THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Elizabeth Musoke, Muzamiru M. Kibeedi & Monica K. Mugenyi, JJA)

ELECTION PETITION APPEAL NO. 78 OF 2021

WAIRA JAMES KYEWALABYE MAJEGERE SITINGO :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

1. KUBEKETERYA JAMES]

2. ELECTORAL COMMISSION] :: RESPONDENTS

[Appeal from the Judgment and Orders of the High Court of Uganda at Jinja (Hon. Justice Isah Serunkuma) delivered on the 08th day of November 2021 in Election Petition No.005 of 2021]

JUDGMENT OF THE COURT

BACKGROUND

The Appellant and the 1st Respondent together with eight others, contested for the seat of Member of Parliament for Bunya East Constituency in the national General Elections held on the 14th of January 2021.

The facts as established by the trial court were that the 2nd respondent's Returning Officer, after carrying out the tallying exercise at Mayuge District Headquarters, declared the 1st respondent the successful candidate with a winning margin of 3,684 votes, having obtained a total of 14,086 votes, while the appellant was the runner-up having garnered a total of 10,402 votes. However, the election results which were subsequently published in the Uganda Gazette of the 17th day of February 2021 by the 2nd Respondent indicated that the Appellant obtained 16,641 votes while the 1st respondent obtained 10,250 votes.

The appellant was dissatisfied with the election results and filed Election Petition No. 005 of 2021 in the High Court of Uganda at Jinja against the 1st and 2nd respondents seeking to set

aside the election results on the ground that the entire electoral process for Bunya East Constituency beginning with the Party Primaries, through the nominations, campaigns up to the Polling day was characterized by noncompliance with the electoral laws and principles which affected the result of the election in a substantial manner. The alleged acts of noncompliance took the form of unfairness, lack of freedom and transparency, intimidation, violence, and falsification of results.

The appellant also alleged that illegal practices or other offences under the Parliamentary Elections Act (PEA) were committed in connection with the elections by the 1st respondent personally, or with his knowledge and consent or approval.

Each one of the respondents denied the claims in their respective Answers to the Petition.

On the 8th of November 2021, the High Court (Isah Sserunkuma, J.) dismissed the Petition with costs to the first and second respondents and declared the 1st respondent as the validly elected Member of Parliament for Bunya East Constituency in Mayuge District.

The Appellant was dissatisfied with the decision of the High Court and appealed to this court on the 16 grounds set out in the Memorandum of Appeal as follows:

1. ***The Learned Trial Judge erred in law and fact when he held that the Declaration of Results Forms, Tally sheet (Annexture "P30") and Return Forms for Transmission of Results which were given to the Appellant's polling agents at different polling stations as well as at the Office of the 2nd Respondent's Returning Officer had to be certified pursuant to section 73(a)(ii),75 and 76 of the Evidence Act and cannot be admitted in evidence.***
2. ***The Learned Trial Judge erred in law and fact when he struck off the Record the Declaration of Result Forms, Tally Sheets and Return Forms for Transmission of Results for being uncertified by the Electoral Commission.***
3. ***The Learned Trial Judge erred in law and fact when he held that the Appellant had not proved falsification of Results and as such did not affect the Results in a substantial manner.***

4. *The Learned Trial Judge erred in law and fact when he disregarded cogent evidence contained in the Handwriting's Expert's report (Annexture P.58) properly introduced through the Appellant's affidavit confirming falsification of results by holding that the author did not testify/swear an affidavit thereby occasioning a miscarriage of justice.*
5. *The Learned Trial Judge erred in law and fact when he expunged off the court record the WhatsApp message (Annexture P.57) whose contents were admitted by the 2nd respondent's Returning officer when he held that it offended Section 8(5) of the Electronic Transactions Act 2011.*
6. *The Learned Trial Judge erred in law and fact when he held that Results in the Gazette cannot be visited on the Respondents yet the same was contained in the Tally Sheet (P.30) and Return Form for Transmission of Results thereby occasioning a miscarriage of justice.*
7. *The Learned Trial Judge erred in law and fact when he refused to invalidate results at the Polling Stations in disregard of evidence of violence and intimidation meted out at the Appellant's Polling Agents.*
8. *The Learned Trial Judge erred in law and fact when he failed to consider the fact that there were 3 (three) different sets of results, to wit: 16683, 16641 and 14086 for the 1st respondent which could warrant setting aside the entire election thereby occasioning a miscarriage of justice.*
9. *The Learned Trial Judge erred in law and fact when he relied on the Results contained in an Impugned Tally Sheet which was belatedly manufactured (an afterthought) and lacked the basic features of a computer-generated Tally Sheet thereby reaching/making wrong conclusions.*
10. *The Learned Trial Judge erred in law and fact when he struck off the Record electronic and photographic evidence which had been properly introduced by the Petitioner thereby occasioning a miscarriage of justice.*
11. *The Learned Trial Judge erred in law and fact when he held that the 1st Respondent could not be held vicariously liable for the violent acts of his Agents/supporters meted out onto the Petitioner's Agents/supporters in pursuit to win in elections.*

12. ***The Learned Trial Judge erred in law and fact when he misdirected himself on the position of the law pertaining the acts of violence when he held that for violence to warrant setting aside an election has to occur on the polling day.***
13. ***The Learned Trial Judge erred in law and fact when he held that the partisan recruitment of election officials by the 2nd Respondent did not affect the conduct/credibility of the elections as well as the fairness obligations imposed on the Electoral commission.***
14. ***The Learned Trial Judge erred in law and fact when he failed to properly evaluate the evidence relating to violence and partisan recruitment of electoral officials thereby coming to an erroneous conclusion that the appellant had not proved to the satisfaction of court holding that there was compliance with electoral laws.***
15. ***The Learned Trial Judge erred in law and fact when he struck off the record cogent evidence contained in the affidavits of Wapaha Emmanuel, Tambo Mubaraka and Mugabi Peter holding that their signatures were visibly different from those on National Ids whereas not thereby occasioning a miscarriage of justice.***
16. ***The Learned Trial Judge erred in law and fact when he placed a higher burden of proof on the Appellant than what is required by law.***

At the Scheduling Conference held before the Registrar of this Court, the parties agreed to reduce the 16 grounds to 7 issues for determination by this court, namely:

1. *Whether the Appellant took essential steps after filing the Notice of Appeal and Memorandum of Appeal.*
2. *Whether the grounds of appeal as set out in the Memorandum of Appeal offend the Rules of Court.*
3. *Whether the learned trial Judge erred in law and fact by holding that the Respondents had not committed electoral Offences.*
4. *Whether the learned trial Judge erred in law and fact when in holding that the Elections were held in compliance with the Electoral Laws.*

5. *Whether the learned trial Jude erred in law and fact in holding that even if there was non-compliance with the Electoral Laws it did not affect the results in a substantial manner.*
6. *Whether the learned trial Judge erred in law and fact in holding that Falsification of Results was not proved to the satisfaction of court.*
7. *Whether the learned trial Judge erred in law and fact in expunging the Appellant's pieces of evidence.*

We note that issue 1 has since been overtaken by our Ruling in Consolidated Election Petition Application Nos. EPA 16 of 2021, 17 of 2021 and 38 of 2022 between the parties to this appeal which was delivered on 22nd April 2022 validating the instant appeal.

REPRESENTATION

At the hearing of the appeal, the appellant was represented by Mr. Kalali Steven and Mr. Lule Kennedy Ben; while the 1st Respondent was jointly represented by Mr. Asuman Nyonyintono, Ms. Lydia Ntono and Mr. Daniel Mudhumbusi. The 2nd Respondent was represented by Mr. Eric Ssabiti holding brief for Mr. Lugolobi Hamid. The appellant and the 1st respondent were both present in court.

Counsel for appellant and first respondent applied to this court to adopt their respective written submissions which they had already filed in Court before the hearing date as each party's submissions in this matter. On the other hand, the 2nd respondent applied to rely on the submissions filed by the 1st respondent. The applications were granted.

We shall set out the detailed submissions of the parties and the appellant's Rejoinder filed on 11th March 2022 while considering the respective issues and/or grounds of appeal to which they relate.

CONSIDERATION OF THE APPEAL

As a first Appellate Court, the duty of this Court in an appeal of this nature is to re-appraise the evidence before the Trial Court and draw its own inferences of fact while making allowance for the fact that it did not have the opportunity enjoyed by the Trial Court of seeing or hearing the

witnesses testify. **See Rule 30(1) of the Judicature (Court of Appeal) Rules S.I 13-10,** *Pandya Vs R [1957] EA 336*, and Banco Arabe Espanol v Bank of Uganda [1999] UGSC 1

It is with the above principles in mind that we now proceed to consider and resolve the issues raised from the grounds in the following order:

1. Issue 2 - which deals with the propriety of the grounds of appeal as framed.
2. Issue 7 which deals with admissibility of the appellant's evidence and encompasses grounds 1, 2, 5, 6,10 and 15 of the Memorandum of Appeal.
3. Issue 6 which deals with falsification of the election results by the 2nd respondent and encompasses grounds 3, 4, 8 and 9 of the appeal.
4. Issues 3 and 4 which deal with electoral offences and illegal practices and encompass grounds 7, 11, 12, 13 and 14 of the Memorandum of Appeal.
5. Issue 5

PROPRIETY OF THE GROUNDS OF APPEAL

The complaint about the propriety of the grounds of appeal was raised under issue 2 which was framed by the parties during the Scheduling Conference as follows:

> ***"Whether the grounds of appeal as set out in the Memorandum of Appeal offend the Rules of this Court."***

In their submissions, Counsel for the appellants complained about the issue as having been framed in terms which were too general to enable them meaningfully to address it.

We agree that Counsels' complaint is valid. The grounds allegedly offending the Rules and the Rules allegedly offended by the grounds ought to have been specified when framing the issue during the Scheduling Conference. However, any injustice that might have been occasioned by the generality in framing issue No.2 was ameliorated when the 1st Respondent specified in their written submissions the offending grounds as being grounds 6,8,9,13,14 and 15 of the Memorandum of Appeal. It was the contention of Counsel for the 1st respondent that the said grounds offended Rule 86 (1) of the Court of Appeal Rules and Order 43 Rule 2 of the Civil

Procedure Rules, S.I No. 71 – 1 for being argumentative and narrative. They prayed to this Court to strike out the said grounds.

The appellant's Counsel did not agree and prayed to this Court to reject the objections and hear the appeal on its merit.

Rule 2 of Order 43 of the CPR relied upon by the appellant's Counsel, and indeed any other Rule in Order 43, does not apply to appeals before this Court. The application of Order 43 CPR is limited to appeals to the High Court. The Order expressly states so.

The law applicable to the framing of the grounds of appeal in Civil matters before this Court is Rule 86 of the Court of Appeal Rules. As far as is relevant to the resolution of issue no 2, the Rule provides:

> ***"86. Contents of memorandum of appeal.***
>
> *(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is proposed to ask the court to make."* [Emphasis Added]

We have closely examined the impugned grounds. We note that each one of them sufficiently discloses the points which were allegedly wrongly decided by the trial Judge - albeit they could have been drafted better by the Appellant's Counsel.

Needless to add, the objection to the impugned grounds lost most of its significance when, at the pre-hearing Scheduling Conference, the parties narrowed the grounds of appeal into 7 issues for determination by court. Accordingly, the respondents' objections to grounds 6,8,9,13,14 and 15 of the Memorandum of Appeal are hereby rejected.

ISSUE 7 - ADMISSIBILITY OF THE APPELLANT'S EVIDENCE

In their respective Written Submissions, the appellant and respondent combined their respective arguments on grounds 1, 2, 5, 6,10 and 15 of the Memorandum of Appeal under issue 7 which was framed as follows:

> ***"Whether the learned trial Judge erred in law and fact in expunging the Appellant's pieces of evidence."***

We have reviewed the grounds which were clustered under issue 7. Whereas the common complaint in those grounds relates to admissibility of evidence by the trial court, the evidence held to be inadmissible falls in diverse categories. As such, we shall resolve the complaints in respect of each category while being guided by the grounds of appeal.

Admissibility of DR Forms, Tally sheet and the Return Forms for Transmission of Results

The first category of evidence which was held by the trial judge to be inadmissible consists of the Declaration of Results Forms (DR Forms), the Tally sheet annexed to the Appellant's Affidavit in support of the Affidavit (Principal Affidavit) as "P30" and the Return Forms for Transmission of Results which the appellant sought to rely on. The trial judge rejected the said evidence on the ground that the photocopies sought to be relied upon by the appellant were not certified. The appellant's grievance in respect of the said evidence is set out in grounds 1 and 2 of the appeal which were couched as follows:

> ***Ground 1:*** *The Learned Trial Judge erred in law and fact when he held that the Declaration of Results Forms, Tally sheet (Annexture "P30") and Return Forms for Transmission of Results which were given to the Appellant's polling agents at different polling stations as well as at the Office of the 2nd Respondent's Returning Officer had to be certified pursuant to section 73(a)(ii),75 and 76 of the Evidence Act and cannot be admitted in evidence.*
>
> ***Ground 2:*** *The Learned Trial Judge erred in law and fact when he struck off the Record the Declaration of Result Forms, Tally Sheets and Return Forms for Transmission of Results for being uncertified by the Electoral Commission.*

In his submissions, the appellant advanced two reasons for faulting the trial judge's holding. First, that uncertified Election Forms are admissible in evidence for purposes of facilitating an inquiry by the court where there are allegations of alteration of the election results in order for the court to determine whether there was an alteration of results or not. For this submission, Counsel relied on the case of *Kakooza John Baptist vs Electoral Commission & Anor, SC EPA No.11 of 2007 and Konde Julius Tamale Vs Ssenkubuge Isaac & Anor*

Second, that there was actual evidence on record in the form of the letter addressed by the Appellant's advocates to the Secretary of the 2nd Respondent on the 15th of January 2021 requesting for certification of the DR Forms, Tally Sheet (P.30) and Return Form for Transmission for Results. The said letter was attached to the Appellant's Affidavit in Rejoinder and marked "P.61". However, the appellant received no response to the request. As such, argued the appellant, he satisfied the conditions under which uncertified copies of public documents are admissible.

The respondents, in reply, supported the decision of the trial court. They submitted that the impugned annextures to the Appellant's Affidavits being photocopies of public documents ought to have been certified in accordance with Sections 73, 75 and 76 of the Evidence Act.

Failure to do so rendered them inadmissible in evidence.

As regards the letter written by the appellants to the 2nd respondent requesting for certification, the respondents argued that the appellant cannot take benefit of it since it was written long after the Petition and the 1st Respondent's Answer had been filed in Court.

When dealing with the question of admissibility of the documentary attachments to the appellant's Affidavits, the trial judge stated thus:

> *"The declaration of Results Forms and Tally Sheet attached to the petitioner's affidavit in support of the petition were not certified in conformity of Section 73(a) (ii) of the Evidence Act. In the case of Kakooza John Baptists Vs Electoral Commission & Another, SC EPA No. 11 of 2007 and Mashate Magoma Peter Vs Electoral Commission & Another, EPA No. 47 of 2006, it was held that the National Voters' Register and DRFS attached by the Petitioner and her witnesses, are public documents within the meaning of the* ***Section 73 (a) (ii) Evidence Act.*** *That the petitioner who sought to rely on them ought to have applied to the Secretary to the Electoral Commission to have them certified pursuant to* ***Section 75*** *and* ***76*** *of the Evidence Act upon payment of the prescribed fees. These uncertified Declaration of Results Forms and Tally Sheet cannot, therefore, be relied on."*

We have examined the contested documents. All of them were photocopies which were annexed to the Appellant's Affidavit in Support of the Petition sworn at Jinja on 15th March 2021 and filed in Jinja High Court on 16th March 2021. As such, the Supreme Court authority of *Kakooza John Baptists Vs Electoral Commission & Another, SC EPA No. 11 of 2007*, especially

the judgments of Mulenga JSC and Katureebe JSC (as he then was) provide binding guidance on how to handle the uncertified DR Forms and the other Electoral Forms attached to the appellant's Affidavit. In our view, the law is not in issue. The real issue is contextualization of the application of the law.

In the present case, the appellant's Counsel wrote to the Secretary of the 2nd respondent requesting for certified copies of the impugned Electoral documents. The letter is dated 14th January 2021 and its copy was attached to the Appellant's Affidavit in Rejoinder and marked "P.61".

By the said letter, the appellant requested for certification of the following three Electoral Forms, namely:

i. The Return Form for Transmission of Results dated 14th January 2021;

ii. The Return Form for Transmission of Results dated 15th January 2021; and

iii. The Tally Sheet dated 22nd January 2021.

The letter went ahead to state that the said documents were "*needed for Court Purposes vide Election Petition No. 005 of 2021 of the High Court of Uganda at Kampala*". The letter was received by the 2nd Respondent's Security Registry on 19th April 2021. The 2nd respondent did not respond to the Appellant's letter. However, the 2nd respondent subsequently produced the certified documents in evidence. And in his judgment, the learned trial Judge considered the DR Forms and the Results Tally Sheet produced by the 2nd Respondent and found that they contained figures similar to the secondary evidence of the appellant.

As such, one fundamental difference which distinguishes the present case from the Kakooza case (supra) is that in the present case, the Electoral Commission produced the certified copies in Court. Consequently, it is our finding that in the overall context of this case, grounds 1 and 2 present a moot or academic question with no serious significance to the determination of the appeal. They accordingly fail.

For purposes of completeness, we have also considered the arguments of the respondents the implication of which is that an application for certification of documents necessary for the

disposal of an Election Petition made after the Petition and the Answer to the Petition have been filed in Court is time barred. We have not seen any legal basis for such a submission. Unless the trial court has given specific timelines within which to produce the certified copies of public documents, the guiding principle in determining whether the application for certified documents is late or not is whether injustice will be occasioned upon the other parties to the Petition at the time the appellant seeks to have the certified documents admitted in evidence by the court. In the instant case, the application for the certified copies was made by the appellants, and copies of the application served upon the respondents, well before the trial court conducted the pre-trial Scheduling Conference. No injustice was thereby suffered by the respondents if the appellant's application were complete. As such, the claims that the application was made late or otherwise time barred are without basis.

ADMISSIBILITY OF WHATSAPP MESSAGE

The second category of evidence which was rejected by the trial judge comprised of WhatsApp messages whose printout was attached to the Petitioner's Affidavit in Rejoinder and marked **"P.57".** The appellant's grievance in respect of the said evidence is set out in ground 5 of the appeal as follows:

> ***Ground 5:*** *The Learned Trial Judge erred in law and fact when he expunged off the court record the WhatsApp message (Annexture P.57) whose contents were admitted by the 2nd respondent's Returning officer when he held that it offended Section 8(5) of the Electronic Transactions Act 2011.*

In his submissions, Counsel for the appellant faulted the trial judge for expunging the appellant's WhatsApp message for two reasons. First, that the message was between the appellant and the 2nd Respondent's Returning Officer, RW1, who admitted its correctness during the cross examination in court. Second, that the law recognizes that a blue tick in the WhatsApp message of the of the sender is legitimate evidence of proof that the recipient has acknowledged the communication. For this submission, Counsel relied on the case of *SBT Cards & Payment Services PVT Ltd vs Rohidas Yadav Execution Application No. 1196/2015*.

In Reply, the respondents submitted that the trial judge was justified in expunging the impugned WhatsApp message for offending Section 8(5) of the Electronic Transactions Act since it was not introduced in evidence by way of an affidavit deponed upon by its author setting out that the qualifications he/she possesses, the skill and equipment used all of which are critical for court to be sure that they were not tampered as required in S.8(5) of the Electronic Transactions Act. The respondent further submitted that the appellant was not qualified to introduce the WhatsApp message in evidence since in cross-examination he confirmed that he does not have knowledge in transcribing.

We have examined the impugned WhatsApp messages between the appellant and the Mayuge District Returning Officer who testified in court as "RW1". Their printout (hard copy) was attached to the Petitioner's Affidavit in Rejoinder and marked "P.57". We have also examined the testimony of RW1 during the cross-examination by the appellant's Counsel. When annexture P.57 was shown to her, she admitted having had the communication with appellant in the terms appearing in the printout of WhatsApp.

It is our finding that the consequence of the admission was that all the issues of authenticity and integrity of its storage, retrieval and printing into hard copy ceased to be relevant. All the safeguards put in place by Section 8 of the Electronic Transactions Act are intended to ensure that the electronic record is indeed what it claims to be. The burden to prove that the integrity of the electronic message has not been compromised before any before court can rely on such evidence is placed on the party seeking to rely on it by Section 8(2) of the Electronic Transactions Act which provides thus:

> ***"8. Admissibility and evidential weight of a data message or an electronic record***
>
> *(1) Not applicable*
>
> *(2) A person seeking to introduce a data message or an electronic record in legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be."*

Through the admission of the WhatsApp communication between RW1 and the appellant, the appellant discharged the burden to proof the authenticity and integrity of the said messages which are the preconditions for their admissibility. The messages were thereafter supposed to

be considered by the learned trial Judge while evaluating the rest of evidence. Expunging from the WhatsApp message was thus an error on the part of the trial court. Ground 5 succeeds.

ADMISSIBILITY OF ELECTRONIC AND PHOTOGRAPHIC EVIDENCE

The third category of evidence rejected by the trial judge is what was termed as "*electronic and photographic evidence*"

The appellant's grievance in respect of this type of evidence was stated in ground 10 thus:

> ***"The Learned Trial Judge erred in law and fact when he struck off the Record electronic and photographic evidence which had been properly introduced by the Petitioner thereby occasioning a miscarriage of justice."***

At the start of his submissions, the appellant faulted the trial judge for what he termed "expung[ing] *en masse*" all the photographic evidence of the appellant and yet all the photographs bore dates. But as he went on, his focus on this ground was on the four photographs attached to the Affidavit of a one Oboth Richard of Busira Village.

In response, the respondents submitted that the known annexures of photographs at the trial were those attached to the appellant's Affidavit in support of the Petition and marked as ***P2A1-6, P3, P4A, P4B, P12A, P13, P14, P14A, P18, P19***. That none of them had dates and this fact was admitted by the appellant during cross examination. That the only photographs attached to the appellant's Affidavit in support of the Petition which had dates were "***P.12" dated 29/01/21 and "P19N" dated 30th December, 2018***.

The respondent further argued that the other photographs which had dates were those which were attached to the appellant's Affidavit in Rejoinder as ***P19C, P39, AP42, P44***. However, the dates were outside the period relevant to the instant election.

In his consideration of the admissibility of the photographs sought to be relied upon by the appellant, the trial judge expunged all the photographs on the ground that they were not introduced in evidence by way of affidavits sworn by the persons who took them since this was an election petition. The second reason given by the trial judge was that the photographs did not have any dates on which they were taken.

We have examined the Record of Appeal. It has numerous photographs as rightly observed by the respondents. However, from his submissions, the appellant's grievance in respect of ground 10 relates to only the four Photographs attached to the Supplementary Affidavit in Support of the Petition of Oboth Richard sworn on the 23rd March 2021. The attachments are coloured photocopies of four photographs and they bear the dates on which they were taken. In paragraph 3 of his said Affidavit, Oboth Richard stated that the photographs were taken by a Police Officer sent from Mayuge Police Station.

In the circumstances, we find that in so far as Oboth was not the photographer or that the annextures were not certified by the Police Authorities who are stated to have taken them, they were inadmissible notwithstanding that they bore the date on which they are stated to have been taken. Ground 10 accordingly fails.

ADMISSIBILITY OF AFFIDAVITS WITH DIFFERING SIGNATURES

The last category of evidence which was rejected by the trial court consists of the affidavits of Wapaha Emmanuel, Tambo Mubaraka and Mugabi Peter which were expunged from the record on the ground that the signatures on the said affidavits were different from the signatures of the same deponents on their National Identity Cards. The appellant's grievance in respect of his category of evidence was set out in ground 15 thus:

> ***"The Learned Trial Judge erred in law and fact when he struck off the record cogent evidence contained in the affidavits of Wapaha Emmanuel, Tambo Mubaraka and Mugabi Peter holding that their signatures were visibly different from those on National Ids whereas not thereby occasioning a miscarriage of justice."***

In his submissions, the appellant stated that the trial judge erred as on a proper scrutiny of the said documents there is no visible discrepancy between the said signatures.

In their Submissions in Reply, the respondents supported the trial judge's finding. They added that it does not require rocket science to see the difference nor does one even need the assistance of a hand writing expert to find the discrepancy between the said signatures.

The respondents further submitted that the Afidavits of *Wapaha Emmanuel, Tambo Mubaraka and Mugabi Peter* were not the only ones expunged from the trial court record for having different signatures from those on their national identity cards. That the other affidavits in the same category were of Tuke Anthony, Kaduyu Sinani, Ziraba Elukana, Wandera Grace, Kaboda Adam, Taabo Sabiku, Munyali Moses, Mubale Karimu, Mukisa Richard, Muganda Ausi, Weguli Ivan, Muwonge Isma, Bakaki Mutwalibi, Ziraba Abdul Karimu, Buyinza Moses, Bazibu Ali, Mugabi Peter, Balikowa Geofrey and Lutu Shafiki.

In Rejoinder the appellant reiterated his submission that the impugned signatures are not visibly so different to be obvious to a naked eye that they do not belong to the same person. That the Trial Judge who was not acquainted with the deponents' signatures erred in law in expunging the same without the opinion of the handwriting expert as required under Section 43 and 45 of the Evidence Act.

When dealing with the subject, the trial court while relying on the decision of the Court of Appeal in *Nabukeera Hussein Hanifah Vs Kusasira Peace K. Mubiru and the Electoral Commission Election Petition Appeal No. 52 of 2016* held that he did not agree with Counsel for the petitioner's submissions that verification of the difference in the signatures, *per se*, requires a handwriting expert. He then went ahead to examine all the contested signatures and expunged from the record the signatures of Tuke Anthony, Bazibu Ali, Kaduyu Sinani, Balikowa Wapaha Emmanuel, Ziraba Erukana, Tambo Mubaraka, Mukisa Richard, Bakaki Mutwalibi, Buyinza Moses, Mugabi Peter and Luutu Shafiki on the ground that the signatures on their Affidavits differ from the signatures on their respective National Identity Cards.

However, the trial court declined to expunge from the record the Affidavits of Wandera Grace, Kaboda Adam, Taabo Sabiku, Munyali Moses, Mubale Karim, Muganda Ausi, Weguli Ivan, Muwonge Isma and Ziraba Abdul Karim on the ground that the signatures on their Affidavits "*were not visibly different from the signatures on their respective Nationality identity Cards and would, ideally, require a handwriting expert to verify their difference.*"

The approach of the trial court cannot be faulted. It was backed by the decisions of this court in *Nabukeera Hussein Hanifah Vs Kusasira Peace K. Mubiru and the Electoral Commission(ibid)*

and *Muyanja vs. Lubogo and Another, Court of Appeal Election Petition Appeal No. 82 of 2016 (unreported)*.

In *Hon. Kipoi Tonny vs. Ronny Waluku Wataka and 2 Others, Court of Appeal Election Petition Appeal No. 07 of 2011 unreported,* this Court held that it is not prohibited for a trial judge to compare signatures/handwritings in the absence of expert evidence, but Court has to exercise great caution because of the lack of expertise on the matter. The above decision was quoted with approval in the recent case of *Musisi Kibugujju Muhammed Vs Ashraf Nasser & Electoral Commission EPP No. 18 of 2021 (Unreported)*

We have closely looked at the record of appeal. We note that out of the 10 Affidavits expunged by the trial court, the appellant has complained about only three Affidavits. We have also closely examined the contested signatures on each one of the three Affidavits and their respective National Identity Cards. To the ordinary eye, there are some differences. But in our assessment, the differences are not very significant. We are satisfied that the contested signatures would properly fall in the category of signatures where the court would require a handwriting expert to resolve the not very significant differences noted. This is especially important as the tools/equipment which a signatory uses, and the equipment signed on when creating the signature on the National Identity and contested Affidavits respectively are not identical.

Accordingly, the three contested Affidavits were erroneously expunged from the Court Record. Ground 15 accordingly succeeds.

ISSUE 6 – FALSIFICATION OF THE ELECTION RESULTS

The appellant's complaint under issue 6 was about the falsification of election results. The issue was couched thus:

Whether the learned trial Judge erred in law and fact in holding that Falsification of Results was not proved to the satisfaction of court.

In his submissions, the appellant stated that issue 6 encompassed grounds 3 and 4. However, after closely reviewing grounds 6, 8 and 9, we are convinced that the complaint of falsification

also extends to grounds 6, 8 and 9. As such, they will be considered concurrently with grounds 3 and 4.

Grounds 3,4,6,8 and **9** were couched as follows:

***Ground 3**: The Learned Trial Judge erred in law and fact when he held that the Appellant had not proved falsification of Results and as such did not affect the Results in a substantial manner.*

***Ground 4**: The Learned Trial Judge erred in law and fact when he disregarded cogent evidence contained in the Handwriting's Expert's report (Annexture P.58) properly introduced through the Appellant's affidavit confirming falsification of results by holding that the author did not testify/swear an affidavit thereby occasioning a miscarriage of justice.*

***Ground 6**: The Learned Trial Judge erred in law and fact when he held that Results in the Gazette cannot be visited on the Respondents yet the same was contained in the Tally Sheet (P.30) and Return Form for Transmission of Results thereby occasioning a miscarriage of justice.*

***Ground 8**: The Learned Trial Judge erred in law and fact when he failed to consider the fact that there were 3 (three) different sets of results, to wit: 16683, 16641 and 14086 for the 1st respondent which could warrant setting aside the entire election thereby occasioning a miscarriage of justice.*

***Ground 9**: The Learned Trial Judge erred in law and fact when he relied on the Results contained in an Impugned Tally Sheet which was belatedly manufactured (an afterthought) and lacked the basic features of a computer-generated Tally Sheet thereby reaching/making wrong conclusions.*

APPELLANT'S SUBMISSIONS

In his submissions, the appellant stated that the falsification of the results was evidenced by the publication of three different sets of results by the 2nd respondent. That at the Tally Centre at Mayuge District Headquarters, the Returning Officer publicly announced and declared the 1st

Respondent the Winner with 16,583 votes while the appellant was stated to have obtained 10,166 votes. It is this result which is reflected in the Return Form for Transmission of Results which was annexed to the Appellant's Principal Affidavit as "P.28".

But thereafter the Returning Officer transmitted another set of results to the Electoral commission for publication in the Uganda Gazette under which the Appellant was stated to have obtained 10,250 Votes as against 16,641 Votes for the 1st respondent. A copy of the Return Form for Transmissions of Results allegedly given to appellant by the 2nd Respondent's Returning Officer appears at page 23 of the Supplementary Record of Appeal. It is dated 15th January 2021. It is the same set of results which was published in the Uganda Gazette of 17th February 2021.

Further, the same results were reflected in the Results Tally Sheet dated 22nd January 2021 (Annexture "P.30" to the Appellant's Principal Affidavit) which the appellant claimed to have received from the Mayuge District Returning Officer. But upon the Returning Officer disowning the signature on the said Tally Sheet, the appellant obtained a Report from the handwriting expert which confirmed that the signature of the Returning Officer on the Tally sheet was a genuine signature of the Returning Officer. The report was attached to the Appellant's Affidavit in Rejoinder. Counsel criticized the trial judge for rejecting the Handwriting experts' report on the ground that its author did not swear an Affidavit in the matter. Counsel contended that as a recipient of the report, the appellant was competent to tender it in evidence and, accordingly, the trial judge erred not to have admitted it in evidence.

Further, Counsel submitted that during the cross examination the Returning Officer admitted having had communication with the appellant as reflected in the WhatsApp message annexed to the Appellant's Affidavit in Rejoinder as "P.57". That this WhatsApp message was additional evidence to prove that "P.30" (Tally Sheet) was indeed given to the appellant by the Returning Officer.

The third set of Results is contained in the Return Form for Transmission of Results dated 16th January 2022 and the Results Tally Sheet dated 16th January 2021 both of which were attached to Ms. Birungi Sarah Keziah's Affidavit in Support of the 2nd Respondent's Answer to the Petition

and marked "A" and "B" respectively. Both forms indicate that the appellant obtained 10,402 votes while the 1st respondent obtained 14,086 votes.

The appellant criticized the trial judge for failing to evaluate the aforementioned evidence which led to the erroneous finding that falsification was not proved to the satisfaction of Court.

RESPONDENTS' REPLY

In their submissions, the respondent's Counsel denied the claims of falsification. They contended that the Tally Sheet and The Uganda Gazette Volume CXIV NO.16 dated 17th February 2021, photocopies of which were attached to the Appellant's Principal Affidavit as respectively "P30" and "P31", which the appellant sought rely upon to prove that the 2nd respondent issued 3 different sets of results were not documents authored by the 2nd respondent.

Counsel argued that the results published in the Uganda Gazette volume CXIV NO.16 dated 17th February 2021 contained a mathematical error for which the printer and publisher are the ones responsible. The appellant referred to the testimony of the Returning Officer to the effect that when the 2nd respondent realized the mistake in the results published in the Uganda Gazette, they crosschecked the copies of the Declaration Forms left at her office vis-a-vis the Tally sheets and realized that it was simply an arithmetic error that needed rectification. That accordingly *"we retallied all the results and now we have the right transmission of results forms and tally sheets"*. RW1 confirmed that the correct results are those reflected in the Certified Return Form for Transmission of Results and the Results Tally Sheet which were attached to the Affidavit of Ms. Birungi Sarah Kezia and marked "A" and "B" respectively. They indicate that the appellant obtained 10,402 votes while the 1st respondent obtained. 14,086 votes.

Besides, argued the respondents, the said mistake does not affect the outcome of the election. While relying on the case of ***Kizza Besigye versus Museveni Presidential Election Petition NO. I of 2006*** the respondents submitted that an election is a matter of great public interest and should not be set aside on light or trivial grounds. They accordingly invited court to disregard the mistakes as trivial since they never affected the outcome of the election.

Lastly, the respondents contended that while being cross examined the appellant confirmed before the trial court that the certified tally sheet had the same results as those contained in his DR forms which had been given to him by his Polling Agents.

Counsel prayed that this court does uphold the trial court's finding that there was no sufficient evidence adduced by the appellant to prove the claims of falsification of the results.

APPELLANT'S REJOINDER

In rejoinder, the appellant reiterated his earlier submissions and contended that he tendered in court sufficient evidence to prove falsification of the results. That the falsification of Results was confirmed by the Report of the Handwriting Expert (P.58) and the Police Report (P.59). He then invited this court to re-evaluate the whole evidence and come up with its own conclusion/finding.

Analysis by the Court of the Claim of Falsification of the results of the election

Falsification of election matters, if proved, is a very grave matter in that it undermines the fundamental principle that Political Leaders must be a reflection of the will of the people expressed through a free and fair election. In *Freda Nanziri Kase Mubanda Vs Mary Babirye Kabanda & The Electoral Commission, Election Petition Appeal No.38 of 2016*, the Court of Appeal stated thus:

> (i) *Falsification of results is against the spirit of section 47(1) of the Parliamentary Elections Act No. 17 of 2005 which provides that votes cast at a polling station shall be counted at the polling station immediately after the Presiding Officer declares the polling closed and the votes cast in favour of each candidate shall be recorded separately in accordance with this Part of the Act. The spirit of the Section is that votes cast should be accurately recorded in favour of the candidates for whom they are cast.*
>
> (ii) *Falsification of electoral results is also contrary to the principle that the decision in an election must be a reflection of the will of the majority of the voters.*

We have closely examined the Record of the trial court. The appellant's case before the trial court was properly captured by the trial court in its judgment. It was to the effect that at the Tally Centre, the 2nd respondent's Returning Officer declared that the 1st respondent obtained 16,583 votes while the appellant obtained 10,166 votes. These were the results reflected in the Return

Form for Transmission of Results and the Results Tally Sheet which were attached to the Appellant's Principal Affidavit as "P.28" and "P.30" respectively. That the said "original" results were altered on transmission of the results by the Returning Officer to the Electoral Commission from the 1st respondent having obtained 16,583 votes to 16,641 votes and the appellant from 10,166 votes to 10,250 votes. These are the results which were published in the Uganda Gazette of 17th February 2021 which was attached to the Appellant's Principal Affidavit as "P.31".

The appellant went ahead to specify in Paragraph 66 of his Principal Affidavit the results for 18 polling stations which he alleged were altered and the 1st respondent given an extra 2600 votes. The alleged altered polling stations in which the 1st respondent's votes were increased were stated to be Kanyabwina, Kikubo, Namago, Buwolya Muslim School, Buwaya P/S, Kabayingire, Kirongo C O U, Muyanzi, Kakoge, Musubi, Kitumbezi, Butumbula, Bugoto voice of God, Busira, Bukabooli P S, Namulwana B, Nakibago and Maina polling station. The appellant also alleged that his results were fraudulently reduced in Kikubo, Kirrongo Church of Uganda, Musubi, Kakoge, Butambula, Bukabooli T/C and Mpungwe A-M.

The appellant attached Declaration of Results Forms to his Principal Affidavit for each one of the said impugned Polling Stations which were marked "P.32" and "P.33". He also attached annexture "P.30" being the results tally sheet which he claimed bore results different from the results in the Declaration of Results Forms.

When dealing with the allegation of falsification of results, the trial court held the appellant's evidence namely, the Tally Sheet (P.30), the Return Form for Transmission of Results (P.28) and the DRFs attached to the appellant's Principal Affidavit and Rejoinder were inadmissible for being uncertified. Accordingly, they were expunged from the record. We have faulted the way the trial Judge handled the appellant's uncertified documents while resolving grounds 1 and 2.

The aforesaid notwithstanding, in his judgment it is indicated that the trial Judge went ahead to ascertain and satisfy himself that no injustice was occasioned by his decision to expunge the "inadmissible evidence" by what he termed *"tak[ing] a sneak peek into the results of the impugned polling stations for purposes of comparison and clarity*". In so doing, the trial judge

analysed the DR Form for each one of the queried Polling Stations as adduced by each party and compared the results from each with the corresponding entry in the Tally Sheet which was certified by the Electoral Commission as having been used to declare the results (Annexture "B" to the Affidavit of the Returning Officer (Ms. Birungi) in support of the 2nd Respondent's Answer. He also compared with the appellant's uncertified Tally Sheet which he had expunged (P.30). The trial court found that the DR Forms attached to the Affidavits of the appellant, the 1st respondent and the 2nd respondent in respect of the contested Polling Stations had identical results for the appellant and the 1st respondent. The trial court was also satisfied that the entries in the Certified Tally Sheet (Annexture "B") were consistent with the results obtained by contestants as set out in the respective DR Forms. He accordingly dismissed the appellant's claim of falsification of the results.

Our finding, upon review of the record of the trial Court, is that it is true that at different stages the Electoral Commission published different sets of results for the same election. In those circumstances, this court needs to establish whether or not the varying results arose due to fraudulent intentions on the part of the Electoral Commission as alleged by the appellant, or as innocent errors as alleged by the respondents. This takes us to a review of the documentation used to generate the results which were eventually declared at the District Tally Centre and/or published in the Uganda Gazette.

It is worthy re-emphasizing that the results for constituency elections do not originate from the Return Form for Transmission of Results and the Tally Sheet all of which are generated at the District Tally Centre. These two documents come into play at the tail end of the results declaration process. Declaration of results commences at the Polling Station and is done by the Polling Officer of the respective polling station in accordance with Section 50 of the PEA. The primary evidence of the declared results consists of the DR Forms for the respective Polling Stations. And for purposes of checks and balances, Section 50 of the PEA requires that original copies are given to each candidate, and one original copy sealed in the ballot box together with the other election materials used during the election. Then the last original copy is sent to the Returning Officer for purposes tallying the results from all the relevant polling stations and

making the declaration of the overall winner. Any error or falsification of results in the Tally Sheet can easily be proved by reference to the results in the DR Form for the respective Polling station and juxtaposing it with the corresponding entry in the Tally Form.

In the instant case, the record of proceedings indicates that during cross-examination of the appellant, he was made to juxtapose the entries in the Certified Tally Sheet attached to the Returning Officer's Affidavit with the results of the DR Forms for the respective contested polling stations. He admitted that they were identical. The trial judge likewise made the same finding. We have likewise examined the DR Forms submitted by each one of the parties in respect of the contested areas. The results indicated are the same. We then went ahead to juxtapose the respective DR Forms as against their respective entries in the Certified Tally Sheet. Our conclusion is that in the instant matter, there were some errors in the results as contained in the different Results Tally Sheets and their eventual publication in the Uganda Gazette. However, the evidence indicates that eventually, the Electoral Commission re-tallied the votes and found the true results to be 14,086 for the 1st respondent and 10,402 for the appellant. This is the information contained in the annextures "A" (Return Form for Transmission of Results) and "B" (Results Tally Sheet) which were certified by the Electoral Commission. The same figures are reflected on the Certified DR Forms tendered in evidence by the Electoral Commission which tallied with those tendered by the appellant and 1st respondent. Accordingly, the appellant's claims of fraudulent falsification of the results were not proved.

For purposes of completeness, one of the appellant's complaints about his evidence in proof of the alleged falsification of results which the trial court held to be inadmissible relates to the Handwriting Expert's Report. The appellant's complaint in respect of the same was set out in ground 4 of the appeal to the effect it was erroneous for the trial court to disregard "cogent evidence contained in the Handwriting's Expert's report (Annexture P.58) properly introduced through the Appellant's affidavit confirming falsification of results by holding that the author did not testify/swear an affidavit thereby occasioning a miscarriage of justice."

We note that the Handwriting's Expert's Report was one of the documentary annextures to the Appellant's Affidavits which were expunged by the trial court for not being certified. This was

erroneous. The Report of the Handwriting Expert was not a Public Document to require certification. Although the person who made the Report is a Public Servant, the appellant approached him in a private capacity. The appellant's complaints are thus valid. However, this does not change the finding by this court that falsification of the results was not proven by the appellant.

Accordingly, issue 6 is answered in the negative.

ISSUES 3 AND 4

Issues 3 and 4 were argued concurrently by the appellant. The said issues were couched thus:

> ***Issue 3**: Whether the learned trial Judge erred in law and fact by holding that the Respondents had not committed electoral Offences.*
>
> ***Issue 4**: Whether the learned trial Judge erred in law and fact when in holding that the Elections were held in compliance with the Electoral Laws.*

In his submissions, the appellant contended that issue 3 and 4 encompassed grounds 3, 7, 8, 9, 11, 12 and 14 of the Memorandum of Appeal.

We note that we have already resolved grounds 3, 8 and 9 while considering issue 6. That leaves grounds 7, 11, 12 and 14 of the Memorandum of Appeal as the only remaining grounds for resolution under issues 3 and 4.

In his written submissions, the appellant raised two complaints under issues 3 and 4. The first one was about the failure of the trial judge to find that the Respondents committed the electoral offences alleged by the appellant namely: chasing some of the appellant's Polling Agents from their Polling Stations, violence against the Appellant and other candidates, partisan recruitment of Electoral Officials and falsification of election results. The appellant sought to hold the respondents vicariously liable for the offences.

The second complaint is about the improper evaluation of the evidence on record by the trial court as to the violence and commission of other electoral offences witnessed during the election which the appellant claims to have compromised the integrity of the election. As such, the appellant prayed to this court to use the "qualitative" test to nullify the election results.

The respondents denied the claims.

We shall analyze each complaint as set out above:

COMMISSION OF ELECTORAL OFFENSES BY THE RESPONDENTS

The appellant's complaint about the failure of the trial judge to hold the 1st respondent liable for the electoral offences alleged pursuant to the principle of "vicarious liability" arose from ground 11 of the Memorandum of Appeal which was couched as follows:

> ***Ground 11**: The Learned Trial Judge erred in law and fact when he held that the 1st Respondent could not be held vicariously liable for the violent acts of his Agents/supporters meted out onto the Petitioner's Agents/supporters in pursuit to win in elections.*

Under Section 61(1)(C) of the PEA, the Court can set aside an election on account of an illegal practice or any other offence under the PEA if it is proved that it "*was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval*". The section provides as follows:

> ***61. Grounds for setting aside election***
>
> (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—*
>
> **(a)** *Not applicable*
>
> **(b)** *Not applicable*
>
> **(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"*

We have closely studied the appellant's submissions. He does not allude to the alleged violent acts of the 1st respondent's agents/supporters and any other alleged offences for which he wants the 1st respondent held vicariously liable, as having been committed with the 1st Respondent's knowledge and consent or approval. And neither have we been able to find any credible evidence having been adduced by the appellant before the trial court to that effect. Instead, the appellant faults the trial judge for not holding the appellant liable under the plain principle of "vicarious liability". The claim has no legal basis. Section 61(1)(c) of the PEA is clear as to the extent of the 1st respondent's liability in respect of commission of any alleged illegal

practice or other offence under the PEA: It must have been committed by *"the candidate personally or with his or her knowledge and consent or approval". "Vicarious liability"* is not one of the components that are set out in Section 61(1)(c) of the PEA for triggering an investigation into an election by the court whose intended outcome is the nullification of the election. It is a settled principle of legal interpretation that no words should be read into a statute whose words are clear and unambiguous. See *Katikiro of Buganda Vs Attorney General of Uganda (1959) EA 382.*

Accordingly ground 11 of the appeal fails.

Violence and other electoral offences committed during the election and their effect on the election.

In his submissions on issues 3 and 4, the appellant faulted the trial judge for not properly evaluating the evidence before him in respect of the appellant's allegations of violence and the other electoral offences which he claims to have marred the election and compromised its integrity. The alleged electoral offences were: Chasing of some of the appellant's Polling Agents from their Polling Stations through Violence and intimidation (ground 7 of the appeal), violence against the Appellant and other candidates (grounds 12 and 14 of the appeal) and partisan recruitment of Electoral Officials (ground 14 of the appeal). We shall consider each complaint in the order in which it was raised by the appellant.

Chasing of some of the appellant's Polling Agents from their Polling Stations through Violence and intimidation

This complaint arises from ground 7 of the Memorandum of Appeal which was couched thus:

> ***Ground 7:*** *The Learned Trial Judge erred in law and fact when he refused to invalidate results at the Polling Stations in disregard of evidence of violence and intimidation meted out at the Appellant's Polling Agents.*

It was the appellant's case before the trial court that, through violence and intimidation, his polling agents at three polling stations were chased away during the voting and, as a result, they did not sign the DR Forms for the said Polling Stations. The Polling Stations affected were

located at Bukabooli Trading Centre, Bugulu Primary School and Kigulu Victory Nursery School. The appellant submitted that it was at these Polling Stations that the 1st Respondent obtained the highest votes in the constituency. That in accordance with the "qualitative test" all the votes obtained by the appellant from the three contentious Polling Stations totaling 1254 ought to be deducted from the total votes obtained by the appellant in the whole election. Upon effecting the deduction, the impact is significant and casts doubt on the outcome of the election. Counsel referred to the case of *Amama Mbabazi Vs. Musinguzi Garuga, Election Petition Appeal No. 12 of 2002* for the proposition that despite the differences in margin, court can apply the qualitative test while analyzing the entire electoral process and set aside an election.

In reply, the respondents submitted that whereas it is desirable for the candidates' polling agents to sign the DR Forms, it is not a requirement of the law that can vitiate the result of an election. Moreover, the Polling Stations where the DR Forms were not signed by the appellant's agents were very few and isolated and their results were not disputed by the appellant himself. For this submission, the respondents relied on the case of *Anifah Kawooya Electoral Commission Vs Joy Kabatsi Election petition Appeals Nos. 3 and 4 of 2007.*

The candidates' Polling agents are key players in ensuring the transparency and accountability that are some of the critical parameters for assessing whether an election conducted by the 2nd respondent is free and fair. Section 32 of the PEA entitles a candidate to appoint not more than two agents at each polling station for the purposes of safeguarding the interests of the candidate with regard to the polling process. The form of the appointment and the positioning of the agents at the polling station and their role is clearly set out in Section 32. The section is couched thus:

> "***32. Polling agents of candidates***
>
> (1) *A candidate may be present in person or through his or her representative or polling agent at each polling station for the purposes of safeguarding the interests of the candidate with regard to the polling process.*
>
> (2) *Not more than two representatives or polling agents shall be appointed by a candidate under subsection (1) and the appointment shall be in writing addressed to the presiding officer of the polling station.*
>
> (3) *A representative or polling agent appointed under subsection (2) shall report to the presiding officer of the polling station on polling day and shall sit at a table provided under section 31(5)(a) or be positioned in such a way that he or she is*

able to crosscheck the names of the voters on the voters' roll against the voter's card or any other identification given."

The candidate's agent is entitled to stay at the polling station throughout the voting exercise. Only then can he/she be able to execute his/her mandate prescribed under Section 32 of the PEA.

The candidate's agent has additional rights conferred upon him/her by Section 50 of the PEA in respect of the declaration of the election results for the given Polling station. These include signing on the DR Form after the counting of the votes has been completed – if he/she so wishes and is present at the material time. He/she is entitled to be given a copy of the DR Form duly signed by the Presiding Officer and the candidates' agents who are present at the time of declaration of the results and so wish to sign.

The three polling Stations from where the appellant's Polling Agents were alleged NOT to have signed the DR Forms because of the violence and intimidation meted upon them were located at Bugulu Primary School, Bukabooli Trading Centre and Kigulu Victory Nursery School. The Appellant's evidence to prove his allegations was contained in the Affidavits of Bamuwalaine George, Kisige Yazid and Muganga Yasin.

Bamuwalaine George stated in his Affidavit that he was the Polling Agent of the appellant at Bugulu Primary School Polling Station. That voting started at around 8.30AM and there was multiple voting. That around 10:30AM, he and Kakerewe Abdallah who was the appellant's 2nd agent at the Polling Station left the Polling Station upon being chased away by a group of more than 5 people led by the LC1 Chairman, Gemesa Hassan, a known supporter of the 1st respondent.

The 2nd respondent rebutted the appellant's evidence using the Affidavit evidence of the Presiding Officer of the Polling Station, Guluka Robert. He stated that polling went on smoothly, uninterrupted and was concluded peacefully. That the appellant's agents, Kakerewe Abdullah and Bamuwalaine George were present throughout the entire electoral exercise. And that after the closure of the polls, votes cast in favour of each candidate were counted in full view of the

candidates' agents at the Polling Station and recorded in the DR Forms which all the candidates' agents who were present and willing signed on.

We have looked at a copy of the DR Form for Bugulu Primary School Polling Station which was attached to the Affidavit of Guluka Robert. It indicates that the appellant obtained five votes while the 1st respondent obtained 518 votes. Further, that the appellant's agents, Kakerewe Abdalla and Bamuwalaine George, were stated to be present but only Kakerewe Abdalla signed. The DR Form was signed by the Presiding Officer, one agent of Candidate Ikoba Rogers, one agent of Candidate Kubeketerya, two agents of Candidate Mukwana Cyrus, and one agent of Candidate Wesiire. In the space provided on the DR Form for stating the reasons for refusal of any of the candidates' agents to sign, the Presiding Officer stated,

"*Some of the Candidates' agents were absent during the time of counting* ."

On a proper re-evaluation of the evidence before the trial court, it is our finding that on a balance of probabilities, the appellant's claims in respect of Bugulu Primary School Polling Station were not truthful. They are accordingly rejected. Documentary evidence in the form of the DR Form bearing the signature of one of the appellant's Polling agents, Kakerewe Abdalla, sufficiently rebutted the Affidavit evidence of the second Polling agent of the appellant at the same Polling station, Bamuwalaine George.

As for the second contested polling station at Bukabooli Trading Centre, the appellant's evidence was adduced through the Affidavit evidence of Kisige Yazid. He stated that he was the Polling Agent of the appellant at Bukabooli Trading Centre Polling Station. He did not claim to have been chased away. Instead, he stated that the Presiding Officer deliberately delayed to fill in the DR Forms until late in the night. And that around 10PM a vehicle went to the Polling Station followed by motorcycles and went away with the Presiding Officer and the ballot boxes after driving the appellant's supporters present into fear. Accordingly, it is our finding that the said evidence does not prove the appellant's claim as to his Polling Agents being chased from the polling station at Bukabooli Trading Centre through violence and intimidation.

The aforesaid notwithstanding, and for purposes of completeness, we have looked at the 2nd respondent's evidence in rebuttal. It was contained in the Affidavit evidence of the Presiding

Officer of the Polling Station, Magemeso Bosco. He stated that polling went on smoothly, uninterrupted and was concluded peacefully. And that after the closure of the polls, votes cast in favour of each candidate were counted in full view of the candidates at the Polling Station and recorded in the DR Forms which all the candidates' agents who were present and willing signed on.

We have looked at a copy of the DR Form attached to the Affidavit of Magemeso Bosco. It indicates that the appellant obtained 161 votes while the 1st respondent obtained 113 votes. Further, that the appellant's agents, Mukama Anthony and Ndimulala Yazidi, were present but did not sign. No reason was stated by the Presiding Officer in the space provided on the DR Form for stating the reasons for refusal of any of the candidates' agents to sign. However, the DR Form was signed by the Presiding Officer, one agent of Candidate Ikoba Rogers, two agents of Candidate Kubeketerya, one agent of Candidate Mukuve Mulenghi, two agents of Candidate Mukwana Cyrus, One agent of Candidate Wandebye, one agent of Candidate Wamboga and one agent of Candidate Wesiire.

On a balance of probabilities, we are satisfied that the appellant did not prove the claims in respect of the second contested Polling Station at Bukabooli Trading Centre.

As for the third contested Polling Station at Kigulu Victory Nursery School, one of the appellant's Polling Agents at the Polling Station, Muganga Yasin, stated in his Affidavit that he was the Polling Agent of the appellant at Kigulu Victory Nursery School Polling Station. He was present at the Polling Station by the time voting started at 9AM. That within a period of about 20 Minutes after the start of the voting, a group of rowdy youths led by Baliruno Moses started engaging in multiple voting. That when he complained "they chased us away from the Polling Station". That they left the Polling Station at around 11AM. Muganga does not clarify as to who else constituted the plural "us" and "we" who were chased away from the Polling Station alongside with him.

The 2nd respondent rebutted the appellant's evidence using the Affidavit evidence of the Presiding Officer of the Polling Station, Mwase Karim. He stated that the appellant's two agents, Muganga Yasin and Namatovu Asifah, were present throughout the Polling Day and freely

witnessed the entire electoral exercise. But that when it came to signing the DR Form, only the candidates' agents who were present and willing signed on it.

We have looked at a copy of the DR Form for Kigulu Victory Nursery School Polling Station which was attached to the Affidavit of Mwase Karim. It indicates that the appellant obtained two votes only while the 1st respondent obtained 623 votes. The DR Form was signed by the Presiding Officer, two agents of Candidate Ikoba Rogers, one agent of Candidate Kubeketerya, two agents of Candidate Mukwana Cyrus, One agent of Candidate Wandebye and two agents of Candidate Wesiire. The DR Form further indicates that the appellant's agents, Muganga Yasin and Namatovu Asifah, were present but did not sign. No reason was stated by the Presiding Officer in the space provided on the DR Form for noting the reasons for the refusal of any of the candidates' agents to sign.

Signing of the DR Forms by the candidates' agents has been held by this Court to be important as it is confirmation of the truthfulness of the information therein by the Candidates' agents themselves. (See *Halima Nakawungu Vs Electoral Commission and Another EPA No. 0002 of 2011*). However, failure by the candidates' agents, or some of them, to sign the DR Form by itself does not invalidate the votes otherwise properly cast (See *Anifah Kawooya Electoral Commission Vs Joy Kabatsi Election petition appeals N0's. 3 AND 4 OF 2007*). Section 50 of the PEA makes the signing of the DR Form voluntary on the part of the Candidates' Polling Agents. It is only mandatory on the part of the Presiding Officer. After the signing, the Presiding Officer is required to immediately proceed to announce the results of the voting at the Polling Station before communicating them to the Returning Officer.

In the instant case, the DR Form for Kigulu Victory Nursery School Polling Station was signed by the Presiding Officer and agents of five candidates out of the total of ten candidates who contested in the election. The appellant has not furnished sufficient evidence to warrant invalidation of the results of the voting at the Polling Station as reflected in the DR Form.

In all, ground 7 of the appeal fails.

VIOLENCE AGAINST THE APPELLANT, OTHER CANDIDATES AND THE APPELLANT'S SUPPORTERS

The appellant's complaints about the trial judge's findings regarding the violence and intimidation meted upon him, the other candidates and his supporters were set out in grounds 12 and 14 of the Memorandum of Appeal thus:

> ***Ground 12**: The Learned Trial Judge erred in law and fact when he misdirected himself on the position of the law pertaining the acts of violence when he held that for violence to warrant setting aside an election has to occur on the polling day.*
>
> ***Ground 14**: The Learned Trial Judge erred in law and fact when he failed to properly evaluate the evidence relating to violence and partisan recruitment of electoral officials thereby coming to an erroneous conclusion that the appellant had not proved to the satisfaction of court holding that there was compliance with electoral laws.*

The appellant submitted that the entire electoral process beginning with the primaries, nomination, campaign period up to polling day was characterized by acts of unfairness, lack of freedom, widespread intimidation and violence towards the appellant and his supporters and agents.

The appellant stated that the evidence of Violence and Intimidation was contained in Paragraph 51 of his Affidavit in support the Petition where he stated that due to Violence and Intimidation by the 1st Respondent, his Agents/hooligans like Baliruno Moses, Mwase Karim Ndifuna and Omanyo Charles, he was unable to campaign/make consultations in the following Villages: Busira, Matovu, Buyaga, Bulowooza and others. According to the appellant, the above evidence was not rebutted as the Respondents made general denials.

The appellant further submitted that the other candidates to wit: Mukwana Cyrus; Ikoba Rogers and Wamboga Godfrey corroborated the Appellant's evidence and stated that on Polling Day some of their agents were chased away due to violence and intimidation. And that prior to that, they were unable to consult in some Villages/Parishes due to Intimidation and Violence.

The appellant faulted the trial Judge for failing to evaluate the evidence regarding violence and intimidation for the entire electoral period which was presented before him. That he instead focused on only the events of the Polling Day which occasioned a miscarriage of justice. He invited this court to re-evaluate the evidence of violence and intimidation for the entire electoral process beginning with the primaries, nomination, campaign period up to polling day. For this proposition the appellant relied on the decision of the Supreme Court of India in *the case of Union of India Vs Association for Democrat Reforms and Another*, Supreme Court of India 104 of 2002 at Page 11 where it was held that "*The Word 'Election' is used in a wide sense so as to include the entire process of election which consists of several stages and it embraces many steps, some which may have an important bearing on the result of the process*"

In reply, the respondents denied the appellant's claims and submitted that the appellant's evidence in paragraphs 7,8,9,11,29 to 51 of his Affidavit in Support and the affidavits of Cyrus Mukwana and Ikoba were answered by paragraph 35 of the 1st respondent's affidavit in support of the answer to the Petition *as* being baseless, unknown, unfounded and not in any way attributable to the 1st respondent.

Further that the appellant's allegations in paragraph 14 to 27 of his affidavit in support of the Petition that he made a complaint to the President of Uganda by way of letter is unknown to the 1st respondent and, besides, the said correspondence was generated before nominations were conducted. As such, it could not sustain the cause of action in the current election dispute.

Lastly, the 1st respondent denied the existence of any agency relationship between the suspects and the 1st respondent.

The 1st respondent supported the findings of the trial court that the appellant did not prove the allegations of violence and how it affected the election. The 1st respondent prayed that this court disallows the appeal in this aspect.

In Rejoinder, the appellant simply reiterated his earlier submissions.

It is settled that an election is not an event but an elaborate process consisting of several stages which climax into voting, counting and tallying of votes, and final declaration of the winner by

Gazettement. As such, when faced with an Election Petition, the court has to analyse and evaluate the entire electoral process and not restrict itself to the polling day activities only. (*See* *Joy Kabatsi Kafura Vs Anifa Kawooya Bangirana & Electoral Commission Election Petition Appeal No. 25 of 2007 of the Supreme Court of Uganda, Union of India Vs Association of Democratic Reforms & Anor, Supreme Court of India 104 of 2002 and Raila Odinga & Anor Vs Uhuru Kenyatta & Others Election Petition No. 1 of 2017 of the Supreme Court of Kenya*).

The real question which ought to be determined by this court is: What is the cut-off point at which the trial court ought to have started its investigation of the appellant's complaints? In the instant case, some of the allegations of violence and intimidation relate to the period of the NRM Primaries in which both the appellant and the 1st respondent contested and the 1st respondent emerged the winner and the NRM Flag-bearer in the national elections. Should the investigation of the allegations of violence and intimidation by the trial court have extended to the period of the NRM primaries?

We think NOT. The election which is the subject matter of the petition under the PEA is the one which is conducted by, and the result declared by, the Independent Electoral Commission in discharge of its functions under Article 61 (2) of the Constitution of Uganda which is coached as follows:

> ***61. Functions of the Electoral Commission***
>
> (1) *Not applicable*
>
> (2) *The Electoral Commission shall hold presidential, **general parliamentary** and local government council elections within the first thirty days of the last one hundred and twenty two days before the expiration of the term of the President, Parliament or local government councils as the case may be."* [Emphasis aadded]

The NRM Primaries were not conducted by the 2nd respondent; they were simply an in-house election involving NRM Party members to identify candidates to contest in the General Parliamentary election as the NRM Flag bearers.

The other reason is that it would be contrary to the principles of natural justice entrenched in Articles 28 and 44(C) of the Constitution for the trial Court to extend its investigations into the

NRM Primaries in a Petition like the instant one where the organisers of the said Primaries and other key stake holders, including the NRM party, are not parties.

As such, in re-evaluating the evidence as to the violence allegedly witnessed in the election of the 1st respondent, the period of NRM primaries shall be excluded. We shall consider only the complaints which arose after the appellant and the 1st respondent were nominated to contest in the general parliamentary election organized by the 2nd respondent. While being cross-examined before the trial court, the appellant stated that the nominations were conducted in October 2021. That date constitutes our commencement date when considering the allegations of violence and intimidation.

When dealing with the complaint of widespread violence and intimidation, the trial judge considered the pleadings of the parties in respect of violence and intimidation. He analyzed the evidence in support of the different incidences of violence against the appellant himself and his supporters. This included the incident at Kigandalo Sub-County where the appellant was physically manhandled by policemen who tore his t-shirt and harassed him, and the personal verbal attacks against the appellant by the Deputy RDC, Emmy Mitala, who was stated to be a brother-in-law of the 1st respondent. After summarizing the gist of the Affidavit Evidence, the trial judge said:

> *"…The above incidences of assault were independent of the candidates and none of the candidates was proved to have taken part in the assault. Given the partisan nature of an electoral process and the fact that supporters of each candidate passionately involve in campaigns, it is pertinent that the Courts ascertain whether such actions caused obstruction, harassment or intimidation of voters, which retrained and affected the voting process. Most of the alleged assaults occurred during the campaign period but none of the suspects was prosecuted under Section 80 of the Parliamentary Elections Act.*
>
> *I am of the strong view that in partisan politics, violent actions may occur between different candidate supporters but I do not agree with the petitioner's Counsel that a candidate would be vicariously liable for actions of his supporters which he/she did not directly sanction.*
>
> *The assaults were actually done by persons who were never prosecuted and other acts of violence were allegedly done by the police and the army during campaign period. There is pictorial evidence of the petitioner being manhandled by the police during the campaign period. These, in my view, are actions of police officers that cannot be remedied in an election which the Uganda police is not part of. I recall that amongst the*

duties of the police is keeping law and order and without the evidence of the security personnel, Court is left in speculation.

I must however note that this was a campaign carried out during the COVID-19 period and had to be done alongside observing standard operating procedures. It would be different if the violent acts were done during voting because that would mean voters could be hindered from casting their votes. In Winnie ***Babihuga Vs Matsiko Winnie Komuhangi and Others Election Petition No.4 of*** *2001 which cited with approval* ***Musinguzi Garuga Vs Amama Mbabazi and another Election Petition No.03 of 2001,*** *it was held that elections must be conducted under conditions that enable the voter to cast his or her vote for whoever candidate he or she wishes to vote for. There must be no obstruction, harassment, hindrance, threats or intimidation.*

The allegations of firing bullets as stated by the petitioner and Kaduyi Sinani have also not been proved to the satisfaction of Court. I therefore disallow this allegation."

We have reviewed the trial record. There is no doubt that there was involvement of the security personnel and the Deputy Resident Commissioner in the electoral process, especially during the campaigns, to the chagrin of the appellant. Public officials are supposed to act impartially in the discharge of their respective duties. That explains why the PEA was amended by Parliament to introduce Section 83A which expressly barred Public Officers from being involved in political campaigns in a partisan manner.

The context under which the security forces were operating also needs to be taken into account. The trial court rightly observed that campaigns were being conducted in the context of the Covid-19 Pandemic. There is no doubt that for the security forces to enforce the Standard Operating Rules that were put in place by the Ministry of Heath to minimize the spread of the Covid-19 virus on the one hand, while at the same time ensuring that the candidates enjoy their right to canvass for votes, was not an easy task. Challenges were bound to arise while the security forces were making the delicate balance.

It is also true that violence was meted upon several persons. However, all said and done, the relevance of the evidence of violence in an election litigation is in two aspects only: First, whether it was committed with the knowledge and consent or approval of the 1st respondent. In this case even a single act of violence proved to the satisfaction of court is sufficient to set aside the election result under Section 61(1)(c) of the PEA. While resolving ground 11, we held that the appellant did not prove this aspect.

The second relevance of the evidence of violence in an election litigation is if it is so widespread or substantial that the integrity of the election process is compromised substantially or that it substantially affects the final election result.

The record before this court which we have closely reviewed indicates that there were several incidents of violence which were reported to the Police for redress. The status was summarised in Annexure "P.11" to the Appellant's Principal Affidavit. P.11 indicates that 14 cases of violence and election malpractices were reported to the Police between July 2020 and 23rd of January 2021. Of the 14 cases, 12 related to violence. But out of the 12 cases of reported violence, 7 complaints were lodged with the Police before the nominations were conducted by the 2nd respondent in October 2020. We have already stated that this category of complaints of violence and intimidation was outside the scope of investigation by the trial court. On subtracting the said 7 complaints (which relate to the pre-nomination date) from the 12 cases of alleged violence and intimidation, we were left with only 5 cases which were properly before the trial court for evaluation when considering the appellant's Petition before him. The five cases are:

a) Mayuge Police SD14/08/01/2021 Uganda Vs Omanyo Charles – Complaint: Assault of Oboth Richard and burning the appellant's t-shirt

b) Kigandalo Police SD07/29/12/2020 Uganda Vs Ogutu Ronald – Complaint: Assault of Omonding and defacing the appellant's Posters

c) Mayuge Police SD 02/15/01/2021 Uganda Vs Baliruno Moses and Others – Complaint: Assaulting Wasibi and the appellant and grabbing election materials.

d) Bukabooli Police SD06/14/01/2021 Uganda Vs Sula and Tony – Complaint: Assault of Maluda Davis

e) Kigandalo Police SD08/12/11/2020 Uganda Vs Okumu and Aliu - Complaint: Assault of Okech Bernard

The appellant's evidence of violence indicates that it was isolated. From the Affidavit of Oboth Richard sworn on 15th March 2021 in respect of the Assault case reported against Omanyo Charles, the incidents complained about occurred during the NRM Primaries. From the Affidavit

of Omonding George sworn on 15th March 2021, he was cut on his face by Ronald Ogutu at a place called Matovu Village in Mayuge District following an argument between them over the refusal of Omoding to pin the posters of the 1st respondent. From the Affidavit of Maruda Devis Ekunyat sworn on 15th March 2021, he states that he was beaten on the Polling day by Sula Lugambo, when he went to Matovu Polling Stations in answer to the call from one of the appellant's Supervisors at the Polling Station to the effect that there was multiple voting and confusion. Maruda was the Sub-County Supervisor of the appellant. From the Affidavit of Okech Bernad sworn on 15th March 2021 he was beaten on 13th November 2020 by two known campaigners of the 1st respondent from a place known as Magoto B. His "sin" was wearing the t-shirt of the appellant and refusing to support the 1st respondent.

The above Affidavits represent the general pattern which has emerged upon reviewing the appellant's evidence of violence and intimidation which was adduced before the trial court. It proved that there was violence and intimidation during the campaign period and on polling day. The violence was from some members of the security forces, and the 1st respondent's supporters. But it was very scattered in terms of scale, time/date, place and people. We have also already considered the evidence of violence allegedly meted upon the appellant's Polling agents resulting into their failure to sign the DR Forms. We were not satisfied that it was sufficient to discharge the burden prescribed for proof of such claims by the appellant. We are likewise satisfied that even when it comes to the violence and intimidation of the appellant and his supporters, it was not as widely spread or of such a magnitude as to have either affected the result of the election, or to have so negatively impacted the integrity of the election as to require a nullification.

Grounds 12 and the appellant's claims of violence and intimidation set out in ground 14 accordingly fail.

PARTISAN RECRUITMENT OF ELECTORAL OFFICIALS

The appellant's complaint about the trial judge's findings about the alleged partisan recruitment of Electoral Officials also arises from ground 14 of the appeal.

Partisan recruitment of electoral Officials is one of the complaints that the appellant set out in the Petition. The appellant adduced, by way of Affidavit Evidence, several communications which he addressed to the District Returning Officer of Mayuge District and the Secretary of the 2nd Respondent complaining about the recruitment of several persons as Presiding Officers and Polling Day Officials in then forthcoming General Election. The appellant provided a long list containing names of persons who he alleged to be partial on account of being campaigners, relatives, and close associates of the 1st respondent. Others were alleged to have sworn Affidavits in his favour in the previous election Petition case between the appellant and the 1st respondent.

The appellant also adduced evidence of three other candidates, Mukwana Cyrus, Ikoba Rogers and Wamboga Godfrey who had likewise complained about the recruitment of some Polling Officials who were alleged to be partial.

The appellant argued that the effect of the partiality of the Polling Officials was evident in Kigulu victory Nursery Primary School station presided by Karim Mwase (who deposed an affidavit in 2016 for the 1st Respondent). According to the appellant, it was at that Polling Station that the 1st Respondent obtained the highest votes (623) in the constituency upon chasing away the Polling agents of the appellant, Mukwana Cyrus and Ikoba Rogers.

In the Affidavit of the District Returning Officer, Ms. Birungi Sarah Keziah, sworn on 26th March 2021 in support of the 2nd Respondent's Answer to the Petition, she said that a good number of the persons recruited were re-absorbed basing on their record of having worked well and impartially during the previous election cycle where the appellant was the successful candidate.

When resolving this issue the trial judge said:

> *"Under Section 30 of the Electoral Commission Act, appointment of returning officers is done by the commission, by notice in the Gazette for each electoral district and such persons shall be of high moral character and proven integrity. Section 34 of the same Act gives the returning officer powers to appoint presiding officers and polling assistants for each polling station. The Act does not make provision for procedure to be followed while recruiting presiding officers and as such, it cannot be ascertained that the Retuning Officer failed in the statutory duty therein. The fact that a presiding officer in the 2021 elections was an agent of a candidate in the 2016 elections is not, per se, a*

statutory failure on the part of the returning officer. This being a democratic nation, one person can belong to the NRM party in 2021 and then belong to the NUP or FDC party in 2026. The guiding principle is carrying out the statutory duties in accordance with electoral laws."

Presiding officers and Polling Assistants for each polling station are very important players in enabling the 2nd respondent deliver on its mandate of holding free and fair elections. Impartiality on the part of the persons recruited to discharge electoral functions is a key trait. And once issues are raised about the impartiality of any electoral official, they ought to be investigated and disposed of.

We note that the complaint of partisan recruitment of electoral officials was raised by the appellant and some of the other three candidates before the election was held. In a young multiparty democracy where the stakes of the contestants continue to rise higher and higher up with each election cycle, such complaints are common and will continue to be on the rise. However, it is one of the functions of the 2nd respondent to hear and resolve such complaints which arise before and during polling pursuant to Article 61(1)(f) of the Constitution. Beyond the letters written by the appellant and the other three candidates to the officials of the 2nd respondent, no evidence has been shown as to what action was taken by the 2nd respondent on the complaints.

However, the complaint was appropriately rebutted by evidence of the District Returning Officer to the effect that the performance or track record of the different persons in the previous election cycle where the appellant was the successful contestant was a key consideration in the recruitment of the Polling Officials in the current election cycle. The majority of the recruits were stated to have had a good track record.

The aforesaid notwithstanding, the appellant did not adduce sufficient evidence to prove that the recruitment affected the election result substantially. Whereas we appreciate that recruitment of Polling Officials is very important, how the officials perform after being recruited is determined by several other factors including training, the facilities availed and the working environment. Our electoral laws envisaged occurrence of some flaws in the different electoral activities and processes and put in place several checks and balances to ensure that voters are enabled to

vote, and their will is reflected in the results declared. The provision for Candidates agents at the Polling Stations is one such checks and balances in our electoral laws.

As proof of the effect of the recruitment complaints on the election result, the appellant sought to attribute the good performance of the 1st respondent at Kigulu victory Nursery Primary School station to the Presiding Officer who he accused of being Pro-1st Respondent. Such approach has no basis. We dealt with this particular Polling Station when evaluating the evidence of violence against the appellant's Polling Agents. We disallowed the appellant's claims.

In conclusion, the appellant's claims as set out in grounds 12 and 14 fail.

ISSUE 5

Issue 5 was couched as follows:

> ***Whether the learned trial Jude erred in law and fact in holding that even if there was non-compliance with the Electoral Laws it did not affect the results in a substantial manner.***

In his submissions, the appellant stated that this issue covers grounds 11,12, 13 and 14 of the Memorandum of Appeal.

We note that this court has already resolved each one of the above grounds while considering the preceding issues. Accordingly, issue 5 was thereby rendered redundant.

Ground 16:

Ground 16 of the appeal was couched thus:

> ***The Learned Trial Judge erred in law and fact when he placed a higher burden of proof on the Appellant than what is required by law.***

We note that the appellant did not make any submissions on this ground. As such, we treated the ground as having been abandoned by the appellant.

DECISION OF COURT

1) The appeal fails and is hereby dismissed.

2) The Declaration by the High Court that of the 1st Respondent, Hon. KUBEKETERYA JAMES, is the validly elected Member of Parliament for Bunya East Constituency in Mayuge District is hereby upheld.

COSTS

Award of costs in election litigation, like in any other litigation, is a discretionary matter. But the discretion must be exercised judiciously and in accordance with the applicable laws namely, Rule 27 of the Parliamentary Election (Election Petition) Rules, S.I. No. 141 -2 and S.27 of the Civil Procedure Act, Cap.71.

This court has on several occasions held that election litigation is a matter of great national importance in which courts should carefully consider the question of awarding costs so as not to unjustifiably deter aggrieved parties from seeking court redress *(See Akuguzibwe Lawrence Vs Muhumuza David, Mulimira Barbar and the Electoral Commission EPA No. 22 of 2016 and Aisha Kabanda Nalule Vs Lydia Daphine Mirembe, Electoral Commission and the Returning Officer Butambala District EPA No.90 of 2016).*

The complaints of the appellant as set out in the Petition and the grounds of appeal were not frivolous. The only problem was that sufficient evidence was not availed to the satisfaction of the court as against the respondents. However, the appellant's Counsel's preparation of the pleadings before the lower court, the record of appeal and legal arguments was highly meticulous. Indeed, the appellant succeeded on some few grounds, though they did not have any significant impact on the determination of the appeal.

Further, the petition came against the backdrop of NRM Party primaries in which both the appellant and the 1st respondent contested but which appear to have experienced some degree of acrimoniousness. In those circumstances, in order to promote closure of the checkered history and reconciliation of the parties, it is only befitting that each party bears its own costs before this court and in the High Court.

We so order.

Signed, dated and delivered at Kampala this 1st day of Aug 2022.

ELIZABETH MUSOKE
Justice of Appeal

MUZAMIRU MUTANGULA KIBEEDI
Justice of Appeal

MONICA K. MUGENYI
Justice of Appeal