prove violence allegations against the 1st Respondent and or his agents.

Consideration of Court

The grounds revolve around violence and offences committed during the elections. The trial Court held that;

735
> "I failed to find **any cogent evidence to support the violence allegations made against the 1st respondent**. The petitioner did not provide evidence of the Police Officers, who arrested the 1st respondent and a final verdict from any court to show that he was found guilty
740
> and accordingly convicted for the alleged electoral offences, the attachment of complaints filed at the police post does not amount to commission of the alleged offence. Any suspect is presumed innocent until he is taken to court, tried and proved guilty"

745 We agree with the finding of the trial Court that there is no cogent evidence to support the allegations of violence made against the 1st

Respondent. The standard of proof in an election petition is high on a balance of probabilities hence mere allegations cannot warrant a judgment in their favor. This court in **Mashate Magomu Peter vs.** 750 **Electoral Commission and another, Election Petition Appeal No.0047 of 2016,** held that;

> "We too are unable to find admissible evidence to support the Appellant's allegations. There is no Police Report of violence or harassment and the evidence of the Presiding 755 Officer, Musinguzi Rashid, during cross examination was that he never received any formal complaint from the appellant regarding the allegations"

We identify ourselves with the above position of the law, that in the absence of a police report of the alleged violence and harassment, 760 mere complaints made at the police do not amount to evidence of violence against the 1st respondent. Therefore, the trial Judge rightly held that the complaints filed at the police post do not amount to evidence of commission of the alleged offence because of the principle of Presumption of innocence. We therefore find that 765 the lower court Judge made the right findings and cannot be faulted.

These grounds also fail.

Grounds 4, 5, 14, 16, 17 and 20

The learned trial Judge erred in law and fact when he held that some of the 1st 770 **Respondent's witnesses didn't contradict themselves and or that the contradictions were not so serious which occasioned a miscarriage of justice.**

The learned trial Judge erred in fact when he held that PW2 swore two contradicting affidavits over the same event thereby branding PW2 not a believable witness which caused a miscarriage of justice.

775 **The learned trial Judge erred in law and fact when he held that the Petitioner had failed on a balance of probabilities and to the satisfaction of court to prove that the winning majority if the 1st Respondent would have been reduced in such a way as to put the victory of the election in doubt which occasioned a miscarriage of justice.**

780 **The learned trial Judge erred both in law and fact when he held that the 1st Respondent was validly elected Member of Parliament for Isingiro west constituency after having failed to properly and correctly evaluate the evidence on record thereby reaching wrong conclusions.**

The learned trial Judge erred both in law and fact when he relied on conjecture
785 **and on extraneous matters rather than relying on the actual evidence on record thereby reaching wrong conclusions.**

And

The learned trial Judge erred in law and fact when he held that it had not been proved that the persons who interfered with the smooth counting of votes at
790 **Kabuyanda were agents of the 1st Respondent thereby reaching wrong conclusions.**

Appellant's Submissions

These grounds revolve around evaluation of evidence on record. Counsel stated the trial court failed to evaluate the following pieces
795 of evidence;

1. The fact that the Declaration of Results form for Kabuyanda Adventist Church polling station was not a contested document, so it did not need certification.

800 805 810 815 820

2. Failed to analyze the 23 affidavits of the Appellant which showed that the 1st Respondent was the one who introduced this document.
3. Failed to analyze the entries on the said Declaration of Results Form which showed that the number of votes entered as counted exceeded the people recorded as registered in the polling stations. He would also have found that 222 females and 196 males were recorded as having voted making a total of 418 people and yet the form indicated that 420 votes were recorded as validly cast. He would have found that 13 ballots were recorded as invalid.
4. Failed to analyze and if the results of the said station has been excluded the appellant would have emerged winner with the vote difference of 98. That if 217 votes allocated to the 1st Respondent had been deducted from 7992 votes attributed to him he would have remained with 7775 votes and if the 102 allocated to the appellant had been deducted from the 7975 votes attributed to him he would remain with 7873 votes thereby emerging winner with a vote margin of 98 votes.
5. Did not actually read the affidavit of PW3 because there was no attached Declaration of Results Form as stated by the trial judge.
6. Failed to evaluate the evidence adduced by PW2 and instead imagined that she had contradicted herself yet there was no such contradiction.

825 Counsel for the Appellant conclusively stated under these grounds that the learned trial Judge failed to evaluate evidence on record with regard to Kabuyanda Adventist church polling station and the Declaration Results Form therein.

830 **1st Respondent's submissions**

The Appellant sought to rely on unsubstantiated Affidavits based on falsehoods, hearsay, not accompanied by any certified copies Declaration of Results Form and other public documents. That the appellant attached unauthentic Transmission of Results (TOR)
835 Forms with no names of the voters register attached to his petition. Uncertified Declaration of Result Form, not filed or stamped by court oddly appear in vol. 2 pages 40-44; 68-199 of the record of appeal.

2nd Respondent's Submissions

840 It was submitted for the 2nd Respondent, that the learned trial Judge properly evaluated the evidence in regard to Kabuyanda SDA Polling Station when he considered two contradicting affidavits sworn by PW2 when stating what happened. The evidence of Ndyamuba, Tayebwa Paddy and Taremwa Gilbert remained
845 consistent that PW2 was attempting to stuff ballots when they involved police. That during cross examination at first she said they had finished counting the votes but on further cross examination she said that they had not contended the votes. That Declaration of Results Form is silent about why the appellant's agents did not sign
850 the Declaration of Results Forms.

Consideration of Court.

We have read through the submissions of the appellant and it is our observation that the counsel's submissions revolve around the

incident that happened at the Kabuyanda SDA Polling Station, St.
855 Mary's Primary School, and Kanoni Church of Uganda. All these incidents have been substantially handled under the previous grounds.

Concerning St Mary's Primary School and Kanoni Church of Uganda, we have held that there was non-compliance however it did
860 not substantially affect the results. Regarding Kabuyanda Seventh Day Adventist Church, we noted that since the Declaration of Results Forms was not certified, court could not consider it in evidence.

Considering the earlier analysis we are firm that the trial Court
865 properly evaluated the evidence on record.

These grounds also fail

Grounds 1 and 21

The learned trial Judge erred in law and fact when he held that the respondent did not ague the first issue relating to the competence of the petition and that
870 **the presumption was that the first issue had been abandoned thereby leading him to award full costs to the Respondents who had raised and argued the 1st issue as preliminary objection and had the same dismissed which occasioned a miscarriage of justice.**

And

875 **Having resolved the 1st, 2nd, and 3rd issues in favor of the Petitioner the trial Judge erred in law to award the Respondents full costs and further erred to award the 2nd Respondent costs when it had failed in its duty which caused a miscarriage of justice.**

880 **Appellant's submissions**

Counsel for the Appellant submitted that the court was wrong in awarding full costs to the Respondents yet their application was dismissed. He acknowledged that the court has discretion to grant costs or not.

885 **1st Respondent's submissions**

Counsel submitted that the trial Judge is unfairly criticised as he never ordered payment of full costs. He apportioned to the 1st Respondent 80% and the 2nd Respondent 20%. The Respondents were the successful parties in the petition and the trial Judge

890 exercised his discretion judiciously to award them costs.

2nd Respondent's submissions

Counsel submitted that it is not true that the trial Judge awarded full costs. The Judge awarded 20% to the 2nd Respondent and 80% to the 1st Respondent.

895 **Consideration of Court**

It is trite law that the award of costs is at the discretion of court. The Appellate Court can only interfere where there is evidence that the trial Court did not follow the principles of awarding costs. The Appellant in this case has not adduced any evidence in this regard.

900 The trial Court in exercising its discretion decided to award the 1st Respondent 80% and 20% to the 2nd Respondent and we have no ground to fault this discretion.

From the above analysis we therefore find that the appeal does not have merit and it is hereby dismissed. The Judgment and orders of 905 the lower court are hereby upheld, to the effect that;

1. The 1st Respondent was validly elected as a Member of Parliament for Isingiro West Constituency.
2. Costs are awarded to the Respondents both in this court and in the lower court as ordered by the trial Judge.

910 Dated at Kampala this.......15th.......... day of ......June........2022

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GEOFFREY KIRYABWIRE

JUSTICE OF APPEAL

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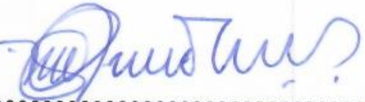

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STEPHEN MUSOTA

JUSTICE OF APPEAL

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C. GASHIRABAKE

JUSTICE OF APPEAL