THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 50 OF 2021

CORAM:

{BUTEERA DCJ; OBURA JA; BAMUGEMEREIRE JA }

JANE BABIRYE ZANINKA :: APPELLANT

VERSUS

1. MICHEAL IGA BUKENYA
2. ELECTORAL COMMISSION :::::::::::::::::::::::: RESPONDENT

Arising out of the Judgment of Eva Luswata J while presiding over High Court of Uganda at Mubende in Election Petition No. 2 of 2021.

JUDGMENT OF THE COURT

The Brief Background

The Appellant Jane Babirye Zaninka was a candidate in the 2021 Parliamentary elections for Bukuyu County Constituency, in Kasanda District. She contested with Dr. Michael Iga Bukenya the 1st Respondent, Robinson Kweezi and Robert Mutebi. The election took place on the 14th January 2021, and the 1st Respondent was returned as the successful candidate. On 17th February 2021 Dr Michael Iga was gazetted as the duly elected Member of Parliament for Bukuya County in Kasanda District. The Appellant being dissatisfied with the outcome of the elections, filed an election petition in the High Court of Uganda at Mubende. The appellant's dismissed her petition with costs. In response, the Appellant filed this election petition appeal with several grounds of appeal.

During the scheduling conference the 14 grounds of appeal were consolidated into nine grounds as shown below.

Grounds the Appeal are that

1. The learned trial Judge erred in law and fact when she failed to evaluate the evidence on the record regarding incidents of bribery.
2. The learned trial Judge erred in law and in fact when she failed to evaluate the evidence on record of bribery at Kichumbanswa, Katuugo, Bwerenga, Kasambya and Kiguudde.
3. The learned trial Judge erred in law and in fact when she held the view that none of the accusers reported the alleged bribery to the Electoral Commission or the Police.
4. The learned trial Judge erred in law and in fact when she set the standard of proof higher than that provided by the law.
5. The learned trial Judge erred in law and in fact when she failed to expunge all the defective affidavits filed by the 2nd Respondent on the 8th of June 2021.
6. The learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning intimidation and violence.
7. The learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning non-compliance with the Electoral laws.
8. The learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning the grave irregularities in the Declaration of result forms, clerical errors, mathematical errors, and incorrect filling and posting of statistics on the Declaration result forms.

9. The judgment delivered in the High Court of Uganda at Mubende in respect of Election Petition No. 002 of 2021 Babirye Jane Zaninka v Bukenya Michael Paul Iga, the Electoral Commission was a nullity as Hon. Lady Justice Eva Luswata was elevated to the Court of Appeal by his Excellency the President under Art 142 (1) of the Constitution on the 18th of August 2021 but in violation of the Constitution and Judicial Conduct Regulations, Hon. Lady Justice Eva Luswata who had since been elevated to the Court of Appeal signed a judgment dated 12th October 2021 as a High Court Judge which she shouldn't have since she was no longer a High Court Judge at the material time. **This ground was later to be abandoned.**

Representation

At the trial the Appellant was represented by Mr. Semuyaba of Semuyaba Iga & Co. Advocates while the 1st Respondent was represented by Ssekana Associated Advocates & Consultants and the 2nd respondent was represented by the Legal Department of the Electoral Commission. The parties proceeded by written submissions which this court has taken carefully consideration of to arrive at this Judgment. We note though that the Appellant abandoned the ground nine of the appeal and proceeded only with the eight agreed grounds.

Submissions of Counsel for the Appellant

In the Appellant's submissions of Learned counsel for the Appellant dealt with Grounds No. 1, 2, 3 and No. 4 jointly. Counsel for the appellant was, on the whole critical of the approach of and the conclusions arrived at the trial by the learned trial Judge.

1. Whether the learned trial Judge erred in law in fact when she failed to evaluate the evidence on the record regarding incidents of bribery.
2. Whether the learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record regarding the incidence of bribery at Kichumbanswa, Katuugo, Bwerenga Kasabya and Kiguudde.
3. Whether the learned trial Judge erred in law and in fact when she held the view that none of the accusers reported the alleged bribery to the Electoral Commission or to the police.
4. Whether the learned trial Judge erred in law and in fact when she set the standard of proof higher than that provided by the law.

Regarding Grounds No. 1,2,3 and 4 Counsel submitted that the petitioner's case was based largely on the Electoral offences and illegal practices committed by the 1st and 2nd Respondent or their Agents. Counsel argued that in the case of Electoral offences and illegal practices, a single Electoral offence or illegal practice once proved under the requisite standard is sufficient ground for setting aside an election. He relied on the case of **Odo Tayebwa v Arinda Gordon Kakuuna and Electoral Commission Election Petition**

Appeal No. 86 of 2016. His contention was around the conclusions arrived at by the trial Judge when the evidence adduced by the appellant clearly discharged the burden of proof. He also relied on **Bakaluba Mukasa Peter v Nambooze Bakileke Betty Supreme Court Election Petition Appeal No. 4 of 2009**.

Counsel for the appellant attacked the trial Judge's findings of law and fact arguing that she set the standard of proving bribery higher than the required standard when she held that, "I note that in all cases of alleged bribery, none of the recipients (and in this case they were quite a good number) found it important to report the matter to any Electoral Commission official or the Police. This leaves their evidence suspect and weak."

He submitted that in the judgment, the learned trial Judge established that the bribery took place but took issue with the fact the alleged bribery was not reported to the Police or the Electoral Commission. It was Counsel's submission that the trial Judge set a standard beyond reasonable doubt which is only a requirement in criminal trials thereby arriving at a wrong conclusion that the evidence was weak. Counsel also relied on **Mukasa Antony Harris v Dr. Bayiga Micheal Philip Lulume Supreme Court Election Petition Appeal No. 017 of 2007** in which the Court had considered whether the learned trial Judge erred by finding that the appellant bribed voters. He cited section 68(1) of the Parliamentary Elections

Act 2005 and related it to the matter currently before this court and concluded that bribery had been proved.

Counsel once again criticized the trial Judge for relying on the Supreme Court decision in **Kizza Besigye v Y.K Museveni and Electoral Commission Presidential Election Petition No. 1 of 2006** which stood for the proposition that charges of bribery had to be proven beyond reasonable doubt and not based on balance of probabilities. He found the position erroneous and not applicable to parliamentary elections proceedings which are regulated by the Parliamentary Elections Act 2005 as amended (the PEA). Counsel contended that the learned trial Judge ought to have been aware of the existence of **section 61(3)** of the PEA and to have distinguish between **Besigye (2006)** and the case at hand. Counsel criticised the learned trial Judge for not being able to distinguish this case as one in which electoral offences and illegality had been proved. He submitted that the law clearly prescribes the standard of proof required in bribery cases under section 68(1) of the Parliamentary Elections Act. He contended that Bribery is proved on a balance of probabilities. Counsel relied on **Dr. Bayiga Michael Philip Lulume (Supra)** where all the material witnesses who gave evidence about the incidents of bribery were cross-examined on their respective affidavits. He submitted that in the instant case, the evidence of the witnesses on the record proved that the witnesses at the two rallies were voters. Counsel concluded that the Court had carefully

weighed the evidence against the degree of proof, the trial Judge would have found for the appellant.

Bribery at Bwerenga and Katuugo Villages

Relating **Lulume** (supra) to the current case, counsel submitted that from the evidence of the witnesses in the instant case, there was no doubt that the witnesses at the two rallies were voters. Counsel added that had the Court had clearly and carefully considered all the material witnesses who gave evidence about the incidences of bribery at Bwerenga, at Katuugo and to Boda Boda riders, she would have come to the conclusion that there was no doubt that the participants or the witnesses were voters who participated in the impugned rallies. Counsel pointed to the intention of the candidate to bribe submitting that when he gave out money, he intended to influence voters. It was counsel's submission that the candidate knew that the people to whom he handed out money were voters, and that he gave out the money with the intention of soliciting their votes. He relied on the opinion of Tsekooko JSC in **Lulume** (above) to submit that in such case it was hardly unreasonable to imagine that a Parliamentary candidate could give out money to people who were not voters in a particular locality nor was it unreasonable to imagine that the money could have been given out for anything else other than to persuade the voters to vote for the Appellant. Counsel submitted that there was ample evidence to show that the money was released by the candidate for purposes of voter bribery.

Relating **Mukasa Antony Harris (Supra)** to the case at hand, Counsel for the Appellant submitted that money exchanged hands and it certainly was not for any other reason than to bribe voters. Counsel contended that there was actual bribery which was clearly described in sufficient detail for the trial Court to reach a determination that indeed the bribery took place.

Bribery at a Football Tournament at Katuugo

It was Counsel's submission that on the 3rd of January 2021, the 1st Respondent Dr. Michael Bukenya Iga organised a tournament at Katuugo Village in which most of the youth participated. He noted that the clubs which participated in the tournament included Katuugo FC, Nfuka FC, Mundade A, Mundade B and Namulanda FC. Basing on the evidence on record counsel submitted that the 1st Respondent arrived at Katuugo at 4:00 pm and waited for the tournament to end. He submitted that when the Katuugo FC won, the 1st Respondent gave UGX 200,000/= to the Club to share as the winners and UGX 100,000/= to the Nfuka FC who were the runners up. The rest of the Clubs - Mundade A and Mundade B and Namulanda FC which participated in the Tournament each received UGX50,000/= to share.

Bribery at Kinchumbanswa

Counsel invited this Court to take a keen look at the affidavit deponed by Brian Ssenyonyi in support of the Petition filed in Court

on the 15th of May 2021 particularly paragraphs No. 1, 2, 3, 5, 6, 7, 8, and 9; the affidavit deponed by Charles Kalanzi, the one deponed by Moses Ssewakinga (which was expunged) and the one deponed by Godfrey Ssesaazi. Counsel invited this court to keenly consider the affidavit in support of the petition, more specifically the affidavit of Ephraim Mugisha. In particular, he alluded to paragraph 4 of the affidavit of Ephraim Mugisha in which he swore that the 1st respondent went to Kichumbanswa trading centre at 4: 00pm to attend the village meeting and that in that meeting he gave out UGX 300,000/=. Counsel invited this court to disregard the 1st respondent's arguments that Ephraim Mugisha who was handed money to distribute to the voters was a discredited witness. Instead, counsel insisted that the 1st respondent, in person solicited the voters to vote for him. Counsel relying on the affidavit of Ephraim Mugisha, the residents were at liberty to use the money the way they chose when they decided to buy chairs out of it. Counsel cited Ephraim Mugisha who, himself, bought 10 chairs at UGX 250,000/= and used the UGX 50,000/= as transport. Counsel argued that the above averments and evidence by Ephraim were admitted by the witnesses of the 1st respondent. He invited this court to look at the affidavit of Scovia Ndagire in which she admitted that money was given to Ephraim Mugisha. Counsel also pointed to the additional affidavit in reply to the petition deponed by Noah Lugendo where he admitted that he received UGX 300,000/= which he admitted was

bribery. Counsel also referred to the affidavit of Milson Ssendegeya where he admitted that there was money given to Ephraim Mugisha intended to influence voters to vote for the 1st respondent. Counsel contended that the trial Judge erred when she failed to evaluate the evidence of clearly unearthed bribery that was taking place in the area to the benefit of the 1st respondent and that instead the learned trial Judge in her judgment had to say this:

> **'To my mind, there must have been some disagreement between Mugisha and his party members regarding to that sum. It cannot be dispelled that he may have for some reasons chosen to give false evidence against the flag bearer.'**

Counsel in his submissions added that Ephraim Mugisha evidence was corroborated by the respondent's case. Counsel then argued that the 1st respondent's counsel admitted that the corroborating evidence of Milson Ssendegeya, Scovia Ndagire and Noah Lugendo was uncontroverted. Counsel for the appellant argued that the evidence of Ephraim Mugisha was strongly corroborated and supported by other evidence of Milson Ssendegeya, Scovia Ndagire and Noah Lugendo. Counsel relied on the evidence of Ephraim Mugisha who when cross- examined admitted that he voted for Dr. Michael Iga Bukenya who won the elections. It was counsel's submission that a witness who maintained his evidence under cross- examination should be believed. Counsel invited this court to

find that this single event proved that money or a gift was given out by the candidate personally or through him or his agents with his or her knowledge or approval and that the recipient was a registered voter and that the giving was with intent to influence the voters to vote or to refrain from voting. Counsel relied on **Odo Tayebwa** v **Arinda Gordon Kakuuna Electoral Commission Election Petition Appeal No. 86 of 2016** and **Anthony Harris Mukasa v Michael Philip Lulume Bagaya in Supreme Court Election Petition Appeal No. 18 of 2007** and further on **Vincent Kyamadidi Mujuni v Charles Ngabirano and EC in Electoral Petition Appeal No. 84 of 2016** and he invited this court to find that a single act of bribery by or with knowledge and consent of the candidate or his agents, however, insignificant might be, was sufficient reason to invalidate an election.

Counsel for the appellant objected to any suggestion that Ephraim Mugisha's affidavit was false. He asserted that every statement in Mugisha's affidavit had been corroborated by the other witnesses and ought to be believed. Counsel propositioned that as an agent of the 1st respondent, Mugisha was authorised or undertook to transact business or manage the affairs for the 1st respondent. He opined that while some agents are appointed, others are ostensible or apparent. In that regard he related to **Hellen Adoa & Another v Alice Alaso Election Appeal No. 57 and 54 of 2016**. He then concluded that all the witnesses were registered voters who clearly

referred to their Voter Registration Numbers in the affidavits. Counsel then opined that this court does not require a multiplicity of incidents of bribery to annul an election. He further relied on **Kikulukunyi Faisal v Muhammed Muwanga Kivumbi Court of Appeal Election Petition No. 44 of 2011** and **Isondo v Amongin Election Petition Appeal No. 60 of 2016.**

Bribery by NRM Party Officials

Counsel invited this court to find that the appellant adduced evidence which proved that NRM officials were canvassing votes for **Michael Bukenya Iga** as a Flag Bearer for the NRM Party. He contended that the appellant adduced evidence of bribery in her affidavit and that the bribery was by use of money paid to NRM officials to mobilise voters. He submitted that this evidence was primarily adduced by **Ephraim Mugisha** and that it was corroborated by the evidence of the 1st respondent's own witnesses who included **Ndagire Scovia, Noah Lugendo** and **Milson Ssendegeya** to confirm the incident.

Counsel further submitted that when the 1st respondent was examined by the court, his evidence was that his team of NRM officials were mobilising votes for him as the NRM flag bearer and therefore the party was routing for him. Counsel added that this evidence should be evaluated by the court as an admission on the party of the 1st respondent that there was a bribery incident.

Counsel for the 1st Appellant relied on the transcript of the evidence by **DW1: Hon. Bukenya Michael Iga** in cross-examination in which he said.

Mr. Muwonge, so you confirm to court that these NRM officials mobilised you?

DW1: They mobilised for NRM Mr. Lule.

Court: What is the purpose?

DW1: Mobilisation for presidential candidates and other flag bearers for NRM 2021 elections.

Court: Just clarifications on this, agents of NRM on village level.

DW1: I want to be clear, during the elections because I know they exist all the time.

Court: What are their duties during campaigns?

DW1: They are supposed to put up posters for the candidates and talk for the NRM candidates at every opportunity amongst other duties.

Court: When they say abstain you are alluding to look for votes, did they encourage people to vote for you.

DW1: Yes my Lord

Counsel then argued that this statement by the 1st respondent himself should not have been taken lightly by a trial Judge since he confirmed to the court that NRM officials mobilised for him and for the NRM party. Counsel submitted that the mobilisation was also for presidential candidates for other NRM-flag bearers. The mobilisation included putting up posters for candidates, talking-up

the NRM candidates at every opportunity and encouraging people to vote for them. This evidence, given on oath under the supervision and superintendence of the trial Judge, was sufficient to supplement the affidavit evidence under **section 58** of the Evidence **Act and rule 15** of the Parliamentary Elections rules where a deponent of affidavits can be cross-examined thereupon. Counsel then submitted that this is proper and valid evidence to be considered together with the fact that the affidavit evidence might have been rejected or contradicted. Counsel then argued that the weight or the significance of the bribe would not matter as along as it is proved that it was given for the purpose of influencing a voter to vote for a candidate or to refrain from voting. He relied on **Muwanga Kivumbi v Electoral Commission and Kikulukunyu Faisal** (supra). He reiterated the words of **Justice Tsekooko,** in **Philip Michael Lulume (supra)** that it is hardly unreasonable to imagine a Parliamentary Candidate give out money to people who were not voters in a particular locality nor is it unreasonable to imagine that money could have been given out for anything else other than to persuade the voters to vote for the appellant. There was ample evidence showing that the money was realised by the appellant for bribing.

Counsel for the appellant invited this court to peruse the record of appeal and all the evidence supplied by affidavit and that upon perusal, this court would discover that the appellant discharged the

burden of proof required to the satisfaction of court and the satisfaction of court was not proof beyond reasonable doubt as suggested by the trial Judge. Counsel invited this court to find that bribery took place in the period of the elections specifically during campaigns and that the police and other officials were not always in the space that the bribery took place. Counsel invited this court to find that the requirements said by the trial Judge to have the bribery first reported to the police or to the EC set a standard of proof that was beyond the reasonable doubt and was therefore not the required standard in the election petitions. He invited this court to allow Grounds No. 1, 2, 3 and 4.

Ground No. 5:
Whether the learned trial Judge erred in law and in fact when she failed to expunge all the defective affidavits filed by the 2nd respondent on the 8th of June 2021.

Counsel submitted that the appellant unearthed affidavits deponed by the officers of the 2nd respondent EC which were signed on the 20th day of May 2021 and were filed by the 2nd respondent on the 8th day of June 2021. He submitted that the affidavits offended all the rules governing affidavit evidence in Uganda and it was clear on cross examination that none of the deponents had appeared before the commissioner of oaths but instead all they did was draft omnibus affidavits and later attach the jurats. Counsel submitted that all the 2nd respondent's additional affidavits allegedly deponed by Paul **Mayanja**, Jackline **Muhonjerwa,** Abaasi **Tumusiime**, Vianney **Hagumimana**, Deo **Wiize**, Brian **Kalega**, Elijah

Ndikubwimama, Fred **Nsubuga**, Deogratius **Kalibata,** Matthew **Katongore,** Esau **Kato**, Joyce **Kajumba,** Rogers **Kabali**, Friday **Amos**, Lydia **Namuli**, Grace **Bukirwa,** Godfrey **Muhumuza**, Olivious **Ninsima**, Ronald **Byamugisha**, Sarah **Nakabu Nansubuga**, Simon **Mugisha**, Emmanuel **Tumwesigye** and David **Munanga,** totalling to 24 affidavits**,** were all signed on 28th May 2021 which in the eyes of counsel was logically and procedurally impossible. Counsel further contested the manner in which all the above affidavits which bore the same content particularly paragraphs 5 to 13 presented with the same wording could be genuine. Counsel argued that the 2nd respondent designed these affidavits in such a way that there could only be one explanation; that the affidavits could not have been specifically deponed by each individual separately, but rather that they were a mere regurgitation of facts which were a cut and paste job. Counsel invited this court to find that the impugned affidavits were widely spaced in order to create a stand-alone page for the jurats. Counsel argued that it was highly likely that the deponents had neither read the contents, nor did they appear before the commissioner for oaths to clearly defend the contents. He related to **Dr Bayiga Micheal Philip Lulume v Mutebi David Ronnie and the EC Election Petition No.14 of 2016** where it was observed that the practice of separating the jurats from the main body of the affidavit lends a hand to the no so far-fetched suspicion that the deponent did not

know the contents of the affidavit and did not answer to the truthfulness and correctness of the contents in the next paragraph. Counsel then argued that all the affidavits with stand-alone jurats offended the provisions of section 5 and 6 of the Oaths Act.

Ground No. 6 Violence During Elections

Whether the learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning intimidation and violence.

Counsel for the 1st Appellant submitted that the Appellant was attacked while she was addressing a gathering. Bonny Tumwesigye the officer in charge of the Lugigi Parish Police Station animatedly approached the appellant and stopped her from conducting a lawful gathering. The police officer then returned with a van and a team of uniformed men and unleashed violence on the petitioner tearing her dress, exposing her nakedness. The evidence of the torn dress was marked annexure "B." It was further alleged that the appellant was at some point dragged by a group of male officers disrespectfully. Counsel argued that as a result she sought medical attention thereafter exhibit marked annexure "C". Counsel for the appellant contended that there was no fairness and transparency adhered to at all stages of the electoral process. Counsel then submitted that the intention of the violence upon the appellant was for the reason that she was a woman contesting in an election. The statement attributed to supporters of the 1st respondent that **"how**

can a woman contest in an election against Bukenya" proved that there was wide-spread discrimination.

Counsel further submitted that on 13/1/21 the police raided the appellant's home and the guest house where her agents were being trained as is required by law and arrested them for no apparent reason. The appellant's trained agents failed to oversee her election due to this inconvenience. Counsel for the appellant submitted that the learned trial Judge observed that "it is a cardinal rule that candidate's interests at the polling station are best protected or guaranteed by the presence of their polling agent which (make it sic) understandable that using new and untrained agents hurriedly appointed as a replacement would affect the quality of security of the petitioner's votes." Counsel submitted that the learned trial Judge failed to clearly evaluate the evidence on record thereby coming to a wrong conclusion that "there was no evidence adduced to confirm which particular polling station had new agents appointed and none were presented as witnesses."

Counsel submitted that the police arrested the appellant's agents and that proved that the police already had a file to investigate in regard to the election violence and that the 1st respondent's argument that the appellant did not open a police report in regard to this Ground was not only inaccurate but was also misleading to court. Counsel noted that the appellant had police bonds and relied on **Katuntu Abdul v Kirunda Kivejinja Ali & Anor Election**

Petition No.7 of 2006 to submit that once there has been widespread bribery, violence, voter intimidation and several irregularities then an election can be upset. Counsel submitted that in the instant case the voter margin can be attributed to the widespread intimidation and electoral violence and bribery committed by the 1st respondent personally, these irregularities or non- compliance of electoral laws affected the election in a substantial manner.

Ground No. 7 &No. 8

7. **Whether the learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning non-compliance with the Electoral laws.**
8. **Whether the learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning the grave irregularities in the declaration of result forms, clerical errors, mathematical errors, and incorrect filling and posting of statistics on the declaration result forms.**

Counsel for the appellant criticised the trial Judge when she observed that "it is safe to conclude that the court attempted a critical evaluation of the contested DR forms. Serious errors pointing to deliberate tampering irregularities were noted only at Kisiita, Kamusenene A-M and Nabagabe polling stations. That evidence was constituted with non-compliance of Part IX of the PEA Act."

He submitted that it was erroneous of the trial Judge fact to find that the DR forms did not affect the tally for either candidate at different polling stations. Counsel was critical of the trial Judge when she

found that the appellant had proved to the satisfaction of court that there was non-compliance with the electoral laws and irregularities at the 3 polling stations on the same day and yet arrived at a different verdict. Secondly, the trial Judge found that the EC through their agents is held accountable for the irregularities at the 3 polling stations and further that "it was also a grave irregularity to have used one ballot box for all categories of candidates at Nabagabe polling station. This alone amounted to substantial non-compliance with the law." Counsel submitted that although the trial Judge reached the conclusion that serious errors and irregularities were committed at Kisiita, Kamusenene A-M and Nabagabe polling stations and that the evidence would constitute non-compliance, she found that the non-compliance did not affect the tally for either candidate at the different polling stations. The appellant complied with Rule 11(1) and (2) of the PEA when he duly filed a list of objected votes.

Counsel for the appellant abandoned Ground No. 9 of the appeal and prayed that the judgment and orders of the learned trial Judge given on 12/9/2021 be set aside, the appeal be allowed, and the appellant be awarded costs of this appeal.

Submissions of Counsel for the 1st Respondent

Grounds No.1, No. 2, No. 3

In reply to Grounds No. 1, 2 and 3 counsel for the 1st respondent submitted that the trial Judge correctly and properly directed

herself to the law; she evaluated the evidence on record, subjecting it to exhaustive scrutiny and came to a right conclusion that the allegation of bribery had to be proved to the satisfaction of the court. Counsel for the 1st respondent argued that the learned trial Judge evaluated the evidence of alleged bribery incidence before reaching her conclusion and that none of the allegations of bribery were proved to the required standard. Counsel for the 1st respondent submitted that under the Parliamentary Election Act, there are different types of illegal practices, but section 68 of the Parliamentary Election Act sets out what bribery is. Counsel for the respondent referred to section 68(1) of the PEA which stipulates as follows:

a. That money or a gift was given to a voter
b. That the giving was with the intent to influence the voter or to vote or refrain from voting.
c. That the candidate committed bribery personally or through his or her agent with his or her knowledge consent for approval.

Counsel invited this court to accept **Lanyero Sarah Ochieng and Electoral Commission v Lanyero Molly Election Petition Appeal No. 32 of 2011** that the standard of proof of bribery is higher than the ordinary balance of probabilities but not beyond reasonable doubt as in criminal cases since it is a grave illegal practice and must be considered carefully. He referred to **Kamba Sale Moses v Hon. Namuyanga Jenifer No. 27 of 2011.** It was the submission of counsel

for the 1st respondent, that the petitioner made particularised allegations of bribery which he systemically rebutted.

Alleged Bribery at Kichumbanswa Trading Centre

Regarding the alleged bribery with UGX 300,000/= at Kichumbanswa trading centre on the 12th of December 2021; Counsel for the 1st respondent submitted that the trial Judge evaluated and scrutinised the evidence regarding this alleged bribery incident involving Ephraim Mugisha including the responses by the 1st respondent and his witnesses. His submission was that a bribery allegation at Kichumbanswa Trading centre by Ephraim Mugisha got on the record 5 months after filing the petition and it was contained in the affidavit of Ephraim Mugisha.

Counsel then argued that it was an afterthought and a belated attempt to fill gaps in the appellant's petition. Counsel submitted that there was objection to the admission of Mugisha's affidavit among others, as new evidence but that they were overruled by the trial Judge as reflected in the trial record. Ephraim Mugisha stated that on the 12th of December 2021, the 1st respondent went to Kichumbanswa trading centre and handed him UGX 300,000/=. The 1st respondent rebutted Mugisha's allegations through his additional supplementary affidavit filed on 26th August and through the affidavit of Milson Ssendegeya and Scovia Ndagire which were filed on 26th of August 2021. Counsel for the 1st respondent relied on Scovia Ndagire, Ssendegeya and the 1st

respondent's affidavit which were not controverted in rejoinder or destroyed through cross examination. However, counsel argued that Mugisha's evidence was tested in reservation and was found wanting. It was counsel's submission that Mugisha's evidence had many loopholes for instance there was no connection of the photographs of chairs and plates to the 1st respondent. The photographs had no date indicated as held in election petition of **Lanyero Sarah, Achieng & EC v Lanyero Molly Election Petition No. 32 of 2011** and **Robert Ntende v Isabirye Idi Election Petition No. 74 of 2016**. Counsel further submitted that there was no corroboration by any independent witness and that in fact Mugisha was a partisan witness. Counsel relied on **Bayo Jacob Robert v Talisuna Simon Election Petition Appeal No. 002 of 2006 and John Kosi Odomelo v Electoral Commission & Anor Election Petition Appeal No. 6 of 2006** to the effect that in the absence of the evidence of reporting cases of bribery to police becomes hard to believe their allegations. Further that there was no proof that Mugisha was a registered voter, and no register was adduced by the petition to prove as was expected in **Kabusu Moses Wagaba v Lwanga Timothy & EC Election Petition Appeal No. 53 of 2011**. Counsel argued that it was not enough to attach a voter's card to the submissions. It was his view that there ought to have been a voter's register which proved that Mugisha was a voter. It was counsel's submission that the appellant's counsel misconstrued provisions of

section 68(1) and 61(1) of the PEA which refer to the candidate or his agents with knowledge consent for approval. Counsel for the 1st respondent submitted that the 1st respondent was not in NRM party and yet the money was set for NRM party, and the party cannot commit bribery since it is not a candidate.

Further, the 1st respondent, during cross examination by counsel for the appellant, clarified that he had a different campaign team from NRM, and this was understood by the trial Judge. Counsel relied on the 1st respondent's statement that the witnesses Ndagire and Ssendegeya were never his agents but were brought to respond to Ephraim Mugisha's allegations that NRM party officials corruptly dished out UGX 300,000/=. He referred once again to **Mukasa Anthony Harris Bakaluba Peter Mukasa v Nambooze Bakileke Election Petition Appeal No. 4 of 2009 Kikukunyu Faisal v Muwanga Kivumbi Muhammed Election Petition Appeal No. 44 of 2001** which he found distinguishable from the instant case and that bribery had to have been committed by the candidate in person and yet this was not a case in the instant matter. Counsel submitted that the Judge extensively evaluated all the evidence regarding bribery involving Ephraim Mugisha and invited this court to believe and affirm the finding of the trial Judge that Mugisha's evidence was discredited, and that the bribery allegation was not proved to the satisfaction of court.

Bribery at Bwerenga Village

Regarding the allegations of bribery at Bwerenga Village in respect of UGX400,000, 120 plates and a saucepan, it was counsel's submission for the 1st respondent that the trial Judge dealt with the allegations in a conclusive manner. He invited this court to affirm her finding that Kasumba's evidence did not prove bribery to the satisfaction of the court.

Counsel attacked the evidence of Albert Kasumba as inadmissible for containing hearsay. Further counsel for the 1st respondent relied on the respondent's affidavit which rebutted Kasumba's allegation together with the affidavit of Annet Namilimu in support of answer to the petition. Counsel invited this court to find that the evidence before trial court was not controverted or undermined in cross examination and Namilimu's evidence stood unchallenged. Counsel contended that the photographs attached to Kasumba's affidavits were not dated and were not authentic, unreliable and should not be admitted in evidence as held in **Ntende Robert** and **Nanyiro Ochieng (supra)** and further that there was no proof of Kasumba as a registered voter a fact which was handled in **Kabuusu Moses Wagaba (supra).** He invited this court to uphold the findings of the trial Judge that the bribery allegations were not proved to the satisfaction of the court since Kasumba did not directly receive plates and saucepans from Bukenya and Namilimu,

Bribery at a Tournament and Katuugo Village

Regarding the allegation of UGX 200,000/= given at a tournament of Katuugo village, counsel for the 1st respondent submitted that the trial Judge handled bribery allegations regarding the tournament at Katuugo and concluded that the allegations were not proved to the satisfaction of the court. Counsel submitted that the bribery allegation was made by **Godfrey Ssesaazi**, **Charles Kalanzi, Brian Ssenyonyi**, and Moses **Sewakinga** whose affidavits were expunged from court record as indicated for not appearing credible. It was counsel for the respondent's submission that the evidence of the appellant in the trial court was disjointed and because of his inability to fill in gaps in the appellant's case, counsel attempts to give evidence from the bar by introducing the evidence of Moses Ssewakinga which made the appellant's case suspect. This evidence was eventually expunged from the court record. Counsel argued that it was a belated attempt by counsel for the appellant to strengthen their case. Counsel then submitted that the trial Judge agreed with the 1st respondent that Ssewakinga's evidence was impugned and of no evidential use. Counsel submitted that upon the evaluation evidence of **Charles Kalanzi, Brian Ssenyonyi** and **Godfrey Ssesaazi,** it was concluded that there was no evidential value in their evidence as the witnesses testified about a tournament without specifying the type of tournament whether it was a hand ball, football, or pool tournament and that even **Charles Kalanzi** in

his affidavit did not state the date of the tournament and this was Covid-19 time with restrictions to having tournaments.

Counsel then submitted that none of the witnesses reported the alleged bribery to either the police or electoral commission and that there was no proof that they were registered voters as no voter's register in court or in evidence and there was no other corroborated evidence or independent evidence. Counsel implored this court to affirm the findings of the trial Judge that bribery allegation at Katuugo was not proved to the satisfaction of the court.

Regarding to alleged UGX 200,000 bribery for boda boda at Kigunde. It was submission for the counsel for the 1st respondent that the trial Judge evaluated the evidence of the above incident and found that the incidence of a single witness to-wit Akozilegye, required corroboration from an independent witness. Akozilegye's affidavit was rebutted by the 1st respondent in his affidavit in support of answer to the petition under paragraph 23 in which he stated that he was at Kitumbi sub county and that his evidence was not challenging the cross examination of contrary evidence and therefore stand uncontroverted. Counsel noted that upon the evaluation of Akozilegye's evidence, it was found wanting by the trial Judge. The witness did not state where the alleged incident took place, and no person was present, or witnesses mentioned in the affidavit and yet this was supposed to be a ***boda boda*** group and the witnesses further mentioned another UGX 100,000/= to an

anonymous person. Counsel submitted that no reasonable tribunal could believe such evidence or find it credible or even fathom that such made up evidence could tarnish and discredit the respondent's victory. Further that the witness never reported the alleged incident to the police or electoral commission. He prayed that this court upholds the findings of the trial Judge that the allegations were not proved to the required standard.

In conclusion, counsel invited this court to uphold the findings of the trial Judge that the evidence of alleged bribery as adduced by the appellant in the lower court was weak and suspicious and that the allegations were not proved to the satisfaction of court.

Ground No. 4

Whether the learned trial Judge erred in law and in fact when she set the standard of proof higher than that provided by the law.

Counsel for the 1st respondent submitted that the learned trial Judge was right in finding that the appellants evidence regarding bribery incidents required being reported to the police or electoral commission and the trial Judge did not set a higher standard than what is required. It was also his submission that the cases of **Bakaluba Peter Mukasa v Nambooze Bakileke Election Petition No. 4 of 2009** and **Kikukunyu Faisal v Muwanga Kivumbi Muhammed Election Petition No. 44 of 2001** are distinguishable from the instant case since there was credible evidence incriminating the appellants therein carrying out bribery unlike the

instant case where no so credible evidence exists since the affidavits in support contained hearsay evidence which is inadmissible. Counsel concluded that the appellant's evidence regarding bribery required to be reported to police or EC.

Ground No. 5

Whether the trial Judge erred in law and fact when she failed to expunge all the defective affidavits filed by the 2nd respondent on 8th June 2021.

In reply to this Ground, counsel for the 1st respondent submitted that the trial Judge was correct in not expunging the affidavits from the record. In short, counsel for 1st respondent submitted that the trial Judge was not wrong to uphold the affidavit for the 2nd respondent because the allegation was based on speculation and court should reject them. He argued that rejecting them would be giving in to assumption and speculation. The trial Judge heard these allegations and was right when she overruled them. Counsel prayed that the court finds on merit on this Ground and resolve it in the negative.

Ground No. 6

Whether the learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning intimidation and violence.

Counsel urged this court to uphold the findings of the trial Judge which concluded that the incidents of alleged violence were not

proved to the satisfaction of court since there was no corroborating witnesses and no police form PFA for examination of injuries. In addition, the appellants evidence in cross- examination was filled with inconsistencies since she stated that she was addressing a political rally in her affidavit and in cross examination retracted the same claiming that political rallies were banned in times of covid-19 restrictions.

Counsel relied on the authority of **Toolit Simon Akech v Oulanyah Jacob L'okori Election Petition Appeal No. 19/11** at page 17 of Judgment where the court found that in absence of a police report indicating violence or intimidation of voters during the campaign period, it would be safe to conclude that the period prior to voting day was generally peaceful." Counsel prayed that no voter intimidation or violence was proved to the satisfaction of court warranting setting aside of the election.

Ground No. 7
Whether the learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning non-compliance with the Electoral laws.

In reply to the above ground Counsel contended that no evidence of falsification or alteration of results for any candidate was adduced. He further submitted that the trial Judge correctly observed that the appellant's agents were present at Nabagabe polling station, but declined to sign concluding that failure of the agents to sign does not nullify the results on the DR form since the

only mandatory signature is that of the presiding officer. Counsel submitted that the trial Judge observed the irregularities/deliberate tampering at Kisiita, Kamusenene polling stations but the specifics or particulars were not spelt, and no blame is made towards the 1st respondent. Counsel submitted that the trial judge found that even though the results were to be invalidated on proper re-evaluation of the evidence, the 1st respondent would still emerge the outstanding winner. Counsel prayed that this court makes a finding that the trial Judge properly evaluated the evidence and came to the right conclusion.

Ground No. 8
Whether the learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning the grave irregularities in the declaration of result forms, clerical errors, mathematical errors, and incorrect filling and posting of statistics on the declaration result forms.

Counsel for the respondent submitted that the trial judge properly evaluated the evidence of irregularities inclusive of clerical and mathematical errors, incorrect filling on DR forms and wrong entries. Counsel submitted that the appellant's attempts to reject results are an afterthought and should be rejected since credible or cogent evidence was not adduced over falsification of results or alteration of results. In all contested 37 polling stations, the appellant does not produce any single DR form where she indicates

that her votes were altered or switched in favour of the 1st respondent. On the unaccounted for ballot papers and clerical errors, counsel submitted that the trial judge accounted for the same and neither the appellant nor the 1st respondent benefitted from the errors. Counsel also submitted that the minor errors in filling in DR forms were attributable to the exhaustion, fatigue, carelessness, and low education by the 2nd respondent's agents. Counsel relied on the case of **Amoru Paul & EC v Okello-Okello John Baptist (supra) at page 18 of the judgment**, where the court of appeal held that 1092 unaccounted ballot papers had not benefitted any candidate and were not cast votes for either candidate. And the court went on to hold that it explains why the candidate's agents signed the DR forms without visiting any misfeasance on any person. Counsel also differentiated the case of **Betty Muzanira Bamukwatsa v Masiko Winifred Komuhangi & 2 others Election Petition Appeal N0.065 of 2016** at page 21 from the instant case. Whereas in the case of Muzanira, no entries were made on impugned DR forms for invalid votes and ballot papers, in the instant case the DR forms are filled but with minor errors and the Appellants agents duly signed them. Counsel concluded that non-compliance in the instant case did not substantially affect the outcome of the election of Bukuya constituency whereof the 1st respondent's winning margin of 9,143 votes is not shaken or case in doubt.

Submissions of the 2nd Respondent.

Counsel for the 2nd respondent argued all Grounds No. 1,2,3 on the alleged bribery simultaneously. He submitted that the legal burden of proof rests on the appellant to prove to the satisfaction of court that acts of bribery took place. He invited this court to be persuaded by the Indian authority of **Jeet Mohinder Singh v Harminder Singh Jassi AIR 2000 258 the Supreme Court of India** for the proposition that, "the success of a candidate who has won at an election should not be lightly interfered with…Any person seeking such interference must strictly conform to the requirements of the law… that the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations are criminal it is beyond a reasonable doubt." Counsel also relied on **Ssematimba Peter and NCHE v Sekijgozi Stephen Election Petition No.8 & 10 (2016) and Akol Hellen Odeke v Okodel Umar EPA No.06**.

Counsel for the 2nd respondent submitted that the trial Judge made proper analysis and evaluation of the law and evidence and observed that none of the allegations of bribery were proved to the required standard by the appellant. On the allegations of bribery, counsel handled every allegation separately, there were four allegations.

First is the bribery at Kichumbanswa trading centre, where the 1st respondent is alleged to have given out UGX 300,000. Counsel submitted that the trial Judge correctly evaluated and scrutinized the evidence. He argued that on learning that some of the evidence of the petitioner got on court record on 23rd August 2021 the trial Judge ruled that such evidence was unreliable. The affidavit evidence supporting this claim was objected for reason that it was filed belatedly. The witnesses who swore the affidavit were never cross-examined too. The photographic evidence had no dates and could not be authenticated. Counsel submitted that the bribery was not reported to police and that in the absence of evidence of reporting the cases of bribery to police, it becomes hard to believe the allegations. Counsel agreed with the finding of the trial Judge that Mugisha's evidence was discredited.

Secondly, regarding the allegation of bribery in Katuugo village of UGX 200,000, this alleged bribery for a tournament at Katuugo was not proved to the satisfaction of court. The said bribery allegation was made by Godfrey Ssesaazi, Charles Kalanzi, Brian Ssenyonyi and Moses Ssewikyanga, a fictitious person whose affidavit was expunged from court record as indicated in the judgment.

Third was the alleged bribery at Bwerenga village where the respondent is alleged to have dished out UGX 400,000 in cash and 120 plates and saucepans on 8th December 2020. Counsel submitted that the evidence of Albert Kasumba was inadmissible for being

hearsay as he was merely told as stated in paragraph 5 of his affidavit and that the photographs attached to his affidavit were not dated and thus unreliable and not authentic.

Lastly, on the bribery at Kigudde with UGX 200,000 for boda boda riders; Counsel submitted that the trial Judge evaluated the evidence in the above incident and found that the evidence of a single witness to wit: Akoziregye Isaac required corroboration from an independent witness and that the incident was never reported to the police by the said witness. In conclusion, counsel prayed that this court upholds the findings of the trial judge that the allegations of bribery was not proved to the satisfaction of court.

Ground No. 4

Whether the learned trial Judge erred in law and in fact when she set the standard of prove higher than that provided by the law.

Counsel again submitted that the evidence supporting the bribery claims was based on hearsay and the bribery allegations were never reported to any EC official or police and this left the evidence weak and unsupported. Counsel relied on the authority of **Dr Mayanja Bernard & Can Joyce Okeny v Hood Katuramu & Nokrach William Wilson Election Petition Appeal No. 42 of 2016** where the court of appeal in overturning the decision of the trial Judge based its decision on the evidence of a police officer who investigated the case of bribery against the respondent. Counsel prayed that this court upholds the finding of the trial Judge that the appellant's

evidence regarding bribery incidents required being reported to police or electoral commission in setting a higher standard than what is required.

Ground No. 5

Whether the trial judge erred in law and fact when she failed to expunge all the defective affidavits filed by the 2nd respondent on 8th June 2021.

Counsel for 2nd respondent agreed with the trial Judge for declining to strike out defective affidavits on a claim that it is not possible to commission affidavits in Bukaya on the same day of 28th May 2021 by a commissioner for oaths from Mityana. Counsel submitted that the allegation was a mere speculation and the court rejected it as such.

Ground No. 6

Whether the learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning intimidation and violence.

Counsel submitted that there was no Police Form 3 (PF3), for examination of injuries), and no CRB number was produced under which she recorded the criminal complaint contrary to her promise in paragraph 23 of her affidavit in support of the petition. Counsel submitted that the appellant's evidence in cross-examination was full of inconsistencies. Counsel submitted that there was no evidence of the widespread violence and intimidation of voters nor was there disenfranchisement in the instant case. He argued that the EC never received any reports made to the 2nd respondent to

enable them intervene in alleged intimidation, bribery and violence. Counsel relied on **Hon Oboth Marksons Jacob v Dr Otim Otaala Election Petition Appeal No.38 of 2011** in which the petitioner failed to satisfy the court that the entire election was conducted in an atmosphere of intimidation, bribery and violence that could have subverted the will of the people. He also relied on **Toolit (supra)** citing the absence of a police report of violence and intimidation. He invited the court to conclude that the campaign and voting process was peaceful. Counsel prayed that this court upholds the finding that the respondents were not responsible for the arrest of the appellant's agents on the eve of the polling day.

Ground No. 7

Whether the learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning non-compliance with the Electoral laws.

Counsel submitted that the one ballot box was used for two candidates, but no evidence was adduced for falsification or alteration of results for any candidate. The trial Judge found that at all material times the appellant's agents were at the station and that failure to sign did not validate results on the DR form since what is mandatory is the signature of the presiding officer. He submitted that the trial Judge made a proper evaluation of the evidence of irregularities inclusive of clerical and mathematical errors, incorrect filling on DR forms. Counsel strongly supported the finding of the trial Judge that the appellant's agents went ahead to sign the DR

forms after the vote count was concluded without raising complaints to the 2nd respondent. On the Ground of ballot papers which were not unaccounted for and clerical errors; counsel submitted that the trial Judge extensively dealt with the issues of clerical errors, unaccounted ballot papers, votes, number of male and female not tallying and all other complaints. The trial Judge held that neither the appellants nor the 1st respondent benefitted from the errors. Counsel submitted that this case differs from **Betty Muzanira Bamukwatsa v Matsiko Winifred Komuhangi & 2 Ors Election petition appeal N0.065 of 2016** in that, in Muzanira, no entries were made on impugned DR forms for invalid votes, ballot papers etc. while in the instant case the DR forms are filled out but with minor errors and the appellant's agents duly signed the DR forms. Counsel prayed that this court upholds the findings of the trial court.

Ground No. 8

Whether the learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning the grave irregularities in the declaration of results…

Counsel for the 2nd respondent submitted that the non-compliance did not substantially affect the outcome of the election of Bukuya constituency whereof the 1st respondent's winning margin of 9,143 votes is not shaken or cast in doubt. In conclusion counsel prayed

that the trial Judge's findings are upheld and the appeal dismissed with costs to the respondents.

Appellants submissions in rejoinder to the 2nd respondent's submission in reply.

In rejoinder to Grounds No. 1, No. 2 and No.3 and No. 4, the appellant reiterated their earlier submission that the allegation of bribery had to be proven on the basis of a balance of probabilities. He submitted that the 1st respondent and his agents committed the offences of bribery provided for in **Section 68** of the PEA. He also relied on the definition of bribery in **Isodo v Amongin (supra)** that specified the ingredients of bribery, that a gift was given to a voter, that the gift was given by a candidate or their agents and that it was given with the intention of inducing the person to vote. Counsel argued that in the case before this court, an act of actual bribery occurred. In rejoinder to Ground 4 Counsel submitted that the trial judge was wrong when she found that the bribery had to be reported to the EC, it simply set the standard of proof beyond a reasonable doubt which was wrong.

While handling Ground No.6, the appellant distinguished the case of **Toolit Simon Akecha v Oulanyah Jacob L'okori Election Petition Appeal No.19 of 2011** using **Musinguzi v Amama Mbabazi & Anor No. 5 of 2001** and **Katuntu Abdul v Kirunda Kivejinja & Anor Election Petition Appeal No. 7 of 2006** to submit that intimidation was a good ground to set aside an election. He

further submitted that in this case there were several police reports of the appellant's polling agents arrested with no charges preferred against them.

In relation to **Ground No. 7** in rejoinder, it was submitted for the appellant that DR Forms are public documents within the meaning of **section 73** of the **Evidence Act** and there can be no doubt that they are crucial in the records of elections. The trial Judge should have taken exceptional recognition that the 1st respondent admitted in his own affidavit that there were errors/mistakes in the DR Forms by some presiding officers. Counsel argued that these mistakes were not inadvertent.

Lastly, on Ground No. 8 in rejoinder, counsel relied on his earlier submissions on this Ground and prayed that this court find that the elections held on the 14/1/2021 for Bukuya County for MP in Kassanda district were not free and fair elections; were full of illegalities and irregularities: intimidation, violence; bribery; and non-compliance with the electoral laws. Counsel prayed that the election be set aside, and this court order the 2nd respondent to hold fresh elections for Bukuya county constituency and both the 1st and 2nd respondents pay the costs in this court and the lower court.

DECISION OF THE COURT

This court is enjoined to re-appraise, review and re-evaluate the evidence which was placed before the trial Judge. We accept the trial court was in the best position to evaluate the evidence of

witnesses because of the exclusive advantage of examining the witnesses first hand, being able to test their comportment and demeanour in cross-examination. However, it is the duty of this court, as the first appellate court, to subject the evidence and all the materials adduced at the trial to a fresh and exhaustive scrutiny and to decide whether or not the learned trial judge came to the correct conclusions. Upon such review, this court is entitled to reach its own conclusion(s). See: **Father Nasensio Begumisa & 3 Others v Eric Tibebaga: Supreme Court of Uganda Civil Appeal No.17 of 2002.** We also note that Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion. **See Mbogo v Shah (1968) EA 93 at 94.**

By way of background it is worth noting that in the contemporary world, elections have become the most acceptable vehicle for articulating the political will of the people. Representative government is often referred to as a democracy where the authority of government is derived solely from the consent of the governed. The framework for translating that consent into government authority is the holding of free and fair election. A free and fair election gives the assurance that those who emerge as rulers are the

elected representatives of the people. Except in case where an aspirant is returned unopposed, there will usually be at least two contestants to elective posts.

Having laid the above background, we now proceed to handle the grounds of appeal starting with Grounds No. 1,2,3 and 4.

Grounds No. 1, No. 2, No. 3 and No. 4

In his submissions regarding the above four grounds counsel for the appellant criticised the learned trial Judge for raising the standard of proof beyond what was envisioned under the law. Counsel's contention was that the trial Judge had introduced a standard beyond reasonable doubt in electoral cases whose standard is on a balance of probabilities. In reply counsel for both respondents argued that the trial Judge did not introduce a new standard of proof.

Before we make a finding on the above findings by the trial Judge, we shall start by considering what the law provides in regard to the standard of proof in election petitions. It is provided under section 61 (1) of the Parliamentary Elections Act 2005 that,

> **61. Grounds for setting aside an 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 court-
>
> (2) ...
>
> (3) Any of the grounds specified in subsection (1) shall be proved on the basis of the balance of probabilities.

A contested election is one where the results are the subject of a lawsuit. We shall take a granular look at section 61(3) of the PEA which lays down the standard of proof in an election petition. The

standard of proof is to all intents and purposes the level of proof which the court requires before it can conclude that a litigating party before it has discharged the burden of proof placed on such litigant. It is therefore the level of acceptability of evidence before it, in order to give judgment in favour of such party. In law, two standards are applied one to criminal proceedings and the other to civil proceedings. They are different standards. The standard of proof in criminal cases is a higher than that expected in civil cases. A finding of guilt in criminal cases can lead to imprisonment and other severe sanctions against a person; see **Uganda v Oloya 1977 HCB 4, Uganda v DC Ojok 1992 HCB 54 and Akol Patrick and others V Uganda (2006) HCB 6, Woolmington v DPP 1936 AC 462**. Therefore, before a person's liberty can be curtailed, the state must be held to account to the highest standard possible. This is the reason there is an obligation to prove the case against an accused person beyond reasonable doubt. On the other hand, the standard of proof required in civil cases is proof on a balance of probabilities or as the Americans say, on a preponderance of evidence. It is quoted in **Choitram v Hiranad Ghamshamas Dadlani [1958] EA 641** that preponderance of evidence is,

"where (burden of proof) may shift constantly accordingly as one scale of evidence or the other preponderates … it rests, after evidence is gone into, upon the party whom the tribunal, at the time the question arises, would give judgment if no further evidence

were adduced. As a matter of fact, the degree ... required to discharge a burden in civil cases ... is well settled. It must carry a reasonable degree of probabilities but not so high as is required in a criminal case";

In **Miller v Minister of Pensions [1947] 2 ALLER 373** it was stated that 'if the evidence is such that the tribunal can say 'we think it is more probable than not the burden is discharged, but if the probabilities are equal, it is not.'

A look at the judgment proves that the trial Judge struggled with which of the standards in the law to apply. This should not have been the case. The standard of proof as laid down in s. 61(3) is on the balance of probabilities. It is understandable, however that there is confusion with section 61(1) which requires that a case should be proved to the satisfaction of court. Our understanding of the law is that the court trying an election petition under PEA ought to be satisfied that the alleged grounds in the petition are proved to the balance of probabilities. The courts, in their judgments, need to produce a degree of certainty as to what amounts to the requisite standard of proof.

In evaluating the evidence on the bribery at Kichumbanswa the trial Judge found as follows:

> '... it was stated by Ssendegeya Milson, the NRM chairperson Mbirizi Sub County that he was also aware that Mugisha had received the sum of UGX300,000 for mobilization. However,

he later confirmed that Mugisha had instead relocated the money to purchase chairs, an action Ssendegeya considered a misappropriation of the money. Mugisha did not rebut that evidence. To my mind, there must have been some disagreements between Mugisha and his party members with regard to that money. It cannot be dispelled that he may have for those reasons chosen to give false evidence against the party flag bearer. As a whole, his evidence was unreliable and seriously discredited because he offered no satisfactory response to certain clarifications made by Bukenya's witnesses. I would accordingly find that the offence of bribery in Kichumbanswa has not been proved to the required standard. To my mind, there must have been some disagreements between Mugisha and his party members with regard to that money. It cannot be dispelled that he may have for those reasons chosen to give false evidence against the party flag bearer.'

We do find that in the above holding the trial Judge assessed the evidence and in our view correctly arrived at her conclusion having carefully considered both sides. The trial Judge, who saw Mugisha first-hand, formed an impression about him and in the above statement is an expression of what was in the mind of the trial Judge expressing her level of satisfaction. The trial Judge was able to glean, discern and draw conclusions about the demeanour and

assessment of witnesses. She for instance drew the inference that the 1st respondent and Mugisha had some disagreements and biases.

As the trial Judge herself noted, 'Mugisha was at the material time the NRM chairman for Kikyumbaswa Village. ...would for that reason give special attention to his evidence, which was being given against the flag bearer of his party.' There was no doubt that the incident occurred but it involved a witness who could easily be accused of bias for openly switching sides and secondly was explained as routine campaign financing.

In some cases, however, the trial Judge appeared to expect a much higher standard. For instance, we find that it was not necessary for a witness to produce a police report to prove an act of bribery. We do understand that allegations of bribery are of a serious nature and should not be wantonly thrown about by the parties without proof. We have to be careful though that in requiring cogent proof we are not understood to mean that it is impossible to prove an allegation of bribery.

In assessing whether there was election violence against the appellant the trial Judge had this to say about the appellant,

> 'She admitted knowing the EC complaints procedure but still made no formal report to the EC, leaving it to a mere phone call. Her testimony that she reported that incident to police was also not sufficiently proved because she did not attach the PF3A for examination of her injuries, and undertook, but did not produce the CRB number under which her case was

recorded. She was later to turn around in cross examination to state that the police refused to hand over her statement or give her details of her report. It is doubtful then, that the attack ever took place.'

In dealing with whether election violence taken place, the trial Judge chose to use the standard of proof under criminal law by requiring the production of a **PF3A**. For clarification when a person accuses another of assault occasioning any sort of harm whether common or grievous, they are required to show proof of a forensic pathologist's report by use of Police Form 3 commonly known as PF3. PF3A is on the other hand, is reserved for rape and defilement cases. It was introduced, among other reasons, to cater for the language restrictions faced by many female and juvenile victims of sexual violence when describing which part of their body has been violated. If this was indeed a criminal case and the state was proving assault, the correct form ought to have been a PF3. Yet even in criminal trials, the reference to PF3 is not always a must if other proof can be procured. This being a civil trial, proved on a preponderance of evidence, a requirement by the trial Judge to prove harm beyond reasonable doubt that the appellant was assaulted raised the degree of proof beyond the requisite standard. The appellant was under no duty to prove more than she had done that she had been brutally assaulted. We note that the standard to prove a matter to the 'the satisfaction of court' may often be at variance with proving a matter 'on a balance of probabilities'. It is

difficult to measure the standard of satisfaction a trial Judge may need and therefore a trial Judge cannot be faulted is a witness does not satisfy her.

Bribery in Bwerenga with Cash, Saucepans and Plates

The trial Judge found that Dr. Iga Bukenya dished out UGX 400,000, 120 plates and one big saucepan at Bwerenga Village. It was also not in contention that UGX 300,000, a large saucepan and plates were given out by the 1st respondent at Kasambya. The above items were passed to Albert Kasumba the LC1 Chairperson of Bwerenga village for distribution. One of the recipients of the items, Jalia Nakiyemba stated that she was present when Dr. Iga Bukenya handed over the money and the 100 plates and the large saucepan to the residents. Then there was the affidavit evidence of Joseph Kiiza who stated that he was present when Dr. Bukenya gave out the saucepan, plates and UGX 400,000. Not to mention one Annet Namilimu who confirmed that Kasumba, the LC1 once hired the saucepan for use while he was hosting great numbers of people. In reply the respondent's case was that this was mere hearsay on the part of Albert Kasumba. The trial Judge agreed with the respondents as follows:

Kasumba did not profess to have received the saucepan and plates directly from Bukenya and his evidence of those facts would only be hearsay and inadmissible. Again the undated and unmarked photographs of the items add no value to his evidence because they

are not authenticated. Kizza Joseph being Babirye's professed mobilizer could be partisan and his evidence to support that incident is to be taken with much caution. Again, Namilimu Annet's evidence that during February 2021 Kasumba hired from her a saucepan and plates belonging to the "Mukama Afayo Women's Group", appeared to point to the fact that these could be the items he was attaching to the alleged bribe. I would for that reason also find that the incident of an alleged bribe at Bweranga village was not proved to the required standard.'

Hearsay evidence is not admissible unless other evidence can be produced to bolster it. Without independent corroborative evidence a case based on such evidence is weak. In this case we have carried out a thorough re-appraisal of the material that was placed before the trial Judge and agree with the trial Judge that partisan witnesses during elections blur the possibility of providing cogent evidence to prove a fact. We uphold the decision of the trial Judge that the evidence of bribery at Bwerenga was weak.

Bribery at Katuugo Village

It is alleged that on 3rd January 2021 the 1st respondent, Dr. Michael Iga Bukenya organised a tournament at Katuugo village in which most youth participated. The local clubs including Katuugo FC, Nfuka FC, Mundade A and B FC and Namulanda FC participated. It is alleged that the 1st respondent arrived at Katuugo football grounds towards 4:00pm and remained watching until the

tournament ended. When Katuugo FC won the game, the 1st respondent handed out UGX 200,000 to the winning team. Godfrey Ssesaazi stated that he witnessed the 1st respondent giving UGX 200,000 to the winning team which was the Katuugo FC after the tournament. Nfuka FC which was a runner-up received UGX 100,000 and Mundade A and B Teams received UGX 50,000 each. Charles Kalanzi stated that during the election period the 1st respondent organised a tournament. He did not state the exact date of the tournament. Godfrey Ssesaazi stated that he witnessed the giving of prizes of UGX 200,000 to Katuugo FC, UGX 100,000 to Nfuka FC and UGX 50,000 each to Mundade A and B football clubs. Brian Ssenyonyi testified much to the same effect.

It later transpired that the affidavit of Ssesaazi was a falsification and that he did not exist. The evidence of bribery was discredited.

Bribing of the Kigudde Boda Boda (Motorcycle) Riders

Isaac Akoziregye was a verified voter and resident of Kichumbanswa and a polling agent for a candidate called Robinson Kweezi who is not a party to this petition. He testified that on the 12th of December the 1st respondent Dr. Micheal Iga Bukenya gave his group the Kigudde Boda Bodas UGX 200,000 and then another UGX 100,000 from which he in person, received UGX 10,500. He stated that on giving them the money, Dr. Iga Bukenya encouraged them to vote for him. In reply counsel for the respondent invited this court to conclude that this evidence needed corroboration since

it was of a single witness and that it was not reported to the police. The law on bribery excludes the need for corroboration.

There is no requirement that a person ought to have reported a bribery incident to police in order to prove bribery under section 68(1) of the PEA. Be that as it may, we find that the trial Judge who saw the witness, first hand, had reason not to entirely believe him. We are comforted in relying on **Amoru Paul and Electoral Commission v Okello Okello John Baptist, Consolidated Election Petition Appeal Nos. 39 and 95 of 2016;** for the proposition that

> "Election matters being matters of general importance we find that the trial Judge ought to have looked for the independent evidence from an independent witness to corroborate the evidence of Otima Joseph or Oming Charles. We find no such evidence on record".

The trial Judge had the advantage of listening to the single witness and observing his demeanour, before deciding that she did not find that witness credible. In agreeing with the trial Judge, we therefore conclude that there was insufficient evidence to prove that an act of bribery had taken place.

Violence against the Appellant

The Appellant, Zaninka Babirye's side of the story was that upon harmonizing campaign programmes with other candidates she proceeded to Kihuna sub county in Lugingi Parish. Towards 6pm,

Bonny Tumwesigye the officer in charge of police station at Lugigi Parish approached her and asked her to stop the campaign. She was again intimidated at Bukuya, Bulimila, Wandagi and Nfuka. When she insisted on meeting voters he switched off her public address system, went away and returned with two double cabins full of policemen. She testified that they threw the rally into disarray and began to randomly shoot in the air and to beat up her supporters. According to the petitioner, some people dressed in the uniform of the Uganda Police Force roughed her up, used the butt of a gun to physically assault her. The above-mentioned Bonny attacked her, yanked off her wig, tore her dress exposing her nakedness and yelled at her. He questioned why a woman could stand against a man in a general election. ***"How can a woman contest against a man like Bukenya?"***, he scoffed. His taunts included why she did not stand as a woman MP? She states that gunshots rocked the air but one hit rather close. She lost consciousness and became hypertensive. She added that her husband also became hypertensive as he witnessed the violence meted out on her and her agents. On her affidavit is attached a medical form from Family Care Medical Centre marked Annexure 'C' as proof of the medical attention she received. Her evidence was that this escalation of violence was left unchecked by the 2nd respondent and the Uganda Police Force.

In reply the respondents argued that the appellant failed to produce any other witness who could attest to the violence meted out against her. They invited the court to confirm the findings of the trial judge who made the following findings,

> 'If true, Babirye's allegations against one Bonny would be serious because it involved violence and discriminatory attacks. Sadly, despite her testimony that the attack took place during a gathering of about 20 people, it was her single account and thus uncorroborated. She admitted knowing the EC complaints procedure but still made no formal report to the EC, leaving it to a mere phone call. Her testimony that she reported that incident to police was also not sufficiently proved because she did not attach the PF3A for examination of her injuries, and undertook, but did not produce the CRB number under which her case was recorded. She was later to turn around in cross examination to state that the police refused to hand over her statement or give her details of her report. It is doubtful then, that the attack ever took place.'

The requirement of a PF3 appeared to require the criminal standard of proof. We earlier discussed this issue and found that the trial Judge raised the standard for proving evidence higher than require. We however will not interfere with her decision since she saw the witness first hand.

Arrest of the Appellant's Agents

Regarding the arrest of the polling agents of the appellant; the appellant's case was that scores of her agents were roughed up, arrested and detained on polling day.

The submissions of the two respondents are that neither of them was responsible for the violence that was meted out against the appellant. Counsel for the 1st respondent submitted that they had no control over the security agents who roughed up the appellant's polling agents. The submission of counsel for the 1st respondent was that in the end there was no widespread violence and intimidation since no single voter swore an affidavit attesting to failure to vote due to the violence. Both respondents asserted that the appellant failed to discharge the burden and standard of proof of this ground on the balance of probabilities. It was their submission that the appellant ought to have produced credible and cogent evidence of violence, voter intimidation and harassment caused by the 1st respondent or done with his knowledge and approval. They cited Abdu **Kantuntu v Ali Kirunda Kivejinja and Anor Election Petition No. 7 of 2006 and Garuga Musinguzi v Amama Mbabazi Election Petition No. 3 of 2001.** The trial Judge ruled that the appellant had proved that her agents had been arrested and intimidated.

> 'Save for form, there was little contest to that evidence. Each deponent attached a letter of appointment that Babirye signed and a Bond Release executed before the District CID officer, indicating that her **(read they) sic** were released from custody on 19/1/2021 and 20/1/2021 about one week after election day. With that strong evidence, the Court is satisfied that 10 or so

of Babirye's agents were arrested and kept in custody at the Bukuya Police Station on polling day. They were thus unable to carry out their duties on voting day. Indeed, there was no urgent necessity to carry out the arrests using considerable force and during the night. The actions of Okello and his team would constitute intimidation and violence which is an election offence.'

The trial Judge found that the appellant had proved one incident of noncompliance with the electoral laws, when her agents were arrested by operatives on the morning of 14/1/2021 and that there were irregularities at three polling stations on the same day.

Here is what the trial Judge ruled,

70] I would thus conclude that Babirye proved to the satisfaction of the Court, only one incident of noncompliance with the electoral laws, when her agents were arrested by State operatives on the morning of 14/1/2021, and irregularities at three polling stations on the same day. I have specifically found that the respondents or their agents cannot be held responsible for the arrest of Babirye's agents but the Electoral Commission through their polling agents, is held accountable for the irregularities at the three polling stations.

104] Further, it was shown that only ten agents were arrested.

The trial Judge did find pockets and incidents of non-compliance with electoral laws but on employing the substantiality principal,

she concluded, and rightly so in our view, that the non-compliance was not so widespread as to upset the victory of the 1st respondent.

Regarding the remaining Ground No. and No. 8:

1. **whether the learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning non-compliance with the Electoral laws.**
2. **Whether the learned trial Judge erred in law and in fact when she failed to evaluate the evidence on the record concerning the grave irregularities in the declaration of result forms, clerical errors, mathematical errors, and incorrect filling and posting of statistics on the declaration result forms.**

In respect of Grounds No. 7 and No. 8; whether there was non-compliance with electoral laws and whether there were grave irregularities in the declaration of result forms, clerical errors, mathematical errors, and incorrect filling and posting of statistics on the declaration result form; the trial Judge arrived at this conclusion that

> 'On the whole, the confirmed but isolated irregularities connected to voting and tallying and the one incident of harassment, could not and did not amount to irregularities that would in my estimation affect the final result in a substantial manner'.

The trial Judge conversely found that the appellant had proved to the satisfaction of court that there was non-compliance with the electoral laws and irregularities at three polling stations on the same

day. And also that it was a grave irregularity to have used one ballot box for all categories of candidates at Nabagabe polling station.

A look at the evidence of what transpired a few nights before the polls and on the polling day which the trial Judge acknowledged was that at least ten polling agents were arrested, the appellant had to hurriedly find replacements who were not properly trained.

Under that section 61(1)(a) for non-compliance to succeed the failure must be such that it affected the result of the election in a substantial manner. The concept of substantiality was considered by this Court in **Mbayo Jacob Robert v Electoral Commission and Another, Election Appeal No. 07 of 2006;** where in the Court quoted Odoki, CJ (as he then was) in **Col. Dr. Kizza Besigye v Electoral Commission & Yoweri Kaguta Museveni Supreme Court Presidential Election Petition No. 01 of 2006:** The learned Chief Justice held, with the concurrence of the other members of the court, that:

> "... some non-compliance or irregularities of the law or principles may occur during the election, but an election should not be annulled unless they have affected it in a substantial manner. The doctrine of substantial justice is now part of our constitutional jurisprudence. Article 126(2)(e) of the constitution provides that in adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the principle, among others, that substantial justice

shall be administered without undue regard to technicalities. Courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice".

The Court examined the words 'affected results' in the following manner:

"The term "affected the result" of an election was considered in 1966 by the High Court of Tanzania in **Mbowe v ELiufoo [1967] EA 240:** at page 242 when George, CJ. stated, that:

In my view in the phrase "affected the result" the word "result" means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules".

In **Presidential Election Petition No. 1 of 2001: Dr. Kizza Besigye v Yoweri Museveni, (Mulenga, JSC),** applying the above principles of the ***Mbowe case*** (supra) held, with the concurrence of the rest of the justices, that:-

"To my understanding therefore, the expression "non-compliance affected the result of the election in a substantial

manner as used in S.58 (6) (a) can only mean that the votes a candidate obtained would have been different in a substantial manner, if it were not for the non-compliance substantially. That means that to succeed, the petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that the winning majority would have been reduced. Such reduction however would have to be such as would put the victory in doubt".

The Supreme Court of Zambia in **Anderson Kambela Mazoka & 3 Others v Levy Patrick Mwanawasa & 3 Others: Presidential Petition No. SCZ/01/02/03/2002,** dealt with the issue of determining whether defects in the conduct of the Presidential election in Zambia had substantially affected the result of the election. The court referred to its earlier case of **Lewanika & Others v Chiluba**, where it had stated: -

"... it can be said that the proven defects were such that the majority of the voters were prevented from electing the candidate whom they preferred or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true will of the majority of the voters".

The court in **Mwanawasa** (supra) threw more light on **Chiluba**:

"The few partially proved allegations are not indicative that the majority of the voters were prevented from electing the candidate whom they preferred or that the election was so flawed that the dereliction of duty (by Election Commission) seriously affected the result which could no longer reasonably be said to reflect the free choice and free will of the majority of the voters".

In the case before us the appellant would have to prove that the non-compliance with electoral laws was such that the majority of the voters were prevented from electing the candidate whom they preferred or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true will of the majority of the voters. Meaning that the votes the 2nd respondent candidate obtained would made a difference in a substantial manner, if it were not for the non-compliance substantially. In fact, it ought to be proved that his winning majority would have been reduced substantially.

In the instant case we rigorously reviewed the evidence and the law and we agree with the trial Judge when she found although ten polling agents belonging to the appellant were arrested and could not witness the elections this did not affect 84 other polling stations. In doing the maths ten or so polling stations were left without the authorised agents of the appellant. The petitioner, however, did not succeed in proving that the declared candidate lost or that his

majority had reduced so critically as to put his victory in doubt. This ground of appeal also fails.

Consequently, we find that the whole Bukuya Constituency had 94 polling stations. The 1st respondent was declared the successful candidate after he garnered 15,190 votes, with the appellant as runner- up managing to win 6,047. The vote margin between the two candidates was about 9,143. The trial Judge was therefore correct in finding that the isolated irregularities in ten polling stations could not have affected the final result in a substantial manner.

In the result, we find that the appellant only succeeded in proving Ground No. 4 which ground is inconsequential to the fate of this appeal and does not alter the findings of the trial Judge. This appeal is hence unsuccessful and is hereby dismissed. Each party shall bear its own costs in this court and in the court below.

Dated and Signed this 5th Day of ...August..... 2022

Hon. Mr. Justice Richard Buteera
Deputy Chief Justice

Hon Lady Justice Hellen Obura
Justice of the Court of Appeal

Hon. Lady Justice Catherine Bamugemereire
Justice of the Court of Appeal