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**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

*(Coram: Elizabeth Musoke, Hellen Obura, and Christopher Madrama, JA)*

**ELECTION PETITION APPEAL NO. 33 OF 2021**

*(Arising from Election Petition No. 06 of 2021)*

10 **BUWEMBO MONDAY KASULE:.....APPELLANT**

**VERSUS**

- 1. **BUSULWA ATANANSI**
- 2. **THE ELECTORAL COMMISSION ..... RESPONDENTS**

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**JUDGMENT OF HELLEN OBURA, JA**

This is an appeal against the decision of the High Court at Mubende (Luswata, J as she then was) delivered on 28<sup>th</sup> September, 2021, in which she dismissed the appellant's petition for failing to prove his claims in the petition on a balance of probabilities.

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The background facts to this appeal as ascertained from the court record are that the appellant, the 1<sup>st</sup> respondent (Busulwa Atanansi) and 3 others contested for the position of Chairperson LC III of Malangala Sub-county in Mityana district in the Local Council elections of 2021 which were held on 3/02/2021. After the election, the 2<sup>nd</sup> respondent returned the results and declared the 1<sup>st</sup> respondent as the winner of the election with 1361 votes, followed by the appellant with 1253 votes with a margin difference of only 108 votes.

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Aggrieved by the election results, the appellant filed Election Petition No. 006 of 2021 in the High Court at Mubende wherein he alleged that the election process was marred with violence, bribery, intimidation of voters, threats of arrests of voters, publication of false statements claiming the appellant was dead and he had pulled out of the election among

5 other illegal actions by the 1<sup>st</sup> respondent and his agents to the detriment of the appellant. The learned trial Judge heard and dismissed the petition on the grounds that the appellant had failed to prove the averments in the petition on a balance of probabilities to the satisfaction of court. Being dissatisfied with the decision of the learned trial Judge, the appellant appealed on 6 grounds contained in the Memorandum of Appeal filed in this Court on 7<sup>th</sup> October, 2021  
10 as follows;

1. *The learned trial Judge erred in law and fact and did not properly evaluate the evidence on record when she held that the 1<sup>st</sup> respondent did not commit any illegal practices or election offences in connection with the election personally or by his agents or supporters with his knowledge and consent or approval. As a result, she came to the wrong decision to dismiss the petition on this  
15 ground.*
2. *The learned trial Judge erred in law and fact and did not properly evaluate the evidence on record when she exonerated the 1<sup>st</sup> respondent from the election offences of undue influence through actual use of force and violence upon the Petitioner (Appellant), personal or by his agents and supporters with his knowledge and consent or approval, and held that such offences had not been proved on a  
20 balance of probabilities and to the satisfaction of court. As a result, she came to the wrong decision to dismiss the petition on this ground.*
3. *The learned trial Judge erred in law and fact and did not properly evaluate the evidence on record when she held that the 1<sup>st</sup> respondent was not present at the scene and join in the assault of the Petitioner (Appellant) on the eve of polling day 2/2/2021. As a result, she came to the wrong  
25 conclusion upholding the 1<sup>st</sup> respondents alibi.*
4. *The learned trial Judge erred in law and fact and did not properly evaluate the evidence on record when she held that those responsible for the assault of the Petitioner (Appellant) on the eve of polling 2/2/2021 were not the agents or supporters of the 1<sup>st</sup> respondent and their illegal actions did not implicate the 1<sup>st</sup> respondent. As a result, she came to the wrong conclusion that the 1<sup>st</sup> respondent  
30 was not liable for their illegal practices/election offences.*
5. *The learned trial Judge erred in law and fact and did not properly evaluate the evidence on record when she held that the irregularities and non-compliance committed during the election by security agents under the supervision and control of the 2<sup>nd</sup> respondent, election officers of the 2<sup>nd</sup> respondent and the agents or supporters of the 1<sup>st</sup> respondent did not affect the result of the election in a*

5           substantial manner. As a result, she came to the wrong decision to dismiss the petition on this ground.

6. The learned trial Judge erred in law and fact and did not properly evaluate the evidence on record when she held that the violence and acts of impurity committed by security agents, the 1<sup>st</sup> respondent's agents or supporters and election Officers of the 2<sup>nd</sup> respondent during the election was not widespread and that it did not contaminate the quality of the election in a substantial manner. As a result, she came to the wrong decision to dismiss the petition on this ground.

### The issues for determination

The appellants raised the following 9 issues for determination by this Court;

1. Whether the learned trial Judge erred in law and in fact when she failed to properly evaluate evidence on record and as a result, she reached a decision that the 1<sup>st</sup> respondent was validly elected and declared winner of the election held on the 3<sup>rd</sup> day of February 2021 by the 2<sup>nd</sup> respondent which in the result occasioned an injustice to the appellant?
2. Whether the learned trial Judge erred in law and in fact when she allowed the 1<sup>st</sup> respondent's answer to the petition during the trial without the requisite properly filed accompanying affidavits.
3. Whether the learned trial Judge erred in law and in fact when she held that the 1<sup>st</sup> respondent with his knowledge or approval, his agents and supporters never committed any illegal practices or election offences in connection with the election?
4. Whether the learned trial Judge erred in law and in fact when she exonerated the 1<sup>st</sup> respondent and his agents from the election petition offences of undue influence through actual use of force and violence upon the appellant and as a result she reached a wrong decision of dismissing the petition?
5. Whether the learned trial Judge erred in law and in fact when she held that the 1<sup>st</sup> respondent was not present at the scene and that he never joined in the assault of the appellant on the 2<sup>nd</sup> day of February 2021 which was the eve of the polling day, as a result she reached a wrong conclusion of upholding the 1<sup>st</sup> respondent's alibi?
6. Whether the learned trial Judge erred in law and in fact when she held that those responsible for the assault of the appellant on the polling day were not the agents or supporters of the 1<sup>st</sup> respondent and that their illegal actions did not implicate the 1<sup>st</sup> respondent, as a result she reached a wrong conclusion that the 1<sup>st</sup> respondent was not liable for their illegal practices/election offences?

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7. *Whether the learned trial Judge erred in law and in fact when she held that the irregularities and noncompliance committed during the election by security agents under the supervision of the 2<sup>nd</sup> respondent, election officers of the 2<sup>nd</sup> respondent and the agents of the 1<sup>st</sup> respondent did not affect the results of the election in the substantial manner, as a result she arrived at the wrong decision of dismissing the appellant's petition.*
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8. *Whether the learned trial Judge erred in law and in fact when she held that the violence and acts of impunity committed by security agents, 1<sup>st</sup> respondent's agents, supporters and election officers of the 2<sup>nd</sup> respondent during election was not widespread and that it did not contaminate the quality of the election on a substantial manner and as a result she reached a wrong decision by dismissing the appellant's petition.*
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9. *Whether the learned trial Judge erred in law and in fact when she awarded costs to the respondents.*

The 1<sup>st</sup> respondent raised the following 7 issues for determination;

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1. *The learned trial Judge erred in law and fact when she allowed during trial the 1<sup>st</sup> respondent's answer to the petition without the requisite properly filed accompanying affidavit. This occasioned a miscarriage of justice to the appellant.*
2. *The learned trial Judge erred in law and fact and did not properly evaluate the evidence on record when she held that the 1<sup>st</sup> respondent did not commit any illegal practices or election offences in connection with the election personally or by his agents or supporters with his knowledge and consent or approval. As a result, she came to the wrong decision to dismiss the petition on this ground.*
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3. *The learned trial Judge erred in law and fact and did not properly evaluate the evidence on record when she exonerated the 1<sup>st</sup> respondent from the election offences of undue influence through actual use of force and violence upon the Petitioner (Appellant), personal or by his agents and supporters with his knowledge and consent or approval, and held that such offences had not been proved on a balance of probabilities and to the satisfaction of court. As a result, she came to the wrong decision to dismiss the petition on this ground.*
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4. *The learned trial Judge erred in law and fact and did not properly evaluate the evidence on record when she held that the 1<sup>st</sup> respondent was not present at the scene and join in the assault of the Petitioner (Appellant) on the eve of polling day 2/2/2021. As a result, she came to the wrong conclusion upholding the 1<sup>st</sup> respondents alibi.*

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5. *The learned trial Judge erred in law and fact and did not properly evaluate the evidence on record when she held that those responsible for the assault of the Petitioner (Appellant) on the eve of polling 2/02/2021 were not the agents or supporters of the 1<sup>st</sup> respondent and their illegal actions did not implicate the 1<sup>st</sup> respondent. As a result, she came to the wrong conclusion that the 1<sup>st</sup> respondent was not liable for their illegal practices/election offences.*
  6. *The learned trial Judge erred in law and fact and did not properly evaluate the evidence on record when she held that the irregularities and non-compliance committed during the election by security agents under the supervision and control of the 2<sup>nd</sup> respondent, election Officers of the 2<sup>nd</sup> respondent and the agents or supporters of the 1<sup>st</sup> respondent did not affect the result of the election in a substantial manner. As a result, she came to the wrong decision to dismiss the petition on this ground.*
  7. *The learned trial Judge erred in law and fact and did not properly evaluate the evidence on record when she held that the violence and acts of impurity committed by security agents, the 1<sup>st</sup> respondent's agents or supporters and election Officers of the 2<sup>nd</sup> respondent during the election was not widespread and that it did not contaminate the quality of the election in a substantial manner. As a result, she came to the wrong decision to dismiss the petition on this ground.*

The 2<sup>nd</sup> respondent raised the following 5 issues:

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1. *Whether the 1<sup>st</sup> respondent committed illegal practices or offences in connection with the election personally.*
  2. *Whether the agents and supporters of the 1<sup>st</sup> respondent committed any illegal practices with his knowledge and consent or approval.*
  3. *Whether there was non-compliance with the electoral laws in the conduct of the election.*
  4. *Whether such non-compliance, if any affected the result of the election in a substantial manner.*
  5. *What are the remedies available to the parties?*

## **Representation**

30 At the hearing of this appeal, Mr. Sserunkuma Farouk and Mr. Mbasia Denis appeared for the appellant. Mr. Joseph Luzige appeared for the 1<sup>st</sup> respondent while Mr. Godfrey Musinguzi, Mr. Ezale Oshman, Ms. Angel Kanyiginya and Mr. John Baguma represented the

5 2<sup>nd</sup> respondent. The parties filed written submissions which were adopted as their respective legal arguments for consideration by this Court.

I note that the appellant's Record of Appeal contains an amended Memorandum of Appeal which was signed by counsel for the appellant on 22/11/2021 but was never lodged in this Court and it neither bears the Court registry received stamp nor the signature of the Registrar  
10 of this Court. The amended Memorandum of Appeal contains an additional ground contained in paragraph 1 which states as follows:

*"The learned trial Judge erred in law and fact when she allowed during the trial the 1<sup>st</sup> respondent's answer to the petition without the requisite properly filed accompanying affidavit. This occasioned a miscarriage of justice to the appellant."*

15 The court record shows that the Notice of Appeal was filed in the High Court at Mubende on 30/09/2021 and the Memorandum of Appeal was filed on 7/10/ 2021 with 6 grounds of appeal. On 22/11/2021 an amended Memorandum of Appeal containing 7 grounds was signed by counsel for the appellant but was not filed in this Court. However, it was smuggled onto the appellant's record of appeal and the new ground it introduces was argued by counsel for the  
20 appellant in his submission without leave of court and was responded to by counsel for the 1<sup>st</sup> respondent. Order 6 Rule 19 of the Civil Procedure Rules allows amendment of pleadings at any stage of the proceedings with the leave of court. It therefore follows that where pleadings have been closed, parties have to seek leave from court to amend the pleadings.

In this appeal, the amended Memorandum of Appeal was never lodged at the court registry  
25 and in any case, by the time counsel signed it, 52 days from the date of filing the Notice of Appeal had already passed. Therefore, even if the amended Memorandum of Appeal was to be filed in this Court, extension of time within which to file it had to be first sought from this Court by the appellant's counsel. (**See: *Igeme Nathan Samson Nabeta vs Mwiru Paul, EPA***)

5 **No. 46 of 2022).** Since the appellant's counsel did not do so, I find that the amended Memorandum of Appeal was not properly filed and for that reason we strike it off the court record.

10 In the result, issue 2 raised and argued by the appellant and issue 1 of the respondent's issues are accordingly expunged from the court record. I will, therefore, only consider issues 1,3,4,5,6,7,8 and 9 as raised by the appellant and issues 2, 3, 4, 5, 6 and 7 raised by the 1<sup>st</sup> respondent which arise from the 6 grounds in the original Memorandum of Appeal.

### **Appellant's submissions**

Counsel for the appellant argued issues 1 & 9 separately, issues 3, 4, 5 & 6 together and issues 7 & 8 together.

15 They submitted on issue 1 that the 1<sup>st</sup> respondent was not duly elected because the election process was marred with bribery, assaults, intimidations, threats, publication of false statement against the appellant and violence, in which circumstances people could not exercise their free will to choose their leader. They added that the election process was invalid on ground that it was not conducted in accordance with the principles laid down in the provisions of the Constitution of the Republic of Uganda (Constitution), the Local Government Act (LGA) and the Electoral Commission Act (ECA) and that such non-compliance affected the results in a substantial manner which resulted into wrongful declaration of the 1<sup>st</sup> respondent as winner of the election.

25 Counsel argued that it was vividly shown by the appellant in his petition, affidavits in support of his petition and in his submissions that the offences were committed by the 1<sup>st</sup> respondent personally and by his agents with his knowledge, consent and/or approval and all those allegations were proved during the trial of the petition. They added that the appellant was

5 violently attacked, beaten and injured to the extent that he lost a tooth and was hospitalized  
on the eve of the election, as a result of which he never participated in the voting exercise.  
Further, that the appellant attached evidence of torture and beating by the 1<sup>st</sup> respondent and  
his agents together with the evidence of undue influence which was never rebutted. Counsel  
contended that all these acts were brought to the attention of the learned trial Judge and that  
10 had she properly evaluated this evidence, she would have allowed the appellant's petition.  
They invited this Court to consider the petitioner's affidavit in support of the petition specifically  
paragraphs 5, 6, 7, 9, 10, 11, 13, 16, 17 and 18 to come to its conclusion.

In regard to issues 3, 4, 5 and 6, counsel submitted that the 1<sup>st</sup> respondent and his duly  
authorized agents committed illegal offences and election offences during elections. In regard  
15 to the offence of bribery, counsel submitted that the 1<sup>st</sup> respondent and his duly authorized  
agents committed the offence of bribery which resulted in failure of the people to exercise  
their free will in choosing their leader voluntarily. Further, that this caused the electoral  
process not to be conducted under the conditions of freedom and fairness as required by  
Article 61 of the Constitution and section 12(1) (e) and (f) of the ECA.

20 Counsel argued that in paragraphs 4 and 5 of his affidavits in support of the petition, the  
appellant testified and his evidence was never controverted at trial that the 1<sup>st</sup> respondent  
kept bribing voters in the different places of the Sub-county with sugar, soap and other items  
which offence he reported to the 2<sup>nd</sup> respondent and the area Police Post of Kiwawu but it  
was all in vain. They added that Lukumbuka Briens Robert testified that he saw the 1<sup>st</sup>  
25 respondent dishing out money to boda-boda riders who kept on ferrying voters at Kyasengeze  
polling station and his evidence was never controverted since he was not cross examined.  
Further, that Nanyonga Harriet who was with Lukumbuka Briens Robert saw the boda-boda  
riders who were given money by the 1<sup>st</sup> respondent ferrying voters to the voting line at the  
polling station where she was supervising.





5 Counsel also invited this Court to look at paragraph 7 of the affidavit of Ngabo Ssebuufu Ibrahim where he stated that the 1<sup>st</sup> respondent and his agents bribed the voters with bundles of Ushs.5000/= and Ushs.2000/= as they came to the polling station with instructions to vote for the 1<sup>st</sup> respondent. They argued that this evidence was never controverted and, or cross examined on. They relied on the case of **Ernest Kiiza vs Labwoni Masiko, EPP No. 44 of**  
10 **2016**, where court stated that it is recognized that it is not easy to prove bribery especially when it is done secretly given the dire consequences it carries on the person alleged to have committed it.

15 In regard to publishing false statements against another candidate, counsel submitted that the 1<sup>st</sup> respondent and his agents published false statements that the appellant was dead and had pulled out from the political race having been seriously beaten and injured by the 1<sup>st</sup> respondent, his agents and the security agents/officers of the 2<sup>nd</sup> respondent. They pointed out the evidence of Ngabo Ssebuwugu Ibrahim who averred in paragraph 5 of his affidavit that supporters and agents of the 1<sup>st</sup> respondent such as Matayo Lubega, the Chairman of Kayunga LC1 and Bukenya Francis in Bongole village were telling people that the petitioner  
20 had died or been killed by police and were laughing at him for working for a dead man. Counsel invited this Court to look at paragraphs 4 and 6 of Ngabo Ssebuufu's affidavit and paragraph 12 of Kiwanuka Ben's affidavit in support of the petition which point to the publication of the false statements by the 1<sup>st</sup> respondent and which evidence was not discredited by the 1<sup>st</sup> respondent.

25 In regard to violence, intimidation and undue influence, counsel invited this Court to look at paragraphs 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the appellant's affidavit in support of the petition, paragraphs 4-8(e), and 9 of the appellant's affidavit in rejoinder and paragraphs 5-13 of Kiwanuka Ben's affidavit in support of the petition. They contended that all this evidence was never controverted during cross examination and that with the medical  
30 evidence attached, there is no doubt that the appellant did not participate in the voting

5 exercise due to the torture and serious beatings he sustained. Counsel pointed out that the perpetrators were the 1<sup>st</sup> respondent, his agents such as Nakalema Anna Maria and Asaba Nelson, GISO for Malangala sub-county, Kizito Juma Bijampola, all of whom never denied to have been working for the 1<sup>st</sup> respondent.

10 Counsel further submitted that at pages 52-55 of the record of proceedings, the 1<sup>st</sup> respondent conceded during cross examination that Kizito Juma Bijampola was his agent. In conclusion, counsel submitted that all the aforementioned people were agents of the 1<sup>st</sup> respondent and that it was erroneous for the learned trial Judge to hold otherwise.

15 On issues 7 and 8, counsel submitted that the election was marred with irregularities, non-compliance with the electoral laws, violence and acts of impunity which acts were widespread on the eve of the election and they contaminated the quality of the election in a substantial manner to the detriment of the appellant.

20 They faulted the learned trial Judge for holding that the 1<sup>st</sup> respondent was not at the scene of the crime having found that Kizito Juma Bijampola, Asaba Nelson, Baker Sekasi, Masifa and Lubandi Ramathan were at the scene and were agents of the 1<sup>st</sup> respondent. In addition, counsel faulted the learned trial Judge for holding that the 1<sup>st</sup> respondent never committed election offences which affected the election in a substantial manner after observing that false statement worked in favor of the 1<sup>st</sup> respondent. Further, that it was erroneous for the learned trial Judge to disregard the evidence in the appellant's affidavit in rejoinder that described how the 1<sup>st</sup> respondent was physically present at the scene of the crime.

25 Counsel argued that the learned trial Judge had already noted in her judgment that the 1<sup>st</sup> respondent's agents participated in the assault of the appellant and his agents which implied that even if she wanted to exonerate the 1<sup>st</sup> respondent, his agents had already been pinned and placed at the scene of the crime where violence was meted on the appellant and his agents. They added that having properly cited section 2(1) of the Parliamentary Elections Act,

5 the cases of ***Ernest Kiiza vs Kabakumba Masiko(supra)***, ***Kaija William vs Byamukama James EPP No. 12 of 2006*** and ***Odo vs Tayebwa and EC EPP No. 13 of 2011***, the learned trial Judge failed to properly apply the same decision when she held that the 1<sup>st</sup> respondent and his agents never participated in the terrible assault that happened on 2/2/2021, the eve of an election that led to the appellant's loss of a tooth.

10 Regarding issue 9, counsel prayed that the award of cost be quashed since the election was marred with illegal practices, assault, election offences, intimidation, bribery that greatly affected the results in a substantial manner. They further prayed that the appeal be allowed, the judgment and decree of the lower court be set aside, the election of LC III Chairperson of Malangala Sub-county, Mityana District be set aside and re-election using election officers  
15 other than the ones who conducted the annulled election be ordered and that the costs of this appeal and of the petition in the court below be borne by the respondents.

#### **1<sup>st</sup> Respondent's submissions**

20 Counsel argued grounds 1, 2, 3, 4, 5, and 6 concurrently. He submitted that the appellant failed to prove all the allegations contained in his petition to the required standard and to the satisfaction of court. Further, that the appellant in his petition alleged that the activities complained of took place on 2/2/2021 at around 9:30pm which was curfew time following the Presidential Directives and that at that time the 1<sup>st</sup> respondent was at his home. Further, that the said actions were perpetuated by security personnel and the 1<sup>st</sup> respondent was not  
25 accountable for their acts or omissions since keeping law and order was entirely the responsibility of the Government of Uganda.

Counsel also submitted that the appellant did not prove that the people said to be involved in the actions complained of were agents of the 1<sup>st</sup> respondent and as such their alleged actions cannot be attributed to the 1<sup>st</sup> respondent. He cited the case of ***Ernest Kiiza vs Kabakumba Masiko (supra)*** where it was held that a petitioner must adduce cogent evidence to the

5 satisfaction of court. He added that in all these grounds the appellant alleges that the 1<sup>st</sup> respondent committed illegal practices or electoral offences but the appellant failed to attribute any of them to him or any of his agents which implies that there is no evidence whatsoever that was adduced implicating the 1<sup>st</sup> respondent in those alleged malpractices.

10 Counsel further contended that the offences were alleged to have been committed before and on the polling day when the appellant was hospitalised which means that he did not witness their commission. He prayed that this Court finds that the learned trial Judge appropriately evaluated the evidence and reached the correct findings on these grounds of appeal.

### **2<sup>nd</sup> respondent's submissions**

15 Counsel argued grounds 1, 2, 3 and 4 concurrently. They submitted that the appellant made several allegations of bribery in his petition in which he claimed that during the voting process, the 1<sup>st</sup> respondent while at Bongole and Kyesengeze villages bribed voters by giving them cash but that no attention was given to his complaints and reports at Kiwawu Police Station. They contended that the learned trial Judge extensively evaluated all the evidence regarding these bribery allegations and found that there was no specific mention of the people who received bribes just as there no mention of the specific sites of bribery and when the bribery happened. She further found that no evidence was adduced to identify those who received money in the neighborhood of Kyesengeze polling station or to confirm that they were registered voters. Counsel invited this Court to uphold the learned trial Judge's finding that these bribery allegations were not proved to the satisfaction of court.

25 In regard to the bribery allegations made by Bayavuge Charles, the appellant's polling agent that he observed Kizito Bijampola at a shop opposite Bongole polling station giving out Ushs. 5,000/= and 2,000/= to voters approaching the polling station, counsel submitted that the learned trial Judge evaluated this evidence on page 25 of her judgment and noted that while  
30 this evidence was corroborated by the testimony of Ngabo Sebunya who claimed to have

5 witnessed the bribery of voters entering the polling station, the witnesses failed to directly connect the perpetrators to the 1<sup>st</sup> respondent. She further found that it was not confirmed that the people who allegedly received the money were registered voters and therefore bribery by agent was not proved to the required standard.

10 In regard to the allegations of violence, counsel submitted that it is imperative for the court to look out for independent evidence corroborating the violence and that like any other electoral offence, electoral violence must be proved to the satisfaction of court. They argued that the learned trial Judge extensively evaluated all the evidence regarding these allegations of violence and intimidation on pages 18-23 of the judgment and found that there was no proof  
15 that the 1<sup>st</sup> respondent's known agents acted or committed a particular offence with the knowledge or approval of the 1<sup>st</sup> respondent.

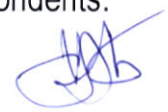
Counsel added that not only did the appellant admit in court that the 1<sup>st</sup> respondent was not at the scene, he also deposed that he encountered a one Kizito Bijjampola, Asaba Nelson  
20 (the GISO), Baker Sekasi, Masifa, Lubandi Ramathan and other people but did not mention the 1<sup>st</sup> respondent. Counsel contended that the evidence of Lutakome and Kiwanuka who testified that the appellant was beaten by the 1<sup>st</sup> respondent was contradicted by this evidence of the appellant. They invited this Court to uphold the finding of the learned trial Judge that these allegations of intimidation, harassment and violence allegedly meted out by the 1<sup>st</sup>  
25 respondent against the appellant and his agents were neither brought to the attention of the 2<sup>nd</sup> respondent nor proved to the satisfaction of court. They relied on the cases of **Hellen Odoa vs Alaso Alice EPP No.03 of 2016, Ernest Kiiza vs Kabakumba Matsiko (supra)** to support their submission.

30 Regarding the allegation of publication of false statements, counsel submitted that the appellant and his witnesses testified that the 1<sup>st</sup> respondent and his agents started a rumor

5 that the appellant was ill or dead and had withdrawn from the poll which resulted in many  
appellant's voters being disillusioned and regarding voting for the appellant a futile exercise.  
They argued that the learned trial Judge extensively evaluated these allegations on pages  
29-34 of her judgment and found that it was not proved to the satisfaction of court that the 1<sup>st</sup>  
respondent had instigated the rumor or supported those who were spreading it. She added  
10 that in any case, the appellant was absent in the sub-county on the polling station and he  
stated that he never saw the 1<sup>st</sup> respondent as alleged. She further noted that the allegations  
that a Police Constable was party to the rumor were not proved because the said Constable  
was never identified by the appellant or his witnesses. Counsel invited Court to uphold the  
finding of the learned trial Judge that these allegations of publication of false statements were  
15 not proved to the satisfaction of court.

On grounds 5 and 6, counsel submitted that the appellant should have adduced cogent  
evidence to show that there was non-compliance with the law and that such non-compliance  
affected the election in a substantial manner. They relied on section 19 of the LGA and the  
20 decision in the cases of **Sarah Bireete vs Bernadette Birigwa EPP No. 13 of 2003** and  
**Kiiza Besigye vs Museveni & The Election Commission EP No. 1 of 2001** to support their  
submission. Counsel submitted that the learned trial Judge extensively evaluated all the  
evidence regarding these allegations on pages 35- 42 of her judgment where she found that  
the irregularities and non-compliance in three out of ten polling stations would not be sufficient  
25 proof that such non-compliance affected the result of the election in a substantial manner.  
Counsel invited this Court to uphold the finding of the learned trial Judge and find that the  
non-compliance was not substantial to affect the outcome of the election.

In conclusion, counsel prayed that the appeal be dismissed with costs to the respondents.



30

5 **Court's Consideration**

10 The duty of this Court as a first appellate court is to re-evaluate all the evidence on record and come to its own conclusion as provided under rule 30(1) of the Rules of this Court and elaborated in the case of ***Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997***. With the above duty in mind, I have carefully studied the court record and considered the submissions of counsel together with the authorities relied upon. I shall consider grounds 1, 2, 3 and 4 jointly as they all point to the commission of illegal practices and election offences and grounds 5 and 6 together as they all relate to irregularities and non-compliance with electoral laws.

15 In regard to grounds 1, 2, 3 and 4 which are canvassed under issues 1,3,4,5 and 6 raised by the appellant, the learned trial Judge is faulted for failing to properly evaluate the evidence in regard to the illegal practices and electoral offences allegedly committed by the 1<sup>st</sup> respondent and his agents against the appellant and his agents. The alleged illegal practices and offences against the appellant by the 1<sup>st</sup> respondent personally or by his agents with his knowledge and consent or approval, are outlined in the affidavit supporting the petition. They include bribery, publishing false statements against another candidate, violence, intimidation and undue influence.

20 I shall first of all deal with the offence of bribery provided for under section 147 of the LGA as follows;

***"147. Offence of bribery***

25 *(1)Any person who, with intent, either before or during an election, either directly or indirectly influences another person to vote or to refrain from voting for any candidate, or gives, provides or causes to be given or provides any money, gift or other consideration to another person, to influence that person's voting, commits an illegal practice of the offence of bribery.*

*(2)A person receiving any money, gift or consideration under subsection (1) also commits the*

5            *offence of illegal practice under that subsection.*

(3) *Subsection (1) does not apply in respect of the provision of refreshments or food—*

(a) *offered by a candidate or a candidate's agent at a candidate's campaign planning and organisation meeting;*

10            (b) *offered by any person other than a candidate or a candidate's agent at a candidates' campaign planning and organisation meeting.*

(4) *A candidate or candidate's agent who, by himself or herself or any other person, directly or indirectly, before the close of polls on polling day offers, procures or provides or promises to procure or provide alcoholic beverages to any person commits an offence of illegal practice.*

15            (5) *Any person who commits the offences stipulated in this section shall be liable on conviction to a fine not exceeding five currency points or to a term of imprisonment not exceeding two years or both."*

In ***Mathina Bwambale vs Crispus Kiyonga and The Electoral Commission, EP No.007 of 2007***, it was held that for allegations of voter bribery to succeed, three things must be satisfied, namely; a gift must be given to a voter, it must be given by a candidate or his agent with his knowledge and consent or approval; it must have been given with the intention of inducing to vote or not to vote for a particular person. The LGA is silent on the standard of proof in petitions that arise from Local Council Elections. However, section 61(3) of the Parliamentary Elections Act (PEA), which provides that the standard of proof is on a balance of probabilities, becomes applicable by virtue of section 172 of the LGA.

25            The Local Governments Act defines a "registered voter" in section 1 (1) (q) as a person whose name is entered on the voters' register. In ***Wakayima Musoke and Electoral Commission vs Kasule Robert Sebunya, EPP No.72 of 2016***, it was held that conclusive proof of being a registered voter is by evidence of the person's name appearing in the National Voter's Register, and not by possession of a National Identity Card. (Also see: ***Kasirye Zzimula Fred***



5 **vs Bazigatirawo Kibuuka Francis and anor, [2019] UGCA 457 and Gaddafi Nassur vs  
Sekabira Denes and anor, EPP No. 0056 of 2021)**

10 In the instant case, the appellant's evidence is that the 1<sup>st</sup> respondent and his agents  
committed the offence of bribery throughout the campaigns and during the elections. He  
averred in paragraphs 3 and 18 of the petition and paragraphs 4 and 5 of the affidavit in  
15 support of the petition that the 1<sup>st</sup> respondent committed the offence of bribery. In paragraph  
18 of the petition, the appellant averred that the 1<sup>st</sup> respondent continued to commit the  
offence of bribery throughout the voting day by giving voters cash, transport to and from the  
polling stations, and by paying motorcycle riders to transport voters. In paragraph 4 of the  
20 affidavit in support, the appellant averred that throughout the campaign period some voters  
in the places of Bongole village and Kyesengeza village were being bribed by the 1<sup>st</sup>  
respondent using money and sugar, soap and other things.

He relied on the affidavits in support of the petition deposed by Lukumbuka Briens Robert,  
Nanyonga Harriet, Lutaakome denis, Kiwanuka Ben and Ngabo Ssebuufu Ibrahim which he  
invited this Court to look at in proof of his allegations on bribery of voters.

25 Lukumbuka Briens Robert who stated that he is the founder of a Non-Governmental  
Organization (NGO) called "Feel of Africa Rights Alliance" which was accredited by the 2<sup>nd</sup>  
respondent as an observer of the 2021 elections and whose focus district was Mityana,  
averred in paragraph 9 of his affidavit that he saw a gentleman whom he later came to know  
as the 2<sup>nd</sup> respondent dishing out money to boda-boda riders who kept ferrying voters at  
Kyesengeza polling station. He also stated in paragraph 12 that he saw the 1<sup>st</sup> respondent  
call the presiding officers in charge of Kyesengeze polling station and talk to them while  
instructing them though he did not hear what they were discussing as he was at a distance.  
He added that he recorded a video of these two incidents using his phone.



5 Nanyonga Harriet who stated that she was the appointed supervisor of the appellant of Kyesengeza polling station, averred in paragraphs 3 and 4 of her affidavit that she saw many people being dropped by boda boda riders at the Kyesengeza polling station and the 1<sup>st</sup> respondent was around for some good hours. In paragraph 4 she stated that the 1<sup>st</sup> respondent paid off boda-boda riders in her presence but she could not hear what they were  
10 saying. In paragraph 9 she stated that she started talking to different voters who told her that their transport had been paid by the 1<sup>st</sup> respondent.

Lutaakome Denis who said he was the campaign supervisor of the appellant stated that on polling day at about 1.00pm, the 1<sup>st</sup> respondent and his agent called Bijampola went to Kanyanya polling station and started issuing money to voters standing in the line.

15 Kiwanuka Ben stated in paragraph 14 of his affidavit that the 1<sup>st</sup> respondent and his agent called Bijampola went to Kanyanya polling station on the polling day where he (Kiwanuka Ben) is a voter and started issuing money to voters standing in the line to vote.

Ngabo Ssebufu Ibrahim and Bayavuge Charles stated in paragraph 7 of their respective affidavits that at Bongole polling station, where Ngabo was a voter and Bayavuge a polling  
20 agent, Bijampola who is an agent of the 1<sup>st</sup> respondent stationed himself in front of the shop of a one Salongo Bukenya opposite the polling station and issued money in denominations of Ushs. 5,000/= and 2,000/= to voters as they came to the polling station to vote with instructions to vote for the 1<sup>st</sup> respondent.

In paragraph 9 (b) of his answer to the petition and paragraph 5 of his affidavit in support of  
25 the answer to the petition, the 1<sup>st</sup> respondent denied ever engaging in any electoral offence of bribery before or during the campaign process as alleged by the appellant and his witnesses. In paragraphs 16 and 17, he denied ferrying people on boda-bodas or paying



5 boda-boda riders or even participating in any malpractice at Kyesengeza polling station as stated by Nanyonga Harriet.

The learned trial Judge evaluated the evidence on the allegations of bribery in her judgment as follows:

10 *“Lutakome Dennis and Ben Kiwanuka being Buwembo’s supporters claim to have observed Busulwa and his agent Bijyampola bribing voters who were standing in line waiting for to vote at the Kanyanya polling station. Bavyange Charles claimed to have observed the same illegal activity at the Bongole polling station. On both occasions, no specifics were given of those being bribed, proof that they were indeed registered voters, or whether they were actually accepting the bribes. (sic) .....*

15 *In addition, I noted a serious contradiction in Kiwanuka’s evidence. In paragraph 1 of his affidavit, he claimed to be a registered voter at the Kabyuma polling station. It is assumed that was his voting station. He contradicted himself to state in paragraph 14 that he was a voter at the Kanyanya polling station and was present there on voting day at 1 pm. It is not stated that Kanyanya and Kabyuma are one and the same place and it would thus doubtful that Kiwanuka was at Kanyanya at all.*  
20 *Lukumbuka Robert who also claimed to have observed Busulwa giving money to boda boda riders, was not able to confirm that they were registered voters or that those that they were ferrying to Kyesengeze polling station, were destined to vote for Busulwa.*


*On the whole, the evidence that Buwembo or his agents committed the offence of bribery would fall well below the standard set to prove that offence.”*

25 I have myself reappraised the evidence on record to determine whether the learned trial Judge indeed erred in law and in fact in her evaluation of the evidence that was before her and the findings and conclusion she made. On the alleged bribery at Kyesengeza polling station, I note that Lukumbuka Briens Robert averred in paragraph 9 of his affidavit that on polling day he saw a gentleman whom he later came to know as the 2<sup>nd</sup> respondent (in the  
30 petition) dishing out money to boda-boda riders who kept ferrying voters at Kyesengeza polling station. I observe that on the lower court record, the 2<sup>nd</sup> respondent was the Electoral

5 Commission. One wonders how the Electoral Commission which is a body corporate could have been dishing out money to boda-boda riders. I therefore take it that the witness meant the 1<sup>st</sup> respondent but stated the 2<sup>nd</sup> respondent in error. Otherwise, the averment would be a falsehood.

10 I also note that during the hearing of the election petition, the video which Lukumbuka Briens Robert relied on to support his allegations of bribery against the 1<sup>st</sup> respondent was expunged from the court record having been withdrawn by the appellant's counsel on the ground that it was not in the language of the court. What remained of his evidence was the allegation that he saw the 1<sup>st</sup> respondent calling the presiding officers in charge of Kyesengeze polling station whom he talked to while instructing them but he did not hear what they were discussing as he was at a distance. The fact that he did not hear what the 1<sup>st</sup> respondent instructed the presiding officers to do, in my view, makes Lukumbuka's averments speculative and without any probative value. It therefore fell short of the required standard of proof on a balance of probabilities to the satisfaction of court that the 1<sup>st</sup> respondent bribed voters.

20 Nanyonga Harriet who said she was the appointed supervisor of the appellant at Kyesengeza polling station also averred that she saw many people being dropped off by boda-bodas at the polling station where the 1<sup>st</sup> respondent was around for some time. She stated that she saw the 1<sup>st</sup> respondent paying boda-bodas but she could not hear what they were talking since she was some few metres away from them. Further, that she was in the company of Lukumbuka when she saw the 1<sup>st</sup> respondent calling the presiding officers who left their tables and together with the 1<sup>st</sup> respondent went a distance from their designated tables in a sub-road and she could see the 1<sup>st</sup> respondent instructing them as he stretched his arms but she could not hear what he was telling them. It should be noted that for there to be bribery, the intention should be to induce the voters to vote for the one who is giving the bribe or their candidate. Like I found regarding Lukumbuka's evidence, this aspect of Nanyonga's evidence is also speculative and of no probative value.



5 The offence of bribery is committed when money or a gift is given to a voter. From Nanyonga's evidence the boda-boda riders were the ones who were paid to ferry voters and not the voters themselves. In view of the above ingredients of the offence of bribery, it would be erroneous to conclude that the alleged act of paying boda-bodas to ferry voters amounts to bribery of those ferried. At any rate, Nanyonga stated that she talked to different voters who told her  
10 that their transport had been paid by the 1<sup>st</sup> respondent but she did not specify those voters by stating their names and the others who were allegedly ferried by the boda-boda riders. Neither was there any proof that the people ferried by the boda-bodas were voters by tendering in evidence voters' registers that bear their names as required. See: **Gaddafi Nassur vs Sekabira Denes and anor (supra)** and **Hon. George Patrick Kasajja vs Frederick Ngobi Gume & Electoral Commission (supra)** where this Court held that the  
15 conclusive proof that a person is a voter is by evidence of that person's name on the national Voters' Register and not by voter slips or National Identification. I am therefore unable to find that the alleged paying of boda-boda riders was an act of bribery of voters.

20 Nanyonga also stated in paragraph 9 of her affidavit that she talked to different voters who told her that their transport had been paid by the 1<sup>st</sup> respondent but she neither named them nor indicated that they are registered voters. I also note that there is no evidence on court record that was adduced by the alleged voters to confirm that they were bribed by the 1<sup>st</sup> respondent to vote for him. I therefore find that the evidence of Nanyonga Harriet as the appointed supervisor of the appellant is not corroborated by any independent evidence and  
25 as such could not satisfy this Court that the 1<sup>st</sup> respondent committed the offence of bribery.

On the alleged bribery at Kanyanya polling station, I note that Kiwanuka Ben stated in paragraph 14 of his affidavit that he saw the 1<sup>st</sup> respondent at Kanyanya polling station on the polling day issuing money to voters standing in the line to vote. I observe that none of the voters from Kanyanya polling station who were standing in the line and received money was  
30 named. Neither did any of them swear affidavits to corroborate Kiwanuka Ben's evidence that

5 they received the money. Further, no evidence was adduced by any other witness that such bribery of voters took place at that polling station.

10 In ***Achieng Sarah and Electoral Commission vs Ochwo Nyakecho Keziah, EPA No. 39 of 2012***, it was held that there is need for other evidence to confirm that a particular witness is telling the truth about bribery, due to the tendency by partisan witnesses to exaggerate claims of what might have happened.

15 In the instant case, only Kiwanuka Ben swore an affidavit in respect of bribery of voters in the voting lines at Kanyanya polling station. His evidence was therefore not corroborated by another independent evidence to confirm the truthfulness of this allegation of voter bribery at that particular polling station. As it were, the evidence of Kiwanuka Ben regarding the 1<sup>st</sup> respondent's bribery of voters at Kanyanya polling station is not cogent enough to satisfy court that the offence was committed as alleged.

In regard to bribery by agent, it is the appellant's evidence and that of his witnesses Kiwanuka Ben, Ngabo Ssebufu Ibrahim and Bayavuge Charles that Bijampola was an agent of the 1<sup>st</sup> respondent who bribed voters at Kanyanya and Bongole pollings stations.

20 In his answer to the petition and the supporting affidavit, the 1<sup>st</sup> respondent denied that Bijampola is his agent. At trial, during his cross examination, the 1<sup>st</sup> respondent conceded that Bijampola in his capacity as NRM Councilor was campaigning for him as NRM Chairman. However, in re-examination at page 290, he denied Bijampola being his official agent. This dispels submissions of counsel for the appellant that the 1<sup>st</sup> respondent never challenged the  
25 evidence of the petitioner's witnesses that Bijampola was his agent and that he gave out bribes to voters.

The learned trial Judge in the instant case evaluated the evidence of bribery by agent and found as follows;

5 "I was not convinced by the evidence of bribery presented against Busulwa. On the other hand, Busulwa's witnesses adduced evidence that appeared to implicate other persons. Bayavuge Charles, Buwembo's polling agent at Bongole polling station deposed that on polling day, he observed one Kizito Bijampola, Busulwa's agent and supporter stationed himself at a shop opposite the polling station giving out shs. 5000 and shs. 2000 to voters approaching the polling station to vote. For that, and other reasons, he declined to sign the DR forms for that polling station. Ngabo Sebunya corroborated that evidence by stating that he too witnessed that incident and that the payments were being made as the voters entered the station to vote and that each was given instructions not to vote for Buwembo.

10  
15 Beyond observing Bijampola handing out money for votes, neither witness was able to directly connect him to Busulwa. There was no evidence that he was working under Busulwa's instructions or with his knowledge to hand out the bribes. None of them approached any of the voters allegedly given money to confirm for a fact that they were registered voters or that Bijampola had mentioned Busulwa as his principal or one who he represented. The court cannot likewise assume that there was any connection in that regard. I do find then that bribery by agent was not proved to the required standard."

20 I find it pertinent that I first consider whether Bijampola was an agent of the 1<sup>st</sup> respondent as alleged.

25 In dealing with the aspect of who an agent is, the Supreme Court in **Col. (Rtd) Dr. Besigye Kizza vs Museveni Y.K. & Anor (supra)** as per Oder, JSC, referred to "**The Digest of Annotated British, Commonwealth and European Cases, 1982 Reissue, Butherwerths & Co. (Publishers) Ltd. 1982; Page 72**", which defines and explains that;

30 "An agent is a person employed by another to act for him or her and on his or her behalf either generally or in some particular transaction. The authority may be actual or implied from circumstances. It is not necessary to prove agency to show that a person was actually appointed by the candidate, if a person not appointed were to assume to act in any department of service as election agent and the candidate accepted his service as such, he

5            would thereby ratify the agency, so that a man may become agent for another in either of two ways, by actual employment or by recognition and acceptance....”

Oder, JSC also referred to a passage in the **Halsbury’s Laws of England, 4<sup>th</sup> Edition, Vol. 15 from Paragraph 698** which discusses agency in relation to elections to the effect that;

10            “In order to prove agency it is not necessary to show that the person was actually appointed by the candidate or that he was paid. The crucial test is whether there has been employment or authorization of the agent by the candidate to do some election work or the adoption of his work when done. The candidate, however, is liable not only for the acts of the agents when he has himself appointed or authorized, but also for the acts of the agents employed by his election agent or by any other agent having authority to employ others. In the absence of  
15            authorization or ratification the candidate must be proved by himself or his acknowledged agents to have employed the agent or to act on his behalf or have to some extent put himself in the agent’s hands or to have made common cause with him for the purpose of promoting of the candidate’s election. The candidate must have entrusted the alleged agent with some material part of the business of election.”

20            The position in the above case was referred to in **Amama Mbabazi & Electoral Commission vs Musinguzi Garuga James, EPP No. 12 of 2002**, and **Fred Badda & Anor vs Prof. Muyanda Mutebi EPP No. 25 of 2006 (CA)**.

25            The allegation that Bijampola was an agent of the 1<sup>st</sup> respondent was inferred from the fact that during the campaigns they were moving together to canvass for votes. This came out clearly in paragraph 6 of Lutaakome’s affidavit in rejoinder where he averred that Bijampola was an agent of the 1<sup>st</sup> respondent since he belonged to and was a councilor in the same party as him (the 1<sup>st</sup> respondent) and therefore they were looking for votes together.

During cross examination, it was confirmed by the 1<sup>st</sup> respondent that indeed as candidates belonging to NRM party who were vying for different political positions but within the same

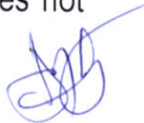


5 sub-county and district, he and Bijampola moved together campaigning for votes. Asked whether it is true that Bijampola as NRM councilor was also campaigning for him, the 1<sup>st</sup> respondent answered in the affirmative. However, in re-examination, he clarified that Bijampola was not his official agent and that it was not wrong for Bijampola to campaign with him as they are members of the same party.

10 In my view, the fact that the 1<sup>st</sup> respondent and Bijampola moved together as members of the same party during campaigns to canvass for votes and did campaign for each other in the process makes him an agent of the 1<sup>st</sup> respondent by recognition and acceptance. I say so in view of the evidence on record and the explanation from "***The Digest of Annotated British, Commonwealth and European Cases (supra)***" which was cited in ***Col. (Rtd) Dr. Kiizza Besigye vs Electoral Commission and Yoweri Kaguta Museveni (supra)*** as already  
15 quoted above. The gist of it is that the authority of an agent may be actual or implied from circumstances, as such it is not necessary to prove agency to show that a person was actually appointed by the candidate. Further, that a person may become agent for another either by actual employment or by recognition and acceptance.

20 The evidence on record in the instant case is that the 1<sup>st</sup> respondent, in cross examination, acknowledged that Bijampola as a member of his party and a candidate in the Local Council 5 race moved with him as they canvassed for votes individually and mutually for each other. The clarification offered by the 1<sup>st</sup> respondent in re-examination only managed to make it clear that Bijampola was not his official agent. However, the fact that Bijampola campaigned for the  
25 1<sup>st</sup> respondent as a member of his party was confirmed and ratified by him in re-examination when he asserted that it was not wrong for him to do so.

In the circumstances, I would find that the learned trial Judge erred in her finding that Bijampola is not an agent of the 1<sup>st</sup> respondent because the evidence on record does not



5 support that finding. On the contrary it shows that Bijampola was an agent of the 1<sup>st</sup> respondent by recognition and acceptance.

The issues for consideration would then be whether or not Bijampola as an agent of the 1<sup>st</sup> respondent bribed voters to influence them to vote for the 1<sup>st</sup> respondent and, if so, whether he did so with the 1<sup>st</sup> respondent's knowledge and consent or approval as required under  
10 section 139(c) of the LGA.

On whether Bijampola bribed voters, the evidence that implicates him was given by Kiwanuka Ben, Ngabo Ssebufu Ibrahim and Bayavuge Charles who all stated that Bijampola as an agent of the 1<sup>st</sup> respondent bribed voters at Kanyanya and Bongole polling stations. Kiwanuka Ben stated in paragraph 14 of his affidavit that he saw the 1<sup>st</sup> respondent and his agent called  
15 Bijampola at Kanyanya polling station on the polling day issuing money to voters standing in the line to vote. On the other hand, Ngabo Ssebufu Ibrahim and Bayavuge Charles in paragraph 7 of their respective affidavits stated that at Bongole polling station, Bijampola who is an agent of the 1<sup>st</sup> respondent stationed himself in front of the shop of a one Salongo Bukenya opposite the polling station and issued money in denominations of Ushs. 5,000/= and 2,000/= to voters as they came to the polling station to vote with instructions to vote for  
20 the 1<sup>st</sup> respondent.

First of all, I note that while Kiwanuka Ben stated that Bijampola was at Kanyanya polling station issuing money to voters standing in the line to vote, Ngabo Ssebufu Ibrahim and Bayavuge Charles stated that the same Bijampola also stationed himself in front of the shop  
25 opposite Bongole polling station and issued money to voters as they came to the polling station to vote. There was no explanation given as to whether the two polling stations were next to each other such that one person could be in both at the same time. I would therefore be hesitant to make a finding that the offence of bribery was proved based on such weak and uncorroborated evidence.

5 Secondly, as correctly found by the learned trial Judge, the voters who were allegedly bribed were not specifically identified by the witnesses and none of them adduced evidence to support the allegation of Kiwanuka Ben. In addition, Ngabo Ssebufu Ibrahim and Bayavuge Charles who averred that the bribed voters had instructions to vote for the 1<sup>st</sup> respondent had no proof of that averment beyond the allegations thus making it mere speculation that court cannot rely on.

10 As I had earlier noted, the burden of proof in election petitions lies on the petitioner (appellant in this case) which means that in order for the appellant's allegations of bribery to succeed he had to prove that the persons alleged to have been bribed were registered voters by showing that their names appear in the voters' register. It could be argued that because some of the people who were alleged by Kiwanuka Ben to have been bribed by Bijampola were standing on the line to vote, this would imply that they are registered voters and as such, there would be no need to produce a copy of the voters' register that bear their names. In light of the provisions of section 128 of the LGA, this argument would only be valid if the witness had specified that the people on the line at which the voters were, for the well-known reason that not all who line up to vote actually qualify to vote.

20 Section 128 of the LGA provides for the polling and voting procedures. Subsection (3) thereof requires all the intending voters to form one line from a point at least twenty metres away from the table at which each voter is to place the authorized mark of choice on the ballot paper. Then subsection (5)(a) provides for the positioning at every polling station the 1<sup>st</sup> table where every voter reports for identification in the voter's roll and collection of a ballot paper. Subsection (5)(b) provides for the positioning of the second table where a voter ticks or thumbprint to indicate his/her preferred candidate, fifteen metres from the first table and subsection (5)(d) provides for the 3<sup>rd</sup> table where the ballot box for inserting the ticked or thump printed ballot paper is placed.

5 It is common knowledge that at polling stations, depending on what time of the voting day, there  
can be long lines that stretch several metres away from the 1<sup>st</sup> table for identification of voters  
and issuance of ballot papers. It therefore follows that one can only safely conclude that a person  
is a registered voter when he/she has been identified and given a ballot paper as it is not  
uncommon for people who have lined up to vote to be turned back because their names do not  
10 appear in the voters' register. I would therefore find it erroneous to assume that simply because  
some people were on the line to vote, then they are registered voters.

The appellant had the duty to provide proof that the people allegedly bribed while lining to vote  
were registered voters by first of all stating their names and either showing that they had already  
been given the ballot papers and were now on the line waiting to indicate their preferred  
15 candidate or by tendering in evidence a certified copy of the voters' register that bear their names  
or both. It would be very unsafe for court to base its decision on such blanket statements that  
people on the line were seen being bribed to vote for particular candidates without further proof  
being provided. Thankfully, the learned trial Judge was alive to this, hence her finding that no  
specifics were given of those being bribed, proof that they were indeed registered voters, or  
20 whether they were actually accepting the bribes. I would find no reason to fault her for that  
finding.

In its recent decision in ***Gaddafi Nassur vs Sekabira Denes and anor (supra)*** this Court dealt  
with the issue of voter bribery, and found as follows;

25 *"As noted above, the burden of proof in election petitions lies on the petitioner. The appellant should  
have applied to court seeking orders to compel respondent no.2 to produce the voters' register in  
court but he did not take the step. In any case, section 24 of the Electoral Commissions Act allows  
the public to access the voters roll at the office of the returning officer in the constituency for purposes  
of inspection and of making photocopies of the registers.*

30 *...In my view, the learned trial Judge was justified to find that the appellant had not proved to the  
satisfaction of court that there was any registered voter who was bribed."*



5 I agree with that position which is based on the law and I wholly adopt it in this appeal because  
the appellant did not produce the voters' register that bears the names of the people allegedly  
bribed to prove that they are registered voters. However, I hasten to opine that in circumstances  
where there is cogent evidence that the named person allegedly bribed had a ballot paper in  
his/her hand and was on the line waiting to indicate the preferred candidate and cast the vote  
10 as discussed above, there would be no need to require proof by production of a voters' register.

On the whole, I find that the evidence adduced to prove the offence of bribery falls short of what  
is stipulated under section 147 of the LGA and the standard of proof required by section 61(3)  
of the PEA. In the circumstances, except on the issue of whether Bijampola was the 1<sup>st</sup>  
respondent's agent, I cannot fault the learned trial Judge on her findings and conclusion in regard  
15 to the offence of bribery. The allegation in respect of bribery in ground 1 of the appeal would  
therefore fail.

In regard to the offence of publishing false statements against another candidate, counsel for  
the appellant submitted that the 1<sup>st</sup> respondent and his agents published false statements that  
he was dead and had pulled out from the political race having been seriously beaten and  
20 injured by the 1<sup>st</sup> respondent, his agents and the security agents/officers of the 2<sup>nd</sup>  
respondent. They pointed out the evidence of Ngabo Ssebuwugu Ibrahim who averred in  
paragraph 5 of his affidavit that supporters and agents of the 1<sup>st</sup> respondent such as Matayo  
Lubega, the Chairman of Kayunga LC1 and Bukenya Francis in Bongole village were telling  
people that the appellant had died or been killed by police and were laughing at him for  
25 working for a dead man. Counsel invited this Court to look at paragraphs 4 and 6 of Ngabo  
Ssebuufu's affidavit and paragraph 12 of Kiwanuka Ben's affidavit in support of the petition  
which points to the publication of the false statements by the 1<sup>st</sup> respondent, which evidence  
was not discredited by the 1<sup>st</sup> respondent.



5 Conversely, counsel for the 1<sup>st</sup> respondent submitted that in all grounds the appellant alleges that the 1<sup>st</sup> respondent committed illegal practices or electoral offences but he failed to adduce evidence to prove that the 1<sup>st</sup> respondent and any of his agents committed the offence.

For the 2<sup>nd</sup> respondent, counsel submitted that the learned trial Judge extensively evaluated the allegation and found that it was not proved to the satisfaction of court that the 1<sup>st</sup> respondent had instigated the rumor or supported those who were spreading it.

Section 148 (2) of the LGA provides as follows;

***"148. Offence of illegal practice***

*(2)Any person who, before or during an election, publishes a false statement of the illness, death or withdrawal of a candidate at the election for the purpose of promoting or procuring the election of another candidate, knowing that statement to be false or not knowing or believing on reasonable grounds the statement to be true, commits the offence of illegal practice."*

The appellant averred in paragraphs 15 and 16 of his affidavit in support of the petition that early in the morning of the voting day his supporters and remaining agents were calling him to ask if it was true he had withdrawn his candidature and that information was being spread widely by the 1<sup>st</sup> respondent and his agents that he (appellant) had pulled out of the race and withdrawn his candidature and that people should not waste time to vote for him. Further, that he was told by his supporters like Ssenabulya Juma who was also his supervisor of the whole sub-county that people were telling him that the appellant was ill, others said he was dead, while others that he had withdrawn from the race and that police was looking for him among other lies.

The evidence adduced to corroborate the above statements is that of Ngabo Ssebuufu Ibrahim and Kiwanuka Ben. Ngabo Ssebuufu Ibrahim in paragraphs 4 and 6 of his affidavit averred that on the polling day, Bayavuge who was the polling agent of the appellant at Bongole polling station called him to report that the election constable was telling voters who

5 came to vote that the appellant had died the previous night and that people should not vote for a dead person. He further averred that this rumor was intended and had the effect of discouraging many supporters of the appellant from voting, as it was public knowledge that the appellant was grievously assaulted the previous night by security officers and the agents and supporters of the 1<sup>st</sup> respondent and was hospitalised.

10 Kiwanuka Ben stated in paragraph 12 of his affidavit in support of the petition that the incident on the eve of the polling day created widespread fear in the populace and as a result many shunned the election for fear of violence. He added that the appellant could not participate in the voting as on the polling day he was in the hospital nursing wounds and there were rumors being spread by the agents and supporters of the 1<sup>st</sup> respondent that he had in fact died which  
15 created fear and despondency among the voters.

I also note that the other appellant's witnesses, namely; Lutaakome Denis and Bayavuge Charles in their respective affidavits in support of the petition in paragraphs 15 and 4 respectively alluded to the allegation of publishing false statements against the appellant.

20 The 1<sup>st</sup> respondent in his affidavit in reply in paragraph 13 denied ever publishing or circulating any false information as alleged by the appellant. Further, in paragraph 7 of his affidavit in reply to the affidavits of the appellant's witnesses, the 1<sup>st</sup> respondent denied ever participating or instructing anyone to publish or circulate any false information as to the death of the appellant or his whereabouts as alleged by the witnesses in their affidavits.

25 I note that the learned trial Judge evaluated the evidence on the allegation of publishing of false statement against the appellant and stated thus;

*"Even so, the evidence that Busulwa's supporters and others circulated a rumor that he was dead was not strongly contested. Bayuvuge explained that on polling day while he was manning the Bongole polling station, he heard and saw an election constable at the same station telling incoming voters that Buwembo had died the previous night and that they should not vote for another person.*

5            *He rang Ngabo with that information and the latter confirmed it in his affidavit and named Lubega, a  
Chairman LC1 of Bukuya and Bukenya Francis of Bongole village as Busulwa's supporters' who  
were circulating the rumour and laughing at him that Buwembo had been killed by police. I am  
persuaded that the attack on Buwembo which was vicious and public was known by many people  
and must have become public knowledge by morning. Such damaging information which  
10            contravened Section 148(2) LGA would deprive Buwembo of possible votes. It is Busulwa and no  
other who would stand to gain by that rumour.*

15            *That said, it was not proved to my satisfaction that Busulwa had instigated the rumor or supported  
those who were spreading it. Significantly, in cross examination, Buwembo who claimed to be absent  
in the sub county on polling day, conceded that he never saw Busulwa at all and thus did not prove  
the allegations of the latter's involvement. I noted also that the police Constable allegedly spreading  
the rumor was not properly identified and no evidence was advanced to show that Lubega and  
20            Bukenya were Busulwa's agents or supporters. Although possible, there was also no evidence  
adduced to show that those spreading the rumor did so with the aim of procuring the election of  
Busulwa or another candidate other than Buwembo."*

25            I have re-appraised the evidence on the allegations of publishing false statements against the  
appellant and the rebuttal by the 1<sup>st</sup> respondent. I have also considered the learned trial  
Judge's analysis of the evidence and her conclusion. I agree with her that indeed, the  
allegation of publishing false statements by the 1<sup>st</sup> respondent and his agents was not proved  
on a balance of probabilities and to the satisfaction of court. It is trite that the words published  
30            or circulated must be proved to be untrue. According to the evidence on record, the appellant  
neither withdrew from the race nor was he dead which implies that the words were indeed  
untrue. That notwithstanding, there had to be further proof that those false words were  
instigated and published by the 1<sup>st</sup> respondent personally or by his agents with his knowledge  
and consent or approval. This was not proved.

35            I agree with the finding of the learned trial Judge that such attack on the appellant was vicious  
and denied the appellant of possible votes. However, I also agree with her conclusion that it



5 was not proved to the satisfaction of court that the rumor was instigated by the 1<sup>st</sup> respondent or that he supported those who were spreading it. I therefore find no reason to fault her for so finding.

As regards the offence of violence, intimidation and undue influence, section 154 of the LGA provides as follows;

10 **"154. Offence of undue influence**

*A person commits an offence of undue influence—*

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

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

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

20 *(b) if that person by abduction, duress or any fraudulent device or contrivance impedes or prevails upon a voter either to vote or to refrain from voting, is liable on conviction to a fine not exceeding five currency points or to imprisonment not exceeding two years or to both."*

In **Col. (Rtd) Dr. Kiizza Besigye vs Electoral Commission and Yoweri Kaguta Museveni (supra)** Odoki, CJ (as he then was) observed that;

25 *"The entire electoral process should have an atmosphere free of intimidation, bribery, violence or anything intended to subvert the will of the people.....those who commit electoral offences should be subjected to severe sanctions."*

Counsel for the appellant submitted that all the evidence in paragraphs 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the appellant's affidavit in support of the petition, paragraphs 4-8(e),

5 and 9 of the appellant's affidavit in rejoinder and paragraphs 5-13 of Kiwanuka Ben's affidavit  
in support of the petition was never controverted during cross examination and that with the  
medical evidence attached, there is no doubt that the appellant did not participate in the voting  
exercise due to the torture and serious beatings he sustained. They contended that the  
perpetrators of this violence were the 1<sup>st</sup> respondent and his agents such as Nakalema Anna  
10 Maria and Asaba Nelson, GISO for Malangala Sub-county, Kizito Juma Bijampola, all of  
whom never denied to have been working for the 1<sup>st</sup> respondent.

In reply, it was contended for the 1<sup>st</sup> respondent that the said actions were perpetuated by  
security personnel and the 1<sup>st</sup> respondent was not accountable for their acts or omissions  
since keeping law and order was entirely the responsibility of the Government of Uganda.

15 For the 2<sup>nd</sup> respondent, counsel submitted that it is imperative for the court to look out for  
independent evidence corroborating the violence and that like any other electoral offence,  
electoral violence must be proved to the satisfaction of court. They added that the learned  
trial Judge extensively evaluated all the evidence regarding these allegations of violence and  
intimidation and found that there was no proof that the 1<sup>st</sup> respondent's known agents acted  
20 or committed a particular offence with his knowledge or approval.

The appellant in paragraphs 6-14 of his affidavit in support averred that on the night before  
the elections, he received calls at around 9:30pm that some of his polling agents and  
supporters were being robbed, houses broken, beaten and arrested by unknown men some  
of whom were in police uniform. He proceeded to the scene at Kanyanya Trading center  
25 where he found Police Officers, a one Kizito Juma Bijampola, the GISO a one Asaba Nelson,  
Baker Sekasi, Masifa a Police Officer, and Lubandi Ramathan a Police Officer and other  
people. He asked them why the whole force of police and plain clothed men were beating  
people who were his supporters and those he had appointed polling agents but he was  
immediately grabbed, beaten, wrestled for hours with the same gang of police throwing insults

5 at him in Luganda language saying *"ffe tuli mukintu eno gavumenti yaffe tewali kyojja kukola vamukalulu"* loosely translated as *"we are the ones in the thing this is our government there is nothing you can do just withdraw from the race."*

Further, that during the fight he lost his tooth which was boxed and broken by the police men and that a one Dodoviko Ssentamu and other supporters of his were badly beaten. They  
10 were rushed to hospital that very night at Kampala in the appellant's car only to wake up at the Lord's Mercy Medical Centre where they were admitted and received treatment. As a result, he and Dodoviko Ssentamu were not able to vote since they were admitted and receiving treatment in hospital.

Kiwanuka Ben also averred in his affidavit in support of the petition that on 2/2/2021 at about  
15 9:00pm, while at his home, he heard an alarm and cries for help by people who were being assaulted. He rushed to the scene with a one Kizza Mbalule where they found police beating people including Dodoviko. He further stated that Bijampola, the 1<sup>st</sup> respondent, Baker Sekasi, Asaba Nelson (GISO) and other Police Officers were present at the scene but they were seated in their motor vehicles. Other residents came to the scene and Lutakome Denis, Abdu  
20 Segawa and Musoke Augustine called the appellant who also came to the scene. He stated that as soon as the appellant came, all the policemen, GISO, the 1<sup>st</sup> respondent and his supporters descended upon him, pulled him out of the car and severely beat him using batons, gun butts, sticks and kicks. Counsel for the appellant contended that this evidence was not assailed in cross-examination.

25 In reply to these allegations, the 1<sup>st</sup> respondent stated that he never assaulted the appellant. He stated in paragraphs 10, 11, 12 and 21 of the affidavit in support of the answer to the petition that he never instructed anyone or any Police Officer to beat people and that he is not aware of the appellant's beating or a one Dodoviko Ssentamu and any other supporter of his, since he was not there at the scene. He also denied knowledge of the circumstances

5 surrounding the alleged medical treatment of the appellant nor anything about the Lord's Mercy Medical Centre. Further, that people like Kizito Juma Bijampola, the GISO, Asaba Nelson, Baker Sekasi, Masifa, Lubandi Ramathan are not his agents and he has no knowledge of their activities against the appellant during his campaign as he could not consent or approve illegal activities during campaigns.

10 Nakalema Anna Maria, Special Police Constable (SPC) swore an additional affidavit in support of the 1<sup>st</sup> respondent's answer to the petition in which she averred in paragraphs 3-14 that on 2/2/2021 she received instructions from the OC Kiwawu Police Post to rush with her other colleagues to verify allegations of bribery at Kanyanya against the appellant. She went to the scene with 7 other SPCs in motor vehicle number UAJ 949E belonging to the area  
15 Councilor Kizito Juma Bijampola and motor vehicle number UBH 992S belonging to Baker Sekasi. She denied breaking into Segawa Abdul's house or beating him and Dodoviko. She also averred that the GISO did not beat the appellant at all but instead it is the appellant who slapped her and she ran for protection in the vehicle belonging to Baker Sekasi. She added that the appellant followed her in the company of his rowdy supporters and pulled her out of  
20 the vehicle. She fell down but managed to run away and hide in the nearby bushes from where she saw the appellant and his supporters descending on Baker Sekasi and beating him. She telephoned the OC Kiwawu and he came to their rescue and she thereafter reported a case of assault against the appellant at Kiwawu Police Station vide SD Ref; 3/02/2021/011.

25 Similarly, Asaba Nelson (the GISO) averred in paragraphs 3-11 of his additional affidavit in support of the 1<sup>st</sup> respondents answer to the petition that on 2/2/2021 he received intelligence about unknown people giving out bribes to people during curfew hours. In the company of other SPCs they proceeded to the scene in the Motor Vehicles of Sekasi Baker and the Councilor Kizito Juma. While on their way, they were stopped by the appellant and his supporters at Kanyanya and that is where the altercation started from. He distanced himself  
30 from the chaos so as to monitor and witness what was taking place and he indeed saw the



5 appellant attacking and assaulting one of the SPCs called Nakalema Anna Maria and Sekasi Baker the truck driver. He added that the situation went out of control and he remained in hiding in a nearby bush until the OC came to their rescue with a patrol.

10 In the affidavit in rejoinder, the appellant averred in paragraph 8 (a)- (e) that the 1<sup>st</sup> respondent's answer to the petition and its 3 supporting affidavits are full of naked lies and falsehoods because there are eye witness accounts that the 1<sup>st</sup> respondent was personally present when he (the appellant) was being assaulted and even participated in the violence even if he denied any knowledge that he was grievously assaulted and hospitalised on the eve of polling day. He also averred that the other civilians with whom the 1<sup>st</sup> respondent had travelled to the scene of the incident in Bijampola's vehicle together with the Police Officers, and had equally participated in assaulting the appellant were Bijampola Kizito Juma and Sekasi Baker and that they were his campaign agents/supporters.

15 Further, that Bijampola Kizito Juma, Sekasi Baker, SPC Nakalema Ann Maria and GISO Asaba Nelson are among the suspects who have been sanctioned by CID and DPP for criminal prosecution in the matter which implies that their affidavits in support of the 1<sup>st</sup> respondent's answer to the petition are false, lack credibility and are worthless as evidence. The appellant also averred that it is the 1<sup>st</sup> respondent who stood to benefit and did benefit from the aforesaid election violence as the appellant ended up being hospitalised and could not even vote for himself let alone coordinate his election on polling day. Moreover, his campaign team, agents and supporters were intimidated and put in disarray for fear of being harmed or arrested.

25 Lutaakome Denis also deposed an affidavit in rejoinder wherein he asserted that the 1<sup>st</sup> respondent's alibi was not true because he personally saw him at the scene of the scuffles together with Bijampola in whose vehicle No. UAJ 948E land cruiser the 1<sup>st</sup> respondent was seated in the co-driver's seat with some policemen at the back seat. He stated emphatically

5 that Bijampola and Baker Sekasi were agents of the 1<sup>st</sup> respondent during the election campaigns and they moved together with him looking for votes. He then explained that the Bijampola belonged to and was a councilor in the same party as the 1<sup>st</sup> respondent and therefore they were looking for votes together while the rest of the people he named in his affidavit were agents by their deeds and conduct and the voters knew them as such.

10 I note that Dodoviko Sentamu who was allegedly beaten with the appellant and Segawa Abdul whose house was allegedly attacked by unknown men in police uniform did not swear an affidavit to that effect to corroborate the evidence of the appellant, Lutaakome and Kiwanuka.

15 The learned trial Judge evaluated all the above evidence regarding the incidents of violence that took place and said she was persuaded that the 1<sup>st</sup> respondent's alibi that he was in his home during the attack was not sufficiently rebutted. She stated that in both his petition and affidavit in support, the appellant did not mention the 1<sup>st</sup> respondent as one of the people he first encountered at the crime scene even when he had specifically mentioned the people who were there. She said it was profound that he would omit to mention the 1<sup>st</sup> respondent his main antagonist.

20 The learned trial Judge stated that it is evident from the police report that the appellant attached, that in his first report of the assault to SID of the CID Headquarters in Kampala, he still did not mention the 1<sup>st</sup> respondent as one of those who attacked him on that fateful night. Similarly, he did not also mention the 1<sup>st</sup> respondent's involvement as background information of his injuries to the police surgeon and indeed, the subsequent investigations by police also  
25 did not mention the 1<sup>st</sup> respondent as one of those that had been part of the attack.

She also said the appellant admitted in court that although the 1<sup>st</sup> respondent was present at the scene, he only watched but did not join in hitting him. The learned trial Judge noted that the evidence of Lutaakome Denis as stated in his two affidavits and that of Kiwanuka Ben contradicted that of the appellant in that, while they were emphatic that the 1<sup>st</sup> respondent hit



5 the appellant, the appellant himself said he did not. The learned trial Judge then concluded as already mentioned above, that the 1<sup>st</sup> respondent's alibi was not sufficiently rebutted. My own re-evaluation of the evidence on record leads me to the same finding.

10 As regards participation by the alleged agents of the 1<sup>st</sup> respondent in the attack, I note that Mr. Asaba Nelson, who was named as one of the people that beat up the appellant, denied being part of the fighting and ensuing chaos. He stated in his affidavit that he distanced himself from the chaos and he only monitored and observed what was taking place. The 1<sup>st</sup> respondent in his affidavit denied instructing any one or any Police Officer to beat up people and that he is not aware of anyone who was beaten.

15 It was submitted for the appellant that all this evidence was never controverted during cross examination and that with the medical evidence attached, there is no doubt that the appellant did not participate in the voting exercise due to the torture and serious beatings he sustained.

The learned trial Judge analysed the evidence and found as follows;

*"The court is thus prepared to believe that an altercation happened between the two factions of Buwembo and his supporters and another of police, security operatives and civilians.*

20 *The question then would be whether those responsible for the attack were indeed Busulwa's agents, and that he knew, supported or even directed their actions that night. I say so because, mere proof of agency cannot validate a serious offence of violence which by itself can overturn an election. Similar to cases of bribery, there needs to be sufficient nexus between the victim of the violence and the candidate and proof that the candidate's known agents acted or committed a particular offence with his knowledge or with his approval. See: Ernest Kiiza Vrs. Kabakumba L. Matsiko (supra).*

25 *Buwembo and his witnesses persistently connected both Bijampola and Sekasi to Busulwa as his agents. Both Buwembo and Lutakoome insisted that one Bijampola (an LCV Councillor (sic) in Busulwa's party) and Sekasi were Busulwa's agents during the campaigns who he moved around with him to converse (sic) for votes, and the voters knew them as such. It was also alleged and not specifically denied by Sekasi that his motor vehicle ferried many police officers to the scene and the*

5 same officers were seen participating in the violence. Busulwa equally strongly denied those allegations but offered no evidence to support his denial. Significantly, neither Bijampola nor Sekasi made statements to deny any involvement with Busulwa or his campaigns and specifically their presence and involvement during the attack on Buwembo on 2/2/2021.

10 Further, in response to Buwembo's report about the attack, the CID (Special Investigations Directorate) carried out investigations and on 29/3/2021 issued a report (addressed to Buwembo's lawyers) which implicated Bijampola an LC5 Councillor and Sekasi the LC1 Kisiba village, as having offered their motor vehicles for security work and having been present at the scene of the attack. I saw no serious contest to that evidence which was strong corroboration that an attack happened on the night of 2/2/2021 in which Bijampola, Sekasi and police officers participated. It may well be that the police officers were not directly linked to Busulwa or the 2<sup>nd</sup> respondent. However, their own evidence is that Nakalema Anna Maria and seven other police officers were taken to the crime scene in motor vehicles of Bijampola and Sekasi.

15 During cross examination Busulwa admitted he and Bijampola were from the same political party, NRM and that Bijampola, a councillor at District level sometimes used to campaign for him as NRM chairperson. It was asserted and not rebutted that both Bijampola and Sekasi were on several occasions seen moving around with Busulwa conversing (sic) for votes, and thus furthering his election.

20 Both Bijampola and Sekasi were positively placed at the crime scene and were seen beating up Buwembo and his supporters and agents. However, having rejected the evidence that Busulwa was present at the scene and joined in or watched the assault on Buwembo, I saw no other evidence showing that he was aware of, authorized, supported or approved the involvement of Bijampola and Sekasi in the attack on Buwembo or his supporters/agents. Indeed the cogent evidence available is that Buwembo responded to an alert that his agent and supporters were being beaten up by unknown people in police uniform. When he responded by going to the scene, he encountered Sekasi, Bijampola, police officers and others and an altercation ensued in which he was assaulted. The mere presence and participation of Bijampola and Sekasi in that incident, would not necessarily implicate Busulwa."

25  
30





5 Upon my re-evaluation of the evidence on record, I have no doubt in my mind that indeed there was a scuffle that involved the appellant and his supporters on the one hand and Bijampola Kizito Juma, Sekasi Baker, SPC Nakalema Ann Maria and GISO Asaba Nelson among others on the other hand. That scuffle caused some injuries on the appellant and some of his supporters which could have necessitated the appellant's hospitalization. I say could  
10 have due to the doubt I have in my mind about the appellant's hospitalization since the medical proof provided by the appellant are not in consonance with the evidence they are intended to support. It is averred by the appellant, his witnesses and the witnesses of the 1<sup>st</sup> respondent that the attack occurred on the night of 2/2/2021 which was the eve of the contested election.

15 It is the appellant's evidence that he was rushed to the Lord's Mercy Medical Centre where he remained admitted throughout voting day and was therefore unable to vote. However, we note that the discharge form from that hospital which was attached as proof indicates date of admission (D.O.A) of the appellant as 11/2/2021 and date of discharge (D.O.D) as 15/02/2021. Clinical Notes from the same hospital also indicate the same date although it  
20 mentions 2/2/2021 at 22.00-23.00pm as the date and time of the assault. Other documents like receipts, x-ray request form, MRI request form, diagnosis and treatment form from that hospital indicate various dates like 4/2/2021, 11/02/2021, 12/2/2021 and 27/07/2021. Other medical forms are from Jem Medical Clinic and they are dated 21/02/2021. Meanwhile Police Form 3 which contains the report of the appellant's injury is dated 04/02/2021.

25 During cross examination the appellant was asked to confirm the dates on these medical evidence and he gave the dates listed above. He never offered any satisfactory explanation on his date of admission and date of discharge from hospital. When the learned trial Judge specifically asked him where he was on 03/02/2021, the appellant said he was in Modern Community Health Centre, Nabweru. Asked about when he got to the Lord's Mercy Medical  
30 Centre, the appellant said he got the documents after leaving Modern Community Health

5 Centre. This clearly contradicts the account the appellant had given in paragraph 13 of his affidavit in support that on the very night he was beaten he and a one Dodoviko Ssentamu were rushed to hospital at Kampala in his car only to wake up at the Lord's Mercy Medical Centre which he was told works 24 hours and they were admitted and received treatment.

10 In the absence of cogent and truthful evidence to clarify the contradiction in the evidence that the appellant sustained injuries that necessitated his admission in the Lord's Mercy Medical Centre that very night of 02/02/2021 and the medical evidence especially the Discharge Form given as proof but gives contrary information, I am unable to conclude that the injury the appellant sustained as a result of being beaten caused him to be admitted in the hospital as alleged. Similarly, I have not found any cogent evidence that connects the 1<sup>st</sup> respondent to 15 the incident, whether directly or through his agents. The appellant himself in his evidence, stated that the 1<sup>st</sup> respondent did not participate in beating him much as he was there at the scene of crime.

20 The learned trial Judge saw no serious contest to the evidence which was strong corroboration that an attack indeed happened that night of 2/2/2021 in which Bijampola, Sekasi and the Police Officers participated but found that there was no proof that it was done with the knowledge, consent and approval of the 1<sup>st</sup> respondent.

25 I have made a finding earlier that Bijampola was an agent of the 1<sup>st</sup> respondent by recognition and acceptance. As for SPC Nakalema Ann Maria and GISO Asaba Nelson, I have not found any cogent evidence on record that the learned trial judge could have relied upon to find that they were the agents of the 1<sup>st</sup> respondent whether by appointment or recognition and acceptance.



5 What I will now determine next is whether or not Bijampola committed the offence of undue violence by inflicting injury on the appellant and his supporters with the knowledge and approval or consent of the 1<sup>st</sup> respondent.

10 I have thoroughly reappraised the evidence on record and I find no reason to fault the learned trial judge for her finding that there was no proof that the attack on the appellant by Bijampola, Sekasi and the Police Officers was done with the knowledge, consent and approval of the 1<sup>st</sup> respondent. It was the duty of the appellant to prove the allegation on a balance of probabilities and to the satisfaction of court but he failed to do so.

15 It should be noted that, stakes in elections are usually very high and some vigilant ardent supporters and agents of rival candidates and party die-hards usually take it upon themselves to use all means available including intimidation and aggression to mobilise support for their preferred candidates. It is therefore not uncommon for quarrels and scuffles to ensue when such groups encounter each other even without the knowledge of, and or sanctioning by the candidates who may end up benefitting therefrom. Section 154(a)(ii) of the LGA which provide for the offence of undue influence read together with section 139 (c) of the LGA require proof that the party complained against participated either directly or through his agents but with his/her knowledge and consent or approval. I appreciate that it is not easy to prove the aspect of knowledge, consent or approval because it is always discreet and in most cases it can only be implied/inferred from speech or conduct. However, there must be evidence before court such an inference and not mere allegations based on suspicion and assumptions.

25 In this case, the appellant made allegations which were completely denied by the 1<sup>st</sup> respondent. It was therefore his duty to provide cogent evidence to prove on a balance of probabilities that the 1<sup>st</sup> respondent participated either personally or through his agent(s) and with his knowledge and consent or approval. The evidence which was presented before the



5 trial court fell short of that and for that reason, we agree with the findings of the learned trial Judge that the allegations of violence, intimidation and undue influence by the 1<sup>st</sup> respondent and his agents was not proved to the satisfaction of court, that he participated personally or through his agents who acted with his knowledge and consent or approval.

10 On the whole, I find that grounds 1, 2, 3 and 4 which are canvassed under issues 1,3,4,5 and 6 of the appellant's issues, issues 2, 3, 4 and 5 of the 1<sup>st</sup> respondent's issues and issues 1 and 2 of the 2<sup>nd</sup> respondent's issues must all fail for the above reasons.

15 On grounds 5 and 6, the appellant alleged that the election was marred with irregularities, non-compliance with the electoral laws, violence and acts of impunity which acts were wide spread on the eve of the election and they contaminated the quality of the election in a substantial manner to the detriment of the appellant. In addition, he faulted the learned trial Judge for holding that the 1<sup>st</sup> respondent was not at the scene of the crime and that he never committed the election offences which affected the election in a substantial manner. Further, that it was erroneous for the learned trial Judge to disregard the evidence in the appellant's affidavit in rejoinder that described how the 1<sup>st</sup> respondent was physically present at the scene  
20 of the crime.

25 In reply the 1<sup>st</sup> respondent contended that the offences were alleged to have been committed before and on the polling day when the appellant was hospitalised which means that he did not witness their commission. Similarly, the 2<sup>nd</sup> respondent contended that the learned trial Judge extensively evaluated all the evidence regarding these allegations and she found that the irregularities and non-compliance in three out of ten polling stations would not be sufficient proof that such non-compliance affected the result of the election in a substantial manner.

In the Supreme Court decision of **Col. (Rtd) Dr. Kiiza Besigye vs Museveni Yoweri Kaguta and Electoral Commission** (supra) Odoki B, CJ (as he then was) while citing with approval the holding of Grove. J. in **Borough of Hackney Gill vs Reed [1874] XXXI L.J. 69**

5 emphasized that an election should not be annulled due to minor errors or trivialities. He stated 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 of the election. ... so far as it appears to me, the rational 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 calculated in a rational mind to produce a substantial effect."*

15 Similarly, this Court in ***Election Petition Appeal No.29 of 2011: Muhindo Rehema vs Winfred Kiiza and Electoral Commission*** held that the non-compliance per se is not enough to overturn an election but rather the non-compliance must be so significant so as to substantially affect the results of the election. The Supreme Court decision in ***Col. (Rtd) Dr. Kiiza Besigye vs Museveni Yoweri Kaguta and Electoral Commission*** (supra) was relied upon. In that petition it was held that;

20 *"In assessing the effect of such noncompliance, the trial court must evaluate the whole process of the election by using both the qualitative and quantitative approaches with quantitative approach taking the numerical approach to determine whether the none-compliance significantly affected the results and the qualitative approach looking at the overall process of the election especially the transparency of registration, chaos at polling stations, voter information, the process of counting and*  
25 *tallying and declaring results and the ability of each voter to cast their vote."*

In the instant appeal, the appellant averred in paragraphs 18-21 of his affidavit in support, that they made complaints at the CID headquarters in Kampala where cases of assault and atrocities done to him and his supporters were reported and registered. He also averred that the 2<sup>nd</sup> respondent declared the 1<sup>st</sup> respondent as the winner of an unfree and unfair election

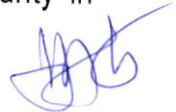


5 and thereafter, it deliberately refused to avail him with the certified copies of the final declaration of results forms until the filing of the petition.

10 Lutaakome Denis and Kiwanuka Ben, in their affidavits in support averred in paragraphs 18 and 16 respectively, that had it not been for the wide spread violence and intimidation inflicted upon the petitioner and his supporters by security officers acting in collusion with and for the benefit of the 1<sup>st</sup> respondent, his agents and supporters on the eve of and on the polling day itself, as well as the election irregularities stated above, the election results would have been substantially different from what was declared and that the petitioner would have easily won the election.

15 In response, the 1<sup>st</sup> respondent in his affidavit in reply denied committing any of the alleged violence and atrocities and contended that he is not aware of who was beaten or arrested since at that time he was already at his home due to the curfew restrictions.

20 The 2<sup>nd</sup> respondent in the affidavit in support of the answer to the petition sworn by its Returning Officer of Mityana District, Mr. Makubuya Stephen averred in paragraphs 5-11 that the campaign guidelines were provided to all candidates and their agents streamlining the conduct and manner in which campaigns were to run. In regard to the bribery claims allegedly perpetrated by the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent averred that the claims are falsehoods, concocted and an afterthought as they were never brought to its attention before or during the election. In regard to documents, the 2<sup>nd</sup> respondent averred that the documents requested for by the appellant were availed upon request after payment of a fee. Further, that  
25 the alleged noncompliance, if any, did not affect the election results in a substantial manner as the margin between the votes of the appellant and the 1<sup>st</sup> respondent was 108 in favor of the declared winner (the 1<sup>st</sup> respondent) who garnered 1361 votes as compared to 1253 votes by the appellant having been validly elected by the people of Malangala Sub County in exercise of their rights.



5 The learned trial Judge evaluated the evidence regarding the allegations of non-compliance in the conduct of the election and she found as follows;

10 *"The main argument by Buwembo's counsel is that there was widespread violence and impunity during the election by security operatives and Busulwa's agents. I fear that is a sweeping statement that was not strongly backed by evidence. It was an uncontested fact that there were ten polling stations in the Malangala Sub County poll. The evidence of violence, intimidation and disenfranchisement was limited to only a few polling stations. I will elaborate.*

15 *I have agreed that sufficient evidence was provided to prove the attack on Buwembo at Kanyanya on the night of 2/2/2021. However, it was not proved to my satisfaction that he was hospitalized on the morning of 3/2/2021 and was thus unable to participate in the poll and generally to ensure that his agents were well prepared and not interfered with. Although I have held that some of his voters could have been discouraged to vote for him, there is no corresponding evidence that his presence on polling day would have improved his vote count. In any case, any action meant to canvass for votes is prohibited on polling day."*

The learned trial Judge further stated thus;

20 *"That said, there was no evidence to show that the attack on Buwembo extensively trickled down to have a significant impact on voting in the entire sub county. Indeed the evidence available indicates that complaints were raised with respect to irregularities at the Bongole, Kyesengeze and Kanyanya polling stations only. It was at Bongole that Ngabo learnt from Bayavuge that an election constable and Chairman of Bukuya was discouraging voters from voting Buwembo then assumed or maliciously declared dead. Only Nangonga, Kiwanuka and Lutakome complained of being chased away or kept away from a polling station for fear of arrest for having witnessed election malpractice by the respondents or for being Buwembo's agents respectively. No agent reported being denied access or chased out of the tally center. Significantly, there is no proof that any of those irregularities were reported to the 2<sup>nd</sup> respondent or their officers on ground. In his affidavit Lukumbuke Briens of FARA, was only able to give evidence of what he believed to be bribery and compromise of election officials by Busulwa and intimation of Buwembo's voters at the Kyesengeze polling station. Even then, his observations were not conclusive that the offence was committed."*

5 The learned trial Judge then concluded as follows;

10 *"Since the vote margin between Buwembo and Busulwa was small, the quantitative analysis could be interpreted to favour Buwembo. Conversely, the qualitative analysis, which is equally important, would not. In the specific circumstances of this case, the irregularities and noncompliance of three out of ten polling stations would not be sufficient proof that such non-compliance affected the result of the election in a substantial manner."*

Upon my own re-evaluation of the evidence, I agree with the finding of the learned trial Judge and I find no reason to fault her. Consequently, grounds 5 and 6 fail which implies that issues 7 and 8 raised by the appellant, issues 6 and 7 raised by the 1<sup>st</sup> respondent and issues 3 and 4 raised by the 2<sup>nd</sup> respondent are answered in the negative.

15 As regards issue 9 on whether the learned trial Judge erred in awarding costs to the respondents. Section 27 of the Civil Procedure Act provides that costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order and that an award of costs and incident to all suits shall be at the discretion of the court or Judge.

20 The learned trial Judge found that on the evidence available, the appellant failed to prove his claims in the petition on a balance of probabilities and she accordingly denied him all the remedies sought and dismissed the petition with costs to the respondents.

25 The appellant having failed to prove his claims in the petition on a balance of probabilities and to the satisfaction of court, the learned trial Judge simply exercised her discretion and awarded costs to the respondents. I would find no reason to interfere with the discretion of the learned trial Judge which, in my view, was exercised judiciously.

In regard to the remedies sought under this issue, I find that the appellant has failed to prove all the grounds of appeal. I further find that the 1<sup>st</sup> respondent was validly elected by the





5 people of Malangala Sub-county in Mityana District as the LC III Chairperson and I would not interfere with the people's choice of their leader. Therefore, I would deny all the prayers and declarations sought by the appellant in this appeal. Consequently, issue 9 raised by the appellant is answered in the negative.

Having so found, I would accordingly dismiss this appeal with costs to the respondents.

10 **Dated at Kampala** this 1st day of Aug 2022

  
.....

Hellen Obura

**JUSTICE OF APPEAL**

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**THE REPUBLIC OF UGANDA,**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**(CORAM: Elizabeth Musoke, Hellen Obura and Christopher Madrama, JJA)**

**ELECTION PETITION NO 032 OF 2021**

**BUWEMBO MONDAY KASULE} ..... APPELLANT**

10

**VERSUS**

**1. BUSULWA ATANANSI}**

**2. THE ELECTORAL COMMISSION} .....RESPONDENTS**

**JUDGMENT OF CHRISTOPHER MADRAMA, JA**

15

I have had the benefit of reading in draft the judgment of my learned sister Justice Hellen Obura, JA and I agree with the facts and issues set out and substantially agree with the resolution of some issues. I however do not accept that the appeal ought to fail on all grounds and I would like to add a few words of my own on two issues relating to the commission of the offence of bribery and on illegal practices and particularly on the recurring issues of burden of proof, corroboration and agents of candidates. For purposes of this judgment I will set out the brief facts and grounds.

20

The appellant, the 1<sup>st</sup> respondent (Busulwa Atanansi) and others contested for the position of Chairperson LC III of Malangala Sub-county in Mityana district in the Local Council elections of 2021 on 3<sup>rd</sup> February 2021. 5 candidates stood for election. The first respondent obtained 1361 votes. The petitioner 1253, the NUP candidate got 361 votes, The DP candidate got 51 votes and one James who stood as an independent obtained 16 votes.

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The first respondent was returned as the winner. The Appellant was aggrieved by the declaration of results and petitioned the High Court for nullification on the ground that the elections were riddled with violence, bribery, intimidation of voters, and false publication that he was dead

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5 contrary to the law. The petition was dismissed and the appellant lodged an  
appeal against the dismissal on six grounds that:

- 10 1. The learned trial Judge erred in law and fact and did not properly  
evaluate the evidence on record when she held that the 1<sup>st</sup> respondent  
did not commit any illegal practices or election offences in connection  
with the election personally or by his agents or supporters with his  
knowledge and consent or approval. As a result, she came to the  
wrong decision to dismiss the petition on this ground.
- 15 2. The learned trial Judge erred in law and fact and did not properly  
evaluate the evidence on record when she exonerated the 1<sup>st</sup>  
respondent from the election offences of undue influence through  
actual use of force and violence upon the Petitioner (Appellant),  
personal or by his agents and supporters with his knowledge and  
consent or approval, and held that such offences had not been proved  
20 on a balance of probabilities and to the satisfaction of court. As a  
result, she came to the wrong decision to dismiss the petition on this  
ground.
- 25 3. The learned trial Judge erred in law and fact and did not properly  
evaluate the evidence on record when she held that the 1<sup>st</sup> respondent  
was not present at the scene and join in the assault of the Petitioner  
(Appellant) on the eve of polling day 2<sup>nd</sup> February, 2021. As a result,  
she came to the wrong conclusion upholding the 1<sup>st</sup> respondent's alibi.
- 30 4. The learned trial Judge erred in law and fact and did not properly  
evaluate the evidence on record when she held that those responsible  
for the assault of the Petitioner (Appellant) on the eve of polling 2<sup>nd</sup>  
February, 2021 were not the agents or supporters of the 1<sup>st</sup> respondent  
and their illegal actions did not implicate the 1<sup>st</sup> respondent. As a  
35 result, she came to the wrong conclusion that the 1<sup>st</sup> respondent was  
not liable for their illegal practices/election offences.



5 5. The learned trial Judge erred in law and fact and did not properly  
evaluate the evidence on record when she held that the irregularities  
and non-compliance committed during the election by security agents  
under the supervision and control of the 2<sup>nd</sup> respondent, election  
10 officers of the 2<sup>nd</sup> respondent and the agents or supporters of the 1<sup>st</sup>  
respondent did not affect the result of the election in a substantial  
manner. As a result, she came to the wrong decision to dismiss the  
petition on this ground.

15 6. The learned trial Judge erred in law and fact and did not properly  
evaluate the evidence on record when she held that the violence and  
acts of impurity committed by security agents, the 1<sup>st</sup> respondent's  
agents or supporters and election Officers of the 2<sup>nd</sup> respondent  
during the election was not widespread and that it did not contaminate  
20 the quality of the election in a substantial manner. As a result, she  
came to the wrong decision to dismiss the petition on this ground.

I have carefully considered the grounds of appeal and find that grounds 1, 2,  
3 and 4 of the appeal are intertwined. In ground 1, of the appeal it is alleged  
that the judge erred in the evaluation of evidence on the issue of the  
commission of illegal practice or election offences in connection with  
25 election personally or through his agents or supporters with his knowledge  
or approval. Grounds 2, 3 and 4 elaborate on ground 1. In the premises, I will  
consider the question of whether there was any illegal practice or election  
offences for resolution of grounds 1, 2, 3 and 4 of the appeal. To do so, I have  
considered provisions relating to bribery and illegal practices as well as the  
30 grounds for nullification of elections under the Local Governments Act.  
Section 139 of the Local Governments Act, cap 243 which gives the grounds  
for setting aside an election under the Local Governments Act does not  
provide for the standard of proof of the grounds for setting aside an election  
but only provides that:

35 The election of the candidate as a chairperson or a member of the council  
shall only be set aside on any of the following grounds if proved to the  
satisfaction of the court -

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- 5
- a. that there was failure to conduct the election in accordance with the provisions of this Part of the Act and that the non-compliance and failure affected the result of the election in a substantial manner;
  - b. that a person other than the one elected purportedly won the election;
  - 10 c. that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval; or
  - d. that the candidate was at the time of his or her election not qualified or was disqualified from election."

15 The phrase that the grounds have to be "*proved to the satisfaction of court*" has generated divergent jurisprudence about the standard of proof and therefore has an effect on the evaluation of evidence. The controversy is whether the standard of proof is that higher than on the balance of probabilities required in civil trials or proof on the balance of probabilities as provided for under section 61 (3) of the Parliamentary Elections Act, 2005  
20 as amended.

In **Kamba Saleh Moses v Hon Namuyangu Election Petition Appeal No 027 of 2011** it was held that the standard of proof in allegations of bribery is slightly higher than that of ordinary civil cases namely that on the balance of probabilities and it had to be to the satisfaction of court. The precedents  
25 show that such evidence has to be cogent. In **Masiko Winifred Komuhangi v Babihuga J. Winnie: Court of Appeal Election Petition Appeal No 9 of 2002** Kikonyogo DCJ held at page 13 of her judgment that:

30 It is now 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 are proved on balance of probabilities, although slightly higher than in ordinary cases. This is because an election petition is of great importance both to the individuals concerned and the nation at large.... The petitioner has a duty to adduce credible or cogent evidence to prove his allegation at the required standard of proof.

35 A careful analysis of the statutory law and precedents show that the conclusion of the learned Deputy Chief Justice was influenced by Supreme Court precedents which are binding. However, in my judgment I have

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5 examined the amendment of the law and the previous law which is retained under section 59 (6) of the Presidential Elections Act, Act 16 of 2005 which provides that:

(6) The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court -


- 10 (a) Noncompliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in a substantial manner;
- 15 (b) that the candidate was at the time of his or her election not qualified or was disqualified to be elected as President; or
- (c) That an offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval; or

20 The issue is whether the court will apply a standard that is slightly higher than on the balances of probabilities. From the outset, it should be noted that section 139 of the Local Government Act and section 59 (6) of the Presidential Elections Act, do not provide for the standard of proof while section 61 of the Parliamentary Elections Act, 2005 in subsection 3 thereof provides that the required standard is that on the balance of probabilities.

25 This means that interpretation of section 59 (6) of the Presidential Elections Act on the question of standard of proof is not binding for purposes of Parliamentary elections as the statutes are different on the issue of standard of proof.

30 The issue is whether there should be a higher standard of proof for elections in local governments than that in parliamentary elections or whether the same standard encapsulated in section 61 of the Parliamentary Elections Act should be applied to local government elections as well. This contradiction is caused by considering precedents on "proof to the satisfaction of court" and "proof on the balance of probabilities. The court

35 ought to come up with one standard of proof for parliamentary and local government elections even if the standard of proof of grounds for annulment of Presidential Elections is higher and therefore different for the

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5 reasons given hereunder. This issue seems to influence how the offence of bribery has to be proved and seems to be grounded on the phrase "*to the satisfaction of court*". The learned trial judge applied a higher standard than on the balance of probabilities in evaluating the evidence on whether the offence of bribery was proved and erred in law.

10 I have carefully considered the issue as to whether a standard higher than on the balance of probabilities does not run counter to the statutory standard. The issue seems to arise from amendment of the parliamentary elections law to include a statutory standard of proof. The Parliamentary Elections (Interim Provisions) Statute, 1996; Statute No 4 of 1996 in section  
15 91 thereof which gives the grounds for setting aside an election did not include the standard of proof because it provided that:

91.(1) The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court -

20 (a) non-compliance with the provisions of this Statute relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the non-compliance and such failure affected the result of the election in a substantial manner;


(b) that a person other than the one elected won the election;

25 (c) that an illegal practice or any other offence under this Statute was committed in connection with the election by the candidate personally or with his knowledge and consent or approval; or

(d) that the candidate was at the time of his or her election not qualified or was disqualified for election as a member of Parliament.

30 (2) Nothing in this section confers on the court when hearing an election petition, a power to convict a person for a criminal offence.

(3) Where it appears to the court on hearing an election petition under this section that the facts before it disclose that a criminal offence may have been committed, it shall make a report on the matter to the Director of Public Prosecutions for appropriate action to be taken.



5 (4) Where an election is set aside, a fresh election shall be held as if it were an election in accordance with section 115 of this Statute.

10 Clearly, section 91 (1) cited above provides for proof to the satisfaction of the court similar to section 139 of the Local Governments Act and section 59 (6) of the Presidential Elections Act 2005. The court previously in Parliamentary elections was therefore required to consider what is meant by "*proof to the satisfaction of court*". The interpretation by was influenced by Supreme Court precedents which were based on a different statutory provision which is not of the same effect.

15 The Parliamentary elections law of 1996 was amended by the Parliamentary Elections Act 2001 which introduced the standard of proof to be that on the balance of probabilities under section 61 (3) thereof. In the amended provisions of the law section 139 of the Local Governments Act by using the phrase "to the satisfaction of the court" does not clearly provide for the standard of proof as expressly provided for under section 61 (3) of the Parliamentary Elections Act, 2005 and my judgment is that from the precedents, there seems to be a lacuna in the law. The matter therefore is whether earlier jurisprudence based on Presidential Elections in interpretation of the phrase "to the satisfaction of the court" are no longer relevant to parliamentary and local governments elections. In interpretation of the law concerning local government elections, the standard of proof ought to be considered on the basis of amendments to the Parliamentary Elections Act and therefore the Local Governments Act is read with the modification introduced by section 61 (3) of the Parliamentary Elections Act. The interpretation of section 139 of the Local Government Act proceeds from section 172 of the Local Governments Act which provides that:

172. Application of laws relating to presidential and parliamentary elections.

35 For any issue not provided for under this Part of the Act, the Presidential Elections Act and the Parliamentary Elections Act in force shall apply to the elections of local councils with such modifications as may be deemed necessary by the Electoral Commission.





5 It is because the Local Government Act does not provide for the standard of proof that recourse should be had to the Parliamentary Elections Act 2005. Section 61 (3) of the Parliamentary Elections Act provides that the grounds of election shall be proved to the satisfaction of the court and on the balance of probabilities because it provides that:

10 61. Grounds for setting aside election

The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court—

- 15 (a) non-compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the non-compliance and the failure affected the result of the election in a substantial manner;
- 20 (b) that a person other than the one elected won the election; or
- (c) that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval; or
- (d) that the candidate was at the time of his or her election not qualified or was disqualified for
- (e) election as a member of Parliament.

25 (2) Where an election is set aside, then, subject to section 63, a fresh election shall be held as if it were a byelection in accordance with section

(3) Any ground specified in subsection (1) shall be proved on the basis of a balance of probabilities.

30 Putting the words in their proper context, the words "to the satisfaction of the court" is immediately followed by the grounds which have to be proved. It therefore means that the elements proving any of the grounds are proved to the satisfaction of the court. When read together with subsection 3, the grounds mentioned in subsection 1 "*shall be proved on the basis of a balance of probabilities.*"

35 It is in that context that I have revisited the question of whether bribery was proved to the requisite standard when the court found that the proof before

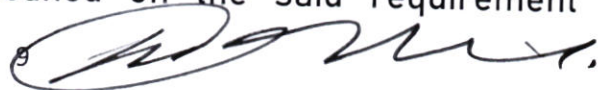


5 the court "fell short of the required standard of satisfying the court that the first respondent bribed voters". The question is which standard was applied since the learned trial judge relied on the older authorities which required a standard higher than that on the balance of probabilities?

10 In my judgement, the requisite standard is that on the balance of probabilities under section 61 (3) of the Parliamentary Elections Act.

I have further considered the statement in **Achieng Sarah and EC v Ochwo Nyakecho Keziah EPA No 39 of 2012** that there is need for other evidence to confirm that a particular witness is telling the truth about bribery in that there it is a tendency by partisan witnesses to exaggerate claims of what  
15 might have happened. In my opinion while there is need for caution, it is a general statement whether there is tendency of witnesses to be partisan because this is a matter of evidence whether a witness is partisan or not, whether witnesses are truthful or not. Further, it is my judgement that the jurisprudence springs from the respondents interpreting the standard of as  
20 that "to the satisfaction of court" based on Presidential election petitions precedents. What is required is for the court to exercise more caution in evaluation of evidence due to the likely partisan leaning of witnesses. This assumes that witnesses are from the party of the person who produces the witness. However, a witness can be neutral party or from the opposite  
25 party. In fact, some of the witnesses in this case were from the Electoral Commission. It cannot therefore be judicially noticed that all witnesses have a tendency to be partisan. This would be a presumption that is unnecessary and that is affected by consideration of the standard of proof to be higher than that on the balance of probabilities. The issue of evaluation of evidence  
30 ought to be left to the trial judge. What I take from the authorities is that there is need for caution in the event that a witness is likely to be partisan. The above decisions weighed on the trial judge in the evaluation of evidence.

I have also considered the statement and the authorities about the need for  
35 corroboration by other independent witnesses or other evidence in cases of bribery to confirm the truthfulness of bribery at that particular station. The learned trial judge heavily leaned on the said requirement for



5 corroboration in cases of bribery. While the need for corroboration is a need  
to be sure, there is no legal requirement or standard in the evaluation of  
evidence as to whether the testimony of an adult of sound mind needs to be  
corroborated. In any case, "proof to the satisfaction of court" generated  
10 higher standard of proof though it also may enable a trial judge to find that  
the witness is a truthful witness who can prove the fact that can be proved  
by oral testimony. A shaky witness may need additional supporting  
evidence. There is no hard and fast rule and I would be reluctant to make a  
general statement that seems to set a standard that there is need for  
15 corroboration in cases of bribery. To the contrary, the statutory law is there  
is no requirement for corroboration of the testimony of a witness unless  
there is a contrary statutory provision that requires it in criminal or civil  
proceedings.

20 Under the Oaths Act, Cap 19 and section 10 thereof, it is only the evidence of  
someone who has not given his or her testimony on oath or affirmation that  
needs corroboration. Section 10 of the Oaths Act provides that:

10. Corroboration.

No person shall be convicted or judgment given upon the uncorroborated  
evidence of a person who shall have given his or her evidence without oath or  
affirmation.

25 From the above, it can be concluded that a person can be convicted upon  
the evidence of a person who has given his or her evidence under oath or  
affirmation. Conversely, the evidence of a person who is not sworn has to  
be corroborated. In **Director of Public Prosecutions v Hester [1972] 3 All ER**  
**1056** Lord Pearson considered section 38 of the Children and Young Persons  
30 Act 1933 insofar as it provided that the evidence over a child not on oath  
needed to be corroborated by some other material evidence in support  
thereof implicating him. The provision considered provided that:

35 (1) Where, in any proceeding against any person for any offence, any child of  
tender years called as a witness does not in the opinion of the court understand  
the nature of an oath, his evidence may be received, though not given upon oath,  
if, in the opinion of the court, he is possessed of sufficient intelligence to justify



5 the reception of the evidence, and understands the duty of speaking the truth;...  
Provided that where evidence admitted by virtue of this section is given on behalf  
of the prosecution the accused shall not be liable to be convicted of the offence  
unless that evidence is corroborated by some other material evidence in support  
thereof implicating him.

10 Lord Pearson found that the word "corroboration"

in itself has no special legal meaning; it is connected with the Latin word 'robur'  
and the English word 'robust' and it means 'strengthen': perhaps the best  
synonym is 'support'. But the statutory provision set out above adds further  
words; it says...

15 According to **Osborn's Concise Law Dictionary Eighth Edition** the word  
"corroboration" means:

Independent evidence which implicates the person accused of a crime by  
connecting him with it; evidence which conforms in some material particular not  
only that the crime has been committed, but also that the accused committed it.

20 Clearly the above dictionary definition applied the word in relation to  
criminal proceedings. The word "corroboration" and its application were  
extensively considered by the House of Lords in **Director of Public  
Prosecutions v Kilbourne [1973] 1 All ER 440** and Lord Hailsham of St  
Marylebone LC at page 446 considered the word "corroboration" and stated  
25 that:

the word 'corroboration' is not a technical term of art, but a dictionary word  
bearing its ordinary meaning; since it is slightly unusual in common speech the  
actual word need not be used, and in fact it may be better not to use it. Where it  
is used it needs to be explained.

30 In **Director of Public Prosecutions v Kilbourne** (supra) page 446 Lord  
Hailsham LC stated that:

In my view, there is no magic or artificiality about the rules of practice concerning  
corroboration at all. In Scottish law, it seems, some corroboration is necessary  
in every criminal case. In contrast, by the English common law, the evidence of  
35 one competent witness is enough to support a verdict whether in civil or criminal  
proceedings except in cases of perjury... This is the general rule, there are now



5 two main classes of exceptions to it. In the first place, there are a number of statutory exceptions. The main statutory exceptions are contained in (i) Prison Act 1795... Perjury Act 1911... Children...

10 In each of these cases the different, but closely similar, provisions of the different statutes override the common law. The other main statutory exception in civil proceedings, the evidence of the plaintiff in breach of promise case is, of course, now obsolete.

15 But side-by-side with the stated exceptions is the rule of practice now under discussion by which judges have in fact warned juries in certain classes of case that it is dangerous to found a conviction on the evidence of particular witnesses or classes of witness unless that evidence is corroborated in a material particular implicating the accused, or confirming the disputed items in the case.

20 Clearly, the term "corroboration" is often used in criminal trials though it may be used in a civil case, it should be borne in mind that the standard of proof in civil matters is not the same as that beyond reasonable doubt in criminal trials. That is the problem with the use of the word "corroboration" when what is to be proved is the offence of "bribery". The problem clearly is that under section 147 of the Local Government Act, bribery is an offence. That notwithstanding, the evidence that is used in civil proceedings to prove the offence of bribery, does not prove a criminal offence but a civil offence with a civil standard and cannot be used in the criminal trial to prove the offence of bribery is a criminal offence. It should therefore be clear that the proof of "bribery" in election petitions is not the proof of a criminal offence. The criminal trial is takes place before another court and not in an election petition. There is therefore no statutory requirement for the evidence in a case of a civil offence of bribery to be corroborated or proved to a standard higher than that on the balance of probabilities.

30 In the context of sections 147 of the Local Governments Act, it is possible that bribery can be proved by adducing evidence that shows that the agents of the candidate who won the elections were giving money to people who were lining up to vote. In such circumstances, the question is whether it is necessary to prove that the people who are lining up were registered voters? The question is whether the petitioner proved to court the particular point at which the voters were lining up and being given money as they were

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5 going to vote at the station. This issue is further tied up with the issue of agents.

According to the facts summarised by the trial judge, the petitioner's case was that the first respondent massively bribed voters. Secondly, the first respondent aided by his agents, supporters and police and security  
10 personnel attacked and assaulted the appellant and his supporters. Further it was alleged that the petitioner and supporters suffered serious injuries and the petitioner could not even participate in voting as a consequence. There were other grounds about non-compliance with the electoral laws and I confine my judgement to the issue of bribery and illegal practices. The  
15 respondent on the other hand averred that he was not accountable for actions of the police and other security operatives. He averred that the agents did not participate in any illegal practices. The issues which are relevant to that of the alleged commission of the offence of bribery and illegal practices are reflected in the issues which were agreed upon before  
20 the trial judge. Five issues were agreed for resolution and two of the issues dealt with compliance with electoral laws in the conduct the elections and whether the non-compliance affected the results of the election in a substantial manner. I will not handle the issue of non-compliance with electoral laws but would deal with the issue of whether there was an illegal  
25 practice and whether there was bribery which if proved to the satisfaction of the court on the balance of probabilities, was sufficient for nullification of the elections results. The other issue was on the issue of remedies to make the fifth issue. I will only consider issues number 1 and 2:

- 30 1. Whether the first respondent committed illegal practices of offences in connection with the election personally.
2. Whether the agents and supporters of the first respondent committed any illegal practices with his knowledge and consent or approval.

35 In resolving this issue, the learned trial judge gives a clear analysis of the law and the facts. She further found that the grounds are to be proved to the satisfaction of court on the balance of probabilities though later on the



5 learned trial judge exacted a higher standard than on the balance of probabilities.

On the issue of bribery, the learned trial judge considered section 147 of the Local Government Act and the ingredients which she set out to be proved were that:

- 10
- a gift was given to a registered voter, who under section 1 (q) of the Local Government Act, who is described to be one whose name is entered on the voter's register.
  - The gift was given by a candidate or their agents and,
  - it was given with the intention of inducing the person to vote ...

15 The finding of the trial judge on the issue of bribery was that:

20 Bribery is considered a grave illegal offence and a single offence, once proved to the required standard, ... To have been committed by the knowledge, costs of the candidate, is sufficient to set aside an election... It must in all cases be given serious consideration and scrutiny and the standard of proof required has been placed slightly higher than that of ordinary civil cases and other electoral offences.... Given the gravity of the offence, the court should only consider the evidence ...first-hand...

25 The learned trial judge held that persons who committed the offences and persons who bribed should be clearly identified and such evidence should be corroborated. The actual act of bribery should be described with precision or sufficient detail. She stated that:

30 "the allegations of bribery by Busulwa and her agents appear in Paragraph 18 of the petition, Buwembo's affidavits and those of his supporting witnesses. Buwembo claimed that throughout the voting process, Busulwa bribed voters by giving them cash but no attention was given to his complaints and reports at the Kiwawu Police Station. I note that although he mentioned that incidents happened in Bongole and Kyasengeze villages, he gave no specifics of the people receiving bribes, the specific sights of bribery and when the bribery happened...

35 Lutakome Denis and Ben Kiwanuka being Buwembo's supporters claim to have observed Busulwa and his agent Bijjampola bribing voters who were standing in line waiting to vote at Kanyanya polling station. Bavyange Charles claimed to have observed the same illegal activity at the Bongole polling station. On both



5 occasions no specifics were given of those being bribed, proof that they were indeed registered voters, or whether they were actually accepting the bribes.

10 In addition, I noted a serious contradiction in Kiwanuka's evidence. In paragraph 1 of his affidavit, he claimed to be a registered voter at the Kabyuma polling station. It is assumed that was his voting station. He contradicted himself to state in paragraph 14 that he was a voter at the Kanyanya polling station and was present there on voting day at 1 PM. It is not stated that Kanyanya and Kabyuma are one and the same place and it would thus be doubtful that Kiwanuka was at Kanyanya at all. Lutakome Robert who also claimed to have observed Busulwa giving money to Boda riders, was not able to confirm that they were registered voters or that those they were ferrying to Kyesengeze polling station, were destined to vote for Busulwa.

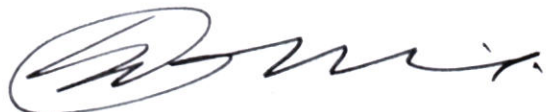
15 On the whole, the evidence that Buwembo or his agents committed the offence of bribery would fall below the standard set to prove that offence".

20 The crucial point is that the learned trial judge held that the standard had to be higher than that on the balance of probabilities. This was clearly a misdirection as I have pointed above. I have considered the evidence of evidence of **Ngabo Ssebuufu Ibrahim** who stated that he is a registered voter of Bongole Village and was the election supervisor of the petitioner. In paragraph 7, He states that,

25 At Bongole polling station where I am a voter, an agent/supporter of the 1<sup>st</sup> respondent agent called Bijjampora came and stationed himself in front of the shop of a one Salongo Bukenya opposite the polling station issuing money to voters as they came to the polling station to vote. He had bundles in 5000/= and 2,000/= notes which he gave to voters as they came to the polling station with instructions to vote for the first respondent".

30 This evidence was generally denied in the 1<sup>st</sup> respondent's affidavit and particularly he stated at paragraph 21 that:

35 That People like Kizito Juma Bijjampola, the GISO, Asaba Nelson, Baker Sekasi, Masiba, Lubandi Ramathan are not my agents and I have no knowledge of their activities against the petitioner during my campaign as I could not consent or approve of illegal activities during campaigns.





5 The learned trial judge in the evaluation of evidence left out the evidence of  
Ngabo Ssebuufu Ibrahim on the issue of bribery and he was a first-hand  
witness. This evidence was corroborated by the evidence of Lukumbuka  
Briens Robertson, executive director of Feel for Afrika Rights Alliance (an  
10 NGO) whose objectives included the objective of watching the electoral  
process and exercises over Uganda. They were accredited and approved by  
the Electoral Commission on 19 November 2020 to observe the 2021 general  
elections. On 3 February 2021 they proceeded with some of the NGO officials  
to Kyesensgeze polling station. While he was there, he observed that there  
15 were presiding officers present and police too. At around 10 AM people  
started to come to the polling station. Later he saw a gentleman who came  
to know as the second respondent dishing out money to Boda Boda riders  
who kept on ferrying voters. Being surprised, he took photos and videos and  
attached the photos as annexure "B". He also saw the respondent calling  
20 presiding officers in charge of the polling station fully dressed in the  
electoral commission attires and he took a video and pictures of the same.  
The video was not played in court and the judge did not look at it as it was  
withdrawn from being not in the language of court. Regarding the identity  
of the polling station, he clearly identified the polling station where he took  
25 the photos. The question seems to be whether he could prove that the  
people who were receiving the money were registered voters and whether  
the person dishing out the money was an agent of the first respondent.

The judgment of the judge on how to prove agency can be considered in light  
of the various court interpretations of agency in the context of a candidates  
programmes for election. The learned trial judge cited **Odo Tayebwa v**  
30 **Bassajjabalaba Nasser and the Electoral Commission; Election Petition**  
**Appeal No 013 of 2011** where Mpagi Mahigeine DCJ considered situations  
where agency may be inferred when she said:

35 "Regarding the issue of agency, he had between the first respondent and  
Hassan Bassajjabalaba, I have to say it has been held that there is no  
precise rule as to what would constitute evidence of being an agent. Every  
instance in which it is shown that either with the knowledge of the member  
or candidate himself a person acts in furthering the election for him, trying



5 to get votes for him, is evidence that the person so acting was authorised to act as his agent.

10 It is thus any person whom the candidate puts in this place to do a portion of this task, namely to procure his election as a Member of Parliament is a person for whose acts, he would be liable. **Halsbury's laws of England 4<sup>th</sup> Edition Volume 15 paragraph 698.**"

15 Clearly the court considered that a candidate who puts in place any person to do a portion of the task of procuring his election, makes that person an agent. This does not depend on whether there is a written authority appointing the person an agent but is a question of fact that can be considered from the circumstances.

20 Further the offence of bribery was considered by the Court of Appeal in **Lanyero Sarah Ochieng and Electoral Commission v Lanyero Molly; Election Petition Appeal No 032 of 2011** in a judgment of the court. The Court of Appeal cited **Odoki CJ in Kizza Besigye v Kaguta Museveni, SC Election Petition No. 1 of 2001** where he said that:

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

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

The Court of Appeal with reference to the above ingredients noted that:

30 These ingredients are inclusive and not in the alternative. To establish whether a bribe was given to a voter, the law, therefore, requires, *among other things*, proof that the person alleged to have received the bribe was a registered voter at the material time and that the bribe was intended to influence his/her voting or non-voting. The motive for the bribe must, therefore, also be proved.

35 Bribery was also considered by the Supreme Court in **Col. (Rtd) Dr. Besigye Kizza Vs. Museveni Yoweri Kaguta and The Electoral Commission; Election Petition No. 1 of 2001** [2001] UGSC 3 (21 April 2001), ULSLR (2020) Vol 1 page 44 when Tsekooko JSC considered section 58 (6) (c ) of the Presidential



5 Elections Act that: "(c) *That an illegal practice or any other offence under this Act was committed in connection with election by the candidate personally or with his or her knowledge and consent or approval*". He noted that there was an allegation of bribe giving to voters by the first respondent's agents.

10 "In this type of bribery, the onus is on the petitioner to prove that the person who gave out the gift to the voter in order to induce him to vote for the first respondent was an agent of the respondent. Secondly, he must prove that the first respondent was aware and consented to the agent giving the gift or gifts to voters or that he approved of the giving of gifts to voters or that he approved what gift his agent  
15 gave to voters.

On the issue of the personal involvement of the candidate in an illegal practice, Mulenga JSC considered the common law of agency and *inter alia* the words of Willes J on **Blackburn Case, Potter & Fielden v Hornby Fielden (1869)** 20 L.T., "*... The matter how clearly his (candidates) character may be  
20 from any imputation of corrupt practice in the matter (election), yet if an authorised agent of his, the person who has been set in motion by him to conduct the election, or canvass voters on his behalf, is in the course of his agency guilty of corrupt practices, and election obtained under such circumstances cannot be maintained.*" Mulenga JSC held that:

25 To hold that those propositions fit within the ambit of the provisions in section 58 (6) (c) of the Act, would, in my view, be tantamount to rewriting the provision. Under that section, it is clear that an illegal practice or other offence which was not committed by the candidate can be sustained as the ground of annulment of his election, only if it is proved to the satisfaction of the court that it was  
30 committed with the candidates "*knowledge and consent,*" or with his or her "*knowledge and approval.*" I do not see how the court can be so satisfied where the candidate expressly directed the illegal practice not to be done, thereby refusing to consent thereto. To my understanding the legislature chose to use those words in order to limit the application of the sanction to only such an illegal  
35 practice or offence as the candidate assumed personal responsibility for, either through consent where he or she had prior knowledge, or through approval upon subsequent knowledge, of its being committed. It is noteworthy that the operation of the provision is not tagged to the relationship between the candidate and the perpetrator of the offence, but with the candidate's knowledge of, and consent to,

5 or approval of, the commission of the offence. My interpretation is that the provision is not a restatement of the common law doctrine of vicarious liability or the principle of agency.

10 Regarding the offence of bribery, it is probable that if money is given to people who are lining up to vote, the people lining up are presumed to be registered voters going to vote at the material polling station. It would be stretching the law to presupposes that money in the circumstances could be given for some other purpose other than of influencing the voters. To my mind what is material is whether evidence proves that money was given to people who are lining up vote at a particular polling station so that would be sufficient to indicate that they were given the money to influence them or in a bid or attempt to influence the vote in a particular way. The offences further complete upon giving the money in the circumstances for purposes of showing the intention. While bribery is also a criminal offence, this has to be considered together with section 139 of the Local Government Act which gives the grounds for nullification of elections that an illegal practice or any other offence under the Act was committed in connection with election by the candidate personally or with his or her knowledge and consent or approval. The provision covers both the commission of an offence or an illegal practice and imports the question of knowledge and approval. The prior knowledge of the candidate, the consent of the candidate, the approval of the candidate in the commission of the offence or in the illegal practice is material to the conclusion of the court that there are grounds for setting aside an election. Secondly, if a stranger acted as an agent and committed the offence of bribery, should the candidate to be penalised? Because the proof is on the balance of probabilities, what is proved is a civil offence and not a criminal offence. In considering approval or consent, the act does not have to have been done by an agent of the candidate who won the elections but by a person who acted as his agent with his approval.

35 In considering the offence of bribery, section 147 (1) of the Local Government Act is relevant. Secondly with the issue of illegal practice, section 148 (2) of



5 the Local Government Act is the applicable provision. The sections are reproduced for ease of reference.

### The offence of bribery:

#### 147. Offence of bribery.

10 (1) Any person who, with intent, either before or during an election, either directly or indirectly influences another person to vote or to refrain from voting for any candidate, or gives, provides or causes to be given or provides any money, gift or other consideration to another person, to influence that person's voting, commits an illegal practice of the offence of bribery.

15 (2) A person receiving any money, gift or consideration under subsection (1) also commits the offence of illegal practice under that subsection.

(3) Subsection (1) does not apply in respect of the provision of refreshments or food—

20 (a) offered by a candidate or a candidate's agent at a candidate's campaign planning and organisation meeting;

(b) offered by any person other than a candidate or a candidate's agent at a candidates' campaign planning and organization meeting.

25 (4) A candidate or candidate's agent who, by himself or herself or any other person, directly or indirectly, before the close of polls on polling day offers, procures or provides or promises to procure or provide alcoholic beverages to any person commits an offence of illegal practice.

(5) Any person who commits the offences stipulated in this section shall be liable on conviction to a fine not exceeding five currency points or to a term of imprisonment not exceeding two years or both.

30 As far as the offence of bribery is concerned, the first ingredient that needs to be proved under section 147 (1) of the Local Government Act, is the ingredient of intention. Secondly the act either before or during an election, of the person who is charged or accused of bribery should either directly or indirectly trying to influence another person to vote or to refrain from  
35 voting of any candidate. If it is not influencing, the person should give,



5 provide or cause to be given or provided any money, gift or other  
consideration to another person to influence the persons voting. It is  
sufficient to prove that such money was given. There are therefore two  
elements to consider. One is that the person directly or indirectly influences  
10 another person to vote or refrained from voting for another candidate or,  
the person gives, provides or causes to be given or provided any money, gift  
or other consideration to another person to influence the person's voting.  
The question of prior knowledge or where there was no prior knowledge of  
the candidate, of approval of the act or of consent are material  
considerations.

15 Section 139 of the Local Governments Act gives the grounds for setting  
aside elections and provides that:

"The election of a candidate as a chairperson or a member of the council shall  
only be set aside on any of the following grounds if proved to the satisfaction of  
the court -

- 20 a. that there was failure to conduct the election in accordance with the  
provisions of this Part of the Act and that the non-compliance and failure  
affected the result of the election in a substantial manner;
- b. that a person other than the one elected purported:
- 25 c. that an illegal practice or any other offence under this Act was committed  
in connection with election by the candidate personally or with his or her  
knowledge and consent or approval; or
- d. that the candidate was at the time of his or her election not qualified or  
was disqualified from election."

30 I have particularly considered section 139 (c) on the issue of illegal practice  
or any other offence under the Local Government Act. What needs to be  
proved for an election to be set aside includes an illegal practice or any  
other offence committed by the successful candidate. The first enquiry  
would be what an illegal practice or other offence is under the Local  
Government Act. Secondly, that the illegal practice or any other offence was  
35 committed in connection with election. Thirdly that it was committed by  
candidate personally or with his or her knowledge and consent or approval.  
It is therefore sufficient to show that it was committed by the candidate



5 personally. Or it can be shown that it was committed with the knowledge  
and consent or approval of the candidate. This may further be narrowed  
down to consider whether it was committed or done with the knowledge  
and consent or in the alternative, with the approval of the candidate. The  
evidence has to be evaluated in light of the legal doctrine to reach a just  
10 conclusion.

In the circumstances, the question of whether it had to be proved that the  
people receiving the money were registered voters does not have to be  
considered from the point of view that the registration needed to be proved  
by adducing the register. It was sufficient to show that the people had gone  
15 to vote at a particular polling station. This ingredient was satisfied on the  
balance of probabilities. Secondly, the fact that money was being given in  
the circumstances was proved by the two witnesses I have mentioned  
above on the balance of probabilities. On the question of whether Bijjampola  
was an agent of the first respondent, the learned trial judge found that the  
20 witnesses could not link him to the first petitioner. He further found that  
none of the persons who were given the money were proven to be  
registered voters. These were the two elements that turned the decision  
against the petition.

Indeed, this was considered by the learned trial judge as the weakest point  
25 in the evidence. However, it was within the knowledge of the two witnesses  
that Kizito Bijjampola was an agent of the first respondent and sat in a shop  
opposite the polling station. This was also the evidence of an observer of  
the elections. The first respondent in his affidavit paragraph 21 denied the  
persons that assaulted the appellant particularly Bijjampora Kizito Juma to  
30 be his agent. He was cross examined and admitted that they are both in the  
NRM party and the 1<sup>st</sup> respondent further told court that he knew Bijjampora  
Kizito Juma as a leader belonging to the NRM party, being from the same  
sub county and was elected prior as a district counsellor to the 1<sup>st</sup>  
respondent and that it is true that the Bijjampora Kizito Juma was  
35 campaigning for him as NRM chairman. The 1<sup>st</sup> respondent only denied that  
Bijjampora Kizito Juma was his official agent and added that it was not bad



5 for Mr. Bijjampora to campaign for him. This fell within the principle in **Odo Tayebwa vs. Nasser Bassajabalaba & Anor** (supra) that it is enough to show that a person is furthering the election of a candidate and trying to get him votes with the candidate's knowledge. In addition, I wish to state that in a multi-party dispensation, persons who are nominated to contest for  
10 elective office by the party and who are elected in the primary are in such a position that he or she cannot claim to proceed to the polls in their individual capacity. The party has a stake in the election of the candidate and some overzealous members might mar the elections with illegal conduct not approved by the officials of the Party but endorsed by the candidate. The  
15 first respondent could not deny the activities of Juma Bijjampola whose activities were meant to secure his election and not the election of other candidates.

The 1<sup>st</sup> respondent during cross examination admitted that he was aware of the fact that Bijjampora Kizito Juma was campaigning for him and said it  
20 was not bad implying that it was done with his approval.

I would find that this ingredient had been proved on the balance of probabilities. In the circumstances, I would find that the offence of bribery had been proved to the statutory standard of the balance of probabilities.

### **The offence of illegal practice**

25 The offence of illegal practice is provided for under section 148 of the Local Governments Act which provides that:

148. Offence of illegal practice.

(1) Any person who votes or induces or procures any person to vote at an election, knowing that he or she or that person is prohibited by law from  
30 voting at that election, commits the offence of illegal practice.

(2) Any person who, before or during an election, publishes a false statement of the illness, death or withdrawal of a candidate at the election for the purpose of promoting or procuring the election of another candidate, knowing that statement to be false or not knowing or believing





5 on reasonable grounds the statement to be true, commits the offence of  
illegal practice.

10 (3) Any person who, at an election, or on nomination days, willfully  
obstructs a voter, or an aspiring candidate either at the polling station or  
nomination centre or on his or her way to or from the polling station or  
nomination centre, commits the offence of illegal practice.

(4) Any person who commits the offence of illegal practice under this  
section is liable on conviction to a fine not exceeding five currency points  
or to a term of imprisonment not exceeding two years or to both.

15 With regard to the offence of illegal practice, the relevant law is section 148  
(2) of the Local Government Act. With regard to section 148 (2), any person  
who before or during an election publishes a false statement of the illness,  
death or withdrawal of the candidate at the election for the purpose of  
promoting or procuring the election of another candidate knowing the  
20 statement to be false or not knowing or believing on reasonable grounds  
the statement to be true commits the offence. It is therefore material that  
the statement has to be false in relation to the illness, death or withdrawal  
of the candidate. Secondly, the statement has to be published and the form  
of publication whether by public announcements or other means should be  
25 proved. Thirdly, in considering the intention, the mental element of knowing  
the statement to be false is material. Alternatively, not knowing or believing  
on reasonable grounds the statement to be true is another material factor  
that has to be proved to the satisfaction of the court and on the balance of  
probabilities.

30 As far as the publication is concerned, the question is whether publication  
has to be in a permanent form. Under section 2 of the Copyright and  
Neighbouring Rights Act, 2006, publication means "the lawful reproduction  
of the work or of an audio-visual sound recording, fixation or of sound  
recording for availability to the public; and includes public performances  
and making available of a work on the Internet. Generally, the word "publish"  
35 may mean making something in writing that is put on the notice board,  
published via WhatsApp, published in a newspaper et cetera. The question

5 is whether the publication of false statements can include making remarks about somebody verbally. When does it amount to a publication? According to **Black's Law Dictionary 8<sup>th</sup> Edition** the word "publication" is generally the act of declaring or announcing to the public.

10 I agree with the learned trial judge that there was no proof of any publication of the death or withdrawal of the petitioner. The evidence on record only pointed to the fact that there was violence on the night before the polling day. This evidence was inconclusive as to the participation of the first respondent or his agents. I am further satisfied with the findings of the learned trial judge and the judgment of my learned sister Justice Hellen  
15 Obura, JA on this point. I only wish to add that the incident happened when there was a curfew and the personnel who allegedly assaulted the petitioner/appellant were security personnel who had the right to impose the curfew but not a right to abuse the rights of whoever had violated the curfew.

20 On the issue of the violence, and whether it was done by his agents, the 1<sup>st</sup> respondent denied that the persons that participated in the violence on the appellant were his agents and the learned trial judge accepted this.

The learned trial judge in evaluation of evidence found that:

25 the question would be whether those responsible for the attack were indeed Busulwa's agents, and that he knew, supported or even directed their actions that night. I say so because mere proof of agency cannot validate a serious offence of violence by itself can overturn an election. Similar to the case of bribery, there needs to be sufficient nexus between the victim of violence and the candidate and proof that the candidate's known agents acted or committed a particular offence  
30 with his knowledge or with his approval. (**Ernest Kiiza Vs. Kabakumba L. Masiko** (supra))

35 Buwembo and his agents persistently connected both Bijjampora and Sekasi to Busulwa as his agents. Both Buwembo and Lutakoome insisted that one Bijjampola (an LC V counsellor in Busulwa's party) and Sekasi were Busulwa's agents during the campaigns who he moved around with him in canvassing for votes, and the voters knew them as such. It was also alleged and not specifically denied by Sekasi that his motor vehicle ferried many police officers to the scene



5 and the same officers were seen participating in the violence. Busulwa equally strongly denied those allegations but offered no evidence nor did Sekasi made statements to deny any involvement with Busulwa or his campaigns and specifically their presence and involvement during the attack on Buwembo on 22/1/2021.

10 Further, in response to Buwembo's report about the attack, the CID (Special Investigations Directorate) carried out investigation and on the 29/03/2021 issued a report (addressed to Buwembo's lawyers) which implicated Bijjampora an LC V counsellor and Sekasi the LC 1 kisiba village, as having been offered their vehicles for security work and having been present at the scene of the attack. I saw no  
15 serious contest to that evidence which was strong collaboration that an attack happened on the night of 2/2/2021 in which Bijjampola, Sekassi and police officers participated. It may well be said that the police officers were not directly linked to Busulwa or the 2<sup>nd</sup> respondent. However, their own evidence is that Nakalema and Sekasi in that incident, would not necessarily implicate Busulwa.

20 I have considered the evidence and agree only on the ground that the violence happened when there was a curfew. No lawful activities could take place in relation to election and I disagree with the learned trial Judge's finding that the violence could be connected to the elections. Those activities were illegal activities since they were activities of clashing during curfew  
25 hours and were therefore criminal. They cannot form the basis of an action to prove violence by the first respondent or agents in relation to the elections. At best, they may form the subject matter of criminal prosecution against perpetrators of the offence of violence or criminal assault.

30 In the premises, I would find that the offence of bribery had been proved on the balance of probabilities. For that reason, the appeal partially succeeds and I would order that the election of the first respondent be nullified and be set aside. I would order that as a consequence, fresh elections should be held. Secondly, I would order that this judgement be served on the Director of Public Prosecutions for purposes of establishing whether a  
35 criminal offence has been disclosed under section 140 (2) of the Local Government Act. I further order that the appeal succeeds with costs in this court and in the High Court.

5 Dated at Kampala the 1<sup>st</sup> day of Aug 2022

  
Christopher Madrama

Justice of Appeal

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
ELECTION PETITION APPEAL NO. 033 OF 2021**

**BUWEMBO MONDAY KASULE:.....APPELLANT**

**VERSUS**

**1. BUSULWA ATANANSI**

**2. THE ELECTORAL COMMISSION:.....RESPONDENTS**

*(Appeal from the decision of the High Court of Uganda at Mubende before Luswata, J. (as she then was) dated 21<sup>st</sup> September, 2021 in Election Petition No. 06 of 2021)*

**CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA  
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA  
HON. LADY JUSTICE HELLEN OBURA, JA**

**JUDGMENT OF ELIZABETH MUSOKE, JA**

I have had the advantage of reading in draft the judgment of my learned sister Obura, JA. I agree with the disposition of the appeal proposed by Obura, JA. I, too, would find that the learned trial Judge was right when she held that the appellant failed to prove his case against the respondents on a balance of probabilities. In my view, the allegations by the appellant that the 1<sup>st</sup> respondent committed the electoral offences of bribery, intimidation, undue influence or that the 1<sup>st</sup> respondent committed the offence of publication of false statements against the appellant, could not be verified to the satisfaction of the Court. The learned trial Judge was also right when she found that the appellant's allegation that the election for the relevant constituency was marred by incidents of non-compliance with the electoral laws that affected the election result in a substantial manner, was also not proven to the satisfaction of Court. I would dismiss the appeal with costs to the respondents.

Accordingly, by majority decision (Musoke and Obura, JJA; Madrama, JA dissenting), the Court dismisses the appeal with costs to the respondents.



The election of the 1<sup>st</sup> respondent as the LC3 Chairperson for Malangala Sub-County in Mityana District is upheld.

**It is so ordered.**

Dated at Kampala this .....<sup>1<sup>st</sup></sup>..... day of .....<sup>Aug</sup>..... 2022.



.....  
**Elizabeth Musoke**

Justice of Appeal