

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

[Coram: Egonda-Ntende, Madrama & Kawuma JJA]

ELECTION PETITION APPEAL NO. 0046 OF 2021

(Arising from Election Petition No.0009 of 2021)

BETWEEN

Mbaju Jackson =====Appellant

AND

Thembo Gideon Mujungu===== Respondent No.1

Electoral Commission===== Respondent No.2

*(On appeal from the judgment of the High Court of Uganda, (Katamba, J.)
delivered at Fort Portal on 14th October 2021)*

JUDGEMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

[1] The appellant, respondent no.1 and 8 others contested for the seat of Member of Parliament for Busongora county South in Kasese district in the general elections held on 14th January 2021. The Electoral Commission (respondent no.2) returned respondent no.1 as the validly elected Member of Parliament for the constituency. Dissatisfied with that result, the appellant filed Election Petition No. 0009 of 2021 in the High Court of Uganda at Fort Portal challenging the outcome of the election. The learned trial judge delivered judgment in favour of the respondents dismissing the petition.

[2] Dissatisfied with the decision of the learned trial judge, the appellant now appeals on the following grounds:

‘1. The Learned Trial Judge erred in law and fact when she held that irregularities in the results from Katunguru Primary School polling station, Katunguru

Market polling station and Busunga polling station did not affect the entire election in the constituency.

2. The Learned Trial Judge erred in law and fact when she did not exclude the results of the election at Katunguru Primary School polling station, Katunguru Market polling station, and Busunga polling station having been satisfied that there were irregularities in the conduct of the election at the said polling stations.

3. The Learned Trial Judge erred in law and fact when she ruled that illegalities and irregularities at Katunguru Primary School polling station, Katunguru Market polling station and Busunga polling station had to be attributed to the 1st Respondent to warrant the reversal of the election results whereas not.

4. The learned Trial Judge erred in law and fact when she did not exclude the results of Ouoran Primary School polling station from the final results tally sheet.

5. The Learned Trial Judge erred in law and fact when she concluded that the Appellant and his agents were satisfied with the outcome of the election because there was no evidence to show any registered complaints by the Appellant on polling day.

6. The learned Trial Judge erred in law and fact when she failed to expunge the affidavits deponed in support of the 2nd Respondent's answer to the petition by Soki Salimah, Ahimbisibwe Winnie, Katusabe Immaculate, Tumwesigye Joram, Busingye Patrick Kiggundu Arod and Kacancu Ivan Mulindwa in light of evidence that they did not take oath before a Commissioner for Oaths.

7. The Learned Trial Judge erred in law and fact when she declined to expunge the affidavits of Kacancu Ivan Mulindwa, Soki Salimah and Biira Juliet in support of the 1st and 2nd Respondent's answer to the petition thereby arriving at a wrong conclusion.

8. The learned Trial Judge erred in law and fact when she failed to make a ruling on the preliminary point of

law raised against the unsworn affidavits in support of the 2nd Respondent's answer to the petition deponed by Soki Salimah, Ahimbisibwe Winnie, Katusabe Immaculate, Tumwesigye Joram, Busingye Patrick Kiggundu Arod and Kacancu Ivan Mulindwa thereby coming to a wrong conclusion.

9. The learned Trial Judge erred both in law and fact by relying on the expunged evidence of Mbabazi Yesunamara, the 1st Respondent's witness and by attributing her evidence to the Appellant thereby arriving at a wrong conclusion.

10. The learned Trial Judge erred in law and fact when she held that evidence of Kacancu Ivan Mulindwa and Kamukasa Karoli in respect of ballot staffing committed by Mbabazi Yesunamara and obstruction was not corroborated, thereby coming to a wrong conclusion'

[3] Respondent no.1 filed a cross appeal on the following ground:

'The Learned trial judge erred in law and fact when she did not address and or resolve the issue as to whether all the affidavits purportedly commissioned by Arinaitwe Peter, a partner in the firm of Guma & Co. Advocates, and a non-gazetted commissioner of oaths are competent and admissible in evidence.'

[4] The respondents opposed the appeal.

Submissions of Counsel

[5] At the hearing, the appellant was represented by Mr. Jude Byamukama and Mr. Phillip Mwesiga, respondent no.1 was represented by Mr. Kenneth Sebabi and respondent no.2 was represented by Mr. Eric Sabiti. The parties opted to rely on their conferencing notes on record as their written submissions. Counsel for respondent no.1 abandoned his skeleton arguments.

- [6] Counsel for the appellant set out the duty of a first appellate court as was stated in Muzanira Bamukwatsa v Masiko and Anor [2018] UGCA 236. Counsel submitted on grounds 1,2, 3,4 and 5 together. Counsel for the appellant challenged the decision of the learned trial judge in three aspects. Firstly, that the learned trial judge erred in law and fact when she held that the acts of non-compliance with electoral laws proved by the appellant did not affect the outcome of the election in a substantial manner because they were not committed by respondent no.1. Secondly that it was an error to hold that irregularities at polling stations that were not won by the appellant or respondent no.1 are irrelevant. Thirdly that it was erroneous to hold that the proved irregularities had to be attributed to respondent no.1. Counsel submitted that it is trite that results from polling stations where irregularities have been proved must not be included in the final results tally sheet. Counsel relied on Muzanira Bamukwatsa v Masiko and Anor (supra), Nabeta & Anor v Mwiru [2018] UGCA 2 and Nyakecho Annet v Ekanya Geoffrey Election Petition Appeal Nos 28 & 30 of 2016 (unreported).
- [7] Counsel for the appellant further submitted that upon excluding those results from the tally sheet, the court must then determine whether the winning margin is affected or not. If the excluded results affect the winning margin, the final result is deemed to have been substantially affected. Counsel argued that the trial court ought to have adopted the quantitative test as required by the law since the petition is challenging results from specific polling stations.
- [8] Counsel for the appellant submitted that the 100% voter turn up at Katunguru Primary school polling station was fraudulent since there were 11 dead people on the voters' register for the polling station who purportedly voted. Counsel referred to pages 329-334 of volume 1 of the record of appeal for proof of death of Kambu Lafahirina, Kiiza Adija, Muhumuza Wilson, Ngambeki Alexander, Tibamwenda Abdallah, Turwameru Godfrey, Korutraro Ndyoka, Kyomukama Grace, Kadogo Geoffrey, Ziiwa Ramathan and Kabasinsinguzi Grace. Counsel also relied on the affidavit evidence of Kamukasa Karoli, Dr. Teddy Achola, Kyahurugahi Shaban, Bin Said and Baluku Tadeo to prove this allegation. Counsel contended that much as these people had passed

away before the polling day, their names were still included on the voters' register for the polling station.

- [9] Counsel for the appellant submitted that there was evidence to show that at the time of voting two registered voters that is; Asiimwe Julius Emoro and Kihara Fredrick were in prison and therefore could not have been part of the 786 voters that voted. Counsel further submitted that the appellant adduced affidavit evidence of Tumuhirwe Ronald, Thembo Emmanuel, Rutahigwa Mukidad and Byensi Abdalahziz who all stated that they did not vote on the polling day. Counsel further submitted that affidavit evidence was adduced to prove that 3 registered voters that is; Tusubira Abbas, Nakuya Benedeta and Nambogo Hanifah did not vote because they were out of the country on the polling day.
- [10] It was counsel for the appellant's submission that the evidence of Kacancu Ivan Mulindwa corroborated by the affidavit evidence of Odworu Vincent proved that there was massive ballot stuffing in favour of respondent no.1 by Mbabazi Yesunamara at the polling station.
- [11] Regarding Busunga Primary school, counsel for the appellant submitted that the national voters register shows that there were 313 registered voters at the polling station whereas the Declaration of Results form shows that 411 people voted but the ballot papers cast were 311. Counsel submitted that this means that the results at the polling station were fraudulent due to an excess of 98 votes. Counsel submitted that the 99.36% turn up registered at the polling station was fraudulent because the appellant led evidence to show that there were 5 registered voters out of the country and one registered voter who did not vote on the polling day. Counsel argued that learned trial judge ought to have excluded the results of the polling station from the final tally sheet upon finding that there were irregularities in the results. Counsel contended that this would have reduced respondent no.1's winning margin by 7 votes.
- [12] Regarding Katunguru Market polling station, counsel for the appellant submitted that the national voters register for the polling station shows that the polling station is comprised of 361 voters, the Declaration of Results Form shows that 350 voters voted whereas 354 ballots were

cast. Counsel contended that the extra unaccounted for ballots indicates fraud in the results. Counsel also contended that the 98.06% turn up recorded at the polling station is fraudulent because there were 3 registered voters who did not vote because they were dead by the polling day. These included Akello Faridah, Nanyonjo, Akello Dorris and Rwabukonzo Cosmas. Counsel submitted that Mbambu Sarah, Boonabana Zulfa, Ojede Kadiri and Bin Iddi Abdul Swaburu adduced affidavit evidence to show that they did not vote which was supported by affidavit evidence of Nanyonjo Zainab, Kazini alias Haruna, Kalinzi Moses and Ninsiima Ritah.

[13] Counsel further submitted that there were two registered voters who did not vote because they were in prison on the polling day. These included Baluku Geoffrey and Kananura William. Counsel referred to the affidavit evidence of the stated persons and that of Nanyonjo Zainab to support his submissions. Counsel submitted that the appellant adduced evidence through the affidavit of Bin Iddi Abdul that Asiimwe Jamila, a registered voter was out of the country on the polling day which was collaborated with the affidavit evidence of Nanyonjo Zainab. Counsel further submitted that the appellant adduced affidavit evidence of Kalenzi Moses, Ninsiima Ritah and Kazini alias Haruna to prove that there was non compliance at Katunguru market polling station. Counsel contended that the signature of Katongole Ahamada, the appellant's polling agent for Katunguru market polling station was forged. That in light of the above, it is clear that the voter turn up at the said polling station contained in the final results tally sheet is spurious and thus the results of the polling station should have been excluded from the tally sheet.

[14] In reply, counsel for respondent no.1 submitted that the learned trial judge properly evaluated the evidence on record and correctly found that the irregularities, if any, in respect of the 3 polling stations were not committed by respondent no.1 and as such did not substantially affect the outcome of the election therefore there was no need to exclude the results of the polling stations from the final results. Counsel submitted that respondent no.1 did not in any way whatsoever benefit from the alleged irregularities and to exclude the results on that account would be

to disfranchise the mandate and will of the rest of the voters of Busongora County South constituency. Counsel relied on Toolit Simon Akecha v Oulanyah Jacobs L'okori & Anor [2012] UGCA 5 and Toolit Simon Akecha v Oulanyah Jacobs L'okori & Anor Election Petition No. 001 of 2011 (unreported) to support this submission.

- [15] Counsel submitted that there were unexplained contradictions and inconsistencies in the testimonies of the appellant's witnesses that is; Katongole Ahamada and Kacancu Ivan Mulindwa which poses questions as to whether the witnesses were at the same polling station and at the same time. Counsel relied on Tayebwa v Kakuunarinda & Anor [2017] UGCA 63 to support his submission. Counsel for respondent no.1 submitted that since Declaration of Results forms from all the 4 contested polling stations were signed and authenticated by the appellant's agents at the polling stations, the appellant is therefore estopped from disowning the results authenticated by his own agents. Counsel relied on Ngoma Ngime v Electoral Commission & Winnie Byanyima Election Petition Appeal No. 11 of 2002 (unreported) and Epetait v Ismat [2012] UGCA 3 to support this submission.
- [16] Counsel for respondent no.1 also submitted that apart from Katongole Ahamada, no other agent at Katunguru Primary school deponed any affidavit to complain about the malpractices they saw at the polling station. Counsel submitted that the allegations of obstruction and disenfranchisement of a one Kamukasa Karoli were not proved to the satisfaction of court. Counsel also submitted that the appellant did not adduce any cogent evidence to prove that the said Tumuhairwe Ronald, Thembo Emmanuel, Hussein Halima and Nambozo Harriet did not vote on 14th January 2021 at Katunguru polling station. Tumuhairwe Ronald and Thembo Emmanuel did not adduce any credible evidence to prove that that they were at Kikorongo trading centre on the voting day. He submitted that no evidence was adduced to show that they were residents of Kikorongo trading centre by the polling day and that Katongole Ahamada who they referred to as their brother did not refer to them in his affidavit. Counsel also submitted that Rutahingwa Mukidad and Byensi Abdalahziz who claim that they were in Katerera-

Rubirizi district and Ntoroko district respectively on 14th January 2021 did not produce any evidence to that effect.

[17] Counsel for respondent no.1 further submitted that there is no evidence on record to prove that Asiimwe Julius Emoro, Mutabazi Isaac and Kihara Fredrick who are registered voters did not vote because they were in prison. He submitted that the evidence on record shows that a one Asiimwe Julius and not Asiimwe Julius Emoro was in prison at the time of voting, that the evidence on record shows that Kihara Federiko was in prison and not Kihara Fredrick, the registered voter at Katunguru Primary School polling station. Counsel submitted that there is no evidence to show that Mutabazi Isaac was in prison.

[18] Counsel for respondent no.1 also submitted that no evidence was adduced to show that the votes of the 9 people that had died by the election day if at all were cast that their votes were cast in favour of respondent no.1. Counsel relied on Toolit Simon Akecha v Oulanyah Jacobs L'okori & Anor (supra) and Toolit Simon Akecha v Oulanyah Jacobs L'okori & Anor Election Petition No. 001 of 2011 to support this submission. Counsel submitted that even if the 9 votes allegedly cast by the dead were to be removed from the tally, respondent no.1's victory would remain untainted. Counsel submitted that whereas the appellant pleaded 9 votes, he attributed 11 votes to the dead which offends order 6 rule 1 of the Civil procedure rules that provides that a party is bound by their pleadings. Counsel relied on Interfreight Forwarders (U) Limited v East African Development Bank [1993] UGSC 16 to support this submission.

[19] Further, counsel for respondent no.1 submitted that the appellant did not plead that any registered voters from Katunguru Primary School were out of the country on the polling day yet it was submitted that Nakuya Benedata, Nambogo Hanifah and Tusubira Abasi were out of the country at the time of voting. Counsel submitted that this offends order 6 rule 1 of the Civil Procedure rules. Nonetheless, counsel contended that there is no evidence to show that Nakuya Benedata and Nambogo Hanifah travelled and Tusubira Abasi's travel history availed to court is not clear. Counsel also submitted that there is no evidence that if at all

these witnesses' votes were cast that they were cast in favour of respondent no.1.

- [20] Counsel for respondent no.1 stated that that allegations that 100 votes were cast by Mbabazi Yesunamara in favour of respondent no.1 are unsubstantiated, baseless and untenable and that the appellant's submission that the 100 votes should be deducted from the 133 votes that respondent no.1 obtained at the polling station should be rejected.
- [21] In reply to counsel for the appellant's submissions regarding Katunguru market polling station, counsel for respondent no.1 submitted that Nanyonjo Zainab who swore the affidavit as respondent no.2's polling assistant at Katunguru market is not the same as the actual polling assistant that was appointed. Counsel submitted that respondent no.2 appointed Nanyonjo Zainabu and not Nanyonjo Zainab. He submitted that Nanyonjo Zainab lied in her affidavit that Mbabazi Yesunamara is a resident of Kasubi whereas the latter is a resident of Kibati. Counsel submitted that Kacancu stated that she was given 1 ballot book containing 50 ballot papers whereas Kazini, Kalinzi and Ninsiima stated that they were 55 ballot papers. Counsel contended that the evidence of Kalinzi Moses and Kazini alias Haruna in respect of the extra ballot papers or 5 ballot papers is contradictory and inconsistent in material particulars at what time and who handed over the ballot papers as alleged. Counsel submitted that the appellant had two agents at the polling station; that is Majidu Byaruhanga and Nsubuga Abdul Rasheed but none of the agents confirmed the allegations against respondent no.1 and they duly signed the Declaration of Results form of the polling station without any complaint. Counsel submitted that it was fear of revealing the truth that counsel for the appellant did not procure affidavits from his own agents.
- [22] Counsel referred to inconsistencies in the evidence of Nanyonjo Zainab, Kacancu Ivan Mulindwa, Kalinzi Moses, Kazini alias Haruna and Ninsima Rita and submitted that the inconsistencies are material and render the evidence of the deponents unreliable. He relied on Kezaala v Batambuze and Another [2017] UGCA 221 to support this submission.

- [23] Counsel for respondent no.1 further submitted that apart from mere allegations, the appellant did not adduce any cogent evidence to prove that Mbambu Sarah, Boonabana Zulfa, Ojede Kadiri, Bin Idd Abdul Swaburu did not vote on the polling day. Counsel submitted that no evidence was attached to their affidavits to show that they are residents of the said places they stated in their affidavits. He stated that respondent no.1 admits that Kananura William and Baluku Geoffrey were in prison but that no evidence was adduced to show that Twinomugisha John was in prison and did not vote at Katunguru market polling station. Counsel submitted that the 5 dead people whose names appear on the voters' register did not vote and if they did, they did not cast their vote in favour of respondent no.1. Counsel submitted that even if the 5 votes were to be removed from the final tally sheet, respondent no.1's victory would remain untainted. Counsel further submitted that there is no evidence to show that Asiimwe Jamila had travelled, the documents adduced in court were not certified and are therefore of no evidential value. He submitted that the allegations that 55 votes were cast by Mbabazi Yesunamara in favour of respondent no.1 are unattainable.
- [24] In reply to counsel for the appellant's submissions regarding Busunga Primary School polling station, counsel for respondent no.1 submitted that there was no evidence adduced in court to show that the people who allegedly travelled out of the country's votes were cast in favour of respondent no.1. He submitted that respondent no.2's polling assistant at Katunguru market was Nanyonjo Zainab and not Nanyonjo Zainabu who swore the affidavit. Counsel submitted that the aspect of the number of male and female voters who voted being in excess of the total number of registered voters at the polling station was not pleaded but nonetheless, counsel submitted that the appellant's agents at the polling station duly signed the Declaration of Results form without any complaint and that since the discrepancies did not change the results declared at the polling station, they could be attributed to human error. Counsel also submitted that the people of the constituency should not be disenfranchised on such a trivial human error because respondent no.1 only obtained 11 votes at the school polling station.

- [25] In rejoinder, counsel for the appellant stated that the cases of Toolit Simon Akecha v Oulanyah Jacob L'O Kori and Anor (supra) and Toolit Simon Akecha v Oulanyah Jacob L'O Kori and Anor (supra) are distinguishable from this instant case. The cases were concerning the validity of some declaration of results forms that were not signed by the presiding officers, agents and candidates. Counsel submitted that the only reason this court did not exclude the results of the impugned polling stations where the agents had signed and not disowned their signatures was because there was no proof of existence of irregularities. Counsel for the appellant submitted that this is distinguishable from this instant case where there is sufficient evidence proving irregularities at 3 polling stations.
- [26] Counsel also submitted that case of Ngoma Ngime v Electoral Commission & Anor (supra) relied upon by the respondents is equally distinguishable from this instant case because in that case there was no proof that irregularities had been committed at the contested polling stations. Counsel maintained that there was sufficient proof that irregularities had been committed at Katunguru primary school polling station, Katunguru market polling station and Busunga primary school polling station to warrant the exclusion of the results of the stated polling stations from the record.
- [27] Regarding grounds 4 and 5, counsel for the appellant submitted that the results in the tally sheet for Quran Primary School polling station were inconsistent with the results in the Declaration of Results Form for the polling station. The Declaration of Results Form shows that the appellant obtained 5 votes while the tally sheet indicates that the appellant obtained only one vote. Counsel submitted that the appellant was cheated of 4 votes which given the narrow margin of victory between the appellant and respondent no.1 affected the outcome of the election once the other irregularities are taken into consideration. Counsel relied on Morgan and others v Simpson and Anor [1973] 3 All ER 722 for the submission that court can declare an election invalid if the irregularities in the conduct of the election affected the results. Counsel submitted that the learned trial judge therefore erred in law

when she held that the irregularities in only 3 or 4 polling stations could not affect the results of the entire constituency.

- [28] In reply, counsel for respondent no.1 submitted that the trial judge rightly declined to strike out the affidavits of Biira Juliet and Mbabazi Yesunamara. Counsel also submitted that the trial judge rightly found that the evidence of Kacancu Ivan Mulindwa and Kamukasa Karoli in respect of ballot stuffing and obstruction allegedly committed by Mbabazi Yesunamara was not corroborated. He submitted that it is not true that the trial court relied on the expunged affidavit of Mbabazi Yesunamara.
- [29] Regarding grounds 6 and 8, counsel for the appellant submitted that the affidavits deponed by Soki Salimah, Ahimbisibwe Winnie, Katusabe Immaculate, Tumwesigye Joram, Busingye Patrick Kiggundu Arod and Kacancu Ivan Mulindwa on behalf of respondent no.1 and respondent no.2 are invalid because the deponents did not appear before the commissioner for oaths. Counsel relied on the affidavit evidence of Kacancu Ivan Mulindwa and Soki Salimah to support his allegations. Counsel for the appellant submitted that this evidence was not challenged by the respondents save for bare denials. Counsel relied on Tubo Christine Nakwang v Akello Rose Lilly [2017] UGCA 223 for the submission that it is trite law that a general denial is insufficient. In addition, counsel for the appellant submitted that no evidence was adduced by the respondents to prove that Cosmas A Kateeba indeed administered the oath of the said witnesses in Kasese which left the evidence of Kacancu Ivan Mulindwa unchallenged.
- [30] Counsel for the appellant cited section 5 and section 6 of the Commissioner for Oaths (Advocate) Act to support the submission that a commissioner for oaths before whom any oath or affidavit is taken or made has the duty to state truly in the jurat at what place and on what date the oath was taken. He contended that there is no evidence to prove that the said witnesses appeared before the commissioner of oaths on 8th May 2021 as falsely reflected in the jurat which is a violation of the law which warrants expunging the affidavits of the said witnesses from the record.

- [31] Counsel submitted that this court and the Supreme Court have held in numerous cases that affidavits that have been signed by deponents and forwarded to the commissioner for oaths for signing without the deponents being present to take oath should be rejected. Counsel for the appellant relied on Nabukeera v Kusasira [2017] UGCA 52 and Kakooza John Baptist v Electoral Commission & Anor [2008] UGSC 8 to support this submission.
- [32] Regarding ground 7, counsel for the appellant submitted that the affidavit of Kacancu Ivan Mulindwa ought to have been expunged from the record on account of variation in the signature on the jurat page and that on his national identification card. Counsel submitted that the learned trial judge erroneously concluded that she could not expunge the said affidavit from the record because the said deponent did not have identification documents on the record to satisfy court that his identification was in question. Counsel submitted that the learned trial judge ought to have compared the signature on the letter attached to the appellant's affidavit in rejoinder and that contained in Kacancu's affidavit. Counsel submitted that the difference in signatures would be sufficient to put the deponent's identity in question therefore warranting expunging the said affidavit from court record. Counsel relied on Muyanja Lutaaya v Lubogo & Anor [2017] UGCA 64 and Kassaja v Ngobi and Another [2018] UGCA 237 to support this submission.
- [33] Regarding grounds 9 and 10, counsel for the appellant submitted that the learned trial judge erred when she relied on the affidavit evidence of Mbabazi Yesunamara that had been expunged from the record for disparity in her signature on the national identification card and the jurat page. Counsel submitted that the evidence of the witness could not be attributed to the appellant because her evidence was not in support of the appellant's case but rather, she was respondent no.1's witness. Counsel for the appellant further submitted that the trial judge erroneously concluded that the evidence of Kamukasa Karoli in respect of ballot stuffing committed by Mbabazi Yesunamara was not corroborated since it was corroborated by the affidavit evidence of Odworu Vincent and Katongole Ahamada.

- [34] Counsel for respondent no.2 reiterated the submissions of respondent no.1 with a few additions, concerning the appellant's prayer to exclude the results of the four polling stations, counsel for respondent no.2 submitted that unlike in this instant case, in Muzanira Bamukwatsa v Masiko (supra), Igeme Nathan Nabeta & Electoral Commission v Mwiru Paul (supra) and Nyakecho Annet & Anor v Ekanya Geoffrey (supra) which the appellant seeks to rely on, the quantum of votes and or the figures in controversy were exactly between the petitioning party and the other respondent who was declared as the winner of the election. Counsel submitted that in this instant case, respondent no.1 did not win in any of the stated polling stations, that in fact the parties performed poorly at the polling stations therefore it is unfair to disfranchise the voters in the constituency on such results. Counsel relied on Apollo Kantinti v Sitenda Sebalu & Others Election Appeals No.31 & 33 of 2016 (unreported) to support his submissions.
- [35] Counsel for respondent no.2 further submitted that the affidavits that were sworn by its officials which came at a much later stage of the petition were an afterthought and are not of any worth. These included that affidavits of Zainab Nanyonjo, Kalinzi Moses, Kazini alias Haruna and Ninsiima Ritah. Counsel submitted that court cannot rely on the evidence of the self-confessed wrong doers who raised the issue much later in the petition. Counsel relied on Kamba Saleh Moses v Namuyangu Jennifer [2012] UGCA 8 and Amama Mbabazi v Museveni Ors [2016] UGSC 3 where the courts did not consider the evidence of self-confessed wrong doers on the ground that their testimonies could not be relied upon.
- [36] Regarding the cross appeal, counsel for the respondent no.1 submitted that the appellant's affidavits in rejoinder to respondent no.1 and respondent no.2's answers to the petition, the affidavits in rejoinder of Kacancu Ivan Mulindwa, Katongole Ahamada, Mbambu Sarah, Odworu Vincent, Kamukasa Karoli and the supplementary affidavits of Assimwe Julius Emoro are incompetent having been purportedly commissioned before a commissioner for oath who is a partner in the same law firm that is representing the petitioner and who was not gazetted in accordance with the law. Counsel relied on section 1(3) and

section 4(1) of the Commissioner for Oaths (Advocates) Act to support his submissions. Counsel submitted that Arinaitwe Peter is a partner in Guma & Co. Advocates, a law firm representing the appellant before court. Counsel relied on Mpanga v Ssenkubuge and Another [2021] UGHCCD 112 and Suubi Kinyamatama v Sentongo [2018] UGCA 240 to support his submissions.

- [37] In reply, counsel for the appellant argued that the cross appeal is incompetent in light of rule 91(1) of the rules of this court. Counsel submitted that before a cross appeal can be instituted, a final decision from the High court settling the matter in controversy has to be in existence from which the grievance arises. Counsel for the appellant submitted that there is no final decision from the trial court regarding the matter which renders the cross appeal an abuse of court process. Counsel for the appellant relied on Attorney General and Anor v James Mark Kamoga and Anor [2008] UGSC 4 to support this submission. Counsel submitted that the respondent no.1 would have had his grievance best heard under a notice of grounds for affirming the decision provided under rule 92 of the rules of this court.
- [38] Nonetheless, counsel for the appellant submitted that the allegations in the cross appeal are unfounded and lack merit. The respondents did not prove to the satisfaction of court that Arinaitwe Peter was at the time of commissioning, a partner at Guma & Co. Advocates. Counsel submitted that respondent no.1's claim to have joined the cross appeal without filing the necessary documents is redundant and should be disregarded.

Analysis

- [39] As a first appellate court, it is our duty to re-evaluate the evidence on record as a whole and arrive at our own conclusion bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses which we did not have. See Rule 30 of the Judicature (Court of Appeal Rules) Directions S I 13-10, Banco Arabe Espanol v Bank of Uganda [1999] UGSC 1, Rwakashaija Azarious and others v Uganda Revenue Authority [2010] UGSC 8 and Omunyokol v Attorney General [2012] UGSC 4.

Grounds 6 & 8

- [40] Grounds 6 and 8 are essentially the same in substance and shall be handled jointly. Counsel for the appellant contended that the affidavits of Soki Salimah, Ahimbisibwe Winnie, Katusabe Immaculate, Tumwesigye Joram, Busingye Patrick, Kiggundu Arod, Kacancu Ivan Mulindwa and Biira Juliet should have been expunged from the record because they were not sworn before a commissioner for oaths. Counsel relied on the affidavit in rejoinder for Kacancu Ivan Mulindwa and Soki Salimah to support this submission. Counsel for the appellant also contended that the additional affidavit in reply of Kacancu Ivan Mulindwa should have been expunged from the record on account of variation in signature on the jurat page and on his national identity card.
- [41] Kacancu Ivan Mulindwa stated in his additional affidavit in rejoinder that on 8th May 2021, he was invited in his capacity as chairperson Local Council 11 by the chairperson Local Council 1 Kibati village to join him at Katunguru Health centre 11 in the patients waiting room for a meeting. He found the above stated deponents at the meeting plus two more persons that were introduced to him as lawyers from respondent no.2. He stated that he knows Cosmas A Kateeba and that the said Cosmas was not present at the meeting. Further, Kacancu stated that the lawyers gave to each of the deponents four copies of affidavits that were for signing and each of the deponents signed. He averred in his affidavit that none of the deponents signed their affidavits before Cosmas Kateeba. He stated that the commissioner did not travel to Katunguru or anywhere to commission the affidavits.
- [42] Soki Salimah corroborated the evidence of Kacancu Ivan Mulindwa in her additional affidavit in rejoinder. She stated that she was invited by Tumwesigye Joram, the Katunguru parish supervisor of respondent no.2 to join him for a meeting at Katunguru health centre 11 on 8th May 2021. The said meeting started at 2:00 pm and ended at 5:00 pm. She stated that Ahimbisibwe Winnie, Yunusu Lubega, Tumwesigye Joram, Kiggundu Arod and Katusabe Immaculate were present. She averred that they were joined by Kacancu Ivan Mulindwa and Bwambale Amon Kisakye, the Local Council 1 of Kibati village shortly after the meeting started. She stated that no advocate or commissioner for oaths by the

names of Cosmas A Kateeba was introduced to them during the meeting. She also averred that Ahimbisibwe Winnie, Yunusu Lubega, Tumwesigye Joram, Kiggundu Arod and Katusabe Immaculate and herself signed their additional affidavit in reply before the lawyer of the Electoral Commission who had earlier on interviewed them. The affidavits were presented to them when they were already drafted.

- [43] It should be noted that Kacancu Ivan Mulindwa and Soki Salimah are recanting witnesses. Kacancu Ivan Mulindwa swore an additional affidavit in reply for respondent no.1 denying all allegations against him that he was involved in pre-ticking of ballot papers, ballot stuffing and multiple voting at Katunguru market polling station and Katunguru primary school polling station but he later swore a supplementary affidavit in rejoinder on behalf of the appellant in which he admits to the allegations. He contended that he did not sign the affidavit in reply basing on the discrepancy in his purported signature on the jurat page and that in a letter addressed to the appellant attached to the appellant's affidavit in rejoinder in which Kacancu Ivan Mulindwa denied having signed the affidavit but states that he only put his name.
- [44] Soki Salimah also swore an additional affidavit in reply on behalf of respondent no.2 denying the allegations by the appellant that there were irregularities at Katunguru primary school polling station and averred that the election was conducted in a free, fair and transparent manner and in accordance with the electoral laws and principles. She later on swore an affidavit in rejoinder for the appellant in which she denies the averments.
- [45] There are 2 possible approaches to dealing with affidavits of witnesses that switch sides and or recant their earlier affidavits. Firstly, it is wrong and unprofessional for an opposite party to approach the witness of the other party seeking to turn that person into the witness for his side. Once that party is aware that such person is witness for the other party the only option available to him or her is to meet in court and subject such witness to cross examination. Any other course undermines the concept of a fair trial where one party's witnesses are not safe from the

machinations of the opposite party. Affidavits obtained this way should be struck out for infringing the right to a fair trial.

- [46] This court in Kintu Alex Brandon v Electoral Commission & Anor Election Petition Appeal No.0064 of 2016 (unreported) while dealing with evidence of recanting witnesses stated;

‘We wish to point out that the actions of the 2nd Respondent and his legal team in approaching the witnesses of the petitioner and obtaining further affidavits from them was contrary to rule 19 of the Advocates (Professional Conduct) Regulations SI267/2 which not only renders counsel involved open to disciplinary proceedings for professional misconduct, but ought to have been sufficient ground for rejecting or striking out those affidavits for violating the tenets of a fair trial. Our rules would have required that the challenge to such evidence would only be by way of cross-examination to test the veracity of their evidence. An adverse side is prohibited from approaching witnesses for the other party with a view to including them to testify against that other party.

Rule 19 states,

‘19. Advocates not hinder witness, etc.

An advocate shall not, in order to benefit his or her client’s case in any way, intimidate or otherwise induce a witness who he or she knows has been or is likely to be called by the opposite party or cause such a witness to be so intimidated or induced from departing from the truth or abstaining from giving evidence.’

- [47] The other approach is to view the evidence of such witnesses who swear affidavits for both contending sides in a proceeding with zero credibility. In Nabukeera v Kusasira [2017] UGCA 52, while dealing with a similar matter, this court stated as follows:

‘... An affidavit is a solemn declaration that is made under an oath and before a commissioner for oaths. The integrity and probate value of an affidavit is the solemnity of the oath that is administered on the basis of which the deponent is bound. If a deponent comes

forth after offering an affidavit, having an oath administered, and then having had it commissioned turns around and confesses to have made a false averment therein, that deponent has no credibility or integrity and cannot be relied upon to be truthful as a witness, whatsoever, in any further affidavit. In **Election Petition No. 008 of 2008 Qurum Okiror Sam vs EC and Ochwa David**, the court ruled;

“The practice of witnesses in election petitions switching sides is becoming too common. The fact that they can state one thing on oath one day state a contradictory thing on oath the next day portends very bad news for the state of law and order in the country. As far as this petition is concerned, I agree with counsel for the 2nd respondent that for a court of law to rely on the evidence of such a witness would be untenable. The credibility of a witness who appears on both sides of a case, stating contradictory statements is left considerably compromised. The safest course of action for court to take is to completely disregard his or her evidence.’

[48] The learned trial judge approached this matter as under,

‘When cross examined, Biira Juliet one of the deponents testified that she appeared before a man to draft the affidavit and the said man translated for her. Her evidence that she appeared in Fort Portal on 23rd August, 2021, was not challenged. Counsel seeks to rely on the time difference between the filing of affidavits and having them drawn. However, this is mere speculation as it is not conclusive proof that the deponents did not appear before a Commissioner for Oaths or that they were not in Fort Portal on the date of swearing the affidavits. This argument is therefore disallowed as it does not affect the credibility and reliability of the affidavit evidence on record.’

[49] The appellant relies on the affidavits of witnesses that have been shown to be turncoats whose evidence is wholly comprised and cannot be relied upon. The learned trial judge, in rejecting the petitioner’s objection, concluded that the petitioner had failed to show that

deponents to the impugned affidavits had not sworn them before a commissioner for oaths. I am not persuaded that she reached the wrong decision on this point. I would reject ground 6 and 8 of this appeal.

Ground 7

[50] As noted above it was wrongful for the respondent no.1 to approach witness for the petitioner and obtain affidavits from them to support the answer to petition and annex them to his answer. As a matter of principle a party is not authorised to approach witnesses of another party to persuade them to recant their evidence in favour of that party. For whatever reason if he objects to their evidence for the other party they should meet only in court and under cross examination establish whatever point or points he needs to establish. To permit the contrary to happen is to allow mayhem in civil proceedings.

[51] I would accordingly allow ground 7 and strike out the affidavits sworn by the petitioner's witnesses and annexed to the respondents' answer to the petition.

Ground 1 of the Cross Appeal

[52] Counsel for respondent no.1 contended that the learned trial judge erred in law and fact when she did not address the issue as to whether the affidavits that were commissioned by Arinaitwe Peter, a partner in Guma & Co. Advocates are competent and admissible in evidence. The affidavits in question were the appellant's affidavit in rejoinder to respondent no.1 and respondent no.2's answer to the petition, the affidavits in rejoinder of Kacancu Ivan Mulindwa, Katongole Ahamada, Mbambu Sarah, Odworu Vicent and Kamukasa Karoli and the supplementary affidavit of Asiimwe Julius Emoro. Counsel contended that these affidavits were incompetent for having been commissioned by Peter Arinaitwe, a partner in the law firm representing the appellant.

[53] Counsel for the respondents also alleged that the said Arinaitwe Peter was not gazetted as a commissioner for oaths at the time of

commissioning which is contrary to section 1(3) of the Commissioner for Oaths (Advocates) Act.

- [54] This allegation was raised in what the respondent no.1 termed as an affidavit in reply to the supplementary affidavits in rejoinder of the petition. There is no such thing in law as a reply to a rejoinder, without the express permission of the court. There must be an end to filing of pleadings and related affidavits. Not having shown that the affidavit in question was filed with the permission of the court I would not fault the learned trial judge for ignoring the same.
- [55] With regard to the issue of non-publication in the Uganda Gazette of a commissioner for oaths' commission, it is not clear that it is the duty of the newly appointed Commissioner for Oaths to publish the appointment in the Uganda Gazette. This duty may actually lie upon the Chief Registrar, and when he or she fails to do so, it need not necessarily result in the nullification of documents that have been commissioned by the Commissioner for Oaths.
- [56] Secondly seeking to nullify such documents does not directly affect the commissioner but a third party who would not be aware whether or not the Chief Registrar or the Commissioner caused the publication of the commission in the Uganda Gazette. Such third party is not sanctioned by the Commissioner for Oaths Act. Nullification of documents commissioned by such a Commissioner does not advance the administration of the justice in anyway. It has nothing to do with the quality of the affidavit evidence so affected. This attack is not directed to the substance of the evidence before the court but is a side show intended to disqualify evidence without attacking its value.
- [57] In my view there ought to be separate proceedings against the Commissioner in relation to whether or not he or she should have commissioned affidavits in light of whether or not the commission that appointed him was published in the Uganda Gazette or not in terms of section 6 of the Commissioner for Oaths (Advocates) Act. Until such proceedings are held and determined I would be loath to nullify affidavits which on their face have been commissioned by a Commissioner for Oaths duly appointed by the appointing authority.

[58] I would dismiss the cross appeal for lack of merit.

Grounds 1, 3, and 5.

[59] Grounds 1, 3 and 5 shall be handled together since they are inter-related.

[60] Counsel for the appellant contended that the learned trial judge erred in holding that the irregularities at the polling stations that were not won by either the appellant or the respondent were irrelevant. Counsel also faulted the learned trial judge for holding that the irregularities proved had to be attributed to respondent no.1 and that the learned trial judge erred in law in finding that the irregularities did not affect the outcome of the election. These irregularities were attributed to four polling stations that is; Katunguru Primary school polling station, Katunguru market polling station, Busunga Primary school polling station and Quran Primary school polling station. Counsel contended that the results from these polling stations ought to have been excluded from the final tally sheet by the learned trial judge following the irregularities that were proved at the said polling stations during the elections.

[61] Counsel for the appellant disputed the 100% voter turn up at Katunguru Primary School Polling station. The Declaration of Results Form for the polling station shows that 786 voters out of the 786 registered voters at the polling station voted. The petitioner alleged in his affidavit that 100% voter turn at the polling station could only be as a result of vote stuffing, ballot pre-ticking and multiple voting considering the fact that there is evidence that there were dead voters on the register. There were voters who were in prison on the polling day and did not vote. And there were some voters who did not vote at all.

[62] The appellant contended that there were 9 people who had died but were still on the voters' register for the polling station. Upon perusing the record of appeal, I have confirmed that they were 7 people that had passed on but were still registered as voters at the polling station. These included Kabasinguzi Grace, Tibamwenda Abdullah, Kamubu Lafahirina, Ngambaki Alexander, Turwameru Godfrey, Kiiza Adija and

Korutaro Ndyoka. The evidence on record also shows that Asimwe Julius and Kihara Fredrick whose names appear on the voters' register for the polling station were in prison on 14th January 2021 when the elections were conducted. This is confirmed by the affidavit evidence of Odworu Vicent and Katongole Ahamada.

- [63] Counsel submitted that Tusubira Abbas, Nakuya Benedeta and Nambogo Hanifah were not in the country on the election day. However, I note that the appellant did not plead this fact in his petition therefore I am not inclined to take it into consideration in light of the decision of the Supreme Court in Interfreight Forwarders (U) Limited v East African Development Bank [1993] UGSC 16. Tumuhairwe Ronald and Thembo Emmanuel swore affidavits in support of the petition stating that they did not vote on the polling day as they were not around. They had not travelled back from Kikorongo trading centre. Rutahigwa Mukidad stated that he did not vote because he was involved in his private fishing work at Katerera. Byensi Abdalahziz also stated that he did not vote on the polling. All these people were registered voters at Katunguru Primary school polling. Their evidence was unchallenged.
- [64] Counsel contended that there was also evidence of massive ballot staffing at Katunguru polling station. This evidence was contained in the affidavit evidence of Kacancu Ivan Mulindwa and Odworu Vincent. The affidavit evidence of Kacancu Ivan Mulindwa has already been rejected.
- [65] Katongole Ahamada, the polling agent for the appellant, the vice chairperson LC 1 Kasubi Village Katunguru parish, Lake Katwe sub county Kasese district and a registered voter at Katunguru Primary School polling station stated in his affidavit in support of the petition that at around midday, he saw the presiding officer Yunusu Lubega picking up 8 ballot books and handing them over to Kacancu Ivan Mulindwa which he took, pre-ticked and later inserted in the ballot box. He complained to the presiding officer but he was shut down. He stated that the presiding officer and police officer in charge of the polling station threatened him with arrest if he continued to complain about the illegality. He stated that in order to cover up the illegality, the presiding officer ticked all the registered persons on the voters' register as having

voted. He further stated that at around 2:30 pm, all ballot papers at the polling station were finished. A one Kamukasa Karoli arrived at 3:00 pm at the polling station to vote but was sent away on account that all persons supposed to vote at the polling station had voted and that the ballot papers were done. Kamukasa complained but he was sent away for causing commotion in the presence of the police constable. Kamukasa Karoli confirmed this evidence in an additional affidavit in support of the petition.

- [66] He further stated that when the voting closed at 4:00 pm, upon counting all the cast ballot papers, they were 801 thus exceeding the number of registered voters by 15 votes and exceeding the number of ballot papers received at the polling station by 1 vote. When he complained, the presiding officer and Rubanza Andrew the police officer in charge of Katunguru police station shifted the vote counting to an ungazetted fenced house next to Katunguru police station. He stated that all the candidates' agents were not allowed to leave until they signed. They remained in the house with the other agents until 11:00 pm. He invited the intervention of the appellant's sub county supervisor, a one Thembo Paul Kimbesa but he was chased away by police and some members of the UPDF. He stated that he did not sign but the Declaration of Results Form showed that the deponent had signed.
- [67] Upon cross examination, the deponent maintained his evidence that he did not sign the declaration of results form for the polling station because of the stealing of votes that had happened during the election.
- [68] Odworu Vicent averred in his affidavit in rejoinder to respondent no.2's affidavits in reply to the petition that Kacancu Ivan Mulindwa received from Yunusu Lubega the presiding officer for Katunguru Primary school polling station 8 ballot paper booklets each containing 50 ballot papers for pre-ticking in favour of the president and that Mbabazi Yesunamara equally received from the said Yunusu 2 ballot books containing 100 ballot papers which they pre-ticked and later stuffed in the ballot box in favour of the NRM presidential candidate and respondent no.1 respectively.

- [69] Malick Bin Hussein, one of the polling agents for respondent no.1 at Katunguru Primary School polling station denied the above allegation in his accompanying affidavit in reply. He averred that the electoral process was shifted to the building next to the police station for purposes of signing the declaration of results forms due to bad weather and that all the classrooms in the school were closed at that time. He stated that he witnessed Katongole Ahamada willingly sign the declaration of results form. Respondent no.1 also denied the above allegations in his affidavits in answer to the petition.
- [70] Katusabe Immaculate, the polling assistant for respondent no.2 at Katunguru Primary school polling station denied the allegations stated above by Katongole Ahamada and Odworu Vicent. She stated that the election was conducted in a free and fair manner. She stated that all voters were verified through the BVVK machine before issuing to them ballot papers and that there was no pre-ticking of ballot papers, ballot stuffing and multiple voting at the polling station. She stated that Kamukasa Karoli was allowed to vote after verification of his details. Yunusu Lubega also denied the allegations against him in his affidavit in support of respondent no.2's answer to the petition. He stated that the elections at the polling station were conducted in a free and fair manner and in accordance with the electoral laws and principles. He denied issuing out the said ballot boxes to Kacancu Ivan Mulindwa. He stated that he saw Kamukasa Karoli vote at the polling station.
- [71] Upon evaluation of the evidence on record, I am unable to believe the evidence to the effect that the election at Katunguru Primary school polling station was conducted in a fair and free manner in line with the principles of conducting an election under our electoral laws. There is sufficient evidence of ballot pre-ticking, balloting stuffing and multiple voting which is strengthened by the fact that the 100% voter turn recorded at one polling station could not have been possible given the fact that there were people who had died and some who did not vote but were still on the voters' register. This implies that their votes were cast and at this point it does not matter in whose favour the votes were cast. What is evident is that the results of the polling station were not a reflection of the will of the people and cannot be relied upon.

- [72] In light of the above, I find that the election at the polling station was marred by irregularities and electoral malpractices.
- [73] Regarding Katunguru market polling station, counsel for the appellant contended that the 98.06% of voter turn up recorded at the polling station was fraudulent. Of the 361 registered voters at the polling station, 354 ballots were cast while the total number of males and females registered to have voted were 350. There was an excess of 4 votes that were unaccounted for. Counsel contended that the 98.06% was fraudulent owing to the fact that there were people who died but were still on the voters' register, some people were in prison, others were out of the country whereas some people did not vote on the polling day.
- [74] There is sufficient evidence on the record to show that Akello Faridah Ateng, Akello Dorris and Rwabukonzo Cosmas, Nasasira Paul and Zizinga Abdul Karim whose names were still on the voters' register for Katunguru market polling station had died by the polling day. Kananura William and Buluku Geoffrey Kibati were in prison on the polling day. Bin Iddi Abdul Swaburu stated in his affidavit in support of the petition that his friend Assimwe Jamila did not vote because he was out of the country. That the said person travelled on 10th February 2020 to the Kingdom of Saudi Arabia and came back in the country on 18th January 2021. This is hearsay evidence and cannot be relied upon. Further, he also stated that he did not vote at the polling station. Mbambu Sarah stated that she did vote because she was in Kigo Wakiso district, Boonabana Zulfa was in Kampala on the polling day and Ojede Kadiri stated that he did not vote because he had shifted temporarily to Fort Portal for work. The people who did not vote stated that their names on the voters' register had been ticked indicating that they had voted.
- [75] Counsel submitted that there was evidence showing non-compliance with the electoral laws by the officials of respondent no.2. Counsel referred to the affidavit evidence of Kalenzi Moses, Ninsiima Ritah and Kazini alias Haruna.
- [76] In his affidavit in rejoinder, Kalenzi Moses stated that he was appointed as the polling assistant for respondent no.2 for Katunguru market

polling station responsible for the directly elected member of parliament for the constituency. He stated that it was not true as alleged by Ahimbisibwe Winnie that the elections at the polling station were conducted in a free and fair manner. Kalinzi stated that he was aware of the events that transpired at the polling station because he arrived at the polling station at 6:00am and left at 9:00pm. He deponed in his affidavit that the voting started at about 10:00am but throughout the voting exercise the voter turn up was low. He stated that Bwambale Amon Kisakye, the chairperson LC1 Kibati village (Kacancu Ivan Mulindwa) were some of the people he knew who were present at the polling station but moving between the polling station and Katunguru primary school polling station because they are less than 100 meters away from each other. It was Kalinzi' s evidence that while at the polling station Mbabazi Yesunamara kept on telling people to vote for the president and respondent no.1. She was among the people who voted early when the voting exercise started and he gave her one ballot paper. Shortly after, she went back and asked for more ballot papers and he refused. This led to an exchange of words where she labelled him a National Unity Platform supporter. Mbabazi Yesunamara proceeded to the presiding officer to whom she complained. The presiding officer gave her 5 ballot papers for Members of Parliament from the deponent's desk which she pre ticked and stuffed in the ballot box for directly elected member of parliament.

[77] The deponent further stated that at around midday Kacancu Ivan Mulindwa, Kisakye Amon and Mbabazi Yesunamara came from Katunguru primary school accompanied by two more people unknown to him and called Agaba Patrick, the presiding officer aside and engaged him. Because he was seated at a distance of less than 5 meter away, he heard the said person persuade the officer to get ballot papers in favour of the NRM presidential and parliamentary candidates. The officer told them to first persuade the other candidates' agents and when they failed they caused a standoff at the polling station alleging that the electoral officials led by Agaba Patrick were working in the interests of NUP and the opposition in a predominantly NRM area. The presiding officer succumbed to pressure and handed over 5 ballot booklets to Kacancu Ivan Mulindwa in favour of the NRM candidate and that

Agaba picked 50 ballot papers from him and handed them over to Mbabazi Yesunamara. He stated that on the instruction of the presiding officers, Daisy Singa and Kacancu Ivan Mulindwa, not being registered voters at the polling station picked ballot papers and voted.

[78] Kalinzi Moses further stated that his attempts to restrain the presiding officer supported by Nanyonjo Zainab and Kazini Haruna were in vain. He stated that shortly after 2:00pm, Kacancu Ivan and Mbabazi Yesunamara came back and put the pre-ticked ballot papers into the ballot boxes in the company of Rubanza Andrew the officer in charge of Katunguru polling station and they watched helpless in the presence of other police officers and constable deployed at the polling station. He stated that all these irregularities were being committed as Rubanza Andrew had taken control of the polling station.

[79] Ninsiima Ritah stated that she was appointed as a polling assistant for respondent no.2 for Katunguru market polling station responsible for the Ink desk. She was to record whoever voted at the polling station. She corroborated Kalinzi Moses' evidence. In addition, she stated that she saw the presiding officer pick one booklet containing 50 ballot papers which he took away and pre-ticked in favour of respondent no.1 and later inserted the ballot papers in the ballot boxes. She stated that Nanyonjo Zainab, Kalinzi Moses and Kazini alias Haruna tried to restrain the presiding officer but in vain. Kazini alias Haruna who stated that she was appointed as a polling assistant by respondent no.2 at Katunguru market polling station responsible standard operating procedures corroborated the evidence of Kalinzi Moses and Ninsiima Ritah. Nanyonjo Zainab, the polling assistant of respondent no.1 in charge of the women desk at the polling station also corroborated the above evidence.

[80] Ahimbisibwe Winnie, swore an additional affidavit in support of respondent no.2's answer to the petition. She stated that she was the BVVK officer for Katunguru market polling station. She averred that the election was conducted in compliance with the principles laid down in the electoral laws. She stated that BVVK machine operated very well and that the entire process was free and fair. Tumwesigye Joram, the

supervisor for Katunguru parish stated the same in his evidence. Kalinzi Moses, Nanyonjo Zainab and Ninsiima Ritah stated in their affidavits that Ahimbisibwe Winnie did not act as the officer in charge of the BVVK machine at Katunguru market polling station on the polling day. That it was a one Sulait Ibrahim who had exchanged positions with the said Ahimbisibwe that operated the BVVK machine at Katunguru market polling station on the polling day. Respondent no.1 denied Kacancu Ivan Mulindwa as his agent but admitted Mbabazi Yesunamara was his Katunguru parish supervisor. He denied the allegations against Yesunamara Mbabazi of pre-ticking ballots and ballot stuffing.

- [81] Singa Deziranta, respondent no.1's polling agent at Katunguru market polling station stated in her affidavit that she did not see Kacancu Ivan Mulindwa at the polling station on the polling. She generally denied the allegation by Kalinzi Moses, Ninsima Ritah and Kazini alias Haruna and stated that Yesunamara Mbabazi did not pre-tick nor stuff ballots in favour of respondent no.1. Masiika Catherine, a polling agent for respondent no.2 at Katunguru market polling station stated the same as Singa Deziranta in her accompanying affidavit in support of answer to the petition.
- [82] Upon evaluation of the evidence above, I find that there was sufficient evidence of non-compliance with the electoral laws and irregularities at Katunguru market polling station. These irregularities coupled with the number of people that did not vote on the polling day for various reasons stated above renders the results of the polling station doubtful.
- [83] Regarding Busunga polling station, the national voters register indicated that they are 313 registered voters at Busunga Primary school polling station, a total of 311 votes were cast but the number of female and males who voted is 411. This is in excess of 100 votes compared to the 311 votes that were cast. I accept counsel for the respondent's submission that this discrepancy could be as a result of human error given the fact that the figures on the tally sheet are consistent. It is indicated that 350 ballot papers were issued to the polling station, 311 ballot papers were counted, 311 valid votes were cast whereas there was one rejected or invalid vote.

- [84] Counsel for the appellant also contended that the 99.36% turn up at the polling station was fraudulent on the ground that they were voters who were out of the country and those that did not vote. The petitioner alleged in his affidavit in support of the petition that Kasatagara Yosia Rutemba, Musasizi Noah, Oyo Godfrey, Oyo Milton and Bitakome Edson who are registered voters at the polling station were away on the polling day. Evidence of the travel history of Milton Oyo shows that he left the country to Dubai on 25th May 2019, Godfrey Oyo left the country for Dubai on 31st May 2020, Musasizi Noah left the country for Dubai on 13th December 2020 and Bitakome Edson left the country on 14th December 2020. Nanyonjo Zainab deponed in her affidavit in support of the petition that as a registered voter at Busunga Primary school, she did not vote because she spent the entire day at Katunguru market polling station where she had been appointed as a polling agent.
- [85] The fact that it has been established that 4 people were out of the country and one person did not vote who are all registered voters at Busunga polling station raises doubt as to the accuracy of the results at that polling station. The results indicate that only 2 people did not vote whereas the evidence shows that 5 people did not vote. This shows that there was an irregularity in the results.
- [86] Regarding Quran Primary school polling station, the appellant contended that the Declaration of Results form for the polling station showed that the appellant had obtained 5 votes whereas the Results Tally sheet indicated that the appellant had acquired only 1 vote. The certified copy of the declaration of Results form of Quran Primary School (A-k) adduced into evidence by the appellant indicates that the appellant obtained 5 votes at the polling station while the certified copy of the Results Tally sheet indicates that the appellant obtained only 1 vote. RW3, Atwijukire Ismail Takira, the district returning officer upon cross examination stated that he entered into the tally sheet the results that he had on his copy of the Declaration of results form which is the original form. He produced the said document in court.
- [87] The appellant obtained from respondent no.2 a certified copy of the declaration of the results for the polling station showing that the

appellant obtained 5 votes at the polling station. This is sufficient to prove that the actual results that were obtained by the appellant at the polling station. It has been held in a number of cases by this court and the Supreme Court that proof of contents of Declaration of Results forms is by adducing the certified copy of the form into evidence except in exceptional circumstances. See Kakooza John Baptist v Electoral Commission and Anor [2008] UGSC 8.

[88] In light of the above, I find that appellant no.1 obtained 5 votes as opposed to 1 vote at Quran Primary School (A-K) polling station.

[89] Section 61(1) of the Parliamentary Elections Act sets out the grounds for setting aside an election. It states:

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

[90] Considering the above, the next question for determination would be if the above stated irregularities affected the results of the elections in a substantial manner which boils down to two tests that is; the quantitative and the qualitative tests. In Kizza Besigye v Yoweri Kaguta Museveni (supra), Mulenga JSC (as he then was) explained the meaning of the phrase ‘affected the results in a substantial manner as follows:

“Issue No. 3 in this petition relates to the application of paragraph (a) of that sub-section {58(6)}. It is centred on the meaning of the phrase “affected the result of the election in a substantial manner”. The result of an election may be perceived in two senses. On one hand, it may be perceived in the sense that one candidate has won, and the other contesting candidates have lost the election. In that sense, if it is said that a stated factor affected the result, it implies that the declared winner would not have won but for that stated factor; and vice versa. On the other hand, the result of an election may be perceived in the sense of what votes each candidate obtained. In that sense to say that a given factor affected the result implies that the votes obtained by each candidate would have been different if that factor had not occurred or existed.

In the latter perception unlike in the former, degrees of effect, such as insignificant or substantial, have practical effect. 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 candidates obtained would have been different in 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 have put the victory in doubt.”

[91] The learned trial judge held, in part,

‘I note that there are some of the polling stations where the petitioner alleges acts of ballot stuffing. These are also the stations where neither the the Petitioner nor the 1st Respondent were winners. It also goes to show that even if there was ballot stuffing at those stations it cannot be attributed to the 1st Respondent and as such is not substantial enough to warrant the reversal of the election results.

The Petitioners' agents did not report any electoral offences or irregularities on the voting day and although there are sufficient affidavits proving some of the voters were away on the voting day, the results from the corresponding polling stations did not substantially affect the election results cannot be ground for annulling the election results. The petitioner has to prove that the alleged offences or irregularities especially ballot stuffing, affected the election results substantially and can also be attributed to the 1st Respondent.

In the instant case, the Petitioner has not discharged that duty and it has not been proved to the satisfaction of court that there were irregularities of ballot stuffing and substantially affected the election results.'

[92] It is true that neither the appellant nor respondent no.2 won at any of the disputed polling stations. However, this cannot lead to the conclusion that such malpractices did not affect the final result in a substantial manner. The election is won by the total number of votes cast and not the number of polling stations at which a candidate wins. Whatever the number of votes received contributed to the total number of votes that determined who won. The respondent no.1 won the election by a small margin of 79 votes. Respondent no.1 obtained 7, 601 votes in total whereas the appellant obtained 7, 522 votes. The fact that the quality of elections at Katunguru Primary school and Katunguru market polling stations was poor, with dead people or persons absent on polling day voting, coupled with the discrepancy in results at Busunga Primary school and Quran Primary school (A-K) affects the results in a substantial manner.

[93] The law does not require that irregularities or unlawful actions be attributed to the successful candidate whose election is challenged. Section 61 (1) (a) of the Parliamentary Elections Act requires the court to be satisfied of 2 things. Firstly, that there was a failure to conduct the election in accordance with the principles laid down in those provisions of the law. Secondly that the non-compliance or breach of the provisions of the law affected the result in a substantial manner.

[94] In my view the evidence of the Petitioner was sufficiently credible in relation to the 4 polling stations complained to establish that electoral malpractices occurred at those polling stations perpetuated in part by the officers of respondent no.2 and other persons named. It is true that no evidence of reports of these infractions to the Police were produced. However, given the evidence available that police officers chose not to restrain or take action against those perpetuating the same in their presence it was unrealistic to expect that a report would be made to the police or to the respondent no.2's officers that were principal actors and a record would be made of the same.

[95] The 100% turn out at one of the polling stations where dead people and prisoners not available on polling day voted corroborates the evidence of witnesses that witnessed ballot books being handed to individuals that ticked those votes and put them in ballot boxes for parliamentary elections. One ballot booklet contained 50 votes. With a margin of less than 100 votes this could be flipped by 2 ballot booklets.

[96] I would allow grounds 1, 3 and 5.

Grounds 2, 4, 9 and 10.

[97] In light of the fact that I have allowed grounds 1, 3 and 5, it is unnecessary to consider grounds 2, 4, 9 and 10.

[98] I would allow the appeal in part with costs here and below.

[99] I would dismiss the cross appeal with costs.

[100] I would set aside the election of Thembo Gideon Mujungu as a Member of Parliament for Busongora county South, Kasese district. I would order the respondent no.2 to hold a bye-election for Busongora County South Constituency in accordance with the law.

Decision

[101] As Madrama and Luswata, JJA, agree this appeal is allowed with costs here and below. The cross appeal is dismissed with costs. The election of Thembo Gideon Mujungu as a Member of Parliament for Busongora county South, Kasese district is nullified and set aside. The respondent no.2 is ordered to hold a bye-election for Busongora County South Constituency in accordance with the law.

Dated, signed and delivered at Kampala this ^{20th} day of ^{June} 2022.



Fredrick Egonda-Ntende
Justice of Appeal

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THE REPUBLIC OF UGANDA,
 IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
 (CORAM: EGONDA NTENDE, MADRAMA AND LUSWATA JJA)
 ELECTION PETITION APPEAL NO 0046 OF 2021
 (ARISING FROM ELECTION PETITION NO 0009 OF 2021)

10 MBAJU JACKSON} APPELLANT

VERSUS

1. THEMBO GIDEON MUJUNGU}
 2. ELECTORAL COMMISSION}RESPONDENTS

JUDGMENT OF CHRISTOPHER MADRAMA, JA

15 I have had the benefit of reading in draft the Judgment of my learned bother
 Hon. Mr. Justice Fredrick Edonga – Ntende, JA allowing the appeal and I
 agree with the orders proposed and would like to add a few words of my
 own.

20 I agree with the facts in the lead judgment and in my Judgment, I would like
 to demonstrate from specific facts I set out below whether the irregularities
 affected the election results in a substantial manner. In applying the
 substantial effect test, the court ought to look at the overall outcome of the
 election which involves assessment of the number of contestants, the total
 number of votes cast and an analysis of the effect of the irregularities on
 25 the overall result.

I have also considered the meaning of the material statutory phrase "*non -
 compliance affected the results in a substantial manner*" under section 58
 (b) (a) (now section 59 (6) (a) of the Presidential Elections Act 2005) as
 defined by Mulenga JSC in **Besigye Kiiza v Museveni Yoweri Kaguta and
 30 Another (Election Petition No. 1 of 2001) [2001] UGSC 3 (21 April 2001)**; the



5 **Uganda Law Society Reports Election Cases Court Decisions 2001 – 2011**
page 449 at page 483 where he stated *inter alia* that:

10 To my understanding, therefore, the expression "*non-compliance affected the result of the election in a substantial manner*" as used in the S.58 (6) (a), can only mean that the votes 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 his winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt.

15 It is the latter part of the definition that shows that it is material to demonstrate that the irregularity or non-compliance with the provisions of the statute, affected the results substantially in that it affected the outcome of the elections. There has to be a quantitative test to see whether such reduction made by excluding the impugned votes would have put the victory
20 of the winning candidate in doubt. This is essentially a quantitative process as the outcome should affect the number of votes cast for each candidate. In other words, the court should be satisfied that the outcome does not reflect the will of the people in terms of the majority votes cast in favour of the winning candidate or that the outcome is very much in doubt.

25 Election by majority votes is supposed to reflect the will of the people as enshrined under article 1 (1) of the Constitution of the Republic of Uganda which provides that all power belongs to the people who shall exercise their sovereignty in accordance with the Constitution. Further, article 1 (4) of the Constitution provides that:

30 The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

By providing for fair elections, it is imperative that the winning of a candidate in a contested election should be by majority of votes. This is
35 established quantitatively in terms of the number of votes cast in favour of each candidate to establish who has the highest number of votes. In any



5 case any qualitative non-compliance with the electoral laws or
irregularities in the conduct of the elections should be demonstrated to
have had a quantitative effect on the outcome of the elections and to show
what that outcome could be.

10 With the above in mind, I would like to set out the facts relating to the voting
on the basis of the declaration of results.

The declaration of results sheet shows that 10 candidates contested and the
following are the names and declared results for all the 10 candidates:

1. Thembo Gideon Mujungu polled 7,601 votes accounting for 24.12%
- 15 2. Mbaju Jackson Mujungu polled 7,522 votes accounting for 23.87%
3. KIGHEMA Alozious Baguma polled 6,956 votes accounting for 22.07%.
4. Mulindwa David Isimba polled 2,464 votes accounting for 7.82%
- 20 5. Barozi Frank Asimwe polled 2,392 votes accounting for 7.59%
6. Businge Bendadet polled 1,318 votes accounting for 4.18%
- 25 7. Kafuda Boaz polled 1,187 votes accounting for 3.77%
8. Bakulirahi Sedrack Mbaju Arinaitwe polled 803 votes accounting for
2.55%
- 30 9. Masereka Michael polled 790 votes accounting for 2.51%
10. Munezero Juma polled 484 votes 1.54 %

The total number of valid votes cast is 31,517 votes. Secondly the total
number of invalid and rejected ballot papers is stated to be 743 and the



5 number of spoilt ballot pages is 38. The number of total ballot papers counted is 32260

The difference of polling between the first two leading candidates is 79 votes. From the statistical data, all the candidates obtained less than 25% of the votes cast. In other words, it is only under 25% of the registered voters who turned up who would decide who the elected leader for the constituency would be. This has some challenges in assessing the substantial effect the irregularities considered in the lead judgment would have in the outcome of the election.

15 The first challenge is that there are 10 candidates who participated. Secondly, it is arbitrary to attribute the 79 votes of the difference between the leading candidate and the follow-up candidate to the irregularities or non-compliance in the elections.

I agree with the factual analysis in the Judgment of my learned brother Hon Justice Fredrick Egonda Ntende, JA and I have nothing useful to add to those facts. For purposes of my additional words I need to regurgitate some of the facts. 786 voters out of 786 registered voters turned out at Katunguru primary school polling station. However, out of these it was proved that nine people had already died but remained on the voter's register. The 100% voter turnout was therefore a fraudulent entry. I agree that the election at the polling station was marred by irregularities and malpractices.

Secondly at Katunguru market polling station, out of 361 registered voters, 354 ballot papers were cast. There was an excess of four votes that were unaccounted for. There was evidence of irregularity at this polling station as well.

30 Further, at Busunga polling station, the voters register showed that there were 313 registered voters at the primary school polling station out of which 311 votes were cast but the number of female and male voters was 411 and therefore in excess by 100 votes. It was established that there were irregularities at this polling station.



5 Fourthly, at Quran primary school polling station the appellant proved five votes but the result tally sheet show that he had only one vote. This was a loss of four votes and an irregularity at this polling station.

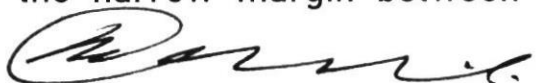
Similar to the Presidential Elections Act 2005, section 61 (1) (a) of the Parliamentary Elections Act has the phrase that "*the non-compliance and*
10 *the failure affected the result of the election in a substantial manner*".

In a scenario of 10 candidates and proportionate distribution of votes, it is hard to subtract the impugned votes due to the irregularity from one candidate in the absence of evidence that the impugned candidate was the direct beneficiary of the malpractice or irregularity. The three leading
15 candidates had 24.12%, 23.87% and 22.07% respectively. The winner won against the runner-up candidate by 1.35%. Further the difference of 79 votes cast some doubts as to who the actual beneficiary of the malpractice could be in light of the following facts.

If the impugned votes are arbitrarily subtracted from all the candidates, the
20 results of the election would not be affected in that the proportionate subtraction would result in the same proportions of votes in terms of percentages in favour of each candidate. The dilemma is how to attribute the malpractice to the winning candidate.

What we have is a reasonable doubt as to the outcome of the elections. To
25 make matters worse the Judgment of the court shows that the appellant and the second respondent did not win at any of the disputed polling stations where there were malpractices. There is absence of evidence that the malpractices and irregularities were tilted to favour the candidate who was declared duly elected with a margin of 79 votes between him and the
30 appellant. The effect of the proved malpractices affects votes in excess of 110. This could be attributed to any of the candidates.

Last but not least, where the court sets aside the election, would all the 10 candidates compete? While the quantitative substantial effect test is inconclusive, I would find that there is a reasonable doubt about the
35 outcome of the elections because of the narrow margin between the

5 

5 winning candidate and the runner-up candidate. I must add that it cannot be
ascertained as to who would have won if there were no malpractices and
therefore the question of whether the people exercised their sovereignty
under article 1 of the Constitution of the Republic of Uganda in the free and
fair election is in doubt. This means that the quality of the election and the
10 outcome in terms of accuracy has been substantially affected.

For the above reasons, it is more prudent to set aside the election and have
the matter resolved through fresh elections.

Before concluding, I wish to observe that five political parties participated
and were depicted in the declaration of results by the following
15 abbreviations: DP, FDC, NUP, ANT and NRM. Five of the other candidates
were independent candidates. The current dispensation of the political
system is a multiparty political system under article 71 of the Constitution
of the Republic of Uganda. Article 71 (1) (c) of the Constitution provides that
the internal organisation of a political party shall conform to the democratic
20 principles enshrined in the Constitution. Article 72 (4) of the Constitution of
the Republic of Uganda further provides that:

"Any person is free to stand for an election as a candidate, independent of a
political organisation or political party.

Obviously, those who participated in primary elections in a political party
25 prior to any political party fielding them as candidates for election as MP
operate under the democratic system which may be reflected under a duly
registered political party or organisation constitution that governs the
relevant political party in terms of article 71 (1) (c) in the internal
organisation of the political party. Their regulations may include how to field
30 candidates for elections and such candidate after losing cannot again stand
as independent candidates as this would water down the principle of
democracy in the internal organisation of the political party to which they
belong. It would be disingenuous to be voted out in primary elections of a
political party and in disregard of the democratic principles of the political
35 party or organisation again present oneself as an independent candidate to

5 contest for national elections against a duly elected member of a political
party elected in the primaries of that political party or organisation. While
there is no evidence that any of the independent candidates originally
contested in the primary elections of any political party or organisation and
lost, I would like to categorically declare generally that any such person
10 would not be entitled to contest against a candidate of their own party in
national elections.

In the premises, I agree with the orders proposed in the lead judgment of
my learned brother Hon Justice Fredrick Egonda Ntende, JA and I have
nothing useful to add.

15 Dated at Kampala the 22nd day of June 2022



Christopher Madrama

Justice of Appeal

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

[Coram: Egonda-Ntende, Madrama & Luswata JJA]

ELECTION PETITION APPEAL NO. 0046 OF 2021

(Arising from Election Petition No.0009 of 2021)

BETWEEN

Mbaju Jackson =====Appellant

AND

Thembo Gideon Mujungu===== Respondent No.1

Electoral Commission===== Respondent No.2

JUDGMENT OF LUSWATA KAWUMA, JA

I have had the opportunity to read in draft the judgment of my brother, Egonda-Ntende, JA. I agree with him and have nothing useful to add.

Dated, signed and delivered at Kampala this ^{20th} day of ^{June} 2022


EVA K. LUSWATA
Justice of Appeal