THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NUMBER 0013 OF 2009

COL. DR. KIZZABESIGYE::PETITIONER

VS.

THE ATTORNEY GENERAL::RESPONDENT

JUDGMENT OF THE COURT

CORAM:
HON. MR. JUSTICE. A.S. NSHIMYE, JA/JCC
HON. MR. JUSTICE. ELDAD MWANGUSYA, JA/JCC
HON. MR. JUSTICE.RUBBY AWERI OPIO, JA/JCC
HON. MR. JUSTICE. GEOFFREY KIRYABWIRE, JA/JCC
HON.JUSTICE.PROF. LILLIAN TIBATEMWA- EKIRIKUBINZA, JA/JCC

Background of the Petition.

The petitioner was a presidential candidate in both the 2001 and 2006 General Elections. He challenged the validity of the results of both elections in the Supreme Court. The Supreme Court held in both petitions that for the results to be nullified, the petitioner had to prove according to the wording of **Section 59 (6) (a) of the Presidential Elections Act,** that the noncompliance with Electoral Laws affected the results in a substantial manner.

The petitioner had at the beginning of the trial at the Supreme Court requested court to refer for interpretation to this court (Constitutional Court) whether **Section 59 (6) (a)** of the **Presidential Elections' Act** contravened the constitution but the Supreme Court declined to do so, hence the petitioner brought this petition to this court for a declaration that the section is in contravention of **Article 104(1) and Article 1(1) of the Constitution.**

Appearances:

Counsel Wandera Ogalo represented the petitioner, while Counsel Christine Kaahwa, Commissioner in the Directorate of Civil Litigation, represented the respondent.

Agreed issues.

1. ***Whether the petition is barred by the doctrine of re judicata and whether the decision of the Supreme Court is obiter dictum?***

2. ***Whether the petition discloses a question for constitutional interpretation or is frivolous, vexatious and an abuse of court process?***
3. ***Whether section 59(6) (a) of the Act is inconsistent with and or contravenes Article 104 (1) and Article 1(4) of the Constitution.***

Submissions for the petitioner

On the first issue whether the petition is barred by the doctrine of res judicata, Counsel Ogalo submitted that the law on the doctrine of res judicata is provided for in **Section 7 of the Civil Procedure Act** and in numerous decisions of this Court to wit:

Constitutional Petition Number 7 of 2007 Kizza Besigye and 10 others Vs. Attorney General; Kamunye and others VS Pioneer General Assurance Constitutional Petition Number 45 of 2012, Retired Justice Alfred Karokora VS Attorney General.

That all the above authorities re-state the principle of res judicata and when it should apply. First, the parties in both suits must be the same or litigating under the same title. Secondly, the former suit must have been decided by a competent Court. Thirdly, the matter in dispute in the former suit must be directly and substantially in dispute between the parties where res judicata is pleaded. Fourthly, the matter must have been heard and finally decided.

Counsel submitted that the question of whether **Section 59 6 (a) of the Presidential Elections Act** contravenes **Article 104 (1) of the constitution** was not in issue in the Supreme Court.

Counsel submitted further that what happened in **Presidential Election Petition number 1 of 2006** was that, counsel made an application for the matter to be referred to the Constitutional Court for interpretation. After hearing arguments from both sides, the Supreme Court rejected the application. The issue of whether **Section 59 (6)(a)** contravenes **104 of the Constitution** was however never argued or submitted upon. Counsel concluded that since the constitutionality of the section was not in issue before the Supreme Court, the matter cannot be res judicata.

That secondly, the issues in Election Petition 1of 2006 were framed by Court but did not include whether **Section 59(6)(a)** contravenes the Constitution and therefore any remarks made therein were not necessary for the decision of the case.

Thirdly, that in **Election Petition 1 of 2006** the parties were ***Dr. Kizza Besigye VS Electoral Commission and Yoweri Kaguta Museveni*** while in this court, the parties are ***Dr. Kizza Besigye VS Attorney General***. That since the respondents in the Supreme Court are not the ones before court in the present petition, the rule of res judicata cannot apply.

Fourthly, that this Court held in the case of **Kikonda Butema Farm**, **Constitutional Petition Number 10 of 2012** that it was only the Constitutional Court which is seized with jurisdiction to interpret the Constitution. Arising there from, Counsel contended that the Supreme Court cannot sit as an original Court to interpret the Constitution. That the Supreme Court simply expressed its views but did not make a final decision on the matter. Counsel further pointed out that for the rule to apply, the subject matter before this Court should be the same as that before the Supreme Court. Counsel therefore summed up, that the doctrine of res judicata is not applicable in the present case and that the issue should be answered in the negative.

On whether what the Supreme Court said was obiter dicta, counsel referred Court to the case of **Paul Nyamarere Vs. Uganda Electricity Board, Civil Appeal Number 55 of 2008** which defined the term obiter as remarks incidentally made and not directly upon the question before the Court. Counsel submitted that what was said by the justices of the Supreme Court were merely suggestions.

On the second issue of **whether the Petition discloses a question for constitutional interpretation or is frivolous, vexatious and an abuse of Court process**, counsel relied on the case of **Baku Raphael and another Vs Attorney General, Constitutional Appeal Number 1 of 2003**, in which Court held that there is a cause of action when the Petitioner identifies an act or omission which he says is unconstitutional and seeks for a remedy. He prayed that this court does find that the petition discloses a cause of action.

On the last issue, of **whether section 59 (6) (a) of the Presidential Elections Act is inconsistent with and/or contravenes Article 104 (1) and Article 1 (4) of the Constitution**, the petitioner's counsel made reference to the case of **Kizza Besigye Vs. Electoral Commission and Museveni Yoweri, Election Petition number 1 of 2006** particularly the judgment of Hon. Justices Tsekooko (JSC)and G. Kanyeihamba (JSC) who expressed their views that there was a problem with **Section 59(6) (a) of the Presidential Elections Act**.

Article 104 of the Constitution provides that ***any aggrieved candidate may petition the Court for an order that a candidate declared by the Electoral Commission elected as President, was not "validly elected".*** In counsel's submission, the words in issue are "validly elected."That those words are exhaustive in themselves and that, even if Parliament did not make any other law the Supreme Court would be able to determine whether a candidate was validly elected. So any law made by the Parliament must be *intra vires* that article, it must not clog the Article.

He argued that if the Parliament of Uganda makes a provision which encumbers the Supreme Court in making a decision of whether a president was validly elected, that provision is unconstitutional, null and void. That by introducing the word that the non-compliance affected the result of the Election in a substantial manner, Parliament imported a scale on the word "validly elected".

Counsel contented that the words *"validly elected"* can be said to be constituted of several ingredients and those ingredients can be seen if we look back in our own political history. He referred to the National Assembly Elections Act 1958 which was repealed in 1996 by the Parliamentary Interim Provisions Elections Act. That Act shows what would ordinarily be the ingredients of a valid election as provided under Section 60. If the voters were prevented from electing a candidate of their choice, such would constitute non-compliance with the law.

He submitted that parliament left out an important component of what constitutes a "valid election".

Counsel further referred to the case of **Morgan and Others Vs Simpson [1974] 3 All ER 722** which summarized the common law principle *"affected the result"* as being that***: "if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not"***.

He cited **Article 1 (4) of the Constitution** which requires that Ugandans should determine their leaders through a free and fair election, which was defined by this Court in the case of **Kwizera Eddie Vs. the Attorney General, Constitutional Petition number 14 of 2005,** where it was held that a free and fair election means the entire Election process should have an atmosphere free of intimidation, bribery, violence or anything intended to subvert the will of the people. Election procedures should guarantee the accuracy of counting, fairness and transparency should be adhered to at all stages of the Electoral process.

Counsel highlighted several instances in the case of **Rtd. Col. Dr. Kizza Besigye Vs. Electoral Commission and Yoweri Museveni, Supreme Court, Presidential Election Petition number 1 of 2006**, showing the instances of unfairness or absence of free will of the people yet due to the existence of **Section 59(6) (a)** those things can happen while the election results remain upheld. Counsel submitted that the impugned Section ought to be struck down in order to be in line with **Article 1 (4).**

Lastly, Counsel prayed that court answers this issue in the affirmative that the Section is inconsistent with the provisions of the Constitution. Since this is a public interest litigation,he did not pray for costs.

Submissions for the respondent.

On the first issue of res judicata, counsel for the respondent submitted that the issue was interpreted in the case of ***Besigye Kizza Vs. the Electoral Commission and Yoweri Kaguta Museveni Supreme Court Presidential Election Petition 1 of 2006***, where it was held that court found nothing in **Section 59(6) (a)** that was inconsistent with **Article 104 (1) of the Constitution**. That the Supreme Court made a finding on the question under Article 132 (4) that, this Court is bound by the decision of the Supreme Court and the Principles of *stare decisis* applied.

Counsel referred to the holding of Justice Bart Katureebe JSC (as he then was) in the case of **Kizza Besigye (supra)**where he stated that the **Presidential Election Petition Rules 2001** provide for the procedure regulating the conduct of petitions seeking annulment of a Presidential Election. Katureebe opined that of particular importance is **Rule 14** regarding evidence at the Trial. In his view, the legislature must have addressed its mind to the great importance of the country to the Election of the President and decided that there must exist grave conditions to annul the election. His Lordship further referred to **Article 109,** where he stated that indeed the framers of the Constitution themselves left it to Parliament **(Article 104)** to determine the grounds upon which a presidential election may be annulled. He saw no inconsistence in the provisions.

Counsel for the respondent conceded that **Section 7 of the Civil Procedure Act** provides for grounds upon which one may raise objection under the doctrine of res judicata but prayed to Court to take cognizance of the fact that in this court, is the same petitioner as in **Election petition 1 of 2006** and that many of the arguments put forward for his case were also put forward in the Supreme Court and findings were made on those arguments. In her opinion the Supreme Court had already ruled upon the matters and this Court could not adjudicate on matters that have already been adjudicated upon by the Supreme Court.

On the third issue on **whether Section 59(6) (a) is inconsistent with or contravenes Article 104 (1) and Article 1(4) of the Constitution,** counsel submitted that there is no contravention of

those Articles of the Constitution. She drew court's attention to the Judgment of Justice Bart Katureebe (JSC) in **Kizza Besigye case (supra)**where he stated that the constitution does not provide for grounds of annulment of presidential elections but expressly provides in **Article 104 (9)** that Parliament may make laws that are necessary for the purpose of carrying out a presidential Election. Parliament enacted the **Presidential Elections Act** and specifically laid down the grounds for annulment of a presidential election in **Section 59(6)** of the Act.

Counsel contended that **Article 104 (1)** cannot be interpreted without looking at **Article 104(9).**It cannot stand alone. The two should be read together. It was reasonably envisaged that failures to comply with the law might inevitably occur but it is the extent of these failures which might impact on the final result of the election and the court has to be concerned about the country going through another period of campaign and the expenses involved.

Counsel argued that **Section 59(6)** sets out the grounds upon which an election may be declared invalid. **Article 104(1)** only provides for an avenue any aggrieved person may take to the Supreme Court to have the election declared a nullity. According to her,**Section59(6) (a)**is not inconsistent with the constitutional Articles.

She submitted that **Section 59(6)** is the one which sets out the grounds or the evidence upon which the Court must base itself to weigh the evidence that is brought before it and make a decision either in favour or against the petitioner.

She submitted further that **Section 59(6) (a)** does not clog **Article 104 of the Constitution** since it expounds the grounds for which an election may be set aside.

That in the case of **Kizza Besigye (supra),** the Supreme Court expounded on what "substantial" is and what it means and after assessing the evidence their Lordships were able to state that the malpractices or irregularities did not substantially affect the final result of the election. Hon. Justice Bart Katureebe observed that, the framers of the Constitution could not have intended that even the slightest non-compliance should result in annulling a presidential election. It was for that reason that they provided in **Article 104 (9) that Parliament** shall provide grounds upon which a presidential election shall be annulled and Parliament did so in Section **59(6)(a) of the Presidential Election Act.**

Counsel argued that **Article 1(4)**of the Constitution does not interpret "free and fair" elections but the Supreme Court both in **Election Petition 1 of 2001 and 1 of 2006** did interpret what a free and a fair election is.

That the Supreme Court looked at the conditions and made an inquiry into the conduct of elections being aware of **Article 104** of the Constitution that the election should be free and fair. The Supreme Court made findings and said that in many instances the elections were not free and fair but they observed that on the whole it was free and fair and that is why the election was not set aside. No contravention of **Section 59(6) of the Presidential Elections Act** was found.

Counsel finally prayed that we find that there was no contravention or inconsistency that had been proved by the petitioner. That this being public interest litigation, no costs should be awarded.

Submissions in Rejoinder.

Counsel for the petitioner in rejoinder referred to the Supreme Court Judges' refusal to refer the question to this court on the ground that, that Article was not applicable as it had not arisen during the proceedings.

On Parliament's power to make law to prescribe the grounds under which to annul a presidential election as directed by the Constitution, counsel argued that when parliament makes laws, the laws must be consistent with **Article 104(1) of the Constitution.** He argued that what was passed was contrary to the said principle. The provision tied the hands of the Court in that it cannot let the Court make its own decision.

Counsel referred Court to the judgment of Justice Tsekooko in Kizza Besigye (supra) in which he stated that **Section 59 (6)(a),**

"…appears to imply a license to a candidate to cheat or violate the law but do it in such a way that the cheating ought not to be so much as to amount to creating a substantial effect on the result…"

Counsel further referred Court to the Judgment of Justice Odoki in which he stated that:

"… these are the problems which Parliament created and which make it difficult for the Courts to properly decide on the validity of an election of the President."

Findings of this Court.

We are alive to **Section 7 of the Civil Procedure Act** and numerous authorities counsel relied on which provide for a detailed explanation as to what constitutes the doctrine of res judicata. For example in the case of **Mansukhal Karia vs. Attorney General & 2 others Civil Appeal N0. 20 of 2002 (SC),** the Supreme Court stated that;

"The provision indicates that the following broad minimum conditions have to be satisfied;

1. ***There have to be a former suit decided by a competent court.***
2. ***The matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar.***
3. ***The parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title".***

The case of the petitioner in the Supreme Court was against the Electoral commission and Yoweri Kaguta Museveni as respondents and was seeking for orders that the second respondent Yoweri Kaguta Museveni who was declared elected President by the Electoral commission was not validly elected, and that a re-run be held or that a recount be conducted.

This Court has held that, while executing its duties, it is bound to follow the principles of Constitutional interpretation laid out in **Paul Kawanga Ssemwogerere & 2 others Vs Attorney General Constitutional Appeal N0.1 of 2001 (SC).** The Constitutional provisions must not be read and considered in isolation but as a whole so as to complement each other. In this regard among others **Article 1(4), 104 (1) and 79 of the Constitution** have to be read together. What amounts to a valid election under **Article 104 (1) of the Constitution** is not defined by the Constitution. Counsel for the petitioner argued that in his view **Article 104(1) of the Constitution** is exhaustive and sufficient without more for the Supreme Court to adjudicate on if Parliament had made no law. However, any law made by Parliament in this regard had to be intra vires that article and should not clog it.

In our view, what amounts to a president being validly elected is a question of fact and law. As a matter of good governance, the test to be applied must be objective so that the ultimate result obtains acceptability from the electorate. If the test threshold is too low then the final result of the election would not obtain the required legitimacy. In a democracy, the benchmark for the test can be varied from time to time within acceptable standards to reflect an improvement in

governance. This is where parliament comes in under **Article 79 of the Constitution** to provide clarity through the objective test and standard to be applied by way of legislation. We agree with counsel of the petitioner that such a law should not prove to be a clog on the constitutional provision. But in the absence of a clear clog on the constitutional provision, the impugned law cannot be said to be unconstitutional.

The learned US author Craig R. Ducat in his book: Constitutional Interpretation, 9th edition Wadsworth Publishers page 134-135 writes;

> ***" ….When the constitutionality of a law is brought into question, judges in a democratic society, it is argued are duty bound to respect the balance among the interests struck by the statute for the logical reason that, having been passed by a majority of legislators, it presumably satisfies more than a fewer interests. It stands no reason, then, that statutes should be assumed to be constitutional … under no circumstances is a judge entitled to compare the policy selected by the legislature with others it might have chosen, for this would be a test not of whether the policy enacted was reasonable, but of whether it was the best policy. In a democracy, the choices as to which is best is reserved for popularly elected office holders. When the justices engage in comparative assessment to see whether the legislative branch enacted the best policy, the court in effect substitutes its judgment about the wisdom of policy for that of the people's elected representatives and assumes the role of a "super-legislature"***

We agree with and adopt the above reasoning as it can be used in this petition as well as policy and standards can be seen from the same perspective. Clearly, what is involved here is a question of balancing interests and judicial self restraint.

Section 59 (6) (a) of the Presidential Elections Act in our view provides the" **non-compliance"** test and standard by which an elected president can be said not to have been "**validly elected"** within the meaning of **Article 104 (1) of the Constitution**. Indeed we find **Article 104(1) of the Constitution** is not, so to speak, self executing for this court to apply. We therefore find no inconsistency between **Section 59 (6) (a)**of the **Presidential Elections Act** and **Articles 1(4) and 104(1)** of the **Constitution**. In our view, if there is a case for tightening the "non-compliance" test in Section 59 (6)(a) of the Presidential Elections Act, then the right forum for this would be for Parliament; as has been its role in the past as far back as the National Assembly Elections Act 1958 as expounded by counsel for the petitioner. It is not for this court, as counsel for the petitioner would have it, to decide as a question of interpretation that **Section 60** of the

National Assembly Elections Act 1958 as matter of policy was better law than the present **Section 59 (6) (a)** of the **Presidential Elections Act.**

The issue before this Court is one for interpretation and the parties are different. **Article 137(5)** of the Constitution provides that where ***any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court—***

> ***(a) May, if it is of the opinion that the question involves a substantial question of law; and***
>
> ***(b) Shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with clause (1) of this Article.***

The Supreme Court rejected the petitioner's application for a reference and wondered why the petitioner had not in the 1st place taken the question in the right court.

Article 132 of the Constitution stipulates the jurisdiction of the Supreme Court and provides thus:-

132. Jurisdiction of the Supreme Court.

> ***(1) The Supreme Court shall be the final Court of appeal.***
>
> ***(2) An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law.***
>
> ***(3) Any party aggrieved by a decision of the Court of Appeal sitting as a constitutional court is entitled to appeal to the Supreme Court against the decision; and accordingly, an appeal shall lie to the Supreme Court under clause (2) of this article.***
>
> ***(4) The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law***.

The Supreme Court is only an appellate court and is vested with no original jurisdiction to interpret the Constitution. For that reason, this Court finds that the petition is not res judicata and the 1st issue is answered in the negative.

On the second issue on **whether the petition discloses a question for constitutional interpretation**, Article 137 (3) of the Constitution provides thus:

> ***(3) A person who alleges that—***
>
> ***(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or***
>
> ***(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.***

The petition falls under Article 137 (3) (a) of the Constitution. The Constitutionality of Section 59 (6) (a) of the Presidential Elections Act is being challenged as being in contravention of Article 104 of the Constitution and this Court is required to make a declaration in that respect and that constitutes a cause of action. The issue as to whether or not the petition raises a matter for Constitutional interpretation is answered in the affirmative.

On the third issue whether Section 59 (6) (a) of the Presidential Election Act is inconsistent with or contravenes Article 104 (1) and Article 1 (4) of the Constitution,

Article 104 (1) of the Constitution provides thus:-

> '***Subject to the provision of this Article, any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the electoral commission elected president was not validly elected'.***

On the other hand, Section 59 (1) of the Presidential Elections Act provides that;

> ***'An aggrieved candidate may petition the supreme court for an order that a candidate elected as president was not validly elected.'***

And **Section 59(6)(a) of the Presidential Elections Act** provides thus:-

'The election of a candidate as president shall only be annulled on any of the following grounds, if proved to the satisfaction of the court-

(a) Non-compliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the results of the election in a substantial manner.'

One of the principles of interpreting the Constitution is that there is always a presumption that an Act of Parliament is in conformity and in compliance with the Constitution and the burden is on whoever attacks an Act of Parliament as being unconstitutional to show that there has been a clear contravention of the constitution by the Act. [See **Akankwasa Damian Vs. Uganda: Constitutional Reference N0. 5 of 2011** (unreported).]

This Court wishes to reiterate the preamble to our Ugandan Constitution of 1995, which provides:

'WE THE PEOPLE OF UGANDA:

- ***RECALLING our history which has been characterized by political and constitutional instability;***
- ***RECOGNISING our struggles against the forces of tyranny, oppression and exploitation;***
- ***COMMITTED to building a better future by establishing a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;***
- ***EXERCISING our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process …'***

The Constitution was promulgated in the name of the people of Uganda and through the Constitution the people gave Parliamentarians elected by the people of Uganda powers to make laws on their behalf. Parliament among other things, made laws for elections and created the grounds for annulment of presidential elections.

Doing away with **Section 59(6)(a)** would mean lowering the standard of proof of Presidential election petitions and any slight form of non-compliance would be argued to be sufficient to annul presidential elections. Not forgetting that this is the highest office in the country, every

presidential contestant would run to court for redress which would seriously impact on the political and economic stability of our country. In his submission, Counsel for the petitioner compared our position with that of Zambia and Tanzania. However, the two countries are not comparable bearing in mind our unique political history and the aspirations of our people.

By inserting the Section in the Uganda law, the legislators had a rationale behind it and the courts ought to interpret it as it is.

Article 79. Functions of Parliament.

> ***(1) Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.***

We find that by enacting the impugned provisions, Parliament acted within its constitutional powers to do so and the provision is not inconsistent with and/or in contravention of Article **104(1) and 1(4) the Constitution** as alleged.

In the result, the petition is dismissed. The petition being a pubic ligation suit, we make no order as to costs.

DATED THIS……29th…….. DAY OF …January……. 2016.

HON. MR. JUSTICE. A.S. NSHIMYE,

JUSTICE OF APPEAL

HON. MR. JUSTICE. ELDAD MWANGUSYA,

JUSTICE OF APPEAL

HON. MR. JUSTICE.RUBBY AWERI OPIO,

JUSTICE OF APPEAL

HON. MR. JUSTICE. GEOFFREY KIRYABWIRE,

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO.0013 OF 2009

COL. DR. KIZZA BESIGYE :::::::::::::::::::::: PETITIONER

VERSUS

THE ATTORNEY GENERAL :::::::::::::::::::::: RESPONDENT

CORAM:

HON. JUSTICE A.S.NSHIMYE, JA

HON. JUSTICE ELDAD MWANGUSYA, JA

HON. JUSTICE RUBBY AWERI OPIO, JA

HON. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA-TIBATEMWA, JA

JUDGMENT OF HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA.

I have had the benefit of reading in draft the judgment of the Court and do agree first that this petition was not res judicata and secondly that the petition discloses a question for constitutional interpretation. I have nothing useful to add to the Court's analysis of these issues.

I am also in agreement with the Court's conclusion that issue 3 must be answered in the negative *to wit* the impugned section **does not contravene** the constitution and that therefore, the petition be dismissed. I wish however to add some points to the Court's reasoning.

Issue 3

Whether Section 59 (6) (a) of the Presidential Elections Act is inconsistent with and or contravenes Article 104 (1) and Article 1 (4) of the Constitution.

It was the petitioner's contention that Section 59 (6) (a) of the Presidential Elections Act contravenes provisions of Article 104 (1) of the Constitution by introducing the words "substantial manner" in the provision of the Section which do not appear in Article 104 of the Constitution.

Counsel for the petitioner argued that through Section 59 (6) (a) parliament placed a clog on constitutional provisions by setting a test of substantial effect. That the framers of the constitution were clear in Article 1 (4) and 104 that the people of Uganda would determine who to govern them through a free and fair election. It was the argument of counsel for the petitioner that to have an election which is not free and fair and yet maintain a product of such elections is contradictory and a mockery of the judicial system. That section 59 (6) encroaches on the powers of the judiciary provided in Article 104.

I have found it necessary to reproduce Article 1 (4) of the Constitution as well as what I consider to be the relevant provisions of both Article 104 of the Constitution, and of Section 59 of the Presidential Elections Act here below.

Article 1 of the Constitution deals with the sovereignty of the people and provides *interalia* that the people shall be governed through their will and consent.

C**lause (4)** specifically states that:

> 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.

Article 104 of the Constitution provides:

> **"Challenging a presidential election.**
>
> (1) Subject to the provisions of this article, any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the Electoral Commission elected as President *was not validly elected.* (My emphasis)
>
> (2) …
>
> (3) The Supreme Court shall inquire into and determine the petition expeditiously and shall declare its findings not later than thirty days from the date the petition is filed.
>
> (4) …
>
> (5) After due inquiry under clause (3) of this article, the Supreme Court may—

(a) dismiss the petition;

(b) declare which candidate was validly elected; or

(c) annul the election.

(6) …

(7) …

(8) …

(9) Parliament shall make such laws as may be necessary for the purposes of this article, including laws for grounds of annulment and rules of procedure." (My emphasis)

The first 5 subsections of Section 59 of the Presidential Elections Act are a replica of the first 5 clauses of Article 104 of the Constitution.

The impugned section, **Section 59(6) (a) of the Presidential Elections Act** provides:

Challenging presidential election

"The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court—

(a) non-compliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and **that the non-compliance affected the result of the election in a substantial manner;"** (my emphasis)

I must note that both the Constitution and the Presidential Elections Act provide that an aggrieved candidate may petition the Supreme Court for a declaration that a candidate declared by the Electoral Commission as an elected president was **not validly elected**. If the allegation is proved the consequence would be annulment of the election. However, the constitutional article more or less limits itself to the procedure applicable in the Court's inquiry in the matter and does not specify grounds which the Supreme Court would use to reach its finding; the constitution does not define validity. Instead, under its **Clause (9), Article 104** gives Parliament the mandate to make the necessary laws that would provide for grounds of annulment. The Presidential Elections Act is a result of this mandate and in its **Section 59 (6) (a)** the Act provided the grounds which the Supreme Court can rely on to annul an election. The section is thus rooted in the mandate given to the legislature by the Constitution.

In answering the question whether the phrase 'substantial manner' renders the section unconstitutional, I find it necessary to present a comparative analysis of how courts in other jurisdictions have resolved presidential election disputes and in some cases handled idiom similar to what is contained in the impugned section. Although the decisions I have relied on deal with situations where courts were handling petitions in which the validity of elections were being: challenged and not with determining the constitutionality of specific provisions of primary legislation, I have found the arguments of the courts pertinent to the case before us.

The case of Ghana:

In the matter of **NANA ADDO DANKWA AKUFO-ADDO & 2 OTHERS V JOHN DRAMANI, Presidential Election Petition Writ No.J1/6/2013.**

Pursuant to elections conducted in December 2012, the Chairman of the Electoral Commission announced that Mr. John Dramani Mahama had received 50.70% of the votes cast, while Nana Akuffo Addo had received 47.74% of the votes cast. Pursuant to Article 63 (9) of Ghana's

Constitution, the Electoral Commission declared Mr. John Dramani Mahama the President Elect. The results declared were challenged and in particular, a declaration was sought to the effect that that the 1st Petitioner had not been validly elected as president.

The petitioners claimed that the election had been marred with irregularities and electoral improprieties such as over voting, lack of signatures on the declaration forms by the presiding officers, lack of biometric verification of voters, and duplicate serial numbers, unknown polling stations and duplicate polling station codes. That the said malpractices hence affected the election. The Petitioners contended that the irregularities vitiated the presidential results in eleven thousand nine hundred and sixteen (11,916) polling stations by four million six hundred thousand five hundred and four votes (4,670,504).That if these votes were to be annulled, the 1st Petitioner would get three million seven hundred and seventy-five thousand five hundred and fifty-two votes representing 59.69% of votes cast while the 1st Respondent gets two million four hundred and seventy three thousand one hundred seventy-one votes representing 39.1% of votes cast.

The two issues for resolution by the court were:

1. Whether or not there were statutory violations in the nature of omissions, irregularities and malpractices in the conduct of the Presidential Elections held on the 7th and 8th December 2012
2. Whether or not the said statutory violations, if any, affected the results of the elections

I note that similar to **Article 1 (4) of Uganda's constitution** which deals with the sovereignty of the people and gives the people the power to elect their leaders, *Article 63 (2) of the Republic of Ghana* provides that:

> *The election of the President shall be on the terms of universal adult* suffrage *and shall, subject to the provisions of this Constitution, be conducted in accordance with such regulations as may be prescribed by constitutional instrument by the Electoral Commission.* (My emphasis)

Nevertheless, the Supreme Court of Ghana held *interalia* that **where a party alleges non-conformity with the electoral law; the petitioner must not only prove that there has been noncompliance with the law, but *that such failure of compliance did affect the validity of the elections*.** (My emphasis)

In the words of the majority of the panel, compliance failures do not automatically void an election; unless explicit statutory language specifies the election is voided because of the failure. It was also held by a majority of 5 to 4 that (if) the elections were conducted **substantially** in accordance with the principles laid down in the Constitution, and all governing law and there was no breach of law such as to affect the results of the elections, **the elections (would have) reflected the will of the Ghanaian people.** (My emphasis).

I note that in its decision, the court imported the concept of **substantial adherence** to the election law as a guide to whether an election would be considered valid.

It was further held that the Judiciary in Ghana, just like its counter parts in other jurisdictions, does not readily invalidate a public election but often strives in the public interest, to sustain it. In deciding whether to disturb the outcome of the Presidential election the broad test to guide the court is whether the petitioner clearly and decisively shows the conduct of election to have been so devoid of merit as not to reflect the expression of the people's electoral intent.

The case of Nigeria:

Article 139 (a) (i) of the Constitution of the Federal Republic of Nigeria, 1999, provides that:

> *The National Assembly shall by an Act make provisions as respects persons who may apply to the Court of Appeal for the determination of any question as to whether any person has been validly elected to the office of President or Vice-President."*

Pursuant to this constitutional provision, the National Assembly enacted **Section 139 (1) of the Electoral Act No.6 of 2010** which provides that:

> *"An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election tribunal or Court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election."*

I note that the concept of substantial adherence was absent in the Constitution but was introduced in the Act. Although couched in the negative, the Nigerian provision is at par with Uganda's impugned provision.

In line with Section 139 of the Electoral Act, the Supreme Court of Nigeria held in the cases of **ABUBAKAR V YAR' ADUA [2009] ALL FWLR (PT.457) 1 SC; BUHARI VS OBASANJO (2005) CLR 7 (k)** that the burden is on the petitioner to prove not only non-compliance with the election law, but also that the non-compliance affected the results of the election.

The case of Kenya:

Article 82(1) (d) of the 2010 Kenyan Constitution provides that:

> *"The parliament shall enact legislation to provide for the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections."*

Following the constitutional authority granted to parliament, the Parliament enacted the **National Assembly and Presidential Elections Act.** In particular, **Section 28** provides that:

> *"No election shall be declared to be void by reason of a non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in that written law, or that non-compliance did not affect the result of the election."*

Whereas the Kenyan legislature did not use the phrase "substantial effect", the relevant section still attaches nullification of an election to proof that the non-conformity with the law had an effect on the result of the election. It is this principle that guided the Supreme Court in resolving the contestation of the election results in the case of **RAILA ODINGA V THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS [2013] KLR.** The brief facts of the case are that, four petitions were filed in the Kenyan Supreme Court challenging the 2013 Presidential results which led to the declaration that Uhuru Kenyatta had got the highest number of votes and thus was the winner of the 2013 presidential elections.

The (4th) petition filed by Raila Odinga was designated as the pilot petition. It was based on the allegation that the electoral process was so fundamentally flawed, that it was impossible to ascertain whether the presidential results declared were lawful. Four broad issues for the court's determination were agreed upon by all the parties.

The two issues relevant to our discussion are:

1. whether the 3rd respondent and the 4th respondent were validly elected and declared as the President-elect and Deputy President-elect of the Republic of Kenya

2. whether the Presidential election was conducted in a free, fair, transparent and credible manner in compliance with the Constitution and the Law.

In resolving the two issues, the Kenyan Supreme Court *interalia* held:

> *"1. Where a party alleges non –conformity with the electoral law, the Petitioner must not only prove that there had been non-compliance with*

the law, but that such failure of compliance had affected the validity of the elections …

13. The conduct of the presidential election was not perfect, even though the election had been of the greatest interest to the Kenyan people who had voluntarily voted. Although there were many irregularities in the data and information capture during the registration process, they were not so substantial as to affect the credibility of the electoral process and besides, no credible evidence had been adduced to show that such irregularities were premeditated and introduced by the 1st respondent, for the purpose of causing prejudice to any particular candidate."

The case of Zambia:

Article 101(4) (a) of the Zambian Constitution, 2006 provides that:

"A person may within seven days of the declaration made, petition the Constitutional Court to nullify the election of a presidential candidate who took part in the initial ballot on the ground that the person was not validly elected."

In **ANDERSON KAMBELA MAZOKA and 3 OTHERS V LEVY PATRICK MWANAWASA and 3 OTHERS, Presidential Petition No.SCZ//01/02/03/2002,** the Zambian Supreme Court held that on the evidence presented before court, the elections had not been totally perfect. The Court nevertheless refrained from annulling the election because

… while not being totally perfect as found and discussed, (the elections) were substantially in conformity with the law and practice. 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 Electoral 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."

Again, the Court considered the important question to be: did the irregularities so affect the outcome of the election that the result could no longer reasonably be said to reflect the free choice and free will of the majority of the voters?

The various decisions discussed here provide evidence that Section 59 (6) (a) is in keeping with a global trend not to lightly deal with monumental political events such as presidential elections. Indeed a case study of election petitions in various jurisdictions world over reveals that courts have maintained the approach inherent in Section 59 (6) in deciding whether a court should or should not annul Presidential election results on grounds of irregularities. There is a common thread in the foregoing comparative jurisprudence that it is not enough for the petitioner to prove that the election law and rules were violated, the petitioner must also prove/satisfy the court that the results were thereby affected in a substantial manner. The trend exists in jurisdictions which have primary legislation equivalent to Section 59 (6) (a) as well as those where no such provision exists. Section 59 (6) is in line with the principle enunciated in the Ghana case that **compliance failures do not automatically void an election**; unless explicit statutory language specifies the election is voided because of the failure. Uganda's Section 59 (6) provides 3 grounds which if proved can lead to annulment of an election but only one is pegged to the need for proof that the anomaly had substantial effect on the results.

Nevertheless I must also highlight the fact that the section also ensures that even an individual preferred by the majority must be a person of integrity - see Section 59 (6) (c)) which empowers court to nullify an election of a person who has committed an electoral offence. Furthermore, the section also ensures that in addition to being a candidate preferred by the majority, the said individual is armed with other distinct qualities ordinarily expected to give a person the ability to effectively lead the nation – see Section 59 (6) (b). Non-compliance with these fundamentals considered necessary for effective leadership (Section 59 (6) (b) or with essentials for ensuring that

the populace have respect for their leader (59 (6) (c)) are each in themselves enough to lead to annulment. In this area the law explicitly specifies that the election of a person falling short of the prerequisites spelt out in the law would be void.

The import of Section 59 (6) (a) is that it enables the court to reflect thus: did the proved irregularities affect the election to the extent that the ensuing results did not reflect the choice of the majority of voters envisaged in Article 1 (4)? Did the non-compliance distort the results to the extent that the result does not represent the people's electoral intent/ the intent of the majority? Did the non- compliance negate the voters' intent? As expressed in the Zambian decision of **Anderson Kambela Mazoka and 3 others vs Levy Patrick Mwanawasa, (Supra),** it is important that court asks the question "given the national character of the exercise **where all voters in the country formed a single constituency,** can it be said that the proven defects so seriously affected the result that the result could no longer reasonably be said to represent the true will of the majority of voters?"

The case of Uganda:

Similar to Kenya and Nigeria's Constitutions, Article 104 (9) of Uganda's Constitution gives her Parliament authority to make laws for grounds of annulment of a Presidential election. Pursuant to this authority, the Parliament went ahead and enacted Section 59(6) (a) of the Presidential Elections Act. The import of this provision was dealt with by the Supreme Court in **KIZZA BESIGYE V ELECTORAL COMMISSION & KAGUTA MUSEVENI 2006**, as the basis for determining whether the 2006 Ugandan Presidential Elections would be annulled for irregularities and malpractices proved to have occurred.

Court found unanimously that in the conduct of the 2006 presidential elections, there was non-compliance with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act. It was the unanimous finding of the Court that some voters had been disenfranchised by the deletion of their names from the voters register and that furthermore the counting and at some polling stations, tallying of results had been marred by irregularities. Further still, Court made a unanimous finding that in some areas of the country the principle of free and

fair elections was compromised by bribery and intimidation and that in some areas the principle of equal suffrage, transparency of the vote, and the secrecy of the ballot were undermined by multiple voting and vote stuffing.

Nevertheless the Supreme Court held by a majority of 4 to 3 that it had not been proved by the petitioner that that the failure to comply with the provisions and principles enunciated above affected the results of the election in a substantial manner. Court held that although the conduct of the election could not be said to have been perfect, the broad test that guided the Court in deciding whether it would "disturb" the outcome of the election was: "Did the petitioner clearly and decisively show the conduct of the election to have been so devoid of merit **as not to reflect the expression of the people's electoral intent**?"

I note that the court could not have dealt with the Section from a constitutional point of view; this Section was handled by Uganda's Supreme Court in its capacity as a court of first instance in regard to handling Presidential petitions. This is because the authority of the Supreme Court to handle constitutional cases only arises where a party appeals against a decision of the Court of Appeal in its capacity as a court of 1st instance in constitutional matters. In other words, the Supreme Court is an appellate Court in matters of constitutional interpretation. Since the Supreme Court did not deal with Section 59 (6) (a) in its capacity as an appellate court in a constitutional matter, this Court is not bound by the decision of the Supreme Court. Nonetheless, the decision/finding of the Supreme Court, rooted in what it considered to be the guiding philosophy in how to resolve presidential election disputes, is still persuasive in determining whether the impugned section contravenes the constitution.

According to Odoki CJ, to annul an election on the basis that some irregularities had occurred, without considering the impact of the irregularities would be tantamount to the court usurping the will of the people, the will of the majority in their determination of who their leader should be. Similar to the opinion of Ghana's Supreme Court, Odoki continued to say that had it been the intention of the framers of the constitution that the slightest infringement nullifies the election, the constitution would have said so.

Arising from the above analysis of the various courts' doctrine, I opine that the framers of the constitution and the promulgators of section 59 (6) (a) were guided by the principle/philosophy that in a democracy, the election of a leader is the preserve of the voting public and that the court should not tamper with results which reflect the expression of the population's electoral intent. Inherent in the section is the philosophy that the fundamental consideration in an election contest should be whether the will of the people has been affected by the irregularities/non-compliance. This is the very philosophy on which Article 1 (4) of the Constitution is founded.

In a democratic system constituted strictly on the basis of majoritarian expression through the popular vote, the essence of an election is that the people should be governed by individuals of their choice. It is the individual preferred by the majority that has the legitimacy to be in leadership. The constitution gives power to voters to choose who is to govern them (Article 1 (4). Section 59 (6) (a) of the Presidential Elections Act, rooted in Article 104 of the Constitution is based on the proportionality test. In defining what constitutes a valid election, I must be guided by **both** the article on people's sovereignty as well as the article providing for challenging the "validity" of an election. Both constitutional provisions must be read together. (See the principle of constitutional interpretation as enunciated in **Foundation for Human Rights Initiative vs The Attorney General, Constitutional Petition No. 20 of 2006, (CC); Paul Ssemogerere and Ors v Attorney General, Constitutional Appeal No.1 of 2012, (SC); Attorney General vs Susan Kigula and Others, Constitutional Appeal No. 03 of 2006, (SC); Twinobusingye Severino v Attorney General, Constitutional Petition No. 47 of 2011 (CC)**)

All jurisdictions discussed above provide electoral laws and procedures but all the courts refrained from holding that non- compliance by and in itself would render the results of an election invalid. The non-compliance must render the process so devoid of merit as to negate the electorate intent of the single constituency – composed of all voters.

From the above analysis of cases, it is thus safe to conclude that the phrase 'substantial manner' in **Section 59 (6) (a)** of the **Presidential Elections Act** breathes life into **Article 104** of the **Constitution**. It is a yard stick by which a court can annul or uphold an election.

In support of the petition before us, counsel drew the attention of court to the dissent judgments of Justices Tsekooko and Kanyeihamba in **Kizza Besigye vs. Electoral Commission and Kaguta Museveni (2006).** The essence of the petitioner's dissatisfaction (and of the two justices), with **section 59 (6) (a)** lies in the contention that such a law goes against the virtues of a free and fair democratic election and that allowing candidates to "cheat as little as cannot affect the results" renders the election a farce, it can imply that holding elections itself is not desirable or necessary and yet proper elections should give legitimacy to winners. The two honourable justices were concerned that section 59 (6) (a) allows a court which has made a finding that the constitution was violated to decline to annul the election. In their opininon the section allows the court to ignore violations of the law, it gives a licence to candidates to cheat or flout the law but do it in such a way that the flouting and cheating ought not to be so much as to amount to creating a substantial effect on the result. In the words of Justice Tsekooko, "the cheating must be such as can be tolerated by the courts!!"

Furthermore, the petitioner cites the case of **Morgan and Others v Simpson and another [1974] 3 All ER 722** in support of his case. The facts of the case are that at a local government election at which a total of 23,691 votes were cast, 82 ballot papers were properly rejected by the returning officer. Forty-four of those papers were rejected because they had not been stamped with the official mark as required by the local election rules. If the 44 ballot papers had not been rejected, but had been counted, the petitioner, a candidate at the election, would have won the election by a majority of seven over the respondent. In consequence of the rejection of the 44 papers the respondent had a majority of 11 and was declared the successful candidate. The petitioner sought an order that the election should be declared invalid under section 37 (1) of the Representation of the People Act, on the ground that it had not been conducted "substantially in accordance with the law "; alternatively that, even if it had been so conducted, the omissions of the polling clerks had affected the result.

Court held that:

Under section 37 (1) an election court was required to declare an election invalid if irregularities in the conduct of the election had been such that it

> could not be said that the election had been 'so conducted as to be substantially in accordance with the law as to elections' **or** if the irregularities had affected the result. And that accordingly, where breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. **Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election had been affected.** (My emphasis)

Having made a finding that **Section 59 (6) (a) of the Presidential Elections Act** does not handcuff the courts as alleged by the petitioner, I also find that the said section does not direct courts to uphold sham elections.

Annulling of presidential election results is a case by case analysis of the evidence adduced before the court. Although validity is not equivalent to perfection, if there is evidence of such **substantial departure** from constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The courts in exercise of judicial independence and discretion are at liberty to annul the outcome of a sham election, for such is not in fact an election. Although **Morgan and Others v Simpson and another (supra)** was not a presidential election petition, but rather a challenge to the validity of results of a local government election, I am persuaded by the principle enunciated in the words of Stephenson LJ which I will adopt. His Lordship said:

> For an election to be conducted substantially in accordance with the law *there must be a real election … and no such substantial departure from the procedure laid down by parliament as to make the ordinary man condemn the election as a sham or a travesty of an election. (My emphasis)*

I opine that whereas **Section 59 (6) (a)** outlines grounds for annulment; such is for an annulment of a real election, albeit one in which malpractices impacted on the result. The section does not permit the officers in charge and other actors to so violate constitutional imperatives and to so poorly mishandle the process that the outcome can only be described as a sham, a mere imitation. If there was no legitimate election, the court would be able to declare the outcome null and void. Therefore, if the process is conducted substantially outside the principles of the constitution, in my opinion, such is no election.

I find that **Section 59 (6) (a) of the Presidential Elections Act** does not handcuff the courts as alleged by the petitioner. The courts in exercise of judicial independence and discretion are at liberty to annul an election. Annulling of presidential election results is a case by case analysis of the evidence adduced before the court. And validity does not mean perfection. On the one hand, the court must avoid upholding an illegitimate election result and on the other, it must avoid annulling an election result that reflects **the free will of the majority of the electorate** – the majority whose rights are inherent in **Article 1 (4) of the Constitution** – a provision which is at the core of this petition.

But perhaps even more important is the need to point out that the wording of **Section 59 (6) (a)** is *silent in regard to non-compliance with provisions of the Constitution* and only refers to non-compliance with the provisions of the Presidential Elections Act. The Section provides that: "The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court—

> *non-compliance with the provisions of this Act,* if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and *that the non-compliance affected the result of the election in a substantial manner;"* (my emphasis)

Consequently there may/would be no need to prove that the substantial departure from the constitutional imperatives had substantial effect on the results in

circumstances where fundamental constitutional imperatives have been violated.

Further still I must underscore that although not every malpractice invalidates the results of an election, the Constitution does provide remedies for violations outside annulments. These remedies would follow if an individual, whose fundamental rights, rights such as the right to vote have been violated, resorted to courts of law under **Article 50 of the Constitution**.

Resulting from the above analysis, I dismiss the petition.

This being a Public Interest Litigation petition, the dismissal is with no costs.

Dated at Kampala this …29th. Day of January 2016.

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HON. JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA, JA/JCC