

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
THE LOCAL GOVERNMENTS ACT CAP 243
THE PARLIAMENT ELECTIONS ACT 2005

AND

THE PARLIAMENTARY ELECTIONS (ELECTION PETITION)
RULES 2006

AND

THE LOCAL GOVERNMENT ELECTIONS FOR LC III
CHAIRPERSON
KAMPALA CENTRAL DIVISION HELD ON THE 10TH DAY OF
MARCH 2006

ELECTION PETITION NO.29 OF 2006

SERUNJOGI CHARLES MUSOKE ::::::::::::::::::::::::::::::: PETITIONER

VERSUS

1. AMOOTI NYAKANA GODFREY }
2. THE ELECTORAL COMMISSION } ::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. AG. JUDGE REMMY K. KASULE

JUDGMENT:

The Petitioner, Sserunjogi Charles Musoke, Challenges the result of the Local Government Election, Central Division, held on the 10th March 2006.

Petitioner and first Respondent, Amooti Nyakana Godfrey, were the candidates in the election.

Second Respondent organized and conducted the same.

The declared and gazetted election result had the first Respondent as winner with 15,925 votes, and Petitioner as loser with 15,479 votes. The winning margin of votes was 444 votes.

Petitioner challenges the election on the ground that the same was conducted contrary to the provisions and principles of the electoral laws; and that the contravention affected the election result in a substantial manner.

The contravention is said to be in the nature of gross irregularities, malpractices, violence, acts of intimidation and torture, lack of freedom and transparency, unfairness and commission of electoral offences as well as illegal practices.

Petitioner also asserts that the second Respondent disenfranchised voters by deleting their names from the voters register; thus denying the Petitioner's registered supporters the right to vote.

It is further alleged that the second Respondent conducted and carried out the election on a day which was neither published in the Uganda Gazette nor widely announced in the media.

Second Respondent is stated to have failed to ensure freedom and fairness during election by allowing Uganda Peoples Defence Forces (UPDF) personnel, other military and militia groups to torture and intimidate Petitioner's polling officials, agents and supporters.

During election, the Petitioner himself complains to have been subjected to inhuman treatment and torture to near death, by being stabbed in the stomach and left hand thumb by a group of vicious men, led by the first Respondent.

Petitioner was denied representation at some polling stations during voting, counting and tallying results of the poll.

The second Respondent is further alleged, to have failed to control the use of ballot papers resulting into votes rigging by ballot stuffing, multiple voting, pre-ticking and manipulation of the voters roll.

Persons whose names were not on the voters roll, and/or had no valid voters cards are alleged to have voted.

Voting by open method, not by secret ballot, is alleged to have gone on at some polling stations; where Petitioner's polling agents were denied access.

Registered voters, supporters of the Petitioner, are said to have been denied to check their names on the voter's register so as to be issued with ballot papers.

Presiding officers prevented Petitioner's agents to present complaints and were denied copies of the Declaration of Results Forms at some stations.

The first Respondent was declared winner on incomplete election results as the Kitante Courts (DMI) A-L polling station results were never declared.

The first Respondent, according to Petitioner, directly benefited from the stated instances of non-compliance. He also personally and through his agents, with his knowledge, consent and approval, committed illegal practices and offences of bribing voters, interfering with election activities of the Petitioner, unlawfully had with him voters cards, which he supplied to his agents and supporters for them to vote more than once.

Petitioner further alleged of first Respondent conniving with election officials to make wrong returns of election and to wilfully prevent Petitioner's supporters from voting for the Petitioner.

By use of UPDF and other militia and violent groups to cause voters vote for him or to refrain from voting, and by canvassing for voters within one hundred metres of polling station on polling day, the first Respondent unlawfully disrupted polling.

The Petitioner filed in Court in support of his case affidavits deponed to by himself and those of his witnesses.

Both Respondents denied the Petitioner's allegations.

The first Respondent denied being served with Notice of Presentation of the Petition and the petition itself. He had therefore filed the reply to the petition in protest.

Service apart, to the first Respondent, the election was properly conducted in accordance with the electoral laws. The Petitioner's polling agents had signed the Declaration of Results Forms for all polling stations without any of them raising any complaint.

Any incidents of violence, first Respondent maintained, were caused by the Petitioner's supporters. Police took action and the law its course. In no way was the result of the election affected.

Second Respondent's reply to the petition, other than on the issue of service, was similar to that of first Respondent.

Specifically in respect of the change of election date from 6th to 10th March, 2006, second respondent pleaded that this was due to the sudden break down of machines printing the election materials. But the change of election date had been widely published and a press release made on 5th March 2006 by second Respondent. The change of election date did not therefore affect the result of the election in any substantial manner or at all.

At the hearing, learned Counsel Caleb Alaka assisted by Renato Kania, Medard Lubega, and Chris Katumba represented the Petitioner. First Respondent was represented by Mr. Didas Nkurunziza while Mr. Brian Kabaiza, State Attorney, appeared for the second Respondent.

The issues framed are:-

1. Whether or not the petition should be dismissed against the first Respondent by reason of failure to serve notice of presentation of the petition and the petition itself upon the first Respondent within the prescribed time.
2. whether or not there was failure to conduct the election in accordance with the electoral laws;
3. if so, whether such a failure affected the result of the election in a substantial manner;
4. Whether an illegal practice of electoral offence under the local governments Act or any other relevant law, was committed in connection with the election by the first Respondent personally or with his knowledge, consent and approval.
5. What are the remedies available to the parties?

The first Respondent pleaded and prayed at the commencement of hearing to raise the first issue as a preliminary objection, contending a decision on the issue would dispose of the whole petition. Court, however felt it proper that all issues be heard together so that, the preliminary objection notwithstanding, Court makes specific findings and decides on every issue raised and thus give finality to the trial of the whole petition in this Court. The findings and decisions of Court to be made on the rest of the issues shall therefore be subject to the Court's finding and decision on the first issue.

With leave of court, some witnesses were cross examined.

The essence of the first issue is whether or not the first Respondent was served with Notice of Presentation of the petition and the petition itself; and if no such service was effected, what are the consequences of non-service.

The petition was filed in Court on 26th May 2006. The first Respondent's reply, under protest, was filed on 17th July 2006, and the second Respondent's on 8th June 2006.

An affidavit of Owere Frank, a process server of a legal firm of Petitioner's Counsel, dated 12th June, 2006, was filed in Court on 14th June 2006.

In this affidavit, the process server states that on 31st May 2006, after affecting service on the second Respondent, he proceeded to serve the first Respondent at Kampala Central Division Headquarters, where he found first Respondent's secretary who never disclosed her names to him. He explained to her the purpose of his visit, served her with Notice of Presentation of the petition together with a copy of the petition attached. She read, understood and delivered the same to the first Respondent; who, according to this affidavit, was in his office reading newspapers.

The first Respondent read through, understood the same, but declined to acknowledge receipt, stating he was first to consult his lawyer. This affidavit was commissioned before advocate Mugenyi, Commissioner for Oaths. It was filed in Court on 4th July 2006.

On the same day of 12th June, 2006, the same process server, deponed to another affidavit which was filed in Court on 14th June 2006, and was commissioned before advocate Cosma Kateeba, this one stating, that at the time service was effected, the first Respondent was found in a meeting on the same building.

It was not explained by Petitioner or any of his witnesses why the process server had to depone to two affidavits of service of the same Notice of Presentation of the petition and the petition itself, on the same person at the same place on the same day.

In one affidavit the process server, states he found the first Respondent in his office reading newspapers. The process server, who knew the first Respondent, greeted him and explained the purpose of the visit.

Yet in the other affidavit, the process server found the first Respondent in a meeting on the same building. There is no mention in this other affidavit of the process server talking to the first Respondent.

It is not disclosed in the affidavits how and from what source the process server came to know the first Respondent's secretary. The physical location of where the Kampala Central Division Headquarters are situated, is not disclosed in the affidavits.

The above contradictions and deficiencies in the process of effecting service of Notice of Presentation of the petition and the petition itself upon the first Respondent were not in anyway explained. Yet, the first Respondent from the very beginning indicated to Petitioner that he was never served.

Section 141 of the Local Governments Act, Cap. 243, mandatory requires service to be effected upon the Respondents by the Petitioner within seven days of the filing of the petition.

Service has to be personal upon the Respondent, and if the Respondent cannot be found within three days, then an application has to be made to Court for service to be effected in any of the ways prescribed by the law. See Rule 6(3) (4) and (5) Parliamentary Elections (Election Petitions) Rules applicable to this election by invocation of Section 172 Local Governments Act.

Given the contradictions and deficiencies in the affidavits of service of the process server, Court cannot rely upon any one or both of them as proving effective service.

Court finds that the law as to service of the Notice of Presentation of Petition and the petition itself was not observed.

Court therefore holds that, on the evidence availed, the first Respondent was not served with the Notice in writing of the presentation of the petition with copy of the petition attached.

Court will deal with the consequences of non service of the notice of presentation of the petition with copy of the petition attached, later on in this judgment.

In the meantime Court will deal with the rest of the other issues, bearing in mind that findings and holdings of Court on any of these issues, are to be subject to the findings and holdings of Court on the first issue.

The second issue is whether or not there was failure and non-compliance to conduct the election in accordance with the provisions and principles of the electoral laws; and if so whether such failure and non-compliance affected the result of the election in a substantial manner.

The electoral laws are Constitution (1995), the Local Governments Act, Cap. 243, the Electoral Commission Act Cap. 140, and by implication, the Parliamentary Elections Act (17 of 2005). Specifically section 139 (a) and (b) of the Local Governments Act, applies to this election.

The burden is upon the Petitioner to prove to the satisfaction of Court the grounds of the petition. The applicable section 61 (3) of the Parliamentary Elections Act (17 of 2005) provides that proof is on the basis of a balance of probabilities.

Setting aside an election of a successful candidate being such a grave matter, as it affects the democratic decision of choice of a representative by the people, the court will only allow a petition to succeed, where the challenger of the result of the election, has proved the ground(s) at a very high degree of probability. The Petitioner has a duty to adduce credible or cogent evidence to prove his allegation at the required standard of proof; and this burden on the Petitioner does not shift: See **Supreme Court Election Petition Number 1 of 2001: Col. (Rtd) Dr. Kiiza Besigye Vs. Yoweri Kaguta Museveni & Another**; and also **Court of Appeal Election Petition Appeal No. 9 of 2002: Winnie Matsiko Vs. Babihuga Winnie**, both cases unreported.

Bearing the above principles of the law in mind, Court will proceed to determine whether Petitioner has proved the alleged specific instances of failure and non-compliance with the electoral laws in this election.

- (i) **Conducting and carrying out election on a day which was neither published in the Uganda Gazette nor widely announced in the public media.**

Section 107 of the Local Governments Act obliges second Respondent to issue a public Gazetted notice appointing the Election Day.

The 6th March 2006 was notified as Election Day in the official Gazette of 10th February 2006, Volume XCVIX.

However, on 5th March 2006, second Respondent, through a press release and without Gazetting, postponed this election to 10th March 2006.

Petitioner complains that the new date was not widely announced in the public media. As a result the election turn out of voters was low compared to that of the Presidential and Parliamentary elections where 44,885 voters voted in the Division, while only 31,617 voters

voted in this election of Division chair person. The drop in turn up of voters was, according to Petitioner, due to the abrupt change of the polling date.

Further, the Petitioner was adversely affected by the change of date, as he remained with inadequate facilities to safeguard his election interests on 10th March 2006, having exhausted them on the premise that election was to be on 6th March 2006.

Mr. Rwakoojo, secretary of second Respondent, explained that the change of election date was inevitable. The machines of the Uganda Publishing and Printing Corporation, Entebbe, printing the election materials for this election suddenly broke down on 5th March, 2006.

He maintained however that the change of date was widely publicized through the press and other media.

Mr. Higobero, the Assistant Returning Officer, justified the lower turn up of voters, as due to apathy on the part of voters, and not due to change of the election date.

Petitioner adduced no evidence of any voter claiming not to have voted because of the change of date. His comparison of the voting patterns between this election and the

Presidential and Parliamentary ones of 23rd February, 2006 is rather speculative with no factual basis.

Petitioner also gave no evidence of specifics as to how the change of polling date adversely affected his election interests.

Court holds that Petitioner has not proved the change of election date to have affected the result of the election to his prejudice.

- (ii) **Torture, violence and intimidation of Petitioner's polling officials, agents and supporters, by officers of Uganda Peoples Defence Forces (UPDF) and other para military/militia groups.**

The Petitioner's case is that, throughout the election, there was a group of vicious men, comprised of UPDF, police LDU personnel and other para military/militia groups, working for, and included the first Respondent, who tortured and intimidated Petitioner's polling officials, agents and supporters throughout the Division on polling day.

Petitioner attempted to prove specific instances.

(a) Kololo II, Summit View (A-H), (I-M) and (N-Z) polling stations.

Petitioner deponed that he was, while proceeding to these stations, tortured, clobbered to near death, stabbed in the stomach and left hand palm by vicious men, first Respondent inclusive. This was on polling day between 2.00 p.m – 3.00 p.m. he, in company of a number of his polling officials, were proceeding to Summit View to verify reports they had received that illegal voting was taking place at these stations.

At Hill Lane, while driving uphill, the Petitioner and his group met the first Respondent and other people travelling in two mini buses and a Saloon car.

The first Respondent, on seeing the Petitioner, came out of the Saloon car and personally ordered the rest of his group to beat and kill the Petitioner and one Deo Mbabazi, Petitioner's election Supervisor. The instructions were partly carried out.

This resulted in the injuries that Petitioner and those with him suffered; and in respect of which they received medical treatment at Nsambya hospital; and other health facilities elsewhere in Kampala and on being discharged from hospital on 15th March 2006, Petitioner recorded a statement at Kira Road Police Station.

Deo Mbabazi, in his evidence, alleges he saw one Omondi Salim as instructing the vicious men to beat him. Ivan Sentamu, also a victim, claims to have heard first Respondent say of him: **“this one is still alive, I only want to see dead bodies here.”**

Namakula Juliet and Mutebi David, in company of the Petitioner, received injuries and recorded police statements. Mutebi claims to have run to Lt. Allen Atuhaire, presiding officer, (I-M) polling station, who sent him away as it was not her responsibility to provide security.

First Respondent denied being at Summit View on polling day. He never caused any injuries to the Petitioner or any one else on that day. He was at his Headquarters, Chairman’s place, Central village, Kisenyi I Parish.

Turya Dick, ASP, Police, of Kira Road Police Station, deponed and testified under cross examination that, Petitioner first declared at Kira Road Police Station, that he was going to fight to the death as his votes were being stolen. He therefore, as a security measure, monitored the movement of Petitioner and his group that was heading to Summit View.

At about 200 metres from the polling station, he saw Petitioner’s group confront occupants in two mini buses. Fighting ensued. He and his team of police went to the scene. He saw Petitioner run, climb and jump over a wall with broken glass on top; and then jumped over

two neighbouring compounds. Witness knew the first Respondent and he never saw first Respondent at the scene.

Lt. Allen Atuhaire, and private Acuma Kenneth, respective presiding officers at (I-M) and (A-H) polling stations, Summit View, were emphatic in their evidence that the incident did not happen and polling was not in any way interrupted, at any of the polling stations at Summit View. Lt. Atuhaire confirmed Deo Mbabazi going to her and asking for soldiers. She explained to him that as presiding officer, she had no soldiers under her command. She advised him to report to police any incident of any breach of peace.

Both Mr. Rwakoojo, Secretary of second Respondent and Mr. Higobero, Assistant Returning Officer, were adamant that the Petitioner never made a report of this

incident to the second Respondent, particularly the fact that the first Respondent was a party to the same. They generally learnt of the incident from the mass media.

An evaluation of the evidence on this matter shows that the scuffle happened away from any of the Summit View Polling Stations. There is no evidence that polling at any of these stations was in any way affected by the incident; or that on its own, it prevented any lawful voter from voting or enabled an illegal voter to vote.

As to the presence and participation of the first Respondent in the scuffle, court notes that David Mutebi, does not claim to have mentioned to Lt. Allen Atuhaire of the presence and participation of the first Respondent in assaulting the Petitioner. The Petitioner himself and his advisors did not report the incident, the presence and participation of first Respondent to the Electoral Commission. The reports of various witnesses to police about the incident were not availed to court. No criminal prosecution of first Respondent for the incident, let alone questioning by police had taken place since its occurrence and by the time of trial of this petition.

While it is true that the incident was reported upon by the press, and newspaper reports and photographs were availed to Court, in absence of evidence from the actual reporters, such evidence of stories in newspapers remains hearsay evidence with little value to a Court of law:

See: **SCCA No. 1 of 1997 Attorney General Vs. David Tinyefunza p.p. 118-126.**

Court, on the basis of evidence before it, holds the Petitioner was injured in a scuffle, which happened away from any of the Summit View Polling Stations, and polling was not affected by the said scuffle.

Though the Petitioner was injured in some incident, on election day, he did not report the incident to second Respondent; and it is not proved to court's satisfaction, that the first Respondent was present, participated and caused injuries to Petitioner or any one else, or that whatever was done to Petitioner, was done with the first Respondent's consent, knowledge and approval.

(b) Chairman's place polling station, Kisenyi I Parish

Petitioner's case is that on polling day Hon Erias Lukwago, Member of Parliament, Kampala Central, and overall election supervisor for the Petitioner, with Councillor John Mary Ssebuwufu, another Petitioner's election official, proceeded to Chairman's Place Polling Station, after it was reported, that Petitioner's polling agents in Kisenyi I Parish were being beaten.

Hon. Lukwago deponed that, he and those with him, found, at this polling station, heavily armed military police. They sought to talk to the DPC, police, who was present. Then the first Respondent and his group of muscular men pushed Hon. Lukwago and his people

away saying in Swahili: **“Tooka”**. **“Mutooke”** : meaning **“go away”**: **Go away”**. **Go-away all of you”**.

Hon. Lukwago was then pounced upon by the first Respondent, pulled him by the collar of his shirt, Hon. Lukwago fell down. His shirt got torn and he sought refuge in Hajati Hanifa Namuddu’s nearby house.

The first Respondent and group then besieged this Hajati Namuddu’s house and prevented Hon. Lukwago and group from leaving the same. Hon. Lukwago and group were rescued by a contingent of police, under the command of DPC, Charles Sebambulidde; from Old Kampala Police Station. On seeing police, the first Respondent and group drove away.

The DPC took Hon. Lukwago to Old Kampala Police Station to record a statement. While at the station, Hon. Lukwago received a telephone call and left the station without recording any statement.

Deo Mbabazi, Petitioner’s witness, present at scene, also received injuries and mentions one Salim Omondi and Miri, Vice Chairman LCI, Central village, supporters of first Respondent, part of the group that assaulted Hon. Lukwago.

Ssentamu David and Mutyaba Steven, Petitioner's supporters were also assaulted in this incident. According to Mutyaba, it was at the intervention of the area LCII Chairman, Mr. Singh Parminder, that the fighting stopped.

John Mary Sebuwufu, Nakitto Zam, Kibombo Sabuli and Nakiberu Betty deponed to having witnessed this incident.

First Respondent denied assaulting Hon. Lukwago. He maintained he was at his headquarters throughout polling day. When he learnt that Hon. Lukwago was involved in a fracas he came out to see what was amiss. He was accompanied by about five supporters. He met Hon. Lukwago who was with about ten people; carrying sticks. They met fifty metres away from the polling station. Some words were exchanged. The general public had by now joined the gathering. Then, Chairman LCII, Parminder Singh came to the scene and order was restored at his intervention.

Parminder Singh Marwaha, Chairman LCII, Kisenyi I, deponed to an affidavit and was cross examined. He found at the scene Hon. Lukwago, a former classmate, arguing with government security personnel insisting that he and his group wanted to access the polling station. Security personnel were resisting this. The first Respondent was around with some other people. The people gathered were becoming unruly. As chairman LCII, he requested

Hon. Lukwago and first Respondent to give him their respective grievances, if any, so that he finds a solution. He advised first Respondent to return to his office which he did, and Hon. Lukwago to leave the area. He escorted Hon. Lukwago and his group to Hajati Namuddu's house, a staunch supporter of Hon. Lukwago's Democratic Party. He saw no fighting or violence. The polling station was not disturbed. The crowd was kept a distance from the station. Voting went on properly unhindered.

LCII Chairman's evidence is supported by that of Scovia Nyanzi, the presiding officer at the station. The Petitioner's polling agents signed the Declaration of Results Form, without recording any complaint at this polling station.

According to ASP Charles Sebambulidde, he received a telephone call, from an unknown person, reporting a fracas. He came and went to Hajati Namuddu's house, met Hon. Lukwago, who complained that some people outside the house wanted to beat him. He requested that they be arrested. The officer refused to arrest any one without having first investigated the matter. He took Hon. Lukwago to Old Kampala Police Station, for him to record a statement to enable police investigate. Hon. Lukwago left the police station before making a statement. At the scene no one was identified to him as having committed any offence either by Hon. Lukwago, or any one else.

Salim Omondi, General Secretary LCI, Central village, denied being at the scene let alone beating Deo Mbabazi and Mutyaba Stephen.

Copies of Newspapers, The New Vision and The Monitor were produced in court as part of evidence as to what happened at this scene. None of the reporters or photographers of the stories and photographs deponed to any affidavit. This evidence is suspect as hearsay. Court is not putting reliance on the same.

Video evidence was also produced to Court. Edris Sentongo, a video recorder deponed to an affidavit. He recorded the video and gave copies of the CD to Petitioner. Viola Naluwoza, lecturer Institute of languages, Makerere University, transcribed and translated the CDs.

Sentongo never identified to Court the CD he recorded. No CD was left with Court as an exhibit after the Video show in Court. Court rejects this evidence.

While Hon. Lukwago's evidence is that on arrival at the scene, ASP Charles Sebambulidde was already there, he is contradicted by Deo Mbabazi whose evidence is that the officer came later. The officer himself confirmed he came to the scene later when Hon. Lukwago was in Hajati Namuddu's house.

Hon. Lukwago, Deo Mbabazi and Sentamu Stephen, claim having seen first Respondent grab Hon. Lukwago by the collar of the shirt. However John Mary Ssebuwufu, saw first Respondent's bouncers, not the first Respondent, hold Hon. Lukwago and proceeded to assault him.

Deo Mbabazi and Hon. Lukwago do not mention having seen the first Respondent and his muscular men being armed with guns. Yet Mutyaba Stephen saw five of the men armed with guns.

While in Hanifa Namuddu's house, Hon. Lukwago, Deo Mbabazi and John Mary Ssebuwufu do not assert that the house was broken into by the first Respondent and his groups and that the three and those they were with were beaten inside. Mutyaba's evidence is otherwise.

These unresolved contradictions render the Petitioner's evidence on the incident unreliable.

The first Respondent was also contradictory. He claimed that after voting he never moved out of his headquarters. However under cross-examination he admitted he went to where Hon. Lukwago's group was; and also that he moved about in the parish.

Court was impressed with the evidence of the Chairman LCII, Singh Parminder, and of ASP Charles Sebambulidde. They were both consistent, calm and sure of themselves. They were never broken down in cross-examination. Court accepts their evidence as truthful as to what happened at this place.

Therefore the allegations in the petition as far as this incident is concerned are not proved.

(c) Kamwokya II Green Valley Primary School Polling Station.

Muhereza Alex, Petitioner's Polling Agent at this station, claimed that the Chairman LCI, Mr. Sebatta, brought Violent Crimes Control Unit (VCCU) operatives who had no voters cards to vote at this station.

The witness and one Bbaale Francis, an election official of Petitioner protested against this. Both the witness and Bbaale Francis were arrested and beaten by these VCCU men. The two were dumped at Kira Road Police Station and later released without any charges.

Muhereza Alex never denied signing the Declaration of Results Form without raising any complaint. There was no evidence that the alleged VCCU men were acting for the first

Respondent, or with his knowledge, consent and approval. Court holds this allegation not proved.

(d) Blue Room Polling Station: Kisenyi I.

Kibombo Sabuli, Petitioner's election supervisor alleged seeing Salim Omondi lead first Respondent's muscular men assault any supporter of Petitioner at this polling station.

Salim Omondi denied this. The Zone Chairman LCI also deponed that election was peaceful. Kibombo Sabuli names no particular person so mistreated. This allegation is not proved.

(e) Kavule A-M and Jambula Polling Stations, Kamwokya II

At Kavule A-M, polling station, Jamiru Maweje Petitioner's election official, asserted that, while raising some issues with the presiding officer, Julius Walakira, first Respondent's supporter with other five men, some armed with rifles pounced on and seriously beat him and other Petitioner's election officials. Police intervened, arrested Petitioner's agents, and took them to Kira Road Police Station. Later police released them.

The presiding officer denied this asserting Polling went on well and Petitioner's agent signed the Declaration of Results Form without raising any complaint.

There was no evidence that what was complained of was with the knowledge, consent and approval of any Respondent. The allegation is not proved.

With respect to Jambula Polling Station, Petitioner's evidence is that a group of Military Police, LDUs and other Militia in plain clothes, armed with guns and batons, beat up Petitioner's election officials and supporters and then dumped them at Kira Road Police Station. Some of these were Kyambadde Raymond, Kasirye Williams, Bbaale Francis and Oluoch James Walker.

The Petitioner annexed to his affidavit as Annexure F10 the Daily Monitor issue of Saturday, March 11, 2006, with a photograph of men, some armed, as having been taken at "Kavule Polling Station."

ASP Turya Dick, of Uganda Police, confirmed in Cross-examination being in the photograph armed with a gun.

He explained that police received information of a blockade of a road of Kavule, Kamwokya, near some polling stations. A VCCU vehicle had been blockaded from proceeding to its destination. He went with his police team and opened up the road and dispersed the crowd.

The incident was away from the polling station and did not disrupt any voting.

There was no evidence that the photograph in Petitioner's affidavit was at a polling station; or that the alleged assault on Kyambadde Raymond, Kasirye Williams, Bbaale Francis, was on the instructions or with knowledge, consent and approval of any Respondent. This allegation too is not proved.

(f) Failure by Second Respondent to control use of ballot papers resulting in massive rigging through ballot stuffing, multiple voting, pre-ticking of ballots for voters and manipulation of the voters Roll

More than eighty registered voters deponed and filed in Court affidavits to the effect that each did not vote because the names were not in the voters Register.

Okello Lukwiya Kolo, UTC village, Nakasero IV Parish, Petitioner's election supervisor recorded 31 of such voters in his parish, Godfrey Mukasa, LCI Chairman, Jambula Zone, Bukesa recorded 19, while Charles Mbazira, LCI Chairman, Kisenyi II Zone received 25 such voters .

Charles Nsimbi, Acting Head, Department of Voter Registration, of second respondent, contended that those whose names were not in the register had themselves to blame

because they did not respond to the display exercise of 22nd December 2005 to 17th January, 2006.

Second Respondent adduced no evidence to support his conclusion. None of the deponents was Cross-examined as to whether or not he/she did not respond to the display exercise.

Mugyerwa John Patrick of Community A-M Kamwokya II, found his name ticked, someone having already voted in his names. His evidence was not contradicted in anyway.

Court believes this evidence as truthful.

However other evidence of Petitioner in this respect is suspect.

Semakula William, Petitioner's polling agent, Chairman's place polling station, claimed that one Kassim Kyazze whom he knew voted as Abubaker Kakooza, who was in South Africa.

No such complaint was raised by the witness at closure of polling at the station. Court cannot accept such evidence for it smacks of being an afterthought.

So is the evidence of Kibombo Sabuli that he saw first respondent with presiding officer of this station at Kampala Guest House, making plans to rig elections at the station. The witness does not explain how he came to know this since he was not part of the meeting. The evidence is speculative and of no value to Court.

Dorah Nayiga, Petitioner's polling agent, Industrial Area Zone polling station, claimed that the Zone LCI Chairman brought illegal voters who voted. The presiding officer also did not open ballot boxes to be inspected before voting started. The witness never raised these complaints, yet she signed the Declaration of Results Form at the closure of voting. Her evidence is suspect to be an afterthought; with no value to court.

Rose Othieno, polling agent and Maweje Jamiru, claimed of five armed men, with no voters cards, voting at Kavule A-M Polling Station. The presiding officer denied this. The Petitioner's polling agent signed the Declaration of Results Form without raising the issue. Court rejects the evidence of this alleged illegal voting.

Najjuma Viarine, Nanziri Miriam and Mutebi David claimed for Petitioner, that illegal voters were ferried to vote for first Respondent at Summit View Polling Stations. Presiding officers denied this. Polling agents were shown to have signed voluntarily and freely the

Declaration of Results Forms. Court has already found Lt. Allen Atuhaire to have been a witness of truth. This allegation is therefore not proved.

At old Catholic Church A-K Polling Station, Kamwokya, Mukasa John and Nanziri Miriam, Petitioner's Polling Agents claimed that the presiding officer did not allow recording of the serial numbers of the issued ballot papers. He also made polling agents to sit more than a metre away from the desk.

The Chairman LCI brought in illegal voters who not only voted but beat up Petitioner's supporters preventing them from voting. Julian Muyira, Petitioner's election supervisor, claimed to have seen ten illegal voters with registration cards with photographs not corresponding with those in voters Register, vote at this station.

The Zone Chairman LCI, James Kakooza denied these allegations. He claimed to have stayed away from the polling station, throughout polling.

It was not explained to Court how the non recording of serial numbers of the ballot paper booklets affected the result of the election. Julian Muyira, not a polling agent, does not explain how she came to know of the matters she complained of. The Petitioner's polling

agents at the station signed the Declaration of Results Form without raising any complaints.

This allegation is too not proved.

At Parkyard, City House, and UTC Yard (Mukwano) Polling Stations, Ali Kayanja, Petitioner's Chief Mobiliser, complained that in Nakasero IV Parish, polling agents were made to sit more than a metre from the presiding officer's desk and that there was multiple voting and unregistered voters voted.

The source of this information is not disclosed by this witness. He gives no particulars of the polling agents so affected. Court puts no reliance on such evidence.

Namakula Juliet, Petitioner's election supervisor stated that at Contafrica, Jambula polling station, the presiding officer did not count the ballot papers issued before voting commenced. Jennifer Natukunda, the presiding officer denied this. It was not explained how this affected the election result. The same is thus not proved.

Namakula Juliet further asserted that at Kitante Polling Station, Petitioner's polling agents were denied access to the voters Register to verify the legible voters. The witness was herself not a polling agent. She does not explain how she came to know of the complaint. Her evidence is therefore suspect to be hearsay. Court puts no reliance on the same.

(g) Express Schemes by first Respondent to rig the Election.

Samuel Kisuule of Kamwokya, Central Zone, claimed to have been paid by Mr. Nyanzi Fred Sentamu, first Respondent's supporter, shs.100,000/= to obtain fifty people to illegally vote for first Respondent at identified polling stations in the Division.

Mr. Nyanzi was paying back to the Petitioner, for the latter not having supported him during elections of LCV Councillor in Kampala District.

Kisuule got the fifty people, and Mr. Nyanzi provided forged registration cards to the group to present to selected presiding officers.

A group member would wear a rubber band on the hand, have an open shirt button, and letter X mark on the hand by way of being identified by the presiding officers who were part of the scheme to rig the election.

Mr. Nyanzi assigned to Kisuule, his brother Julius Walakira to execute the scheme.

On polling day the assignment was executed at some polling stations in Kamwokya, Parkyard, Jambula and Summit View.

In Court, Samuel Kisuule looked knowledgeable and literate. He described himself as a businessman dealing in commodities at Nakasero market, Kampala. In spite of that, though he claimed to know how to count, he feigned not to be able to read the numeral number 2. He termed the whole illegal scheme of unlawful voting to be “a money investment” venture for him to make money.

Both Mr. Nyanzi and Julius Walakira denied the allegations of Samuel Kisuule. They were not broken down in Cross-examination. They were consistent and confident. They appeared truthful.

Court finds Samuel Kisuule, most unreliable, and who for the sake of getting money, is ready to commit a crime. He has no regard for truth.

At any rate, there was no evidence that first respondent knew, consented or approved Samuel Kisuule's activities. Court is unable to put reliance on Kisuule's evidence.

Kawalya Godfrey, claimed that first Respondent through one Kasiita, invited and met him on polling day, to join a group of muscular men “Kanyamas” and he agreed at a fee of Shs.30,000/=.

The group sub-divided into two sub-groups; one to do illegal voting and the other to be a hit squad. The hit squad is the one that had a scuffle with Hon. Lukwago at Chairman's place polling station.

Kawalya joined the other sub-group and proceed to do illegal voting at Kagugube, Kitante Courts, (DMI), Kamwokya, Summit View, Nommo Gallery and Kivulu I Zone.

This evidence is in Kawalya's affidavit of 18th July, 2006. by another affidavit of 4th September 2006, Kawalya denied the contents of the 18th July 2006, affidavit, explaining he had been paid money to depone to the same. On 13th September, 2006, Kawalya again swore another affidavit, claiming that he made the 4th September 2006 affidavit under duress at the RDCs office, Kampala. This is denied by advocate Alex Bashasha who commissioned the affidavit.

Court observes that Kawalya Godfrey has no qualms about telling a lie on oath as long as he is paid money. His evidence cannot be relied upon by Court.

Court holds that the evidence of Samuel Kisuule and Kawalya Godfrey is not capable of proving the matters alleged.

(h) Disenfranchising Voters

The Petitioner contends that the second Respondent failed and/or refused to declare the results of Kitante Courts (DMI) A-L polling station so that the first Respondent was declared winner of the election on the basis of incomplete results.

The Results Tally Sheet, page 9 of 14, of annexure A1 to the Petition show that at Kololo III Parish Kitante Courts (DMI) A-L Polling Station there were 476 registered voters. The sheet does not show any results for the first Respondent and Petitioner.

In the reply to the petition, the second Respondent does not make a specific answer as to what happened to the results at this polling station.

Mr. Higobero Stephen, the Assistant Returning Officer, attaches to his affidavit a Declaration of Results Form R8 for Kololo III Parish, Kitante Courts DMI (A-L) Polling Station. According to the form the first Respondent got 459 votes, second Respondent 21 votes. The total number of ballot papers issued were 500. There were no rejected/invalid ballot papers. The unused ones were 20. The same is signed by the polling agents of both candidates. There is however no signature of presiding officer.

According to the Results Tally Sheet, page 9 of 14 of annexure A1 to the petition, 476 registered voters registered at this polling station.

Mr. Sam Rwakoojo, the second Respondent's secretary, explained that the results of this polling station had been cancelled due to over-voting. This answer tallies well with the figures on the DR form.

Since the results at this polling station have been shown to have been tainted with an unlawful act of over voting, to which the second respondent has not offered any explanation of innocence, court cannot use these results to draw any conclusions in support of the election.

Court therefore holds that the second respondent failed to organize, conduct and supervise the election at this polling station in accordance with the law, and by reason thereof 476 registered voters were disenfranchised.

The Petitioner further asserts that, before polling, the second Respondent unlawfully deleted 5021 registered voters from the voter's roll, thus disenfranchising voters, many of them Petitioner's supporters. He relies on the packing list for 2005 annexure B₁ and that of 2006, annexure B₂ to arrive at this number of 5021.

On February 2006 the Petitioner complained in writing to second Respondent about the issue of deletion of names. The second Respondent promised a ruling but he never gave one.

Nsimbi Charles Benjamin, of the second Respondent, confirmed, under cross-examination, that 5021 registered voters had been removed from the voters Roll.

He explained that second Respondent appointed tribunals to hear disputes arising from the display of the voters register. He deponed in paragraph 25 of his affidavit.

“That all the deponents appearing in annexure “A” hereto and marked NOR were legally deleted from the polling station registers where they purport to have been registered on recommendation of the relevant Tribunals as they neither originate nor resided in those respective parishes at both time of their purported registration and display of Voters Register. (See Annextures “A₁” – A₃₀”, “B1 – b20, “C1 – C14”, “D1 – D4” and E1)”.

The total number of Voters, as per the annexures referred to in the above quoted paragraph of the affidavit of Mr. Nsimbi is certainly 800 and a few more.

Section 25 of the Electoral Commission provides that before any election is held the Commission by notice in the Gazette, appoints a period of not less than twenty one days for display of the voters roll in the parish for public scrutiny. Any objections or complaints in relation to names included in the voters roll are raised during this period.

The objection may be on the grounds that one person is not qualified to vote or to be registered as a voter in the parish or that the name of a person qualified to vote or to be registered has been omitted.

The objection is to the Returning Officer through the Chair person of the objector's parish council.

The returning officer, on receipt of the objection appoints a tribunal of five members to determine the objection(s).

The tribunal has at least three members of the village executive Committee, one of whom a woman, and one each of the elders and chiefs.

Decisions of the tribunals are by consensus, or in absence of consensus, then by voting, and the decision of the majority present and voting holds. A tribunal decision is subject to review by the Commission.

Mr. Nyanzi, and Ms Namutebi, alleged to have objected to some names, denied having done so. They denied having written and signed on the deletion forms.

Their evidence was not disproved.

Mr. Nsimbi, admitted that there was nothing like a complaint, or that the complaint was being addressed to the Returning officer through the Chairperson, Parish Council.

As to whether Tribunals gave an opportunity to the affected voters whose names were being deleted an opportunity to be heard: Mr. Nsimbi stated:

“Those whose names were deleted were not informed for it is not possible. They were not heard in defence. It was not possible for example under age: the only time people come to polling station is during display of voter’s register or on polling day. Those who recommended that voters be deleted know these people.”

The essence of Mr. Nsimbi's evidence is that the tribunals took decisions of deleting names of voters from the voters roll without having given an opportunity to those affected to be heard in defence. The rule of natural justice "Audi Alteram Partem:" "hear the other side" was not observed.

The observance of this rule is fundamental. It is said that:

"God himself did not pass sentence upon Adam, before he was called upon to make his defence. "Adam, says God, where at though? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?" And the same question was put to Eve also: See H. W. R. WADE Administrative Law, 5th Edition, P. 444.

The rule applies to every tribunal or body of persons vested with authority to adjudicate upon matters involving civil consequences to individuals: See: **WOOD VS. WOAD (1874) L.R. EX. 190**

and

BYRNE VS. KINEMATOGRAPH RENTERS SOCIETY LTD (1958) 1 WLR 762.

The right to vote is constitutionally bestowed upon a very citizen of Uganda of eighteen years of age or above: Article 59 of the Constitution. It is a duty of every such citizen to register as a voter. The State has mandatorily to take all necessary steps to ensure that all citizens qualified to vote, register and exercise their right to vote. Parliament, under the same Article is obliged to make laws to provide for the facilitation of citizens with disabilities to register and vote.

The mandatory nature of the language of Article 59 of the Constitution shows the essentiality of the exercise of that right namely: the establishment and promotion of a just, free and democratic society.

Its importance is further shown by its being specifically provided for in the Constitution.

Article 28(1) provides:-

“In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial Court or tribunal established by law.”

Of this rule the Supreme Court of Uganda has held: “The rule embraces the whole notion of fair procedure and due process”. See **SCCA 3/96 KAMURASI CHARLES VS. ACCORD PROPERTIES LIMITED & ANOTHER** unreported.

Musoke – Kibuuka J. in George Semboze Vs. Uganda Red Cross Society, H.C.C.S No. 49/97 reported as **[1998] III KALR 33**, considering this Rule as provided for in Article 28, has observed:-

“The rule of Audi Alteram Partem has now been re-emphasised in the new Constitution of Uganda, 1995, where Article 28 relating to the right to a fair hearing includes any person whose civil rights are being determined. That is a new dimension from the previous position where the right to a fair hearing was restricted only to Criminal matters.”

It is now settled law that a decision arrived at in breach of the “Audi Alteram Partem” rule is void absolutely and is of no consequence at all: See: **MATOVU & 2 OTHERS VS. SSEVIRI & ANOTHER [1979] HCB 174.**

Court therefore holds that the Petitioner has proved to the satisfaction of Court, at the requisite level of burden of proof required in an election petition, that not less than 800 and possibly more registered voters were unlawfully deleted by the second Respondent from the

voters Roll before the election of Chair person LCIII Kampala Central Division. This was non compliance with the Electoral laws.

It is now necessary to decide whether subject, to, the issue of service of the Notice of Presentation of the petition and a copy of the petition upon the first Respondent, the non compliance with the electoral laws affected the result of the election in a substantial manner. Section 139 (a) of the Local Governments Act, Cap 243, places a burden on the Petitioner to satisfy court that non compliance and failure affected the result of the election in a substantial manner.

Odoki C.J. has held “a substantial effect” to mean:-

“The effect must be calculated to really influence the result in a significant manner. In order to assess the effect, the Court has to evaluate the whole process of election to determine how it affected the result, and then assess the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important just as the conditions which produced those numbers, numbers are useful in making adjustments for the irregularities.” :See Supreme Court Election Petition Number 1 of 2001: Rtd. Col. Kiiza Besigye Vs. Electoral Commission and Yoweri Kaguta Museveni. In the same case Oder,

JSC, explained:- “Whether or not non-compliance with the provisions and principles of an Act, in the instant case, affected the result of the election in a substantial manner, is in considered opinion a value judgment. Figures cannot tell the whole story. In my considered opinion an accumulated or sum total of the non-compliance with the provisions and principles of the act, is the yardstick for measuring the effect of non-compliance with the provisions and principles laid down in the act.”

Applying the above principles of the law to the evidence adduced in this petition there were 77,911 registered voters, and 112 polling stations in the Division. While polling went on at all polling stations the results of the election were from 111 polling stations. The results of Kitante Courts, DMI (A-L) with 476 registered voters were never included in the final result of the election on the ground that there were more votes cast than the number of registered voters.

The total number of those who voted was 31,617 representing 40.6% of the total 77,911 registered voters. The valid votes cast were 31,402, the invalid ones 215, being 0.7% of the total votes cast. There were a total of 18 spoilt ballot papers in the whole election.

The margin of votes cast between the first respondent, as the winning candidate, and the Petitioner, as the losing candidate was 444 votes.

Court has already considered and made specific findings on the grounds for challenging the election and set out those that have not been proved by the Petitioner.

Petitioner has proved, to the satisfaction of Court, that 476 registered voters of Kitante Courts DMI (A-L) polling station were disenfranchised when the votes at this polling station were not considered because the second Respondent conducted and organized polling at this station in such a defective way that, at the end of polling, there were more votes cast than the registered voters at the station.

Court is also satisfied that the whole exercise of deleting names of voters from the voters register was handled by the second Respondent in a very casual manner. There were no records kept as to the complaints lodged and decisions made on them; no effort was made to ensure tribunals are constituted in accordance with the law. The identities of those lodging complaints were not ascertained, some alleged complainants were outright forgeries, and most important of all, those voters affected, were not afforded any opportunity to be heard in defence before their names were deleted.

Court is satisfied, that given the fact that the winning margin of votes is 444, the non-declaration of the election results at Kitante Courts, (DMI) A-L polling station, with 476 votes, and the unlawful deletion of at least a minimum of 800 voters, and possibly more, from the voters roll, going by Mr. Nsimbi's affidavit, affected the outcome of the election in a substantial manner.

This finding is subject to the issue of service of the notice of presentation of petition and copy of petition upon the first Respondent.

The last issue is one of the remedies available to the parties.

The court has already held that the Petitioner did not serve the first Respondent with the Notice in writing of presentation of the petition and the petition itself.

The law as to the consequences that arise from non service of a petition upon a statutory Respondent have been resolved upon by the **Court of Appeal in Election Petition Appeal No.2 of 1999: Besweri Lubuye Kibuuka Vs. Electoral Commission & Another;** unreported.

In that case, the election of a chairperson of Kalangala District was being challenged by the losing candidate.

The Election petition was filed in the High Court on 14th May 1998. The first respondent, the Electoral Commission was served with the notice and petition and filed an answer to the petition on 28th May 1998. The second Respondent, the winner of the election, was never served, but on learning of the petition having been filed in Court, he communicated to Court and to the Petitioner's Counsel in writing that he had not been served and then filed in an answer under protest on 8th June, 1998, as he was affected by the petition.

Even in this petition the first Respondent's Counsel communicated in writing to Court on 12th June 2006 of the fact of his having not been served with the Notice of Presentation of the petition and copy of the petition itself. He then proceeded to file an answer to the petition contending that he had never been served with the same within the time stipulated by law or at all.

Their Lordship of the Court of Appeal were unanimous in upholding the decision of the Learned Principal Judge, Ntabgoba, as he then was, that:-

“It shows that, as a matter of fact, there could not be said to be a petition since no notice thereof had been given to the second Respondent as is enjoined by

S.142 of the Local Government Act. The illegality surely cannot be said to have been cured by the second Respondent's answer that was filed in protest and much later than the time stipulated -----

The petition was a nullity. I accordingly dismiss the petition with costs.”

Their Lordships of the Court of Appeal, relying on: **Oulton Vs. Radcliff (1873-74) 9 LRPC 189 at 193 per Keating .J.** held:-

“By reason of non-service of the petition on the second Respondent no action was in existence. Even if he had waived, no waiver can give validity to a nullity.”

The argument that failure to serve the second Respondent was a mere irregularity which the second Respondent had waived by filing an answer to the petition and generally bringing himself into the petition were not accepted by the Court of Appeal. Hence Article 126 (2) (e) of the Constitution seems not to have been applicable to the case.

This Court, given the similarity of facts, is bound by the Court of Appeal decision.

In **MATHINA BWAMBALE VS. THE ELECTORAL COMMISSION AND CRISPUS KIYONGA, HCT-01-CV-EP0007/2006**; an election petition whose facts are similar to those under consideration, Rugadya Atwoki .J., after a full hearing of the petition, held:-

“Non-service and its effect were dealt with on appeal. In dismissing the appeal, Court held that by reason of non-service, no action was in existence. No waiver could give existence to a nullity. That is the position of the law, and the decision in any event binds me. I would therefore decline to validate the petition, as there is nothing to validate, the proceedings before the Registrar having been a nullity. There was no service of notice of presentation of the petition and a copy of the same on the second Respondent as required by law. That is a mandatory requirement and failure to comply with the same rendered the petition a nullity. This issue alone would dispose of the petition.”

Counsel for Petitioner invited Court to follow the case of **Dr. Bayigga Michael Philip Lulume Vs. Hon. Mukasa Anthony Harris: Election petition No. 06 of 2006 (Musoke-Kibuuka .J.)** and hold that non service had been waived by the first Respondent. The facts of that case are however distinguishable. The issue of non- service had not been raised at the very beginning in that case. Respondent did not file his pleadings under protest; and there was no evidence that service had not been effected.

The first Respondent, in this petition at the very beginning prayed Court to have the petition disposed of on this very issue of non-service by way of a preliminary objection.

Because of the nature of the petition, raising many issues of fact and law and the public interest involved in the case, concerning an election of the Chairperson, Kampala Central Division, the Centre of the capital city of the country, Court, with consent of all Counsel ordered that a full hearing be proceeded with the preliminary objection being the first issue. The fact of having had a full hearing however does not turn a petition that is a nullity into a valid one. It did not do so in the **Mathina Bwambale case** (supra).

The Petitioner and his lawyers have themselves to blame for having handled this vital issue of service in such a cavalier and careless manner in this petition.

In accordance with the law therefore as decided upon by the Court of Appeal, which decision binds this Court, it is held that the Petitioner's petition is a nullity by reason of non service of Notice in writing of presentation of the petition and a copy of the petition itself upon the first Respondent, as the Statutory Respondent. It follows therefore that the Petitioner cannot be awarded the remedies he is entitled to by reason of the said nullity.

The petition stands dismissed.

The first Respondent shall have the costs of the dismissed petition from the Petitioner.

Were it not for the nullity of the petition by reason of non-service, the second Respondent would have been held to have conducted the election in such a deficient way that there was failure and non-compliance with the provisions and principles of the electoral laws whereby voters were disenfranchised, thus affecting the result of the election substantially. The second respondent will therefore be denied the costs of the dismissed petition.

Remmy K. Kasule

Ag. Judge

30th November 2006

In accordance with Section 140 of the Local Government's Act, it is directed that a copy of this judgment be passed over to the Director of Public Prosecutions, as a report of this Court, that Criminal Offences may have been committed by Samuel Kisuule of Kamwokya, and Godfrey Kawalya who claims to be of both Kajjansi and Natete, in the course of this election, for the Director of Public Prosecutions to cause further investigations and take appropriate action.

Remmy K. Kasule

Ag. Judge

30th November 2006