THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Kibeedi & Mugenyi JJA]

ELECTION PETITION APPEAL NO. 0048 OF 2021

(Arising from Election Petition No.10 of 2021)

BETWEEN

Bantalib Issa Taligola ==========Appellant

AND

Electoral Commission========== Respondent No.1

Orone Derrick==========Respondent No.2

JUDGEMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

[1] The appellant, respondent no.2 and 4 others contested for the seat of Member of Parliament for Gogonyo county in Pallisa district in the general elections held on 14th January 2021. The Electoral Commission (respondent no.1) returned respondent no.2 as the validly elected Member of Parliament for the constituency. Dissatisfied, the appellant filed Election Petition No. 10 of 2021 at Mbale High Court Registry challenging the outcome of the election. The learned trial judge delivered judgment in favour of the respondents and dismissed the petition.

[2] Dissatisfied with the decision of the learned trial judge, the appellant now appeals on the following grounds:

> '1. The Learned trial Judge erred in law and fact in holding that the Petitioner had the evidential burden to prove that the excess votes belonged to him so as to succeed in overturning the election.

2.The Learned trial Judge erred in law and fact in holding that the excess votes/stray ballots identified in the 16 Polling stations were trivial arithmetic errors that could not be the basis for setting aside the election.

3.The Learned trial judge erred in law and fact when she disregarded the DR Forms for Katukei Fellowship Church polling station exhibited in original form (Primary evidence) and instead relied on the Certified copy of the DR Form (exhibit RE2(b)).

4.The learned trial judge erred in law in concluding that there was no proof that RE2 (b) was a false document or a forgery.

5.The Learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on Court Record on illegal practices/election offences and arrived at a wrong conclusion that the offences of bribery moving with armed personnel at Polling Stations and canvassing of votes at polling stations on polling day were not committed by the 2nd Respondent during the election process.

6.The learned trial judge erred in law and fact in finding that the issue, regarding the 2nd respondent's affidavits illegally commissioned by Advocate **EMMANUEL ANGURA**, was brought to the attention of the Court/Registrar after the trial of the Petition had been completed.

7. The Learned trial judge erred in law and fact by disregarding the issue of the illegality in the commissioning of the 2nd Respondent's Affidavits by an Advocate **EMMANUEL ANGURA** which was brought to the courts attention before judgment.'

[3] The respondents opposed the appeal.

Submissions of Counsel

[4] At the hearing, the appellant was represented by Mr. Richard Okalanyi and Mr. Matchell Omondi, respondent no.1 was represented by Mr. Musinguzi Godfrey and respondent no.2 was represented by Mr. Mudde John Bosco. The parties opted to adopt their written submissions on record.

[5] Counsel for the appellant opted to first argue grounds 6 and 7 together. Counsel contended that the answer to the petition filed by respondent no.2 is incompetent for lack of valid affidavits in reply as required by the law. Counsel for the appellant cited rules 8(3)(a) and rule 15(1) of the Parliamentary Election (Election Petitions) Rules that provide that evidence in election petitions shall be by way of affidavits. Counsel contended that advocate Emmanuel Angura, who commissioned the affidavits attached to respondent no.2's answer to the petition had not published his appointment as a commissioner of oaths in the gazette as required by section 1(3) of the Commission of Oaths (Advocates) Act at the time of commissioning. Counsel submitted that the purpose of publishing the appointment in the gazette is to act as a notice to the world. Counsel submitted that the gazette derives its authority from Article 257 of the constitution and section 2(ff) of the Interpretation Act.

[6] Counsel further contended that section 1(3) of the Act is couched in mandatory terms thus the said appointment could only take effect upon gazetting. He contended that failure to comply with the statutory requirement renders the appointment incomplete, invalid and consequently all affidavits commissioned by an advocate without a valid appointment are illegal. Counsel relied on Musoke Emmanuel v Kyabaggu and Electoral Commission Election Appeal No. 67 of 2016 (unreported), ITC Bhadrachalam Paperborads & Anor v Mandal Revenue Officer JT 1996 (8) 67and Rajendra Agricultural University v Ashok Kumar Prasad and others C.A No. 6937 of 2004 SC to support his submissions.

[7] Counsel for the appellant submitted that by the letter dated 7th September 2021, the illegality of the affidavits was brought to the attention of court on 9th September 2021, 33 days before judgement was delivered. Counsel relied on section 6 of the Commissioner for Oaths (Advocates) Act and section 45 of the Penal Code Act for the submission that it is a crime for one to act as a commissioner for oaths while they are not duly appointed as one. He relied on Makula International v His Eminence Cardinal Nsubuga & Anor [1982] UGSC 2 for the submission that a court of law cannot sanction an illegality once brought to its attention. Counsel relied on National Social Security Fund and Ors v Alcon International Ltd [2009] UGCA 35 for the submission that an illegality can be brought to court's attention at anytime during trial including on appeal.

[8] In reply to grounds 6 and 7, counsel for respondent no.2 submitted that during the preliminaries of the trial, the appellant raised several objections among which was on the validity of respondent no.2's affidavits. That it was the appellant's argument that the commissioner for oaths did not have a valid practising certificate at the time he commissioned respondent no.2's affidavits. Counsel submitted that the trial court made an inquiry into the matter with the registrar of the High Court who confirmed that Mr. Angura Emmanuel had a practising certificate which was issued on 26th March 2021 and thereafter the court made a ruling that the affidavits commissioned by the advocate for respondent on 27th march 2021 were valid.

[9] Counsel for respondent no.2 argued that it is therefore unfair and unjust for the appellant to bring up the issue of non-gazettement which was not raised during trial because the respondents did not get an opportunity to defend themselves on the matter. He contended that the case of Makula International v His Eminence Cardinal Nsubuga (supra) is inapplicable in this case since the issue was never brought to the attention of court during trial and was only addressed by the registrar after trial. Counsel relied on Hon. Dr. Margaret Zziwa v The Secretary General of the East African Community Appeal No.2 of 2017 for the submission that the appellant is bound by his pleadings and by what was agreed upon at the time of scheduling before the trial commenced. Counsel also argued that

the appellant appears to be on a fishing expedition in a desperate attempt to overturn the election since he did not raise the matter during trial.

[10] In rejoinder, counsel for the appellant submitted that the thrust of the grounds of the appeal is the commissioning of respondent no.2' affidavits before Advocate Angura Emmanuel who by the time was not a duly appointed commissioner for oaths on account of non-publication of the appointment in the gazette and not a question of whether the advocate had a practising certificate or not. Counsel contended that the argument that the illegality of commissioning respondent no.2's affidavits by Advocate Angura was raised after trial is untenable because an illegality supersedes the requirement of pleadings as it can be pointed out at any time before court or on appeal. Counsel relied on Ndaula Ronald v Hajji Nadduli Abdul Court of Appeal Election Petition Appeal No. 20 of 2006 (unreported) to support this submission. Counsel also argued that the authority of Hon. Dr. Margaret Zziwa v The Secretary General of the East African Community (supra) is not applicable to this case.

[11] Regarding ground 1, counsel for the appellant submitted that the existence of the excess or stray votes compromised the integrity of the elections and constituted a serious irregularity which did not require any of the parties to prove that the stray ballot papers belonged to him or her. Counsel submitted that the excess votes wipe off the narrow margin of victory of respondent no.2 thus affecting the results of the elections in a substantial manner. Counsel further submitted that it is settled law that the petitioner does not have to prove that the excess votes were his because that would amount to laying claim to illegal or excess votes which is unconstitutional and criminal.

[12] Counsel for the appellant argued that the trial judge over stretched the standard of proof required of the petitioner and misconstrued the principle in *Mbowe v Eliufoo [1967] EA 240*. That the supreme court laid down the law in Amama Mbabazi v Yoweri Kaguta Museveni & 2 others [2016] UGSC 3 that once the burden of proof is discharged by the petitioner, it shifts to the respondents. Counsel for the petitioner

submitted that once the trial court found that there were excess votes, then the test under section 61(3) of the Parliamentary Elections Act 2005 is whether the irregularity of the excess votes could have affected the results in a substantial manner. The law as stated in established precedents does not require that when excessive votes are cited, a petitioner bears the burden to prove that they are his or her votes. Counsel argued that this is impractical to prove since the legitimate and illegitimate votes or ballots are mingled up in the ballot box.

[13] Counsel for the appellant further submitted that the question of dealing with votes which were not properly cast during the election or where court found discrepancies in the results has been handled in Muzanira Bamukwatsa v Masiko and Another [2018] UGCA 236 where this court excluded the DR Forms with glaring discrepancies. Counsel also relied on McCavitt v Registrars of Voters of Brackton 385 Mass. 833 (1982) to support his submissions.

[14] In reply to counsel for the appellant's submissions in ground 1, counsel for respondent no.2 submitted that respondent no.2 agrees with the reasoning of the learned trial judge that whereas there were arithmetical errors, it would be unjust to order for a bye election without proof that the excess votes belonged to the petitioner as opposed to any other candidate. Counsel submitted that the learned trial judge rightly relied on the interpretation in Adoa & Anor v Alaso [2017] UGCA 3 in which this court noted that as much as the total number of ballot papers exceeded the ballot papers that had been issued, the irregularity did not have effect on the actual vote cast. That this court further noted that there was no evidence adduced to suggest that ballot papers were already in the ballot boxes at the time of voting.

[15] Counsel for respondent no.2 further submitted that the learned trial judge rightly held that the petitioner had not proved that the said arithmetical irregularities affected the petitioner's results in a substantial manner or would have changed the outcome of the election in favour of the petitioner. Counsel stated that it is trite law that a petitioner who has come to court seeking to overturn the election results bears the burden of proving his case. Counsel relied on Besigye Kiiza v Museveni

Yoweri Kaguta and Another [2001] UGSC 3 and section 61(3) of the Parliamentary Elections Act to support this submission.

[16] Counsel for respondent no.2 also submitted that there was no evidence to prove that the actual votes received by each candidate were altered on the Declaration of Results Form. The forms were signed by all candidates confirming the entries therein as correct. Counsel submitted that neither the appellant nor his agents complained about the results at the polling station at the time of signing of the declaration of results forms yet PW1 testified that the petitioner's polling agents received training from respondent no.1 before the election.

[17] In rejoinder, counsel for the appellant submitted that once the appellant proved that respondent no.1 violated the provisions of the Constitution and committed the offences of making wrong returns of elections by adding excess votes in the election returns, court was obliged to either cancel the results of the impugned polling stations from the final tally and declare the petitioner as winner of the election or annul the entire election since no lawful election outcome could be sustained on the basis of an illegality. Counsel argued that it was therefore misleading and erroneous for the trial court to require the appellant to prove ownership of proved illegal votes because to do so would be an absurdity and one cannot claim ownership of an illegality. Counsel relied on Articles 1(1) and (4), Article 59 (1), Article 61(1)(a) of the constitution and section 121(e) of the Electoral Commission Act to support the above submissions.

[18] Regarding ground 2, counsel for the appellant submitted that it was admitted by RW1 during cross examination that there was falsification of results or excess votes were added into the final tally of results. These votes were 152 in total. The excess votes were in the polling stations of Kapala LCI mango tree, Agodi trading centre, Aujabule PAG church, Odukurwo trading centre, Ogurutap LC court, St Grace nursery and primary school, Katukei Fellowship church, Angurur primary school and Kachango primary school. Counsel referred to the affidavits of the petitioner, Hon Makula Francis and Mr. Emurwon Micheal

containing the Declaration of Results forms for the affected polling stations to support this submission.

[19] Counsel further submitted that there were also 42 votes that were validly cast by eligible voters which were not counted. These were 4 votes at Kapala primary school polling station, 18 votes at Opeta polling station, 10 votes at Kapala market polling station, 1 vote at Kakurach trading centre polling station, 3 votes at Osiepai LC court, 2 votes at Angurur P.S polling station, 2 votes at Oluwa Aperosi mango tree polling station and two votes at Cheele central PAG polling station. Counsel for the appellant submitted that the learned trial judge's finding that the proved discrepancies or doubtful entries contained in the declaration of results forms were trivial is inconsistent with the law and the decisions in Rehema Muhindo v Winfred Kizza & Anor Election Petition Appeal No. 29 of 2011 (unreported) and Morgan v Simpson [1974] 3 All ER 722 at page 728.

[20] Counsel for the appellant also submitted that an original copy of the Declaration of Results Form for Katukei Fellowship polling station showed that the petitioner gained 171 votes but a certified copy from respondent no.1 alleged that the petitioner only got 71 votes. Counsel further submitted that RW1, the supervisor or returning officer admitted errors and the existence of wrong entries into the declaration of results forms. He submitted that the fact that the election was won with a margin lower than the number of stray ballots or illegal votes and the fact that it is no longer possible to establish who of the two benefited from the illegal votes or false entries, it is untenable to refer to these errors as trivial matters.

[21] Counsel for the appellant relied on Betty Muzanira Bamukwatsa v Masiko Winnifred & 2 Ors (supra) where the total number of votes recorded was less than the number of voters who voted on that day, by three votes in respect of one polling station. Counsel submitted that although this discrepancy appeared to be minor, this court determined that the inclusion of the polling station's results in the tally sheet was an error that should not be counted in the final tally. Counsel contended that the making of wrong entries in election returns and basing on the

same to declare a winner of an election amounts to fraud against the law and a crime against democracy. Counsel also relied on Nyakecho Annet & Anor v Ekanya Geoffrey Election Petition Appeals No. 28 & 30 of 2016 (unreported) where it was held that filing of DR Forms is not a mere formality but a matter of substance, doubtful entries contained in the DR Form renders the result recorded therein unreliable and cannot be the basis for determining the votes cast at the polling station.

[22] Counsel concluded that the errors and falsification of entries in the DR Forms and tally sheet were material as they could wipe off the narrow margin of respondent no.2's victory.

[23] In reply to counsel for the appellant's submissions in ground 2, counsel for respondent no.2 submitted that the respondent agrees with the decision of the learned trial judge that there are clear arithmetical errors but it would be unjust to order for a bye election without proof that the excess votes belonged to the petitioner as opposed to any other candidate. Counsel submitted that the appellant did not discharge his burden of proving electoral malpractices against respondent no.2 or his agents. Counsel submitted that the said 152 votes arose from the inclusion of male and female votes on the Declaration of Result Form which is not one of the methods of ascertaining the winner of an election. Counsel submitted that RW1, Mr. Kimbowa Erasmus explained that the 152 votes were only included for gender participation analysis purposes. The said number of male and female votes cannot therefore be used as a yardstick for ascertaining the actual number of votes cast.

[24] Counsel for respondent no.2 further submitted that the officials of respondent no.1 ably explained the difference in the total number of people who voted for Member of Parliament and the total number of votes cast at the polling station. The difference was due to the fact that some voters only voted for a presidential candidate and omitted voting for a Member of Parliament.

[25] In rejoinder, counsel cited the case of Apollo Kantinti v Sitenda Sebalu & Anor Election Petition Appeal No.31 & 33 of 2016 (unreported) where this court held that voters whose votes were not considered in the

declaration of a winner were disenfranchised and their right to vote was violated. Counsel submitted that respondent no.1 does not dispute the fact there was inclusion of excess or illegal votes in the final tally of results, rather it asserts that the appellant did not prove that the confirmed illegal votes belonged to him and also that the agents signed the DR Forms and as such the illegal votes should be condoned. Counsel submitted that this argument is untenable. Counsel relied on Tuffuor v Attorney General [1980] GRL 637 to support the submission that once an act complained of springs from the violation of rights created under a constitutional provision, estoppel as a defence is inapplicable.

[26] Regarding grounds 3 and 4, counsel for the appellant submitted that the petitioner adduced original copies of the DR Forms given to his agents at Katukei fellowship church polling station into evidence while respondent no.1 adduced a certified copy of the DR Form with different results. The appellant contended that the original copies showed that the appellant had scored 171 votes while respondent no.2's copy showed that the appellant had scored 71 votes which was false. Counsel submitted that the evidence of Hon. Mukula Francis and Mr. Emurwon Micheal who were contestants in the said election showed that the appellant had scored 171 votes. They adduced their original copies of the Declaration of Results Forms into evidence. Counsel submitted that PW8, Mr. Ariong Peter, one of the appellant's polling agents at Katukei Fellowship church polling station confirmed during cross examination that the appellant had scored 171 votes while respondent no.2 scored 60 votes. Counsel submitted that the certified copy adduced into evidence by respondent no.2 is false and forgery, even though it had the similar serial number with the originals adduced into evidence.

[27] Counsel for the appellant contended that the trial judge ought to have relied on the primary evidence that was adduced by the appellant and the other contestants in the same election since it was the best evidence according to section 61 of the Evidence Act. Counsel relied on Tamale Julius Konde v Ssenkubuge Isaac & Anor Election Petition Appeal No. 75 of 2016 (unreported) to support his submission that certified documents can be questioned on their content. Counsel contended that

certification per se of a public document does not make the document authentic. The petitioner presented an original document which does not require certification and that no plausible reason was given for rejecting it. Counsel for the appellant argued that the certified Declaration of Results Form adduced into evidence by respondent no.2 had discrepancies and irregularities therefore should not have been relied upon by the trial judge. Counsel also relied on Nsegumire Muhammad Semata Kibedi v Returning Officer & 2 Ors Election Petition Appeal No. 0071 of 2016 (unreported) to support his submissions.

[28] In reply, counsel for respondent no.2 submitted that Ochan Peter and Ariong Peter, both polling agents of the appellant at Katukei Fellowship church confirmed during cross examination that the appellant scored 71 votes and not 171 votes. Counsel contended that the petitioner did not bring out this issue at the point of vote recount but rather raised up the matter 60 days later after gazetting the results which is suspicious and an afterthought. Counsel contended that Erasmus Kimbowa, the returning officer testified on re-examination that there was a huge screen at the tally centre displaying all the results of the polling stations and that no complaint was raised regarding the results on the screen at Katukei Fellowship church or any other polling station. Counsel relied on Kakooza John Baptist v Electoral Commission and Anor [2008] UGSC 8 where it was held that where the petitioner had his agents at the polling station and the agents signed the DR Forms, it signifies their acceptance of the outcome of the process.

[29] Counsel for respondent no.2 submitted that the Declaration of Results Form produced by the appellant clearly showed tampering with the contents therein. One of the forms showed the insertion of the words "one hundred" on the line above the already written "seventy one." Counsel contended that court could not condone such alterations. Counsel also submitted that the learned trial judge rightly found that there was no proof that exhibit RE2 (b) is a forgery. Counsel invited this court to find that the exhibit is the true reflection of the results for Katukei Fellowship polling station since it was confirmed by the appellant's polling agents.

[30] In rejoinder, counsel for the appellant clarified that Mr. Ochan Peter was not cross examined by the respondents as alleged. Counsel submitted that the trial court did not make any finding on the tampering with the Declaration of Results Form as alleged by respondent no.1, no evidence was led to prove this allegation. Counsel for the appellant contended that respondent no.1 bore the burden of proving to the required standard the claim that the original Declaration of Results Forms presented by the appellant and other candidates in the race were tampered with which he failed to discharge.

[31] Counsel for the appellant further submitted that section 75 of the Evidence Act should be construed in line with Article 2(2), 28(1) and 44(c) of the Constitution. Counsel stated that it was a gross injustice for the learned trial judge to rely on the certified Declaration of Results Form that had been issued by respondent no.1 who had a hand in falsifying the results of the elections.

[32] Regarding ground 5, counsel for the appellant submitted that the learned trial judge failed to evaluate all the evidence adduced in connection with the illegal practices of bribery, moving with armed personnel and canvassing for votes on the polling day. Counsel set out the duty of a first appellate court as was stated in Kifamunte Henry v Uganda [1998] UGSC 20.

[33] Regarding the allegation of the illegal practice of canvassing for votes at polling stations on the election day by respondent no.2, counsel submitted that the learned trial judge did not take into consideration the evidence of the 11 witnesses of the appellant and misconstrued the evidence of PW5 as to his role on the election day. Counsel submitted that PW5, Mr. Okweredi Joseph was a sub-county poll supervisor for the appellant in charge of Obutet sub-county on the election day. Counsel submitted that it is settled law that in any trial, the determination on the matters in controversy can only be based on hard evidence adduced in court and not on any fanciful theory or attractive reasoning. Counsel relied on IP Buko Dafasi & Anor v Uganda [2016] UGCA 65 to support this submission.

[34] Counsel further contended that much as the learned trial judge heard the oral testimonies of Okello Yona (PW7) and Okiriyo Magidu (PW14, she did not take into consideration the evidence yet it was relevant to the issue in controversy. Counsel contended that the learned trial judge did not subject the evidence of many of the appellant's witnesses to evaluation including the evidence of Otim Awazi Kalenzi, Oboi Julius, Byakatonda Latifu, Okello Silver, Otim Bosco, Okipi Isaac, Okoboi Simon and Okwalinga Agelasious to evaluation. Counsel contended that the witnesses gave evidence which was uncontroverted on the allegation of respondent no.2 canvassing for votes at various polling stations on the polling day.

[35] Counsel for the appellant relied on Masiko Winifred Komuhangi v Babihuga J. Winnie Court of Appeal Election Appeal No.9 of 2002 (unreported) where it was held that it is the duty of the court to evaluate and subject to an exhaustive scrutiny all the evidence presented to it during the trial. That random sampling is too speculative and that in courts of law issues in controversy between parties are decided on the basis of the evidence before them. Counsel contended that in adopting a method of random sampling of the evidence before court and in total disregard of the most of the evidence adduced in trial, the learned trial judge arrived at a wrong conclusion that the allegation of canvassing for votes at polling stations was not proved.

[36] Regarding the allegation of the illegal practice of turning up at a number of polling stations on the polling day by respondent no.2 with an armed policeman, counsel for the appellant submitted that the appellant did not have to prove that the armed police man who was escorting respondent no.2 was under his direct employment. Counsel contended that the appellant had only to prove that respondent no.2 was escorted or accompanied by an armed policeman and that it happened at the polling station on the polling day. Counsel contended that the affidavit evidence on record outlines many incidences where respondent no.2 violated section 42 of the Parliamentary Elections Act. This included the affidavit evidence of Okello Yana, Okiriyo Magidu, Otim Bosco, Okwalinga Agelasious, Okello Silver and Byakatonda Latif. Counsel contended that the learned trial judge without justification ignored the

evidence of the stated deponents which was erroneous. Counsel relied on Paul Mwiru v Hon. Igeme Nathan Nabeta Samson & 2 Others [2011] UGCA 9 to support this submission.

[37] Counsel for the appellant submitted that it was stated in Musinguzi Garuga James v Amama Mbabazi & Anor [2002] UGHC 6 that one had to show by evidence that he was entitled to have armed security personnel or that he was entitled to move with them even to the polling stations. Counsel contended that respondent no.2 did not show that he was entitled to move with an armed man all over the place on the election day at the polling stations.

[38] Regarding the offence of bribery, counsel for the appellant submitted that evidence of PW10 during cross examination showed that respondent no.2 was personally involved in the bribery of voters on the election day at Omusoi trading centre but his evidence was erroneously ignored. Counsel relied on Nakate Lilian Seguja & Anor v Nabukenya Brenda Election Petition Appeals No. 17 and 21 of 2016 (unreported). Counsel contended that the averments by Mr. Mukaya Alex and Asire Wilson in their affidavits were never controverted or rebutted by respondent no.2. Counsel relied on Prof. Oloka Onyango and Ors v Attorney General [2014] UGCC 14 for the submission that by failing to controvert the evidence of the deponents, respondent no.2 accepted the allegations of bribery against him. Counsel submitted that Mr. Angura Simon Peter (PW16) admitted during cross examination to having been given money by respondent no.2 to bribe voters. Counsel submitted that his evidence was corroborated by Omoding Demiano's testimony. Counsel relied on Habre International Co. Ltd v Kassam and Others [1999] EA 125 to support the submission that the trial court ought to have considered the uncontroverted evidence of PW16.

[39] In reply to ground 5, counsel for respondent no.2 submitted that that the learned trial judge while quoting Aisha Kabanda v Mirembe Lydia Daphne Election Petition Appeal No. 90 of 2016 (unreported) rightly found that a court of law cannot annul an election on mere allegation of voter bribery, non-compliance by the respondent and speculation without cogent evidence to prove the said allegation. Counsel also relied

on Kabuusu v Lwanga & Another [2011] UGHCEP 20 and submitted that the petitioner's witnesses were asked to produce concrete evidence of proof that they were bribed but they did not produce any evidence apart from their assertions. Counsel submitted that the learned trial judge rightly found that the petitioner did not adduce cogent evidence to prove that respondent no.2 canvassed for votes on the election day. Counsel for respondent no.2 further submitted that the learned trial judge rightly found that the security operatives were not found to be under direct employment of respondent no.2 and that the learned trial judge rightly found that respondent no.2 did not author the letter dated 11th January 2021.

[40] Counsel prayed that this court finds respondent no.2 as the duly elected Member of Parliament for Gogonyo County in Pallisa district and prayed that the appeal be dismissed with costs.

[41] In rejoinder, counsel for the appellant reiterated his submissions that the trial court had a duty to fully consider and evaluate in totality the evidence adduced by the parties before it. Counsel contended that there was complete failure by the learned trial judge in discharging this duty especially when she ignored the unrebutted affidavit evidence of a number of appellant's witnesses thus the evidence remained unchallenged. Counsel relied on Tubo Christine Nakwang v Akello Rose Lilly [2017] UGCA 223 where this court believed affidavit evidence that was neither rebutted nor subjected to cross examination.

[42] Other than the wording, the submissions by counsel respondent no.1 are similar to those of respondent no.2. I therefore find it unnecessary to reproduce the submissions here.

Analysis

[43] As a first appellate court, it is our duty to re-evaluate the evidence on record as a whole and arrive at our own conclusion bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses which we do not have. See Rule 30 of the Judicature (Court

of Appeal Rules) Directions S I 13-10, Banco Arabe Espanol v Bank of Uganda [1999] UGSC 1, Rwakashaija Azarious and others v Uganda Revenue Authority [2010] UGSC 8 and Omunyokol v Attorney General [2012] UGSC 4.

Grounds 6 and 7

[44] Counsel contended that all of respondent no.2's affidavits are illegal and should be struck out because they were commissioned by an advocate who was not duly appointed as a commissioner. The appellant submitted that counsel Angura Emmanuel had not gazetted his appointment as a commissioner of oaths at the time he commissioned respondent no.2's affidavits. The appellant first raised this matter in his written submissions in rejoinder. The learned trial judge after concluding her decision in the election petition considered this matter as obiter dictum. She stated:

> **'OBITER DICTUM**
> On the 7th day of September 2021, counsel for the petitioner wrote a letter to the Registrar High Court, Mbale under reference number AA/OK/157/21 where he stated that Advocate Angura Emmanuel who commissioned the 2nd respondent's affidavits purportedly did so without having been gazetted as commissioner for oaths in accordance with section 1(3) of the Commissioner for Oaths (Advocates) Act and as such makes all the 2nd respondent's affidavits that were commissioned by Advocate Angura null and void. Counsel for the petitioner noted in his letter that once an illegality is brought to the knowledge of the Court, it overrides all issues of the court.
>
> This letter has no bearing on the proceeding in the instant case. First, on the 31st of August 2021, I had Counsel for the petitioner's submissions on the preliminary points of law particularly on the issue Counsel Angura Emmanuel's practicing certificate and evidence was adduced to prove that Counsel Angura Emmanuel had a valid practicing certificate that had been issued on the 26th March 2021 and Counsel

commissioned the 2nd respondent's affidavits on the 27th of March 2021. At no single point did counsel for the petitioner bring to court's notice the issue of gazetting.

The trial of this petition was finalized on the 1st day of September 2021 and counsel for the petitioner was supposed to file his submissions on the 7th of September 2021 and that is when he equally filed this letter in question. It would be unfair for me to consider the issue of gazetting at this point without affording the respondents an opportunity to rebut the same.

In the land-mark of **Makula International ltd versus His Eminence Cardinal Nsubuga Civil Appeal No.4 of 1981,** it was held that court cannot sanction an illegality and once an illegality is brought to the attention of court, it overrides all issues of pleadings…" however, in the instant case, Counsel for the petitioner brought this issue to the attention of the Registrar after the trial had been finalized, therefore this principle does not apply.

In conclusion, I shall not comment on the above mentioned letter because Counsel did not raise this issue during the trial of this petition but rather after the petition's trial had been completed. The other side did not have the opportunity to reply.'

[45] The letter dated 7th September 2021 was from the Chief Registrar High Court of Uganda to the respondent no.2's advocates informing them that even though Mr. Angura Emmanuel had been appointed as a Commissioner for Oaths on 14th July 2009, he had not yet gazetted his appointment as of that date as required by section 1(3) of the Commissioners for Oath (Advocates) Act. It is clear from the above extract that the petitioner had the opportunity to raise the matter during hearing but the petitioner did not do so. The petitioner did not exercise due diligence to ensure that the matter is brought to court's attention in time. Election petitions are special proceedings that require utmost diligence since they are time sensitive matters.

[46] I cannot fault the learned trial judge for the decision she reached upon this matter. The petitioner missed the boat. Hearing was closed when he started investigating this aspect. It was not part of the case put forth before the High Court. It was then raised simply by letter. The trial judge rightly decided to ignore to this letter. A re hearing would have had to be sought and permission granted at this stage. No such permission was sought.

[47] Notwithstanding the foregoing it is not clear that it is the duty of the newly appointed Commissioner for Oaths to publish the appointment in the Uganda Gazette. This duty may actually lie upon the Chief Registrar, and when he or she fails to do so, it need not necessarily result in the nullification of documents that have been commissioned by the Commissioner for Oaths.

[48] Secondly seeking to nullify such documents does not directly affect the commissioner but a third party who would not be aware whether or not the Chief Registrar or the Commissioner caused the publication of the commission in the Uganda Gazette. Such third party is not sanctioned by the Commissioner for Oaths Act. Nullification of documents commissioned by such a Commissioner does not advance the administration of the justice in anyway. It has nothing to do with the quality of the affidavit evidence so affected. This attack is not directed to the substance of the evidence before the court but is a side show intended to disqualify evidence without attacking its value.

[49] In my view there ought to be separate proceedings against the Commissioner in relation to whether or not he or she should have commissioned affidavits in light of whether or not the commission that appointed him was published in the Uganda Gazette or not in terms of section 6 of the Commissioner for Oaths (Advocates) Act. Until such proceedings are held and determined I would be loath to nullify affidavits which on their face have been commissioned by a Commissioner for Oaths duly appointed by the appointing authority.

[50] I would not fault the learned trial judge for not taking on the matters raised under grounds 6 and 7.

[51] I would accordingly dismiss grounds 6 and 7 for lack of merit.

Grounds 1 and 2

[52] Grounds 1 and 2 shall be handled together since they are inter-related. RW1 (Kimbowa Erasimus), the Pallisa district Registrar for the Electoral Commission and a returning officer confirmed upon cross examination of existence of discrepancies in the Declaration of Results Form for some of the polling stations. A close examination of the certified copies of Declaration of Results Forms shows that there were excess and unaccounted for votes at the following polling stations that is; 95 at Ogurutap LC court, 1 vote at Osiepai LC1 court, 6 votes at Odukurwo T/C, 10 votes at Kapala market, 9 votes in Kachango primary school, 16 votes at Angodi Katek T.C, 4 votes at Kapala Primary School, and 18 votes at Opeta Primary School. There is also a deficit of 5 votes at St Grace Nursery & Primary School, 2 votes Angurur Primary School Polling station, and 2 deficit votes for votes at Cheele Central PAG.

[53] In cross examination he stated in part,

> 'According to exhibit RE2 (aa) 339 people voted. The total number of ballot papers counted is 447 but on the declaration forms there 446 and this is an error. There are extra 108 votes which cannot be explained.'

[54] It was RW1's explanation that at times the number of males and females counted differs from the total number of ballots counted. That ballots casts are not counted according to the number of male and female voters who voted, the marker was included for purposes of analysing gender performance. He stated that it is the figures in the table that are put into consideration while computing the results. The explanation by RW1 is dubious. All parameters provided should tally and provide a form of quality control. It cannot be that the only purpose of disaggregating votes cast by male and female voters is only for gender purposes. The sum total of male and female voters is the total number of voters and if there is a discrepancy it must be explained.

[55] The learned trial judge took the view that the appellant had failed to prove that this is excess votes were his votes in the following words,

> 'In the instant case, there are clear arithmetic errors but it would be unjust to order for a bye election without proof that the excess votes indeed belonged to the petitioner as opposed to any other candidate. Furthermore, the petitioner has not discharged his duty and burden of proving the electoral malpractices and if any that they were committed by the 2nd respondent or his agents with the 2nd respondent's consent. In such petitions, one candidate will say what favours his case or the other party which is why there is need to prove one's case on balance of probability.'

[56] Section 61 (1) (a) of the Parliamentary Elections Act does not require the petitioner to prove that the 'excess votes belonged to him and not any other candidate.' What the law requires a petitioner to prove is that the malpractice affected the result in a substantial manner. In an election where the margin between the winning candidate and the runner up is only 61 votes and at one polling station 108 excess votes were recorded above the number of voters that turned up and voted at that the polling station, for which the returning officer was unable to offer an explanation, such excess votes must have affected the final result in a substantial manner. The whole result is now gravely in doubt.

[57] Excess votes indicate that people who were not entitled to vote at a particular polling station did vote. Regardless of who they voted for if there are significant in number and the margin of victory is less than the excess votes this is sufficient to conclude that the result of such an election was affected by that malpractice in a substantial manner both on the qualitative and quantitative approaches to determine what amounts to being affected in a substantial manner.

[58] I am satisfied that the learned trial judge erred in imposing a duty on the appellant that the law does not impose and in ignoring the malpractices in question that have been shown to have occurred by the returning officer of the respondent no.1 for the constituency in question.

[59] I would allow grounds 1 and 2 and find that the election in question was not conducted in accordance with the provisions of section 30 and 31 of the Parliamentary Elections Act for allowing unauthorised persons to cast votes at a number of different polling stations.

Grounds 3 and 4

[60] I will take these 2 grounds together as they all about the results for Katukei Fellowship Church polling station and the way learned judge dealt with the evidence in question.

[61] The appellant disputed his results at Katukei Fellowship church polling station. He contended that his results at the polling station were altered by subtracting 100 votes. This allegation was supported by the appellant's supplementary affidavit and the additional affidavits affidavit of Mukula Francis and Emurwon Michael who were also contestants in the election. They also adduced the copies of their original Declaration of Results Form for the polling station which showed that the appellant had scored 171 votes. Respondent no.2 on the other hand adduced a certified copy of the Declaration of Results Form (exhibit RE2 (b)) showing that the appellant had scored 71 votes at the polling station. Both parties alleged that the other had forged their document. The appellant contended that having produced the original documents, it was the best evidence therefore the learned trial judge should not have rejected the same.

[62] Regarding this issue, the learned trial judge stated:

> 'In relation to Katukei Fellowship church polling station where the petitioner claims that he scored 171 votes as opposed to the 71 votes that the 1st respondent's agent announced, the declaration forms are public documents which are kept in the custody of the 1st respondent and are produced upon application by anyone upon being certified by the electoral commission. According to exhibit RE2 (b) being a declaration form for Katukei Fellowship Church, having been certified as the true copy by the Secretary of Electoral Commission on the 28thday of April 2021, it shows that Bantalib Issa Taligola (petitioner) scored 71

(seventy-one) votes while Orone Derrick (2ndrespondent) scored 60 (sixty) votes.

Section 75 of the Evidence Act requires certification of public documents. I am alive to the provisions of **Section 1 of the Evidence Act which makes it inapplicable to evidence adduced by affidavit**. However, it should be noted that what is in contention is a public document which was attached to the 2nd respondent's supplementary affidavit in the answer to the petition. As earlier mentioned, declaration forms are public documents. A party who wishes to rely on them has to have them certified in accordance with Section 75 of the Evidence Act. In the case of **Kakooza John Baptist versus EC & Anthony Yoga Supreme Court Election Petition Appeal No. 11 of 2007**, it was held that without certification, such documents cannot prove any fact which they sought to prove. The position of the law is that documents had to be proved by primary evidence except as provided in Section 64 of the Evidence Act which is to the effect that a party wishing to rely on uncertified documents is required to give notice to the party in possession of the original document.
The 2nd respondent attached a certified copy of the declaration form of Katukei Fellowship polling station which is proof of what each candidate scored at the said polling station and as such by law that is what this court is bound to rely on unless the contrary is proved with authentic evidence.'

[63] In Tamale Julius Konde v Ssenkubuge Isaac & the Electoral Commission Court of Appeal Election Appeal No. 75 of 2016 (unreported), this court while considering the decision of the Supreme Court in Kakooza John Baptist v Electoral Commission and Anor [2008] UGSC 8 stated:

'The Supreme Court had the opportunity to consider the issue of admissibility of uncertified DR Forms in John **Baptist Kakooza v Electoral Commission & Yiga Anthony** (supra). Kanyeheihamba, 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 uncertified DR 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 import of the majority decision on that point was that there are exceptional circumstances under which uncertified DR Forms can be admitted in evidence pursuant to sections 64(1)(a) and 65 of the Evidence Act.

The instant case being an election matter, the above contentions by the appellant raise very serious allegations that go to the root of the election itself as they cast doubt in the vote tallying process. Given the peculiar nature of the appellant's complaint, it would defeat logic to expect the appellant to get certified copies of the impugned DR Forms from the 2nd respondent whom he is accusing of altering the results in collusion with the 1st respondent.

To our minds, the appellant's complaint presented an exceptional circumstance where uncertified DR Forms should have been admitted in evidence for purposes of facilitating inquiry by the court into the alleged alteration of results. That way, the court would have been able to compare the two sets of the DR Forms and would have made a finding on whether there was any alteration or not.

In view of the foregoing, it is our finding that much as section 76 of the Evidence Act provides for proof of public documents by production of the original or certified copies thereof, the trial judge erred in dismissing the petition at a preliminary stage on the ground that it was unsupported.'

[64] In that case, the appellant had attached two sets of DR Forms to his affidavit in support of the petition to support the allegation that the respondents had altered the results. The petitioner had claimed that one set contained the original DR Forms whereas the other set contained certified copies of the DR Forms. Both sets showed different results, while in the DR Forms given to his agents he scored 2,071 and respondent no.1 had scored a total of 1,877 votes, the certified copies obtained from the Electoral Commission showed that the 1st respondent had obtained 2,188 votes against the appellant's 1,873 thus making the

1st respondent the winner of the election. The learned trial judge found that DR Forms being public documents could not be admitted into evidence without certification by the 2nd respondent.

[65] The appellant stated in his supplementary affidavit in support to the petition under paragraph that he had put in a request for the certified copies of the Declaration of Results Forms and that was the end of the matter. The appellant (PW1) upon cross examination stated that he did not include Katukei church polling station in the application for recount because at the time there was no problem with the results. It was until he got the tally sheet that he realised had a different result than what was stated in the DR Form.

[66] It is the case for the appellant that the photocopies of the Declaration of Results Forms adduced by the appellant were given to his agents and 2 other candidates in the same constituency by the returning officer and that the certified copy reflected the results used in tallying and determining the election results of the constituency. There is a huge discrepancy in the 2 documents. The copies of the original DR Forms for the polling station adduced by the appellant and fellow candidates Makula Francis and Emurwon Michael all show that the appellant had obtained 171 votes as opposed to 71 votes shown in the certified copy of the results. The difference of 100 votes could alter the results since respondent no.1 secured his victory by a margin of only 66 votes. This discrepancy could have a substantial effect on the results of the election.

[67] Obviously if the thrust of the appellant's attack was that officers of the respondent no.1 had falsified the results the evidence that points to this falsification is highly relevant and ought not to be shut out. And it would be no surprise that the party alleged to have falsified the results would not own up to doing so and would not actually certify the correct result having fiddled with it already.

[68] I would therefore hold that it was erroneous for the learned trial judge not to consider and evaluate all the evidence that was adduced by the parties including the copies of declaration of Results Forms of Katukei Fellowship church that were adduced by the petitioner and his witnesses in the circumstances of this case.

[69] I have examined both forms and all of them appear authentic on their face. There are documents emanating from the respondent no.1. Both appear to have been signed by the Presiding Officer. On the emergence of these inconsistent forms an evidential burden shifted to the respondent no.1 to explain how they could arise. No explanation was provided. The presiding officer, an employee of the respondent no.1 did not explain how it was possible to issue 2 contradictory documents, bearing his signature, in respect of the same polling station. In the circumstances of this case it was not simply enough to present a certified copy and claim that it represented the correct result.

[70] Section 61(1) of the Parliamentary Elections Act sets out the grounds for setting aside an election. It states:

> 'The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court—
> (a) 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 laid down in those provisions and that the non-compliance and the failure affected the result of the election in a substantial manner;
> (b) that a person other than the one elected won the election; or
> (c) that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval; or
> (d) that the candidate was at the time of his or her election not qualified or was disqualified for election as a member of Parliament.'

[71] The question now is if the non-compliance with the provisions of the Parliamentary Elections Act affected the results of the elections in a substantial manner. In Kizza Besigye v Yoweri Kaguta Museveni (supra), Mulenga JSC (as he then was) explained the meaning of the phrase 'affected the results in a substantial manner' as follows:

> "Issue No. 3 in this petition relates to the application of paragraph (a) of that sub-section {58(6)}. It is centred on the meaning of the phrase "affected the result of the election in a substantial manner". The result of an election may be perceived in two senses. On one hand, it may be perceived in the sense that one candidate has won, and the other contesting candidates have lost the election. In that sense, if it is said that a stated factor affected the result, it implies that the declared winner would not have won but for that stated factor; and vice versa. On the other hand, the result of an election may be perceived in the sense of what votes each candidate obtained. In that sense to say that a given factor affected the result implies that the votes obtained by each candidate would have been different if that factor had not occurred or existed.
>
> In the latter perception unlike in the former, degrees of effect, such as insignificant or substantial, have practical effect. To my understanding therefore, the expression non-compliance affected the result of the election in a substantial manner as used in S. 58 (6) (a) can only mean that the votes candidates obtained would have been different in substantial manner, if it were not for the non-compliance substantially. That means that to succeed the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that the winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt."

[72] I have already found above that non-compliance with the law affected the results of the elections in a substantial manner given the narrow margin of victory by respondent no.2. Respondent no.2 emerged winner of the election with a total score of 6,280 votes while the petitioner came in second place with a total score of 6,214 votes. Respondent no.2 won the election by a margin of only 66 votes. Votes that ought not to have been cast were in excess of 66 votes.

[73] In light of the above, I would allow grounds 3 and 4.

Ground 5

[74] It was counsel for the petitioners' contention that the learned trial judge erred in law and fact when she arrived at the conclusion that the offences of bribery, moving with armed personnel at the polling stations and canvassing votes at polling stations on the polling day had not been proved.

Bribery

[75] The petitioner alleged that the learned trial judge did not take into consideration the evidence, more so, the affidavit evidence that was unchallenged. While dealing with allegation of bribery, the learned trial judge stated:

> 'In the case of **Apolot Stella Isodo versus Amongin Jacquiline Election Petition Appeal No. 60 of 2016 while citing the case of Dr. Kizza Besigye versus Yoweri Kaguta Museveni & the Electoral Commission Presidential Election Petition No. 1 of 2001, the Court of Appeal** stated that the offence of bribery has three ingredients: i) a gift was given to a voter; ii) the gift must begiven by a candidate or their agent and iii) it must be given with the intention of inducing the person to vote a particular candidate.
>
> In the case of **Amoru Paul & EC versus Okello John Baptist, Election Petition Appeals Nos. 39 and 95 of 2016**, it was held that bribery is a grave illegal practice and had to be given serious consideration. The standard of proof is required to be slightly higher than that of ordinary civil cases. It does not, however require proof beyond reasonable doubt as in the cases of a criminal nature. What is required is proof to the satisfaction of the court. It was held inter alia that the court is required to subject each allegation of bribery to thorough and high level scrutiny and to be alive to the fact that in an election petition, in which the prize was political power, witnesses who are invariably partisan might resort to telling lies in their evidence in order to secure judicial victory for their preferred candidate.

In the instant case, PW4 (Momodu Simon) testified that an agent of the 2nd respondent called Bubinga gave him Ugg 230,000 in denominations of UGX 1,000. He further testified that he was not aware about Mr. Bubinga's letter of appointment as the 2ndrespondent's agent. This evidence is corroborated by PW9 (Kowa Joseph), PW13 (Olupot Mubaraka), PW14 (Okiriyo Magidu) who testified that they got money from the 2nd respondent which they distributed to other people to vote for the 2ndrespondent.

According to the Halsbury's Laws of England, 4thEdition, Volume 15, paragraph 695, clear and unequivocal proof is required before a case of bribery would be held to have been established. Mere suspicion is not sufficient and the confession of the person alleged to have been bribed is not conclusive.

In the instant case, save for the petitioner's witnesses stating that they were given money by the 2nd respondent and the 2ndrespondent's agents, there is no cogent evidence to prove the offence of bribery. In the case of **Aisha Kabanda versus Mirembe Lydia Daphne, EC and Returning Officer EPA No. 90 of 2016**, it was held that a court of law cannot annul an election on mere alleged voter bribery and non-compliance by the respondent and speculation without cogent evidence to prove the said allegation. Furthermore, the courts have also stated that during election petitions which are highly partisan and supporters are likely to go to any lengths to establish adverse claims. Therefore, it is important to look for cogent, independent and credible evidence to corroborate claims to satisfy court that the allegations made by the petitioner are true. This position was stated in Kabuusu Moses Wagaba versus Lwanga Timothy Mute kanga & Electoral Commission Election Petition No. 15 of 2011. It is not enough for the petitioner and his witnesses to allege that the 2nd respondent bribed the voters without any concrete proof. The petitioner's witnesses during cross 575examination were asked to produce concrete evidence to prove that they were bribed but they did not produce any evidence apart from their assertions.

Therefore, the offence of bribery has not been proved to the satisfaction of this court.'

[76] From the above extract, it is evident that the learned trial judge was alive to the law regarding the burden and standard of bribery in election petitions. However, it would appear the learned trial judge was under a misapprehension about the affidavit evidence and testimony of petitioner's witnesses. He refers to their evidence as 'their assertions' which did not amount to evidence. Their affidavits and testimony in cross examination was evidence and not simply 'assertions'. What the learned judge ought to have done is to consider it together with the evidence for the respondent and determine which of the two versions was credible. Had the learned judge chose to treat this evidence with caution on the ground that the witnesses were accomplices to the offence of bribery, that would have been understandable. He would then look if there is any other evidence that tended to corroborate such evidence in case of the evidence provided by accomplices to the offence of bribery.

[77] It was Omodu Simon's testimony that during a campaign rally on 7th January 2021 at Kishangani Trading centre in Obutet, respondent no.2 handed to him UGX 230,000 with the instructions to distribute the money amongst the people present. He stated that the respondent requested the people to vote him on the basis of the money and also threatened to imprison the deponent if he did not vote him. He stated that he distributed to the people who were present UGX 1,000 each and he retained UGX 2,000. He also stated that he received some money from the respondent on the voting day and he cast a vote for the respondent. Bwindi Amisi, Icmar Joseph, Kalenzi Otim, Achom Malisa and Oboi Julius and Etuket Sharif confirmed in their affidavits that they received part of the said money (UGX 1000) as an inducement to vote the respondent. Okweredi Joseph also corroborated this evidence. He stated that he did not receive the UGX 1,000 because he feared that he could not change his mind to vote respondent no.2.

[78] The evidence of Odongo Michael on the allegation of bribery was hearsay. He stated that he was informed by Mr. Otim Bosco that the respondent had visited Cheele PAG church polling station and bribed voters to vote him with a sum of UGX 260,000. Olupot Mubaraka

stated in his affidavit that respondent no.2 while on his way to Kishangani trading centre passed by Kisenyi Borehole site where they were repairing the borehole, he addressed them and begged them to vote him. The respondent thereafter handed to him UGX 50,000 to distribute amongst themselves. He stated that he gave to each of the workers UGX 5000 and to the site chairman UGX 10,000.

[79] Olupot Emmanuel stated in his affidavit that during the campaign period, on a day that he does not remember, the appellant came to Akum Trading Centre at 4:00 pm for a rally. After addressing the people in the campaign rally, he handed UGX 195,000 to Mr. Kowa a resident of Akumi village to distribute to the people around so that they could vote for him. He stated that he received UGX 1,000 from the said Kowa. That it was therefore misleading for respondent no.2 to depone in his affidavit that he did not give out money while in Akumi trading centre. Kowa Joseph confirmed Olupot's evidence in his additional affidavit and upon cross examination.

[80] Respondent no.2 denied the allegations of bribery by Anguria Simon Peter, Olupot Mubaraka, Olupot Emmanuel and Kowa Joseph in his additional affidavit in reply.

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

> 'A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy two currency points or imprisonment not exceeding three years or both.'

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

'I accept the submission of Mr. Bitangaro that the petitioner must prove the following ingredients to establish the illegal practice of offering gifts:

- That a gift was given to a voter
- That the gift was given by a candidate or his agent
- That the gift was given to induce the person to vote for a candidate.'

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

'As earlier stated, the burden of proof in election petitions lies on the petitioner and the standard of proof is to the satisfaction of court. In **Muyanja Simon Lutaaya Vs Keneth Lubogo** and EC (supra) it was held that;

"where allegations of bribery are made in an election petition, it is essential for the petitioner to prove to the satisfaction of court all elements of the illegal practice of bribery on the balance of probabilities. The commission of bribery, once proved to the satisfaction of court, is sufficient in itself to set aside the election of a candidate as a Member of Parliament.'

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

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

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

'The definition of a registered voter is clear. Having national identity card is not sufficient on its own to

> qualify a person as a registered voter. A registered voter must have registered as such and his or her name must appear clearly in the national voters' register.'

[86] I note that the appellant did not produce in the court below the voters' register for the constituency in question. As it has been held above in the authorities I have referred to a voters' register is the proof that would put the matter beyond doubt that a person alleged to have been bribed is a voter.

[87] Considering the necessary elements of the offence of bribery and the evidence above, I am of the view that the appellant failed to prove that the persons that were offered and or accepted or refused the bribes, were voters as he did not produce the Voters' Register for this constituency.

[88] I would accordingly reject this portion of ground 5.

The illegal practice of canvassing for votes and moving with armed personnel

[89] Section 81(1) (a) of the Parliamentary Elections Act prohibits canvassing for votes at the polling station on the polling day. It states:

> '(1) Without derogation from any other provision of this Act or any other enactment, a person shall not, within one hundred metres of any polling station on any polling day-
> (a) canvass for votes;'

[90] Section 42 (1) of the Parliamentary Elections Act prohibits arms and ammunition at polling stations. It states:

> 'A person shall not arm himself or herself during any part of polling day, with any arms or ammunition or approach within one kilometre of a polling station, with arms and ammunition unless called upon to do so by lawful authority or where he or she is ordinarily entitled by virtue of his or her office to carry arms.'

[91] Under the law, one only carries arms and ammunition within a polling station if permitted by lawful authority or entitled to do so by virtue of the office the person is holding.

[92] Okweredi Joseph stated in his affidavit that respondent no.2 came in the company of an armed policeman to Manga LC1 court polling station and asked the voters some of whom who were already in the line to vote for him. He stated that he followed the respondent at Ogurutap polling station where he did the same thing. Twaha Kisu, who was the appellant's campaign strategist and in charge of monitoring all the polling stations with Obutet sub count also stated in his supplementary affidavit that on the polling day, respondent no.2 came at Ogurutap LC1 court polling station accompanied by an armed policeman. The appellant held a mini campaign rally specifically addressing the crowd that had lined up to vote. He maintained the allegation upon cross examination and stated that he raised a verbal complaint against the conduct of the appellant.

[93] Okipi Isaac stated that he found respondent no.2 at Aitaritoi -Oboborio polling station in the company of an armed policeman. That the appellant was holding a rally and addressing a huge gathering at the said polling station during voting. Okello Yona stated that on the polling day at about 10:00 am while moving along Gogonyo-Agule main road at Cheele, he saw respondent no.1 go to Cheele PAG church polling station in the company of an armed policeman. He maintained the statement upon cross examination. He stated that he then saw the respondent come out of his vehicle and went straight to the people queuing to vote and the respondent openly started canvassing for votes for about five minutes and then he started giving out money to voters.

[94] Okiriyo Magidu testified that while he had joined the voters' line at Ogurutap LC Court polling station, respondent no.2 arrived with an armed policeman he was constantly referring to as *afande*. Respondent no.2 greeted them all and openly requested the voters standing in the line to vote for him. The respondent had a brief discussion with the presiding officer and left the polling station. Thereafter, the officer told them that it is incumbent for all of them to ensure that the respondent

gets the most votes for that polling station because he had arranged lunch for everyone. He also stated that he was recruited on that day by the said presiding officer to mobilise people to vote for respondent no.2. He mobilised 25 people in total to vote for the respondent. He was given money to pay the people he had mobilised. He paid each person UGX 2,000 while for him he received UGX 5,000.

[95] The evidence of Okello John, the campaign agent for the petitioner in Apopong sub county was hearsay therefore inadmissible. He stated that when he went to Redeemer nursery and primary school polling station, a one Tukei Martin disclosed to him that Ejulun Luke, the Election Commission supervisor for Apopong had been openly canvassing votes for respondent no.2 at the polling station. Odongo Michael who was the chief campaign coordinator for Gogonyo county stated in his affidavit that while at St Grace Nursery and primary school polling station, at about 2:00 pm, he saw the Electoral Commission officer in charge of Gogonyo sub-county addressing a huge gathering at the polling station on the polling day and telling them to vote for respondent no.2. When the officer realised that the deponent was present, he took off on a motorcycle.

[96] The appellant did not prove that the said Electoral commission officer was working on behalf of respondent no.2. Therefore, I cannot impute the acts of the officer on the respondent.

[97] Okoboi Simon stated that the contents in the affidavits of respondent no.2 and Kamu Antony are false because when he went to cast his vote at Manga LC court polling station at around 9:00 pm, he saw respondent no.2 requesting people to vote for him while addressing a gathering that had queued to vote. He stated that a one Futumu who was a presiding officer allowed the respondent to address the people.

[98] Respondent no.2 generally denied the above allegations against him in his affidavit in reply and supporting affidavits. From the evidence adduced by the petitioner, I am satisfied that respondent no.1 illegally moved with an armed policeman and canvassed for votes at Manga LC1 court polling station, Ogurutap polling station and Cheele PAG church polling station.

[99] I would therefore answer this portion of ground 5 in the affirmative.

[100] I have found that the respondent no.2 committed the illegal practice of moving with an armed police officer within the precincts of several polling stations on polling day and canvassed for votes at the same time in those polling stations. This illegal act is sufficient justification to annul the election in question.

[101] I would allow this appeal in part with 3/4th costs here and costs below.

[102] I would set aside the election of Orone Derrick as Member of Parliament for Gogonyo County, Pallisa District and I would direct that a bye-election be held for the said constituency.

Decision

[103] As Kibeedi and Mugenyi, JJA, agree, this appeal is allowed in part with the following orders:

(a) The respondents shall jointly and severally pay the appellant 3/4th of the costs on appeal, and costs in the court below.

(b) The judgment and orders of the High Court are set aside.

(c) The election of Orone Derrick, respondent no.2, as a member of Parliament for Gogonyo county, Pallisa District is nullified.

(d) The Electoral Commission is directed to hold a bye election for Gogonyo county, Pallisa District in accordance with the law.

Signed, dated and delivered at Kampala this 6th day of July 2022.

Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Kibeedi & Mugenyi JJA]

ELECTION PETITION APPEAL NO. 0048 OF 2021

BETWEEN

Bantalib Issa Taligola ----------Appellant

AND

1. Electoral Commission]
2. Orone Derrick] ---------- Respondents

JUDGEMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the advantage of reading in draft the Judgment prepared by my Lord, Fredrick Egonda-Ntende, JA. I concur with the findings and conclusions made, together with the Orders he has proposed. I have nothing useful to add.

Dated at Kampala this 6th day of June 2022

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: EGONDA-NTENDE, KIBEEDI AND MUGENYI, JJA

ELECTION PETITION APPEAL NO. 48 OF 2021

(Arising from Election Petition No. 10 of 2021)

BANTALIB ISSA TALIGOLA ..... APPELLANT

VERSUS

1. **ELECTORAL COMMISSION**
2. **ORONE DERRICK ..... RESPONDENTS**

(Appeal from the Judgment of the High Court of Uganda holden at Mbale (Busingye Byaruhanga, J) in Election Petition No. 10 of 2021)

JUDGMENT OF MONICA K. MUGENYI, JA

I have had the benefit of reading in draft the lead Judgment of my brother, Hon. Justice Fredrick Egonda-Ntende in this Appeal. I agree with the decision arrived at, the reasons therefor and the orders given, and have nothing useful to add.

Dated and delivered at Kampala this 6th day of June, 2021.

Monica K. Mugenyi

Justice of Appeal