THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 068 OF 2021

(Arising from High Court Election Petition No. 01 of 2021)

BAGALA JOYCE NTWATWA.....APPELLANT

VERSUS

1. NABAKOOBA JUDITH NALULE
2. ELECTORAL COMMISSION..... RESPONDENTS

CORAM:

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.

HON. MR. JUSTICE STEPHEN MUSOTA, J.A.

HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, J.A.

JUDGMENT OF THE COURT

INTRODUCTION

This is an Appeal from the Decision of the Emmanuel Baguma J rendered on the 22nd day of October, 2021 sitting at the High Court of Uganda at Mubende in which he Ordered that the election for the Woman Member of Parliament for Mityana District Constituency be side aside and fresh elections for that seat be held.

BACKGROUND TO APPEAL

The Appellant and the first Respondent were contestants in the election for Member of Parliament for Woman Member of Parliament for Mityana District Constituency held on the 14th January, 2021. In the hotly contested election, the Appellant won that election with 64,633 votes while the first Respondent polled 48,322 votes; a difference of 16,311 votes. The first Respondent contested the results of the election and filed Election Petition No. 01 of 2021 at the High Court of Uganda at Mubende to nullify the election. The Petitioner (now first Respondent) in that election sought declarations that the Election was not conducted in compliance with electoral laws and principles and that offences and illegal practices were committed by the now Appellant personally or with her knowledge, consent and or approval.

In the Petition, the Petitioner (now first Respondent) prayed that the election of the now Appellant as Woman Member of Parliament for Mityana District be annulled and or be set aside, and that fresh elections be conducted. In this regard the Petitioner was successful.

THE APPEAL

The Appellant being dissatisfied with the Decision of the Trial Court filed this Appeal on the following grounds: -

1. The learned Trial Judge erred in law when he declined to strike out the petition which was supported by affidavit of Nabakooba Judith Nalule which was commissioned by an Advocate who had not renewed his practicing certificate for the year 2021.
2. The learned trial Judge erred in law and fact when he held that section 7 (6) of the PEA does not prohibit election officers from giving evidence in election petitions and that counsel did not adduce evidence to support the alleged lack of lawful authority by the electoral officers to testify.
3. The learned trial Judge erred in law when he declined to strike out affidavits with offending jurats on the basis that all affidavits were marked and admitted as evidence in chief in the presence of all parties and there was no contestation.
4. The learned trial Judge erred in law when he failed to strike out the uncertified voter location slips attached to the affidavits in support of the petition.
5. The Learned Trial Judge erred in law and fact when he held that there was noncompliance with the electoral laws and principles laid down in the electoral laws during the conduct of the elections for the woman Member of Parliament Mityana District in 2021 general elections.
6. The Learned Trial Judge erred in law and fact when he held that on a balance of probabilities, the petitioner adduced sufficient

evidence to prove that the 2nd Respondent through her agents with her knowledge or consent with her knowledge and or approval committed the alleged electoral offence of bribery.

7. The learned Trial Judge erred in law and fact when he held that Francis Butebi Sembusi and Hon. Zake were agents of the Appellant.
8. The Learned Trial Judge erred in law and fact when he failed to evaluate the evidence on court record and came to a wrong conclusion that;
   a) There was none compliance with the electoral laws and principles laid down in the Electoral laws during the conduct of the elections for the woman Member of Parliament Mityana District in 2021 general elections.
   b) The Respondent adduced sufficient evidence to prove that the 2nd Respondent through her agents with her knowledge and or approval committed the alleged electoral offence of bribery.

The Appellant in this Appeal prays for: -

a. An Order that the Appeal be allowed with Costs.
b. An order that the Judgment and decree of the trial Judge be set aside and be substituted with an order allowing the Appeal.

The Cross Appeal

The first Respondent equally dissatisfied with the trial Court Decision also preferred a Counter Appeal with the following Ground;

1. That the learned trial Judge erred in law and fact when he held that the non-compliance with the electoral laws and principles laid down in the electoral laws during the conduct of the elections for the woman Member of Parliament for Mityana District in the 2021 general elections did not affect the result of the election in a substantial manner.

The Cross Appellant in this Appeal prays for: -

a. An order setting aside the election of the Appellant as Woman Member of Parliament for Mityana District in the general election of 2021

REPRESENTATIONS

At the hearing of the Appeal, Mr. Chrisestom Katumba appeared for the Appellant. Mr. Okello Oryem Alfred appeared for the first Respondent. Mr. Sabiti Erick appeared for the second Respondent. The parties with the permission of the Court adopted their written submissions as their legal arguments.

DUTY OF APPELLATE COURT

This is a final appellate Court in parliamentary election matters. Section 66 (3) of the Parliamentary Elections Act provides that

> *"(3) Notwithstanding S. 6 of The Judicature Act, the decisions of the Court of Appeal pertaining to parliamentary elections petitions shall be final"*

The role of this court as a last appellate court is laid down under **Rule 30(1)** of **the Judicature (Court of Appeal Rules) Directions** which provides that;

> *"30. Power to re-appraise 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—*
>
> *(a) Reappraise the evidence and draw inferences of fact; and*
>
> *(b)..."*

This Court is therefore obliged to reappraise the inferences of fact drawn by the trial court.

Furthermore, this Court has variously held in a number of cases that in carrying out its duty in election appeals, the Court has to caution itself on the nature of evidence adduced at the trial Court by affidavit where cross examination may not have taken place to test the veracity of testimony.Equally, when evaluating the evidence at the trial Court regard must be had to the fact that in elections contests evidence may be partisan with witnesses having a tendency towards supporting their candidates. This may result in false or exaggerated evidence which may be subjective. Therefore, this situation calls upon the Court to ensure that the veracity of the evidence is tested against independent and neutral sources as well.

Burden and Standard of proof

The burden of proof is cast on the petitioner to prove the assertions to the satisfaction of the court that the alleged irregularities or malpractices or non-compliance with the provisions and principles laid down in the relevant electoral laws were committed and that this affected the results of the election in a substantive manner in the election petition. Furthermore, the evidence must be cogent, strong, and credible. The standard of proof is on a balance of probabilities. In the matter of **Paul Mwiru v Hon. Igeme Nabeta & Others**-Election Petition No. 06 of 2011 this court held: -

"Section 61(3) of the PEA sets the standard of proof in parliamentary election petitions. The burden of proof lies on the petitioner to prove the allegations in the petition and the standard of proof required is proof on a balance of probabilities. The provision of this subsection was settled by the Supreme Court in the case of ***Mukasa Harris v Dr. Lulume Bayiga*** *(supra) when it upheld the interpretation given to the subsection by this court and the High Court"*

Furthermore, in the **Masiko Winifred Komuhangi and Babihuga J. Winnie** Election Petition Appeal No. 09 of 2006 L. E. M. Mukasa Kikonyogo (Deputy Chief Justice as she then was) held: -

"...It is now well settled that the present legislative formulation of section 62 (3) Parliamentary Elections Act requires that ***the court trying an election petition under the Act will be satisfied if the allegation/ground in the petition is proved on a balance of probabilities. Although higher than in ordinary civil cases.***

This is because an election petition is of great importance both to the individuals concerned and the nation at large. *An authority for that observation is the case of* ***Bater v Bater*** *(1950) 2 ALLER 458. See also* ***Sarah Bireete and Another v Bernadette Bigirwa*** *and Electoral Commission, Election Petition Appeal No. 13 of 2002 (unreported). A petitioner has a duty to adduce credible or cogent evidence to prove his allegation at the required standard of proof."* (emphasis Ours)

With the above position of the law in mind, we shall proceed to resolve the Grounds of Appeal and Cross Appeal. It is also necessary to point out that a number of these Grounds of Appeal emanate from the preliminary objections raised in the parties written submissions. We also point out at the onset that the Appellant appears to choose not to submit on Ground number 5 and we shall take the position of the first Respondent that we deem that ground to be abandoned.

Ground No. 1:

The learned trial Judge erred in law and fact when he declined to strike out the Petition which was supported by affidavit of Nabakooba Judith Nalule which was commissioned by an Advocate with no valid Practicing Certificate for the year 2021.

Appellant's Submissions

Counsel for the Appellant submitted that the Appellant at the trial Court had raised a preliminary objection that at the time of commissioning the affidavit in support of the petition, on the l0th

day of March 2021, the Commissioner for oaths: a one Owakukiroru Raymond had no valid Practicing Certificate for the year 2021 and therefore the affidavit in support of the Petition was incompetent and ought to be struck off leaving the Petition unsupported by an affidavit. Counsel submitted that the Chief Registrar by letter had confirmed that the said Commissioner for Oaths did not have a Practicing certificate at the time in question.

Counsel argued that this was an illegality which had been brought to the attention of the court and therefore overrode all questions of Pleadings and Admissions for which a court could sanction. In this regard he referred us to the case of **Makula International Ltd v His Eminence Cardinal Nsubuga & Anor** (1982) HCB 11. He further referred us to another authority from the High Court in **Kamurali Jeremiah v Nathan Byanyima & Electoral Commission** (HC) EP No. 002 of 2021 for the proposition that once an affidavit is found to be defective, then this affects the competence of an election petition as a matter of law.

Counsel further submitted that the issue of a faulty affidavit supporting a Petition was settled by this Court in the case of **Suubi Kinyamatama Juliet V Ssentongo Robinah Nakasirye** Election Petition Appeal No. 92 of 2016 where it was held that a faulty affidavit supporting a Petition should be struck out.

First Respondent's submissions

Counsel for the first Respondent opposed the Appeal. He argued that the issue of the impugned affidavit was not raised during the

pleadings and or trial but rather in the final submissions of the Appellant at the trial Court.

Counsel argued that the matter of whether the Commissioner of Oaths had a practicing certificate was a matter of mixed fact and law which required evidence at the trial stage but not during submissions.

Secondly, counsel argued that the issue of the validity of the impugned affidavit being a matter of mixed law and fact could not be raised as preliminary objection as this required adducing of evidence. He argued that a preliminary objection could only be taken when it raised a pure point of law and is argued on assumption that all facts pleaded by the other side were correct. In this regard we were referred to the case authority of the East African Court of Justice in **Pontrilas Investments Ltd Central Bank of Kenya & Anor V Attorney General of Kenya & Anor** Ref No. 8 of 2017 EACJ.

Counsel further submitted that the trial Court had evidence before it at trial on the allegation of the impugned affidavit and so equally this Court has no evidence before it on record to re-evaluate.

Counsel argued that the matter of the impugned affidavit was raised when all the evidence at the trial Court had been closed and therefore it would have been unfair for the trial Court to have handled it and leave the first Respondent unheard on the matter. The issue of the affidavit therefore should be taken as a new matter.

Counsel submitted that this Court **in Mutembuli Yusuf versus Nagwomu Moses Musamba & Electoral Commission**, Election

Petition Appeal No. 43 0f 2016 held that a party is not permitted to introduce fresh issues or to change the substance of his or her claim by introducing a new matter by way of affidavits in rejoinder.

Counsel also argued that even though the Chief Registrar had written a letter as to the status of the licence of the Commissioner for Oaths, this letter should have been adduced in evidence and that the trial Judge would not be encouraged to "descend into the arena" by taking judicial notice of it.

In reply to the prayer for us to apply the decision of **Suubi Kinyamatama** (supra) to this Appeal counsel asked us to reject the prayer. He argued that the effect of the decision of **Suubi Kinyamatama** (Supra) and Section 14A of the Advocates Act as Amended was that an election petition supported by an invalid affidavit should be rectified before the hearing and that is what the trial Court should have done.

Second Respondent's Submissions

The second Respondent did not address this Ground.

Findings and Decision of the Court on Ground 1

We have carefully considered the submissions of the various parties to this Appeal and the legal authorities provided to us for which we are grateful.

The issue of these Grounds relates to an objection regarding the acceptance by Court of the supporting affidavit to the Petition on the grounds that it was commissioned by an Advocate without a

valid Practicing Certificate so it should be struck out leaving the Petition bare and unverified.

This Court as correctly pointed out by both counsel in their written submission decided the matter of Petitions supported by affidavits commissioned by Advocates without Practicing Certificates in the Appeal of **Suubi Kinyamatama** (Supra) and recently affirmed in **Kayanja Vincent De Paul V Rulinda Fabrice Brad & Electoral Commission** Election Petition Appeal No. 30 of 2021 (lead decision of Madrama JA) where it was held that: -

*"...This rule was considered in **Suubi Kinyamatama Juliet V Sentongo Robinah Nakasirye** (Election Petition No. 92 of 2016) [20181 UGCA 240 (01 February 2018). As far as it is relevant the respondents argued that the petition was not validly brought before court because it was not accompanied by a validly commissioned affidavit as required by rule A (8) of the Rules (supra). The affidavits had been commissioned by Advocates who had not renewed their practising certificates. The Court of Appeal held that section 14A of the Advocates (Amendment) Act 2002 was enacted to protect innocent litigants against unscrupulous Advocates so that the defect in affidavit is not visited on the litigant. The defect on commissioning by unlicensed Advocates is cured under section l4A (l) (b) (2) for the innocent victim to be given time to make good the affidavit. The court found that without rectifying the defect the affidavit remained invalid. On that basis and because the main affidavit was not cured by the innocent litigant it remained defective and the court held that:*

We therefore hold that the purported commissioning of the Affidavit in Support of the Petition under review is not an irregularity that can be cured under Article 126(2) (e) of the Constitution in the particular circumstances of the instant Appeal. This ground is, therefore, resolved in the affirmative. The effect of such a resolution of the ground is that the Petition from which this Appeal arises, was illegally filed in Court in contravention of Section 60 of the Parliamentary Elections Act and Rules 3 (c) and 4 (8) of the Parliamentary Elections (interim Provisions) Rules and it therefore collapses with the affidavit in support that was filed alongside the said Petition. That petition was not supported by any evidence as is required by law. The Petition was, therefore fatally defective and as such there was no petition in law before the trial court. By this finding alone, the appeal succeeds and in essence, there would be no need to resolve the other grounds of Appeal..."

We find that it is necessary to interrogate this objection in some detail and particular how the trial Judge handled it. The trial Judge (at para 225 to 289 of his Judgment) found as follows: -

*"...It was shocking and disturbing to this honorable court to find that Counsel for the 1st Respondent referred and attached a letter from the Chief Registrar dated **5th May 2021** alleging that the said Owakukiroru Raymond renewed his practicing certificate on **19th March 2021**. Yet when this matter came up for pre-session meeting on **16th August 2021**, this issue was not raised neither was it raised*

at Scheduling on ***20th August 2021*** *or at any time during the trial, but Counsel for the 1st Respondent chose to keep it a secret until they raised the Preliminary Objections through written submissions which defeats the principles of fair hearing. It is therefore my view that* ***this was done intentionally*** *either to wait for this stage where the Petitioner would have no opportunity to respond to the same or to deny the court the opportunity to establish the authenticity of the two letters..." (Emphasis ours)*

The above passage of the Judgment gives us a peek into both the case management of this Appeal while at the trial Court and the trial Judge's reasons for dismissing the preliminary objection in the submissions.

We too wonder why the Appellant who by letter from the Chief Registrar dated 5th May 2021 was aware of the alleged defect in the affidavit kept quiet about it until the time of submissions. As an officer of the Court counsel for the Appellant was duty bound to raise his knowledge of the defect at the earliest possible time at the trial Court to be dealt with well knowing that election petitions have to be handled with dispatch. There is no reason on record why this was not done. We agree therefore with the trial Judge that this omission was deliberate and let us add tactical as well. They launched the objection at the "last minute" hoping to secure a "technical knockout". The first Respondent was put in a difficult position to be heard on this point since the hearing had ended. The objection therefore amounted to an abuse of court process, the adage "*he who comes in equity must come with clean hands*". The

Appellants were estopped by clear record from denying knowledge of this potential objection which they chose to keep quiet about and the law cannot come to their aid. The rest of the arguments on this ground in light of this finding need not take our time.

This Ground for the above reasons is answered in the negative.

Grounds No. 2: The learned trial Judge erred in law and fact when he held that section 7 (6) of the PEA does not prohibit election officers from giving evidence in election petitions and that counsel did not adduce evidence to support the alleged lack of lawful authority by the electoral officers to testify.

Appellant's Submissions

This Ground arises from a preliminary objection. Counsel for the Appellant submitted that electoral officers testified at the trial Court without lawful authority. He argued that Section 7(6) of the Parliamentary Elections Act is to the effect that an election officer who, without lawful authority reveals to any person any matter that has come to his or her knowledge or notice as a result of his or her appointment commits an offence and is liable to a fine not exceeding 24 Currency points or imprisonment not exceeding one year or both.

Counsel further relied on the authority of **Wanyoto Lydia Mutende v Electoral Commission and another** (Election Petition No. 002 of 2021) where court held that: -

"Therefore, Section 7(6) PEA is clear enough on the purpose thereof which is to prevent unauthorized disclosure of information obtained

in the course of execution of duties of election officers to third party. The election officers are not barred to testifying in court proceeding per se. The law only imposes upon them a duty to obtain the necessary authorization before divulging information to a third party and testifying on the same in court. Suffice it to note, that sections of the [Evidence Act], cited by counsel for the Petitioner, are provisions of general application that cannot override the specific provisions in Section 7(6) PEA."

Counsel further justified these provisions on the grounds that there is a possibility of such witnesses being compromised by the Respondent is not remote since it is irregular for an employee to testify against his employer in such matters.

First Respondent's submissions

Counsel for the Respondent argued that this ground is remote and should be dismissed.

He submitted that electoral officers are crucial stakeholders in an election since they have to administer free and fair elections.

He further submitted that there was no evidence adduced at the trial Court that such evidence was withheld. He pointed out that electoral officers like any other Ugandan have a right to be heard and there can be no derogation from that right.

He further submitted that the earlier decision of the High Court in Wanyoto Lydia (supra) was bad law and should not be followed.

Second Respondent's Submissions

The second Respondent Commission did not submit on this issue.

Findings and Decision of the Court on Ground 2

We have carefully considered the submissions of the various parties to this Appeal and the legal authorities provided to us for which we are grateful.

This ground relates to the testimony in Court by electoral officers.

In this regard both parties relied on Section 7 (6) of the Parliamentary Elections Act 2005 which provides: -

"...An election officer who, without lawful authority reveals to any person any matter that has come to his or her knowledge or notice as a result of his or her appointment, commits an offence and is liable to a fine not exceeding twenty four currency points or imprisonment not exceeding one year or both...".

However, it is also necessary to read the above section together with Section 64 of the same Act on witnesses which reads: -

"Witnesses in election petitions

(1) At the trial of an election petition—

(a) any witness shall be summoned and sworn in the same manner as a witness may be summoned and sworn in civil proceedings;

(b) the court may summon and examine any person who, in the opinion of the court is likely to assist the court to arrive at an appropriate decision;

(c) any person summoned by the court under paragraph (b) may be cross-examined by the parties to the petition if they so wish.

(2) A witness who, in the course of the trial of an election petition, wilfully makes a statement of fact material to the proceeding which he or she knows to be false or does not know or believe to be true or

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 twenty-four currency points or imprisonment not exceeding one year or both..."

We have also been referred to the High Court Decision of **Wanyoto Lydia** (supra) where Bashaija J held: -

"...To resolve this issue, there is need to examine provisions of Section 7 PEA, which are titled; "Secrecy required of election officers and others". Section 7(6) (supra) provides as follows;

> ***"an election officer who, without lawful authority reveals to any person any matter that has come to his or her knowledge or notice as a result of his or her appointment, commits an offence and is liable to a fine not exceeding twenty-four currency points or imprisonment not exceeding one year or both."*** *[underlined for emphasis].*

From the title–head, it is quite instructive that the provisions were intended to safe guard the secrecy in election matters by election officers. In the opinion of this court, Section 7(6) PEA specifically prohibits election officers from revealing any information/matter that came to their knowledge as a result of their appointment to any third party. Court is therefore, persuaded by the decision in ***Abala David and Oloo Apul*** *case (supra). It is indeed true that in arriving at the conclusion on the interpretation of Section 7 PEA in that case, the court did not consider provisions of Sections 64 (1) (a) PEA and Section 117 and 122 of the Evidence Act; that counsel for the Petitioner seeks to rely on. The mere fact that the court in that case did not consider the said provisions does not render the decision per in curium to warrant a departure by this court, from the conclusion on the correct scope and interpretation of Section 7(6) PEA regarding the admissibility of the evidence of election officers. Most importantly, Parliamentary election petitions are principally governed by the PEA and the Rules made thereunder. This position was restated in* ***Ikiror Kevin v Orot Ismael, EPA No. 04 of 2021,*** *at p.11, that;*

"... election petitions are governed by this Act with rules in a very strict manner. Election Petition law and the regime in general, is a unique one and only intended for elections. It does not admit to other laws and procedures governing other types of disputes, unless it says so itself."

Therefore, Section 7 (6) PEA is clear enough on the purpose thereof, which is to prevent unauthorized disclosure of information obtained in the course of execution of the duties of election officers to any third party. The elections officers are not barred to testifying in court proceedings per se. The law only imposes upon them a duty to obtain the necessary authorization before divulging information to a third party and testifying on the same in court. Suffice it to note, that Sections of the Evidence Act, cited by counsel for the Petitioner, are provisions of general application that cannot override the specific provisions in Section 7(6) PEA.

Besides the above, the submission that the said deponents disclosed information to court and not to "any other person" and that court is not, and cannot be any other person envisaged in Section 7(6) PEA, is untenable. It is quite apparent, from affidavits of the named deponents, that they disclosed the information to the Petitioner who, together with her lawyers, based on that particular information to prepare and file the impugned affidavits in support of her petition. The said witnesses were not court witnesses as envisaged under Rule 15 (3) of the Rules, as none was summoned by court in the manner provided for under the Rule. They were the Petitioner's witnesses who deponed affidavits in support of her allegations against their employer, the EC. A careful perusal of all the impugned affidavits easily reveals that none of the deponents thereto, attached any authorization from the 1st Respondent or stated that such authority was sought and obtained from the EC. Clearly, all the impugned affidavits were procured and filed in contravention of Section 7(6) PEA, and such an illegality cannot be condoned by court. The particular affidavits are therefore struck off the record..."

We have been invited by counsel for the first Respondent to find the **Wanyoto Lydia decision** (Supra) bad law.

In respect of the electoral officers, the trial Judge (at para 290 of his Judgment) found as follows: -

"...I find that the cited Section 7 (6) of the PEA does not prohibit election officers from giving evidence in election petitions. I further find that Counsel of the 2nd Respondent did not adduce evidence to support the alleged lack of lawful authority by the Election officers to testify. For the reasons given, this objection is overruled..."

We wholly agree with this finding of the trial Judge. However, we are persuaded that the **Wanyoto Lydia Decision** (Supra) better explains the wider scope of the law on the subject and we therefore cite it with approval. Furthermore, it is trite law that the onus on a party is to prove a positive assertion and not a negative assertion (See **Jovelyn Barugahare V Attorney General** [SC] CA No. 28 of 1993). To that extent the trial Judge erred in his finding. That notwithstanding, it is noteworthy to state that the second Respondent, the Electoral Commission did not address this issue at all to bring clarity to it.

For this ground we find in the affirmative.

Grounds (3 and 4 together):

No. 3: The learned trial Judge erred in law and fact when he declined to strike affidavits with offending jurats on the basis that all affidavits were marked and admitted as evidence in

chief in the presence of all parties and there was no contestation.

And

No. 4: The learned trial Judge erred in law and fact when he failed to strike out the uncertified voter location slips attached to the affidavits in support of the petition.

Appellant's Submissions

These Grounds also emanate from the preliminary objections at the trial. Counsel for the Appellant argued that it was erroneous to hold that where a party does not raise an objection in respect to the defective jurats which are part of the affidavits at the beginning of the trial, then a party waives his right to raise it at all.

He further argued that, defective jurats on an affidavit are an illegality that should not be sanctioned by court and no amount of admission confers validity on them.

Counsel submitted that the non-compliance with the law in respect of the jurats ranges from use of a translator not on oath contrary to the provisions of Section 3 of the Illiterate Protections Act, deponents not on oath and commissioning on a separate sheet (as shown on pages 463 and 461 of Volume 2 of the record of Appeal).

He submitted that when an illegality is put to the attention of court it overrides all questions of pleading including any admissions made thereon. In this regard he referred us again to the decision of **Makula International Ltd v His Eminence Cardinal Nsubuga & Anor** (supra).

Counsel for the Appellant did not in his written submissions in chief deal with the Ground relating to uncertified voter location slips. He only decided to raise the matter in his submissions in rejoinder (at page 5 of 8) which is procedurally unacceptable and for which we overrule the Appellant.

First Respondent's submissions

Counsel for the Respondent opposed this Ground. He argued generally that it is the duty of the commissioners for oaths to properly administer the oaths and that defects resulting from there cannot be visited on the witnesses.

Counsel for the first Respondent submitted that the Appellant had not proved or demonstrated the defects in contention.

Second Respondent's Submissions

The second Respondent did not submit on this ground.

Findings and Decision of the Court on Grounds 3 and 4

We have carefully considered the submissions of the various parties to this Appeal and the legal authorities provided to us for which we are grateful.

We find that this Ground was argued too generally. It is the duty and onus of the Appellant to fully elucidate his or her claim or argument and not leave it to the Court to build it for them.

As stated before in this Judgment, election cases should not be handled like ordinary civil cases for the simple reason that elections which reflect the will of the people should not be overturned for

reasons that do not show that the will of the people was not properly expressed or was somehow interfered with. Generalities or technical arguments that do not allow for substantive justice to be administered should be handled with extreme care.

The above notwithstanding, the trial Judge (at para 302 of his Judgment) found as follows: -

"...I have considered the above point and find that all affidavits were marked and admitted as evidence in chief in the presence of all parties and there was no contestation, thus this Objection is also overruled..."

It would appear to us that once again the objections with regard to these jurats were left for the very end at the time of submissions after the hearing of the petition which strategy we have already condemned and found wanting.

The upshot of our findings is that these Grounds are decided in the negative.

Grounds (6, 7 and 8 together):

No 6. The learned Trial Judge erred in law and fact when he held that on a balance of probabilities, the Petitioner adduced sufficient evidence to prove that the 2nd Respondent through her agents with her knowledge or consent or and approval committed the alleged electoral offence of bribery.

No 7. The learned Trial Judge erred in law when he held that Francis Butebi Sembusi and Hon. Zaake were agents of the Appellants.

No 8. The learned Trial Judge erred in law and fact when he failed to evaluate the evidence on court record and came to wrong conclusion that: -

a) There was noncompliance with the electoral laws and principles laid down in the electoral laws during the conduct of the elections for the woman Member of Parliament Mityana District in 2021 general elections.

b) Respondent adduced sufficient evidence to prove that the 2nd Respondent through her agents with her knowledge or consent with her knowledge and approval committed the alleged electoral offence of bribery.

Appellant's Submissions

Counsel for the Appellant submitted that the electoral offence of bribery had not been established against the Appellant as required by law.

Counsel submitted that the trial judge had found that on account of one Francis Butebi Sembusi had been established on account of the testimony of Kalema Bonny (PW4); Nakaggwa Annet (PW2); Alumaiya Annet (PW 11) and Vartino Ssewadda (PW 95); all who testified that Sembusi was acting as an agent of the Appellant.

Counsel argued that whereas Kalema had testified that Sembusi had given him Ug shs 300,000/= to distribute to registered voters there was no evidence that Sembusi was an agent of the Appellant.

Furthermore Counsel submitted that in the evidence adduced at the trial Court there appeared to be confusion as to references to one Butebi and in other circumstances Francis Butebi Sembusi as if they were the same person yet there was no established nexus to that effect.

He submitted that it is a known fact that in an election, there are overzealous and illegal acts of wayward supporters whose acts cannot be visited upon the candidate. He submitted that is therefore crucial to prove the existence of principal agent relationship by existence of appointment letter.In this regard,he referred us to the High Court Decision of Ochieng **Peter Patrick v Mayende Stephen Dede & Anor** Election Petition 15 of 2011.

Counsel submitted that the trial Judge failed to evaluate the evidence before him when the Appellant had testified that she did not know the person called Butebi but rather she knew another person known as Emmanuel Sembusi who was the father of Hon. Francis Zaake. In particular, he argued that the trial Judge erred when he faulted the Appellant for not bringing Sembusi to rebut the evidence that he was the same person as Butebi; thus distorting the burden of proof.

Counsel further submitted that the evidence relied upon by the trial Judge like that of Nakyagaba Tolophina (PW 58) that she was given a bribe of Ug shs 100,000/= at the Home of Hon. Zaake to vote for

the Appellant was not corroborated given that Hon. Zaake himself was also a candidate for Parliament. Furthermore, the said Nakyagaba did not prove that she was a registered voter.

Counsel argued that the learned trial Judge's finding that the Appellant committed bribery through agents was not based on the strength of the evidence adduced by the first Respondent but rather was based on the Appellant's failure to bring witnesses to rebut these allegations.

First Respondent's submissions

Counsel for the first Respondent opposed the Grounds. He argued that whereas there was no precise definition as to who an agent of a parliamentary candidate is each case of bribery should be handled on its own facts. He further argued in his written submissions that any person whom the candidate *"...puts in their place expressly or by keeping quiet and benefitting from the person's work or puts them to do a portion of theirs task, namely to procure their election as a Member of Parliament is a person for whose acts they would be liable..."*

Counsel invited Court to consider the affidavit evidence of Sebuwufu Isaac (PW 84), Kalema Bonny (PW 4), Sebuguzi Dickson (PW 83), Nakyagaba Tolophina (PW 58), Kasenge Joseph (PW 22), Tebulindye Disan (PW 89) Ssebwadrida Verito (PW 85) Nalugo Harriet (PW 61) and Nalubega Justine (PW 60). These witnesses were registered voters.

Counsel in his written submissions then wrote that the above affidavit evidence: -

"...was corroborated by the affidavits of election officials and agents of the appellant inclusive of pw8 the presiding officer of Gombolola Area (NAL-Z), PW2 the polling Assistant of Bukalagi Church of Uganda polling station, pw85 the 28 Respondent's agent who confirms giving out money on polling day at the polling station of Kabuwambo Health Centre Polling Station, pw47 the NUP party ward supervisor, pw7 the polling assistant of king faizal (ND-Z) polling station and pw78 the presiding officer of busimbi/kasimbi (0-2) polling station..."

Counsel submitted that evidence clearly pointed to Hon. Francis Zaake and Francis Butebi Sembusi as the people who were dishing out the money.

Second Respondent's Submissions

The Second Respondent did not submit under this Ground.

Findings and Decision of the Court ON GROUNDS 6, 7 and 8

We have carefully considered the submissions of the various parties to this Appeal and the legal authorities provided to us for which we are grateful.

This Ground revolves around the electoral offence of bribery which the trial Court found had been established and based its decision to annul the impugned election.

Section 61 of the Parliamentary Elections Act provides that an election of a candidate as a Member of Parliament shall only be set aside certain grounds are proved to the satisfaction of the court.

One of these grounds is found under Section 61 (1) (c) which provides: -

"...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..."

Bribery is an illegal practice under the Parliamentary Elections Act. Section 68 (1) of that Act provides: -

"...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..."

This Court gave guidance on the offence of bribery in the matter of **Ernest Kiiza V Kabakumba Labwoni Masiko** EPA No. 44 of 2016. In this appeal the Court made findings that are instructive in this particular Appeal.

First, the petitioner has to adduce cogent evidence to prove his or her case to the satisfaction of the court. It has to be that kind of evidence which is free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in favour of a party. Cogent in this regard means compelling or convincing.

Secondly the offence of bribery has three ingredients namely: -

i) A gift was given to a voter;

ii) The gift was given by a candidate or their agent; and

iii) It was given with the intention of inducing the person to vote.

Unequivocal proof is required to prove an allegation of bribery and mere suspicion is not sufficient.

The bribe has to be given by the candidate or his or agent. Section 2 (1) of the Parliamentary Elections Act provides that an "agent" includes a representative and a polling agent of a candidate. Whereas there is no precise rule as what constitutes evidence of who an agent is, knowledge and authorization of the candidate of that person to further the prospects of election for him or her and the impugned act is important. The onus in this regard lies on the petitioner. There has to be sufficient nexus between the person given the bribe and either the candidate or his or her known agent who has to be proved to have been acting with the candidate's knowledge or with his or her approval.

Whereas Section 61 (2) puts the required standard of proof on the balance of probabilities there is no gaining saying that for the court to be satisfied as to the evidence, such a test needs to be compelling or convincing and so is inevitably still higher than that in normal civil cases. This puts a heavy burden on the Petitioner to systematically compile the necessary evidence before, during and after the elections to the required statutory standard.

A re-evaluation of the evidence reviewed by the trial Judge shows that the main actor in the allegations of the bribery was Francis Butebi Sembusi (however called) who was the father of another

candidate Hon. Francis Zaake in district elections. The trial Judge found that bribery by Francis Butebi Sembusi had been established in some stations like Namyeso P/S Polling Station. He also found that alleged bribery by the same Francis Butebi Sembusi was not established at other Stations like Kabuwambo COU Polling Station, Katakala P/S Polling Station and Mizigo A Polling Station. The trial Judge also relied on the evidence of some Polling Assistants of the Second Respondent Commission at Stations like King Faisal (ND-Z); Busimbi area (AL-Z) and Busimbi/Kasimbi (O-Z) that unnamed agents of the Appellant bribed voters.

The trial Judge (at para 869 of his Judgment) then finds: -

"...This finding is corroborated by the admission made by the 2nd Respondent (now Appellant) during cross examination when she clearly stated that ***she actually knew Francis Sembusi as a father to Hon. Zaake Francis****. Taking this evidence as a whole, leads this court to the conclusion that on a balance of probabilities, the bribery of voters by Francis Butebi Sembusi were carried out with the knowledge, consent and approval of the 2nd Respondent. This finding is supported by the decision in the case of* ***Odo Tayebwa v Arinda Gordon Kakuuna & EC*** *Election Petition Appeal No. 86 of 2016. Thus the Petitioner has proved the allegations of bribery against the 2nd Respondent..." (emphasis and additions ours).*

As to the bribery of one Nakyagaba at the home of Hon. Zaake, the trial Judge (at para 835 of his judgment) found that the Appellant

did not bring any evidence from Hon. Zaake to refute or otherwise explain the circumstances surrounding this allegation.

So can this Court on re-evaluation of the evidence before it and the findings conclude that the various tests established by this Court in the matter of **Ernest Kiiza** (Supra) have been met and there is compelling or convincing evidence to support all the ingredients of the offence of bribery by the Appellant? We find not and for the following reasons.

First, the main protagonists in this bribery allegation namely Hon. Zaake and his father had an election of their own to campaign and secure in the same district and there was need to adduce cogent evidence that on top of their own election bid they were also agents of the Appellant who acted with her knowledge and consent. Indeed, the trial Judge in judgment simply says that he found that the Appellant had admitted that she knew Francis Butebi Sembusi was Hon. Zaake's father but did not find he was also the Appellant's agent. The nexus between Francis Butebi Sembusi and his son Hon. Zaake being agents of the Appellants in our view was not established.

Secondly, the trial Judge again shifted the burden of proof for the Appellant to prove a negative assertion in relation to Hon. Zaake. We have discussed the error of law in this regard earlier in this Judgment and need not expound on it again.

Thirdly, we have already dealt with and faulted the reliance by the Court on the evidence of the officers of the second Respondent

without first establishing their authority to offer that evidence on behalf of the first Respondent. In any event the evidence of the Officers of the second Respondent that agents of the Appellant were bribing persons at polling station was not cogent because they did not name the said agents by name.

Lastly, the trial Judge placed too much emphasis on the decision of **Odo Tayebwa** (supra) that a single electoral offence or illegal practice once proved was enough to annul an election without first fully applying all the required tests to reach this conclusion. This proposition of law while correct when applied in isolation of the other legal authorities was with the greatest respect a misdirection.

The upshot of these findings is that Grounds 6, 7 and 8 are all upheld.

The Counter Claim by the first Respondent / Counter Claimant.

Ground: The learned trial Judge erred in law and fact when he held that non-compliance did not affect the results of the elections in a substantial manner with the electoral and principles laid down in the electoral laws during the conduct of elections for woman member of parliament for Mityana District 2021 General Elections did not affect the elections in a substantial manner.

First Respondent's Submissions

Counsel for the first Respondent submitted that whereas the Appellant pleaded her discontent with the findings of the trial Judge

in the Grounds of Appeal, she still failed to advance arguments for her discontent. This in the view of counsel *ipso facto* meant that the first Respondent placed sufficient and irresistible evidence before Court to prove the non-compliance affected the result of the election in a substantial way.

Counsel submitted that non-compliance could be established using quantitative test (concerning numbers) or qualitative test (looking at the whole electoral process). In this regard he referred us to the authorities of **Hon. Oboth Marksons Jacob versus Dr. Otiam Otaala Emmanuel**, Election Petition No.1 of 2001 and **Rtd Col. Dr. Kiiza Besigye Vs Y.K Museveni & Anor** Presidential Petition No. 1 of 2001. He faulted the trial Judge for choosing to apply the quantitative test to hold that the violations were only proved to have occurred at 11 polling stations where the total number of ballot papers issued was less than the winning margin. He therefore concluded that the non-compliance with the electoral laws and principles laid down in the laws did not affect the result of the election in a substantial manner.

He argued that with all the violence and intimidation that was proved at the trial, it is impossible to estimate the numbers of voters who stayed away. Counsel submitted that it was equally impossible to rely on the numbers produced by the Declaration of Results Forms from the polling stations. He contended that the proper approach in the circumstances would have been to use both the qualitative test and the quantitative test to show the real

situation of the election. He argued the numbers approach applied by the trial Judge was clearly a grave error.

Appellant's submissions

The Appellant opposed the cross appeal and responded to the cross appeal in their written submissions in rejoinder.

He argued that Section 61(1) (a) of the Parliamentary Elections Act is the textual root of the substantiality test and was clearly explained by the Court of Appeal in the case of **Freda Nanziri Kase Mubanda vs. Mary Babirye Kabanda and the Electoral Commission** Election Petition Appeal No. 38 of 2016 where it was held that: -

"...That the result of an election may be 'affected'; if after making adjustments for the effect of proved irregularities the contest seems much closer that it appeared to be first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules."

Counsel in this Appeal argued that the margin was 16,311 votes which was large and there was no evidence to show how that margin would be reduced in a substantial way.

Second Respondent's Submissions

Counsel for the second Respondent Commission also opposed the cross appeal.

In his written submissions wrote: -

"...The Petitioner set herself an uphill task to prove substantial effect and, in my submission failed miserably to do so. In terms of the evidence on record, the Petitioner failed to prove even those allegations relating to non-compliance with the electoral law. But even if this Hon. Court were to be liberal and find that the Petitioner furnished some skeletal evidence, she failed not only to prove that those violations of the electoral law affected the results of the election let alone in a substantial manner..."

Counsel like the counsel for the first Respondent submitted that the margin of 16, 311 was so large that it could not have any affected by any proved irregularities and there was no cogent evidence to that effect.

Counsel submitted that the 11 polling stations considered by trial Judge was a small fraction to form the basis for influencing the parameters under the substantial test and the winning margin extinguishes the arguments of the first Respondent in quest for consideration of the qualitative test in this case.

Finally, the trial Judge was alive to the fact that the first Respondent complained about the DR Forms at all the polling stations only led evidence regarding two polling stations (i.e. Kanamba and Kiyinda (NAKE-I) Polling stations).

Findings and Decision of the Court the Counterclaim.

We have carefully considered the submissions of the various parties to this Appeal and the legal authorities provided to us on the Counter Claim for which we are grateful.

We find that the Cross Appellant did not have a strong case for the counter claim save for the argument that both the quantitative and qualitative tests should have been applied to finding of non-compliance of the electoral laws. The Counter Claimant however did not elucidate how the application of both tests would have changed the results of the elections in a substantive way.

Just like in the main Petition, the onus of proof is on the Cross Appellant to prove his or her counter claim. In this case a superficial attempt was made to do so.

We agree with the submissions and reasoning of the Appellant and second Respondent Commission and find that the Cross Appellant has not proved their case.

Final Orders

The upshot of our findings is as follows: -

The Main Appeal and Counter Claim.

1. The main Appeal is upheld and the decision of the trial Court annulling the election of the Appellant as Woman Member of Parliament for Mityana District Constituency is set aside.
2. The Cross-Appeal is not proved and stands dismissed.

Costs

The general Rule of costs is that they follow the event. However, in the main Appeal the first Respondent still succeed on Ground 1 (most hotly contested and consisted of preliminary objections at the trial court); 3 and 4. The Appellant succeed on Grounds 2, 6, 7 and 8. The Appellant and second Respondent succeed in the Counter Claim. In the circumstances each party to bear their own costs.

We so Order.

Dated at Kampala this 24th day of June 2022.

GEOFFREY KIRYABWIRE

JUSTICE OF APPEAL

STEPHEN MUSOTA

JUSTICE OF APPEAL

CHRISTOPHER GASHIRABAKE

JUSTICE OF APPEAL