

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**ELECTION PETITION APPEAL NO. 51 OF 2021**

*(Arising from Mbarara High Court Election Petition No. 005 of 2021  
before Moses Kawumi Kazibwe J.)*

**MPEIRWE MOSES KASHAIJA ::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**1. STEPHEN KANGWAGYE RWAKANUMA }  
2. ELECTORAL COMMISSION }  
3. THE RETURNING OFFICER } RESPONDENTS  
ISINGIRO ELECTORAL DISTRICT }**

**CORAM: HON. JUSTICE GEOFFREY KIRYABWIRE, JA  
HON. JUSTICE STEPHEN MUSOTA, JA  
HON. JUSTICE GASHIRABAKE CHRISTOPHER, JA**

**JUDGMENT OF COURT**

**Background**

The 1<sup>st</sup> Respondent and the appellant contested for the position of Member of Parliament for Bukanga County Constituency in an election organized by the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> respondent was the Returning Officer. The 1<sup>st</sup> Respondent was returned winner with 18,406 votes. The appellant was aggrieved by the above decision and filed Election Petition No. 5 of 2021 at the High Court Mbarara

seeking for a declaration that the first Respondent was not validly elected and that the said election be nullified. The High Court dismissed the Petition and declared the 1<sup>st</sup> Respondent the validly elected Member of Parliament for Bukanga County Constituency.

5 The Appellant, being dissatisfied with the decision of the High Court, filed this appeal on the following grounds;

1. The learned trial Judge erred in law when he found that the 1<sup>st</sup> Respondent herein was properly nominated.
2. The learned trial Judge erred in law and fact when he found  
10 that the Appellant herein waived his right to challenge the 1<sup>st</sup> Respondent's nomination.
3. The learned trial Judge erred in law and fact when he held that the 1<sup>st</sup> Respondent had not disowned his official agent, Bagumya Freddie Rwakaizi thereby wrongly pronouncing  
15 himself on the mandatory nomination requirements on the part of a person seeking nomination.
4. The learned trial Judge erred in law and fact when he found that the Appellant's visual-audio evidence and its attendant transcribed and translated version were inadmissible thereby  
20 reaching a wrong conclusion which occasioned a miscarriage of justice.
5. The learned trial Judge erred in law and fact when he held that the content of the compact discs relied upon by the Appellant herein remained unknown to court notwithstanding the  
25 transcribed and translated version thereof.

6. The learned trial Judge erred in law and fact when he faulted the Appellant herein for not availing Dr. Ssentanda for cross-examination.
- 5 7. The learned trial Judge erred in law and fact when he whimsically feigned ignorance of annexure LTS to the affidavit of the Appellant herein thereby occasioning a miscarriage of justice.
- 10 8. The learned trial Judge erred in law and fact when he dismissed the evidence of pre-ticked ballot papers, annexure FS to the affidavit of Assimwe Precious Victor and thereby occasioned a miscarriage of justice.
- 15 9. The learned trial Judge erred in law and fact when he found annexures TRS and EVR to the affidavit of the Appellant herein inadmissible.
- 20 10. The learned trial Judge erred in law and fact when he sustained on record, considered and believed defective and offensive affidavits of the Respondents.
- 25 11. The learned trial Judge erred in law and fact when he determined the Petition basing on the 1<sup>st</sup> Respondent's additional affidavit in sur-rejoinder which affidavit contained averments strange to the 1<sup>st</sup> Respondent's answer to the Petition.
12. The learned trial Judge erred in law and fact when he held that the Appellant herein did not produce evidence of closure of polling before time.

13. The learned trial Judge erred in law and fact when he believed the materially contradictory evidence of the 1<sup>st</sup> Respondent and Wilson Tumuhairwe and thereby occasioned a miscarriage of justice.
- 5 14. The learned trial Judge erred in law and fact when he decided the Petition on the basis of witnesses' strange to the record thereby occasioning a miscarriage of justice.
- 10 15. The learned trial Judge erred in law and fact when he decided the Petition on the basis of evidence extraneous to the record thereby occasioning a miscarriage of justice.
16. The learned trial Judge erred in law and fact when he misdirected himself on the mandatory obligation of the 2<sup>nd</sup> Respondent to provide seals and serial numbers of seals to the Appellant herein thereby occasioning a miscarriage of justice.
- 15 17. The learned trial Judge erred in law and fact when he dismissed the evidence of the Appellant herein regarding the 1<sup>st</sup> Respondent approaching Nyamarungi Primary School polling station and Kyabahezi Primary School polling station armed with a pistol thereby occasioning a miscarriage of justice.
- 20 18. The learned trial Judge erred in law and fact when he believed the materially discredited evidence of Aine Godfrey Kaguta Sodo thereby occasion a miscarriage of justice.
- 25 19. The learned trial Judge erred in law and fact when he handed down his decision on the electoral offence of defacing campaign posters basing on the substantiality test thereby occasion a miscarriage of justice.

20. The learned trial Judge erred in law and fact when he held that the Appellant herein did not prove defamation thereby occasioning a miscarriage of justice.
- 5 21. The learned trial Judge erred in law and fact when he held that the Appellant herein had a duty to prove that he was not a thief and a munyarwanda, infact and thereby reached a wrong conclusion which occasioned a miscarriage of justice.
- 10 22. The learned trial Judge erred in law and fact when he dismissed the evidence of the Appellant herein regarding giving donations at Kihanda playground and Bugango Catholic Church during the campaign period.
23. The learned trial Judge erred in law and fact when he held that the 1<sup>st</sup> Respondent herein did not bribe Kakama Godfrey Mugume with a sum of 200,000/=.
- 15 24. The learned trial Judge erred in law and fact when he misapplied the test and standard of proving the electoral offence of bribery to the electoral offence of giving a donation during the campaign period thereby reaching a decision which occasioned a miscarriage of justice.
- 20 25. The learned trial Judge erred in law and fact when he dismissed the evidence of the Appellant herein on 100% voter turn up and the dead people voting on polling day thereby reaching a decision which occasioned a miscarriage of justice.
- 25 26. The learned trial Judge erred in law and fact when he dismissed the evidence of the Appellant herein on the inclusion

of pseudo names into the voters register thereby handing down a decision which occasioned a miscarriage of justice.

27. The learned trial Judge erred in law and fact when he held that the notice to produce documents for inspection made by the Appellant herein was not served on the 2<sup>nd</sup> Respondent thereby occasioning a miscarriage of justice.

28. The learned trial Judge erred in law and fact when he found against the Appellant herein on disruption of his campaign meeting at Bugango town.

29. The learned trial Judge erred in law and fact when he held that the 1<sup>st</sup> Respondent did not canvass for votes on polling day thereby reaching a decision which occasioned a miscarriage of justice.

30. The learned trial Judge misdirected himself on the law when he held that witnesses of the Appellant herein who were his polling agents on polling day were required to prove that they are registered voters and thereby handed down a decision which occasioned a miscarriage of justice.

31. The learned trial Judge misdirected himself on his duty to subject the petition to an inquiry and thereby failed to appreciate the uncontroverted evidence of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' election officials who presented evidence impeaching the quality of the elections at their respective polling stations thereby handing down a decision which occasioned a miscarriage of justice.

32. The learned trial Judge erred in law and fact when he found that the 1<sup>st</sup> Respondent did not serve alcohol to voters on polling day thereby occasioning a travesty of justice in his decision.

5 33. The learned trial Judge erred in law and fact when he failed in his duty to evaluate and scrutinize the evidence before him thereby reaching a wrong decision which occasioned a miscarriage of justice.

10 34. The learned trial Judge erred in law and fact when he awarded costs to the respondents on a strange *pro-rata*.

### **Representation**

At the hearing of the appeal, Mr. Brian Tinyefunza appeared for the Appellant while Mr. Kuteesa Ronald appeared for the 1<sup>st</sup> Respondent and Eric Sabiiti appeared for the 2<sup>nd</sup> Respondent.

### **Appellant's submissions**

15 Counsel for the Appellant argued grounds 1, 2 and 3 concurrently and submitted that Section 11 of the Parliamentary Elections Act (hereinafter referred to as "PEA") lays out the requirements for nomination and that the name of the person who proposed the 1<sup>st</sup>  
20 Respondent for nomination does not appear on the voter's register for Bukanga County Constituency where the 1<sup>st</sup> Respondent was seeking nomination. That this contravened Section 11 (1) (c) of the PEA so far as the said Kagumire P. was not a registered voter in Bukanga County Constituency. Counsel argued that the 1<sup>st</sup> Respondent's nomination  
25 paper ought to have been invalidated. In addition, that the

nomination paper had the name Kyarimpa William, a registered voter in Bukanga North Constituency, which is different from Bukanga County Constituency. The trial Judge ought to have found that the addition by the 1<sup>st</sup> Respondent of an extra page seeking to increase the number of signatures from 10 to 18 was a fraudulent play. That the 1<sup>st</sup> Respondent fell short of the requisite 10 signatures before nomination. That whereas the 3<sup>rd</sup> Respondent insisted that one Kagumire P. and Kyarimpa William were registered to vote, no such evidence was proved. There were glaring irregularities surrounding the 1<sup>st</sup> Respondent's nomination which should have been addressed by the trial judge.

Counsel submitted on grounds 4, 5 and 6 that the point of contestation in **Amongin Jane Francis Okili Vs Lucy Akello & another EP No. 0001 of 2014** is different from the present case because of the time and place in terms of when and where the footages were captured. The 1<sup>st</sup> Respondent is among the persons named in the video footages along with Bangumya Freddie and Toyota Michael and none of them claimed that the content of the video footages was adulterated. That the learned trial Judge's finding that the content of the compact discs was unknown to court was misconceived. The discs were introduced through the evidence of Ndibarema in his affidavit. Dr. Sentanda was instructive in his affidavit evidence about how the discs were transcribed and translated.



Counsel submitted further that the learned trial Judge misdirected himself on the ingredients of the electoral offence of giving a donation during campaign period. That the 1<sup>st</sup> Respondent, along with Toyota Michael Nuwagira Kaguta donated money and a cow at Kihanda Play ground on January 2<sup>nd</sup> 2021 in contravention of Section 68(7) and (8) of the Parliamentary Elections Act. The affidavit evidence of voter bribery at Kihanda play ground was never impeached. Munanura Brighton, a team Captain of Kihanda II football team testified that he personally received a cash donation of Shs. 3.000.000/= and Shs. 1.000.000/= from the 1<sup>st</sup> Respondent and Toyota respectively.

Counsel argued that the tournament at Kihanda playground conveniently fell within the campaign period to afford an opportunity to the 1<sup>st</sup> Respondent to award trophies and cash prizes in contravention of Section 68 (7) and (8) of the Parliamentary Elections Act. Counsel contended that this section does not envisage a situation where a donation ought to be proved to have been made to a voter but rather that a candidate engaged in donations during the period of campaigns.

Counsel argued that evidence was led by Mirembe Alex, a polling official, that at his polling station, gun wielding men commanded by one Sodo Aine Kaguta stormed the polling station, put him on handcuffs and took 9 unused ballot paper books accounting for 450 ballot papers. The evidence of Sodo was contradictory as he stated that he was well conversant with the English language yet in his

affidavit, he claimed it was translated to Runyankore after which he proceeded to sign the same.

Counsel submitted further that the 1<sup>st</sup> Respondent and his agent Bangumya Freddie Rwakaizi defaced the campaign posters of the appellant at Nyamarungi round about on January 7<sup>th</sup> 2021. That the 5 testimonies of the Appellant's witnesses squarely placed the 1<sup>st</sup> Respondent's agent at the scene of the crime. In addition, that the 1<sup>st</sup> Respondent made defamatory statements when he referred to the Appellant as a tractor thief and a candidate suffering from mental 10 illness.

Counsel argued that there were a number of glaring instances of election fraud at Mbaare P/S polling station on the number of voters who purportedly voted *vis-a-vis* the registered voters on the register. At Mbaare P/S polling station, there are 677 registered voters yet the 15 DR form showed a total of 700 voters at the polling station. Counsel submitted that the learned trial Judge ought to have found that the petitioner had discharged the burden of proof against the Respondents.

### **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's submissions**

20 Counsel submitted that the Appellant's grounds of appeal were not in compliance with Rule 86 of the Judicature (Court of Appeal Rules) Directions and referred to this court's decision in **M/s Kampala Associated Advocates Vs Al Shafi Investment Group LLC Civil Appeal No. 284 of 2020**. In that case, it was held that: - "... *it is the* 25 *duty of counsel to assist the Judge by simplification and concentration*

*and not to advance a multitude of ingenious arguments in hope that out of the 10 bad points, the Judge will be capable of fashioning a winner....”*

Counsel argued that the 35 grounds of appeal are many, repetitive  
5 and argumentative. That the entire Memorandum of Appeal and its  
35 grounds of appeal is littered with grounds on each and every  
statement made by the Judge even when it had no bearing on the  
outcome of the matter. Counsel prayed that the grounds that offend  
Rule 86(1) of the rules of this court be struck out.

10 While arguing grounds 1, 2 and 3, counsel submitted that the  
nomination of the 1<sup>st</sup> Respondent was seconded by a total of 20  
persons as evidenced by annexure SKI. That even though the  
signatures of Kyarimpa William and Kagumire P. were found not to  
be valid for not being registered voters, the minimum of 10 voters  
15 would still be met by the 1<sup>st</sup> Respondent. Counsel argued that the  
requirement of 10 nominees is a minimum requirement and not the  
fixed and maximum number as contended by the Appellant. That the  
contention of the Appellant regarding the numbering of the pages of  
the nomination form of the first appellant is inconsequential to the  
20 content submitted during the nomination. Further, that there was no  
evidence adduced by the Appellant to prove that the nomination  
forms adduced in court is not what was submitted to the 2<sup>nd</sup>  
Respondent at nomination and on basis of which the 1st Appellant  
was duly nominated.

Counsel submitted that the Appellant's contestation of the 1<sup>st</sup> Respondent's nomination was an afterthought and considering that the Appellant failed to raise these pre polling matters, he was considered to have waived his right to object. Counsel relied on the  
5 decision in **Kasirye Zimula Fred Vs Bazigatirawo Kibuuka Amooti and Electoral Commission Election Petition Appeal No. 001 of 2018** in which this court held that failure to raise a complaint at nomination as provided under Section 15 of the Parliamentary Elections Act 2005 meant that he was estopped from raising it at the  
10 petition stage.

Counsel submitted that the rules governing the admission of the electronic evidence are stipulated in Sections 7 and 8 of the Electronic Transactions Act, 2011 that the foundation of the evidence must be led to ascertain the manner in which the basic data  
15 contained in the medium of relaying the evidence was entered and the method of storing the data. The Appellant should have produced the affidavits of the people who received and transferred the evidence from one electronic medium to another. In absence of the chain of evidence being established to support the electronic evidence, the  
20 evidence contained was inadmissible. To ascertain if the audio visual evidence is what is transcribed, the copies must be viewed before the court to show that the transcription is a reflection of the audio-visual evidence created.

Counsel relied on the decision in **Mashate Magomu Peter Vs  
25 Electoral Commission and another Court of Appeal Election**

**Petition Appeal No. 47 of 2016** in which this court held that DR forms are public documents and therefore a party wishing to rely on them ought to have them certified as per Section 75 and 76 of the Evidence Act. That the learned trial Judge was justified in finding  
5 that annexures EVR and TRF were not admissible in evidence for lack of certification. Counsel argued further that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents produced the documents they believe had been requested for by the notice to produce and the Appellant was satisfied.

10 Counsel submitted further that to prove the alleged illegal practice of giving donations, the Appellant is required to furnish some concrete evidence that was independent. The evidence must identify the recipients of the donations, show that the donation was given by the  
15 1<sup>st</sup> Respondent or his agent and also that the recipients were registered voters. Illicit donation operates like a bribe and court has applied the same standard of proof for giving donations in a similar way to bribery. The affidavits adduced to evidence the alleged illegal practice of giving donations were those of the Appellant's supporters and no independent evidence was adduced at all.

20 Counsel argued that the evidence of the 1<sup>st</sup> Respondent was to the effect that the alleged football tournaments at Kihanda Playground were not an event of the 1<sup>st</sup> Respondent. Toyota Kaguta was very clear when he stated that he had always organized football tournaments in the villages and the alleged event was part of the 9-year continuous  
25 process. Mr. Toyota was not an agent of the 1<sup>st</sup> Respondent and thus

could not have handed over the donations on behalf of the 1<sup>st</sup> Respondent.

Counsel submitted that there was no evidence adduced by the Appellant to prove that closure of Mbaare Primary School polling station was before the requisite closure time of 4:00pm. That the error by the presiding officer of indicating 10 instead of 4 was in the local language translation.

Counsel submitted that the provision of seals and serial numbers of ballots and seals of ballot boxes is governed by Section 28A of the **Parliamentary Elections Act 2005** (as amended) and such serial numbers and seals are provided as soon as practicable after dispatch of election materials. The provision of the serial numbers and seals by the 2<sup>nd</sup> Respondent was arranged during the dispatch.

#### **Appellant's submissions in rejoinder**

Counsel submitted that the grounds of appeal were set forth concisely and under distinct heads without argument or narrative and clearly state the grounds of objection to the decision being appealed against. Counsel relied on the decision in **Makula International vs His Eminence Cardinal Nsubuga & another CACA No. 4 of 1981 (1982) HCB 11**, while arguing that the pre-nomination irregularities can be brought to court at the High Court, and submitted that an illegality can be brought to court's attention at any stage of the trial.

### **Court's consideration of the Appeal.**

This being, *inter alia* a first and last appellate Court in election Appeals, we are alive to Courts duty as such. The cases of **Kifamunte Henry v Uganda Supreme Court Criminal Appeal No. 10 of 1997** and **Pandya v. R [1957] EA 336**, and **Bogere Moses and Another v. Uganda, Supreme Court Criminal Appeal No. 1 of 1997** held that a first appellate court has a duty to review/reappraise the evidence and consider all the materials which were before the trial Court and come to its own conclusion regarding the facts, taking into account, however, the fact that it neither saw nor heard the witnesses testify and that in this regard, it should be guided by the observations of the trial court on the demeanour of witnesses.

The duty of this court is set out in **Rule 30** of the **Judicature (Court of Appeal Rules) Directions** which provides:

15        ***“30. Power to reappraise evidence and to take additional evidence***

***(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—***

20        ***(a) Reappraise the evidence and draw inferences of fact; and***

***(b)...”***

The appellate court must make up its mind after carefully weighing and considering the evidence that was adduced at trial. **See** Mugema

**Peter Vs Mudiabole Abedi Nasser Election Petition Appeal  
No.30/2011**

The burden of proof lies on the Petitioner (**Presidential Petition No. 1/2001 Dr. Kiiza Besigye V. Y. K. Museveni & Anor, Section 61**  
5 **of the Parliamentary Elections Act**) and the standard of proof in Election Petitions is on the balance of Probabilities.

Bearing the above in mind we proceed to consider the issues for determination before this court.

The appellant raised 35 grounds of appeal in the Memorandum of  
10 Appeal. The respondents jointly filed their submissions and raised a preliminary point of law on the validity of the Appellant's grounds of appeal under Rule 86 of the Judicature Court of Appeal Rules Directions. The Respondents argued that the 35 grounds of appeal are many, repetitive, argumentative and largely submissions.

15 **Rule 86 of the Judicature (Court of Appeal Rules) Directions:**

*86. Contents of memorandum of appeal.*

*(1) A memorandum of appeal shall set forth concisely and under  
distinct heads, without argument or narrative, the grounds of  
objection to the decision appealed against, specifying the points  
20 which are alleged to have been wrongfully decided, and the  
nature of the order which it is proposed to ask the court to make.*

In **National Insurance Corporation Vs Pelican Services CACA No. 5 of 2003**, this court while interpreting the cited rule 86, relied on the Supreme Court decision in **Sietco Vs Noble Builders (U) Ltd**



**SCCA No. 5 of 1995** and held that a ground of appeal must challenge a holding, a *ratio decidendi*, and must specify the points which were wrongly decided. This court, in **M/s Kampala Associated Advocates Vs Al Shafi Investment Group LLC Civil Appeal No. 284 of 2020**,  
5 stated that;

*“I am reminded in this regard of the speech of Lord Templeman in **Ashmore V Corporation of Lloyds [1992] ALL ER 486**; he stated: -*

*It is the duty of counsel to assist the judge by simplification and  
10 concentration and not to advance a multitude of indigenous arguments in the hope that out of the 10 bad points Judge will be capable of fashioning a winner.”*

The grounds contained in the memorandum of appeal are indeed repetitive and argumentative and should *prima facie*, fall foul of Rule  
15 86(1) of the rules of this court. This being an election petition, we shall exercise discretion and take the exceptional position not to strike out the appeal but raise concise issues to resolve the appellant’s appeal. We shall use our powers under Rule 2 (2) of this Court and in the interests of justice to cluster the grounds and  
20 accordingly raise issues as follows.

1. Whether the 1<sup>st</sup> Respondent was validly nominated as Member of Parliament for Bukanga County Constituency as required by law?
2. Whether the audio-visual evidence and the transcribed version  
25 produced by the Appellant was inadmissible?

3. Whether the affidavits of the Respondents were defective?
4. Whether there were electoral mal-practices in the election of Member of Parliament for Bukanga County Constituency?

We trust that this set of issues clearly show the fallacy of drawing up a multiplicity of issues instead of concentrating on a few core areas of disagreement with the decision being appealed from.

**Whether the 1st respondent was validly nominated as Member of Parliament for Bukanga County Constituency as required by law?**

The appellant's contention is that the 1<sup>st</sup> Respondent's nomination was invalid as 2 of the persons who seconded him were not registered voters of Bukanga County Constituency.

**Section 15** of the **Parliamentary Elections Act** provides that;

*15. Inspection of nomination papers and lodging of complaints.*

*Any voter registered on the voters' roll of a constituency may-*

*(a) During office hours on the nomination day at the office of the returning officer, inspect any nomination paper filed with the returning officer in respect of the constituency;*

*(b) After the closure of the nomination time and during such period as maybe prescribed, inspect any nomination paper in respect of the constituency at such time and subject to such conditions as maybe prescribed and*

*lodge any complaint with the returning officer or the commission in relation to any nomination in respect of the constituency*

*challenging the qualification of any person nominated. (Emphasis added)*

In the case of **Kasirye Zzimula Fred v. Bazigatirawo Kibuuka Francis Amooti and Electoral Commission, Election Petition Appeal No. 01 of 2018**, this court held that; issues of nomination should be lodged with and resolved by the Electoral Commission before the election and where the petitioner does not challenge the nomination, he or she is deemed to have waived his or her right and is therefore estopped from challenging the nomination after the election. Likewise, in **Akol Hellen Odeke v. Okedel Umar, Election Petition Appeal No. 6 of 2020**, it was held that; the High Court does not have jurisdiction to hear and determine disputes arising before and during the polling day, (including nomination), as a court of first instance.

Therefore, a Petitioner in an election Petition who did not bring complaints within the stipulated time under Section 15 of the Electoral Commission Act is estopped from doing so after the election because he is deemed to have waived his/her rights to complain. We therefore find no reason to fault the learned trial Judges finding that the Petitioner/Appellant waived his right of challenging the nomination of the 1<sup>st</sup> Respondent after an election. There is an elaborate procedure provided for under the Electoral Commission Act on the power of the commission to resolve complaints and where to appeal if not satisfied. Under S. 15 (2) of the Act, an appeal lies to the

High Court against the decision of the Commission, and under S. 15 (4), the decision of the High Court is final.

Having found as we have that the Appellant was estopped from raising matters of nomination, we find no reason to determine whether the persons that seconded the 1<sup>st</sup> Respondent were indeed registered voters of Bukanga County Constituency or not.

**Whether the audio-visual evidence and the transcribed version produced by the appellant was inadmissible.**

At the trial court, the learned trial Judge found that the Appellant's audio-visual evidence and its attendant transcribed and translated version were inadmissible and that the contents therein remained unknown to court. The trial Judge also faulted the appellant for not availing Dr. Ssentanda for cross-examination.

At the trial court, the Petitioner (now Appellant) sought to rely on audio visual evidence in form of compact discs to support claims of ballot stuffing at Obugaaga and bribery at Kihanda playground polling stations. This evidence was not viewed in court but a transcription and translation were done by a person who was never produced in court.

**Section 7** of the **Electronic Transactions Act, 2011** provides that;

*7. Authenticity of data message*

*(1) Where a law requires information to be presented or retained in its original form, the requirement is fulfilled by a data message if—*

(a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and

5 (b) that information is capable of being displayed or produced to the person to whom it is to be presented.

(2) For the purposes of subsection 1(a), the authenticity of a data message shall be assessed—

10 (a) by considering whether the information has remained complete and unaltered, except for the addition of an endorsement and any change which arises in the normal course of communication, storage or display;

(b) in light of the purpose for which the information was generated; and

15 (c) having regard to all other relevant circumstances. (Emphasis added)

20 In the instant case, the electronic evidence was by way of phone recordings done by Ndibalema Patrick (PW2) and Mugisha Enoth (PW3) who are supporters of the appellant. PW2 claimed to have transferred the data to a compact disc while the appellant also claimed to have transferred the data himself in Wandegeya and thereafter took the same to Makerere University for transcription and translation. The transcription and translation was however done by a 3<sup>rd</sup> party who was never produced in court. The translation from

Makerere University was from the local language to English and was attached to the affidavit of Dr. Ssentanda.

It is our considered view that the absence of the person who transferred the data from the phones to compact discs and the one who transcribed the data amounts to a break in the chain of handling the electronic evidence. In addition, the said Dr. Ssentanda, who translated the data was never produced in court except for his affidavit. Whereas evidence in election petitions is by way of affidavits, such deponents ought to be produced in court for cross-examination on the contents of their affidavits. It is therefore imperative for those wishing to rely on electronic evidence to follow this strict code to ensure that the chain of evidence is not broken and that the resultant evidence is credible.

For the reasons given above, we find no reason to fault the learned trial Judge's finding that the contents of the compact discs were inadmissible.

**Whether there were electoral mal-practices in the election of Member of Parliament for Bukanga County Constituency?**

We have categorized the electoral malpractices in the following categories as argued by the appellant.

**a) Pre-ticked ballot papers**

The Appellant's witness, Asiimwe Precious Victor, stated in her affidavit that on 14<sup>th</sup> January 2021, she went to Burigi Church polling station to vote and saw a man named Rutukana, a brother to

the 1<sup>st</sup> Respondent in the company of Barebwiiha Fred LC11 Chairperson bending at a certain point pre-ticking ballot papers in favour of the 1<sup>st</sup> Respondent and plucking them off the booklets. She grabbed Rutukana by his shirt and wrestled him down. After an exchange, he dropped some of the pre-ticked ballots and when she counted them later, she found that they were 58 in number. Barebwooha stuffed the ballot papers into a box and yet all the election officials were unbothered about the malpractice.

Ballot stuffing is an election malpractice created by **Sections 31(1), 76 (f-j) and 77** of the **Parliamentary Elections Act**. In **Toolit Simon Aketcha Vs Oulanyah Jacob L'Okori & EC EP Appeal No. 19/2011**. It was held that:

*“...Ballot stuffing is therefore an election malpractice which involves voting more than once at a polling station or moving to various polling stations casting votes either in the names of people who do not exist at all or those who are dead or absent at the time of voting and yet they are recorded to have voted*

*Ideally at the end of the polling exercise, the number of votes cast ought to be equal to the number of people who physically turned up to vote;*

*Under our voting system, every registered voter is authorized to cast one vote. Therefore, ballot stuffing occurs when someone intentionally and knowingly causes unauthorized votes to be put in the ballot box for purpose of rigging the poll in favour of some candidate.”*

Also see **Ninsiima Boaz Kasirabo & EC Vs Mpuuga David EP Appeal No. 55/2016 and Suubi Kinyamatama Juliet Vs Sentongo Robinah Nakasirye EP Appeal No. 92 OF 2016**

The said ballot papers marked FS were passed on to the petitioner by his agent, Asiimwe Precious Victor. The Petitioner however stated that he did not know who ticked the ballots and he was not sure if they were forgeries. Annexure FS was never annexed to the affidavit of Asiimwe Precious Victor but were annexed to the affidavit of the Petitioner verifying the allegations in the petition. These annexures were thus evidence of the petitioner yet he stated in cross examination that he had no knowledge of the authenticity of the ballots. These allegedly pre-ticked ballots were taken by the appellant and were not considered in computation of the final result. We find no reason to fault the finding of the learned trial Judge that the Appellant's evidence of the ballot papers was unreliable since he had adduced documents which he was oblivious of the particulars.

**b) Giving donations during campaign period and voter bribery.**

The Appellant alleged that one Toyota Kaguta gave donations on behalf of the 1<sup>st</sup> Respondent and organized football tournaments. It is alleged that Toyota bribed various sports teams with cash and cows through football tournaments. The 1<sup>st</sup> Respondent denied having Toyota as his official agent and denied knowledge and participation in the bribery acts.

The offence of bribery is created by **Section 68 (1) of the PEA**. It is provided that:-



5           *“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 .....*”

It has been established that the offence has three ingredients:

- 10           a. A gift was given to a registered voter who under Section 1(1) of the Parliamentary Elections Act is described to be one whose name is entered on the voters register.
- b. The gift was given by a candidate or their agent and,
- c. It was given with the intention of inducing the person to vote for a particular candidate or in a certain manner.

15           See: **Odo Tayebwa Vs Basajjabalaba Election Petition Appeal No. 13/2011** and **Isodo Vs Amongin Election Petition No. 006 of 2016** citing **Col (Rtd) Dr. Kizza Besigye Vs Yoweri Kaguta Museveni & EC (Supreme Court Presidential Election Petition No. 1/2001)**.

20           Bribery is considered a grave illegal offence and a single offence which once proved, is sufficient to set aside an entire election. See: (**Odo Tayebwa Vs Arinda Gordon Kakuuna & EC EP Appeal No. 86/2016**). It must in all cases be given serious consideration and scrutiny and will require cogent evidence that is truthful and free from contradictions proved to the satisfaction of the court. **See**

**Amuru & EC Vs Okello Okello (supra)**, citing **Bakaluba Peter Mukasa Vs Nambooze Betty Bakireke Supreme Court EP No. 4/2009**). Given the gravity of the offence, the Court should only consider direct evidence given first hand, see: **(Kiiza vs. Kabakumba Masiko citing Kwijuka Geoffrey Vs EC & Anor EP. No 7/2011)**.

The courts have further held that it is necessary that persons said to have committed the offence and those said to have been bribed be clearly identified, and such evidence corroborated. See **Hellen Adoa & EC Vs Alaso Alice Election Petition Appeal -2016/57) [2017] UGCA 3**. It follows therefore that the actual act of bribery needs to be described with precision, or at least with sufficient detail for the Court to determine what happened.

There is no evidence that the said Toyota was an agent of the 1<sup>st</sup> Respondent nor that he was aware of the said illegal donations given in the football tournaments. It was submitted that the said Toyota had organized community football tournaments even before elections. No evidence was adduced by the Appellant to prove that the alleged donations were given on behalf of the 1<sup>st</sup> Respondent. The allegation of a donation at a service given to Dr. Kule was not proved in evidence and the alleged Dr. Kule was not called as a witness.

### **c) Closure of polling stations before time**

The Appellant's contention through the evidence of Nyabuturi Van Geoffrey was that at Kibate/Mbaare III Polling station, voting closed as early as midday and closed before the stipulated time of 4:00pm. That the Declaration of Results Form for this particular polling

station, which was later withdrawn by Tindimwebwa Amon RW7, the presiding officer, showed that polling was closed at 10:00am.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents denied that the polling closure was before time. The evidence of RW7 was that people were still voting by 4:00pm when RW7 instructed the polling constable to stand behind the last voter. The indication of 10.00 pm instead of 4pm was a vernacular translation of the time. The Appellant did not however furnish any evidence to support this allegation of closing the polling station before time. We find that this allegation, too, was never proved by the Appellant and cannot be sustained.

#### **d) Defacing campaign posters**

The Appellant alleges that the 1<sup>st</sup> respondent, in the company of Bangumya defaced a campaign poster of the Appellant at Nyamarungi road round about on 7<sup>th</sup> January 2021. The two were seen by Kakama Godfrey who informed the petitioner about what he had witnessed.

The learned trial Judge found that the Petitioner did not adduce evidence that he had posters and did not make any report of the alleged incident to the 2<sup>nd</sup> Respondent or to the police since this was an electoral offence. There was also no defaced poster adduced in evidence of the appellant.

The offence of defacement of posters is criminal in nature and ought to have been reported to the police. This was however not done. In absence of such evidence, it would be unjust for court to decide that

the offence was indeed committed. We find no reason to interfere with the learned trial Judges finding on this allegation.

**e) Defamation**

The appellant alleged in paragraph 15(vii) of the petition that the 1<sup>st</sup> respondent at Katojo, Koranorya and Rwambaga Trading Centers indulged in a campaign and encouraged voters not to vote for the Appellant for reasons that he is a Rwandan refugee and also a tractor thief. That the Appellant stole a tractor and a lorry belonging to Bukanga Diary Farmer's Cooperative Society and he was also a mad man.

The evidence of the above statements was in the affidavits of Muhwezi Nicholas, Kubakuringi Gordon, Mwijukye Sam and Nyabutuuri Van Godfrey in support of the petition.

**Section 73** of the **Parliamentary Elections Act** provides that:-

*A person who, before or during an election for the purpose of effecting or preventing the election of a candidate, makes or publishes or causes to be made or published by words whether written or by song in relation to the personal character of a candidate a statement which is false;*

- a. Which he or she knows or has reason to believe to be false; or*  
*b. In respect of which he or she is reckless whether it is true or false,*

*commits an offence and is liable on conviction to a fine not exceeding twelve currency points or imprisonment not exceeding six months or both*

It is trite that defamation is with respect to personal character. The words stated to be defamatory must also be proved to be untrue. It is very unfortunate that the person whose character was alleged to have been lowered in the eyes of voters by the said allegations chose not to produce evidence before court as to whether what was attributed to him is true or false; or that those who uttered them had no reasonable grounds to utter them.

The test used to determine whether a statement is capable of giving defamatory meaning is among others, that it should be a false statement. The Appellant thus had a duty to prove to court that the statements made are false. Being a Rwandese is not, in our view, a defamatory statement. It is a nationality that by no means amounts to defamation, if made against a person. On the statement of stealing a lorry and a tractor from a Cooperative Society, the Appellant ought to have produced evidence from the members of the society to prove that the said items were indeed never stolen by the Appellant. None of this was done. We thus agree with the learned trial Judge that the illegal practices in **Sections 70** and **73** of the Parliamentary Elections Act are quasi-criminal offences under the Parliamentary Elections Act and the burden of proof was not discharged by the appellant.

It is trite law that the burden of proof on election petitions lies on the Petitioner. **Section 61 (1)** and **(3)** of the **Parliamentary Elections**

**Act, [17 of 2005]** provides that the grounds for setting aside an election shall be proved to the satisfaction of court on a balance of probabilities. In Supreme Court of Uganda **Presidential Election Petition No. 1 of 2001: Col. (Rtd) Dr. Kizza Besigye Vs Museveni Yoweri Kaguta and the Electoral Commission**, the then Learned Chief Justice Odoki, cited with approval the case of Borough of **Hackney Gill Vs Reed [1874] XXXI L.J. 69**, where Grove, J emphasized that an election should not be annulled for minor errors or trivialities thus:

10        *“An election is not to be upset for informality or for a triviality. It is not to be upset because the clock at one of the polling booths was five minutes too late or because some of the voting papers were not delivered in a proper way. The objection must be something substantial, something calculated to affect the result*  
15        *of the election. .... so far as it appears to me the rationale and fair meaning of the section appears to be to prevent an election from becoming void by trifling objections on the ground of informality, but the Judge is to look to the substance of the case to see whether the informality is of such a nature as to be fairly*  
20        *calculated in a rational mind to produce a substantial effect.”*

If the Petitioner is to succeed, therefore, he has to prove the grounds of the Petition to the satisfaction of court, on a balance of probabilities. His evidence must be such as will satisfy the Court that there is a real grievance, a real breach of the Law and that the will of

the people has not been reflected in the result of the election. We find that this burden has not been discharged by the appellant.

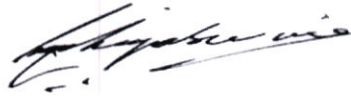
We must state that the Appellant simply placed numerous allegations before, during and after the election and failed to support the same with cogent evidence. The principle in **Kampala Associated Advocates Vs Al Shafi Investment Group LLC (supra)** that it is the duty of counsel to assist the Judge by simplification and concentration and not to advance a multitude of indigenous arguments in the hope that out of the 10 bad points Judge will be capable of fashioning a winner, ought to be taken cognizance of by counsel.

In the final result, we find that this Appeal is void of merit and is accordingly dismissed. We make the following orders;

1. The 1<sup>st</sup> respondent Stephen Kangwagye Rwakanuma is the duly elected Member of Parliament for Bukanga County Constituency.
2. We award costs of this Appeal to the respondents.

We so order





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**Hon. Justice Geoffrey Kiryabwire, JA.**

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**Hon. Justice Stephen Musota, JA.**

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**Hon. Justice Gashirabake Christopher, JA.**

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