THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA

ELECTION PETITION NO. 15 OF 2011

OCHIENG PETER PATRICK ..... PETITIONER

VERSUS

1. MAYENDE STEPHEN DEDE

2. ELECTORAL COMMISSION ..... RESPONDENTS

BEFORE: HON. LADY JUSTICE MONICA K. MUGENYI
JUDGMENT

This petition was brought by Peter Patrick Ochieng, the petitioner, challenging the validity of the results of the parliamentary election in Bukholi South Constituency held on 18th February 2011. The petition is brought against Mayende Stephen Dede (the 1st Respondent) and the Electoral Commission (the 2nd Respondent). The contested results declared the 1st respondent winner of the election with 18,375 votes (46.87%) and the petitioner runner up with 16,754 votes, 46.87% and 42.7% of the votes cast respectively.

The petitioner contends that the election was conducted in contravention of the Constitution of Uganda and prevailing electoral laws; and was characterised by gross irregularities and numerous illegal practices. The specific provisions of the law allegedly flouted by the respondents are section 12(1)(e) and (f) and section 12(1)(b) of the Electoral Commission Act; as well as sections 27(a); 29(4); 30(4); 32(1); 34(2),(3) and (5); 46(1) and (2); 47(5) and (6); 50(1)(d); 68(1); 80(1)(a)(iii) and (b), and 81(1)(a) and (2)(a) of the Parliamentary Elections Act.

It is the petitioner's case that non-compliance with the above legal provisions was depicted by the following malpractice(s): assault and intimidation of the petitioner's supporters and agents throughout the campaign period; inadequate security that occasioned ballot stuffing and vote rigging; participation of under-age and unregistered 'voters'; endorsement of the declaration of results form under duress; disenfranchisement of voters by non-inclusion of their names on the register, refusal to verify their names on the register (where the names did exist) and premature closure of polling stations despite the late arrival of voting materials in several polling stations;

multiple voting in favour of the 1st respondent in connivance with agents of the 2nd respondent; pre-ticking of ballot papers by agents of the 1st respondent; transportation of unsealed ballot boxes, and ineffective representation and, in some cases, non-representation of the petitioner by his polling agents at the instance of unlawful acts by agents of the 2nd respondent.

The petitioner contends that the non-compliance complained of affected the election result in a substantial manner, and the 1st respondent was the beneficiary of the same.

It is the case for both respondents that the election in issue was conducted in compliance with the prevailing electoral laws. The 1st respondent also denies engaging in any illegal practices or election offences, or indeed consenting to their commission by other persons on his behalf.

At the trial the following issues were framed:

1. Whether or not the parliamentary elections for Bukhooli South Constituency was conducted in compliance with the electoral laws.
2. If not, whether the non-compliance affected the results of the election in a substantial manner.
3. Whether or not the 1st Respondent committed any illegal practices, in person or through his agents with his consent and knowledge.
4. Remedies available.

As stated in the case of **Mbowe vs. Eliufoo (1967) EA 240** and affirmed by Odoki CJ in the case of **Kiiza Besigye vs. Yoweri Museveni Kaguta & Anor Election Petition No.1 of 2001**, it is now settled law that the burden of proof in election petitions lies with the Petitioner. Section 61(1) of the Parliamentary Elections Act provides for the grounds of an election petition to be proved '**to the satisfaction of court'**, while section 61(3) of the same Act sets the standard of proof in election petitions at '**balance of probabilities**.' The import of the foregoing legal position is that the petitioner must satisfy court on a balance of probabilities that the grounds cited in the petition did indeed manifest in the election in question.

What constitutes sufficient proof in election petitions was expounded upon in the cases of **Kiiza Besigye vs. Yoweri Museveni Kaguta & Anor** (supra) and **Karokora Katono Zedekia vs Electoral Commission & Kagonyera Mondo Election Petition No.2 of 2001.**

In the case of **Kiiza Besigye vs. Yoweri Museveni Kaguta & Anor** (supra) Odoki CJ cited with approval the following observation by Lord Denning in the case of **Blythe vs Blythe (1966) AC 643**:

> **"The word 'satisfied' is a clear and simple one and one that is well understood. I would hope that interpretation or explanation of the word would be unnecessary. It needs no addition. From it there should be no subtraction. The courts must not strengthen it; nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When parliament has ordained that a court must be satisfied, only parliament can prescribe a lesser requirement. No one whether s/he be a judge or a juror would in fact be 'satisfied' if s/he was in a state of reasonable doubt."** *(emphasis mine)*

The foregoing decision infers that courts hearing election petitions may only be satisfied by proof that negates reasonable doubt. In my view, such proof connotes a standard that is more stringent than proof by balance of probabilities. In that case the suit in issue was a presidential election petition. Furthermore, the suit was in respect of a presidential petition filed in 2001 prior to the amendment of the Parliamentary Elections Act of 2005. With regard to parliamentary elections, Parliament has since explicitly prescribed proof at a lesser degree of satisfaction to wit proof on balance of probabilities. I do therefore find the parameters for satisfaction of court that were set by the Supreme Court in **Kiiza Besigye vs. Yoweri Museveni Kaguta & Anor** (supra) applicable to presidential election petitions but not necessarily to parliamentary election petitions, such as the present one, where the standard against which courts must be satisfied is prescribed by statute.

Nonetheless, in **Karokora Katono Zedekia vs Electoral Commission & Kagonyera Mondo Election Petition No.2 of 2001**, Musoke-Kibuuka J further expounded upon the standard of proof in election petitions as follows:

> **"Setting aside an election of a Member of Parliament is, indeed, a very grave subject matter. It is a matter of both individual and national importance. The decision carries with it much weight and serious implications. ... Parliament will continue to carry out its legislative function on matters of national importance without any representation of the constituency affected. ... Thus, the crucial need for courts to act in matters of this nature only in instances where the grounds of the petition are proved at a very high degree of probability."** *(emphasis mine)*

I do agree with my learned colleague that owing to the intrinsic nature of election petitions, the stakes and implications of which are quite critical to the dictates of democratic governance, the grounds thereof should be determined on the basis of a high degree of probability.

Further, in **Kiiza Besigye vs Electoral Commission & Yoweri Kaguta Museveni Presidential Election Petition No. 1 of 2006** Odoki CJ, citing article 126(2)(e) of the Constitution, held:

> **"The doctrine of substantial justice is now a part of our constitutional jurisprudence. … Courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice."** *(emphasis mine)*

Against this legal yardstick, I now proceed to determine the issues framed in the present petition. I shall address the issues in their order of record, save for issues 1 and 2, which I shall determine concurrently. I must state from the onset that the 2nd respondent was late in filing his written submissions therefore they shall not be considered for purposes of this judgment.

Issues 1 and 2: *Whether or not there was non-compliance with the electoral laws in the elections for Bukooli South, and if so, whether the non-compliance affected the results in a substantial manner.*

The present petition entails averments of conduct in contravention of the Electoral Commission Act, as well as the Parliamentary Elections Act. For ease of reference I reproduce below the petitioner's averments in respect of the Electoral Commission Act.

> **"4(a) Contrary to section 2(1)(e) and (f) of the Electoral Commission Act, the 2nd respondent failed to ensure that the election in Bukooli South Constituency was conducted under conditions of freedom and fairness when:-**
>
> **i. ….**
>
> **ii. ….**
>
> **4(b) Contrary to section 12(1)(b) of the Electoral Commission Act, the 2nd respondent failed to control the use of ballot papers when there was massive rigging of votes through ballot stuffing, multiple voting and pre-ticking of ballots for voters and manipulation of the voters' roll."**

The actions complained of in the general averment in paragraph 4(a) above include inadequate security that occasioned ballot stuffing and vote rigging; participation of under-age and unregistered 'voters'; endorsement of the declaration of results form under duress; disenfranchisement of voters by premature closure of polling stations; multiple voting in favour of the 1st respondent in connivance with agents of the 2nd respondent; pre-ticking of ballot papers by agents of the 1st respondent; and ineffective representation and, in some cases, non-representation of the petitioner by his polling agents at the instance of unlawful acts by agents of the 2nd respondent.

There is no section 2(1)(e) and (f) in the Electoral Commission Act, but given that Counsel for the 1st respondent did most helpfully yield that the provision in reference therein is section 12(1) [which is most plausible], I do likewise consider section 12(1) to be the section in issue.

In his written submissions, Counsel for the 1st respondent contended that the grounds of the petition that are premised on sections 12(1)(e) and 12(1)(b) of the Electoral Commission Act cannot be relied upon to set aside a parliamentary election. In support of this argument, Counsel cited the judgment of Tsekooko JSC in **Kiiza Besigye vs. Yoweri Museveni Kaguta & Anor** (supra) where it was held that violation of the Electoral Commission Act did not matter for purposes of annulment of an election. I do agree with that decision in so far as it reinforces the wording of section 61(1) of the Parliamentary Elections Act, which does appear to restrict the annulment of a parliamentary election to proof of the four (4) grounds stipulated in that section.

With regard to the ground of non-compliance under consideration presently, section 61(1)(a) stipulates that it is only non-compliance with the provisions of the Parliamentary Elections Act that can result in the automatic annulment of a parliamentary election. To that extent, I am in general agreement with Counsel for the 1st respondent that non-compliance with the Electoral Commission Act *per se* would not nullify an election. Indeed section 15(3) of the Electoral Commission Act appears to restrict the remedies available to a party citing irregularities that do not otherwise violate any provision of the Parliamentary Elections Act, to mere declarations. However, I might add that while not automatically nullifying an election, proof of non-compliance with the Electoral Commission Act cannot be entirely irrelevant to an election petition. It does inform courts of the overall quality of the election in question, and may be borne in mind as such.

Accordingly, I draw a distinction between evidence in support of non-compliance with the Parliamentary Elections Act viz evidence in respect of non-compliance with the Electoral Commission Act, and shall address myself to the former. I do note, however, that some of the acts of non-compliance pleaded in paragraph 4(a)(i), (iii) and (iv), as well as paragraph 4(b) in its entirety, do overlap with and are re-stated in the ensuing averments of non-compliance in the petition *[paragraphs 4(c) – (j)]*. Accordingly, they shall be duly addressed under the issue of non-compliance with the Parliamentary Elections Act. Ballot stuffing as pleaded in paragraph 4(a)(iii) is also an electoral offence under section 76 (e) and (f) of the Parliamentary Elections Act and shall be addressed as such.

The petitioner specifically pleaded the following incidences of non-compliance with the Parliamentary Elections Act. The relevant paragraphs of the petition are reproduced below for ease of reference.

"4(c) Contrary to section 27(a) of the Parliamentary Elections Act, 2005, the 2nd respondent through its Returning Officers failed to control the distribution and use of ballot papers to eligible voters resulting in multiple voting and vote stuffing by a number of people.

(d) Contrary to sections 29(4) and 34(2), (3) and (5) of the Parliamentary Elections Act, the 2nd respondent's officers and agents allowed persons whose names did not appear on the voters' roll and/ or who did not hold valid voters cards to vote.

(e) ….

(f) ….

(g) Contrary to sections 30(4) and 32(1) of the Parliamentary Elections Act, the petitioner's agents were denied access to some of the polling areas/ polling stations by the 1st respondent's agents and 2nd respondent's officers during polling and counting exercise and therefore prejudiced the petitioner's interests …

(h) Contrary to section 34(3) and (5) of the Parliamentary Elections Act, the 2nd respondent's officers in connivance with the 1st respondent's agents denied the petitioner's open supporters the right to vote by failing and/ or neglecting to check the voters names on the voters register or roll for the purposes of being issued with ballot papers.

(i) Contrary to section 46(1) and (2) of the Parliamentary Elections Act, the Presiding Officers failed and/ or neglected to record the petitioner's agents' complaints raised during the voting and counting exercise and also failed and/ or neglected to register them as part of the official records of the polling stations.

(j) Contrary to sections 47(5) and (6), and 50(1)(d) of the Parliamentary Elections Act, the 2nd respondent's officers in connivance with the 1st respondent's agents denied the petitioner's agents copies of the Declaration of Results Forms at several polling stations."

In support of his case, the petitioner deponed an affidavit dated 30th March 2011, the gist of which for present purposes was that he was informed of numerous acts of non-compliance with the relevant provisions of the Parliamentary Elections Act as highlighted above. His evidence was largely based on information from his polling agents and/ or supporters, save for paragraphs 1, 2, 3, 4, 5, 7, 9, 10, 26, 28, 30 and 31; the contents of which were within his knowledge.

He attested to personal knowledge of the following acts of alleged non-compliance with the Parliamentary Elections Act.

i. The Presiding Officers omitted to record the complaints registered by himself and his agents.

ii. He studied the DR forms and discovered that:

   a. Some of them were not endorsed by his agents.

   b. At some polling stations his agents were coerced into signing the DR forms prior to the commencement of vote counting.

   c. There were discrepancies in the tallying exercise as ballots that were issued and those that were cast did not tally.

He further attested to having been informed of the following acts of non-compliance.

i. Signing of declaration forms under duress from agents of the 1st respondent in connivance with officials of the 2nd respondent.

ii. Removal of police by polling constables leading to chaos and ballot stuffing.

iii. Under-age and unregistered persons voted with the permission of polling officials.

iv. Disenfranchisement of voters who were already in the line by close of voting at 5.00 pm, as well as declining to confirm the appearance of his known supporters' names on the voters register.

v. Ferrying of voters to polling stations by agents of the 1st respondent, which agents connived with agents of the 2nd respondent to have the voters vote for the 1st respondent.

vi. Polling officials pre-ticked voters' names in the register suggesting that they had already voted whereas not.

vii. Non-appearance of voters' names on the voters register and the deliberate transfer of voters' names from their usual polling stations to others unknown to them thus denying them their right to vote.

viii. Refusal by polling officials to seal ballot boxes.

ix. His polling agents were made to sit 10 metres from the Presiding Officer's table and were therefore unable to monitor the voters' register.

x. Omission by the Presiding Officers to register his agents' complaints or take action on them.

xi. Some of his polling agents were denied access to some of the polling areas/ stations.

xii. The improper invalidation of 1,000 of the petitioner's votes, some of which were allotted to the 1st respondent.

The petitioner presented an additional 24 affidavits to support his case, which largely entailed evidence of illegal practices and election offences. The issue of illegal practices and election offences shall be handled later in this judgment. For present purposes, I restrict myself to the issue of non-compliance with the electoral law.

On their part, the respondents relied on the affidavits of the 1st respondent; the Returning Officer of the Constituency, a one Ms. Ann Tusingwire, as well as one deponed by the Chairman of the Electoral Commission, Mr. Badru Kiggundu. The 1st respondent, in essence, denied having engaged in illegal practices; denied that any of his agents engaged in electoral malpractices with his knowledge and consent, and maintained that the election in Bukhooli South Constituency was conducted in compliance with prevailing electoral laws. In an affidavit in rebbuttal dated 13th June 2011 the 1st respondent denied knowledge of a number of persons alleged to be his agents and reiterated his denial that he did not, in person or through others on his behalf, commit any

illegal practices or contravene any electoral laws. On the other hand, the gist of Ms. Tusingwire's affidavit was a denial that the election was conducted in contravention of the electoral laws, and to suggest that if such incidences did occur they were never brought to her attention as by law required.

An evaluation of the petitioner's evidence reveals that an additional 24 affidavits presented to corroborate the petitioners averments largely falls short of this purpose. On the evidence within his knowledge, the petitioner averred that his individual complaints were not recorded by the Presiding Officers. This averment in his affidavit notwithstanding, it is curious that paragraph 4(i) of the petition only mentioned refusal to record his agents' complaints and made no reference to any complaints by the petitioner. Be that as it may, this allegation – with regard to complaints by the petitioner, as well as those by his agents – was not corroborated anywhere in evidence adduced in his support. It therefore remains unproved.

The petitioner further contended that some of the DR forms were tainted with irregularities. He supported this contention with an averment in paragraph 31 of his affidavit that some DR forms were not signed; contained discrepancies in tallying, and in some cases had been signed under duress prior to the commencement of vote counting. With all due respect, I find the petitioner's evidence inconclusive on this allegation. The petitioner, on his own admission, had the benefit of studying the offensive Declaration of Results forms but did not tender them in court. Therefore, court did not have an opportunity to confirm the truthfulness of his allegations. See **Sarkar's Law of Evidence, 1993, 14th Edition at p. 924** on the role of documentary evidence as a test of the authenticity of oral evidence.

In this regard, section 91 of the Evidence Act provides as follows:

> **"… in all cases where any matter is required by law to be reduced to the form of a document, no evidence … shall be given in proof … of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible …"**

For present purposes section 50(1) of the Parliamentary Elections Act makes provision for a Declaration of Results form in which information on votes cast, as well as ballots issued and used is recorded. To that extent therefore, evidence in respect of those matters may only be adduced by way of the DR form itself. The petitioner in the present case did not do so. I therefore find that this allegation has not been proved.

With regard to the incidences of non-compliance he was informed of, save for the allegation of unsealed ballot boxes, the additional evidence does not substantiate the petitioner's averments. Failure to adduce evidence from persons that did have knowledge of the incidences of non-compliance complained of leaves the allegations unproved.

Indeed in **Kiiza Besigye vs Electoral Commission & Another** (supra), Odoki CJ held:

> **"An evaluation of the evidence relied on by the petitioner shows that much of it was hearsay and uncorroborated. Evidence of reports received … cannot be relied on without the persons who witnessed those incidents … swearing affidavits to confirm the reports."**

The hearsay evidence in this case includes the allegations of involuntary endorsement of DR forms; chaos and ballot stuffing owing to the removal of police by polling constables; refusing the petitioner's polling agents presence at polling stations; voting by under-age and unregistered persons; disenfranchisement of voters who were duly line up before close of voting; non-verification of his supporters on the voters register; ferrying of voters to polling stations; pre-ticking of voters' names; non-appearance of voters' names on the voters register; the deliberate transfer of voters' names from their usual polling stations to others unknown to them, and the improper invalidation of 1,000 of the petitioner's votes, some of which were allegedly allotted to the 1st respondent.

On the question of polling officials sitting arrangements, I find that sitting polling agents 10 metres away from the Presiding Officer's table is a legal requirement embedded in section 30(5) of the Parliamentary Elections Act. It therefore cannot be categorised as non-compliance with the Act, as the petitioner suggests. In any event, save for the petitioner's allegation based on information he received, no cogent evidence was adduced in respect of the sitting arrangement in contention.

In the premises, I find that the foregoing allegations of non-compliance with the Parliamentary Elections Act, of which the petitioner was informed, have not been proved. Similarly, the allegations of non-compliance with the Electoral Commission Act as pleaded in paragraph 4(a) and (b) of the petition, which were simultaneously cited as acts of non-compliance with the Parliamentary Elections Act, have not been proved.

I now revert to a determination of the allegation of refusal by the polling officials to seal ballot boxes, and the implications thereof to the declared result. The allegation of refusal by polling officials to seal the ballot boxes is contained in paragraph 4(k) of the petition and reads as follows:

> **"The polling officers deliberately refused to seal the ballot boxes on an allegation that the same could be sealed at the tallying centre thereby allowing the transportation and movement of unsealed ballot boxes from polling stations to tallying centres."**

It is supported by the petitioner's averment in paragraph 19 of his affidavit where he states that he was informed of the above position by his agents. It is further attested to by a one Barasa David Nambito who, in his affidavit states as follows:

6. **"That on voting day I saw cases of bribery, I saw Tabu John, Ouma Joseph, Natokyo Elizabeth all supporters of the 1st respondent, bribing persons with salt, eats, alcohol at Butejja polling station while requesting them to cast their vote for the 1st respondent …**

7. **That at the closure of counting of votes and announcing the winner, ballot boxes and envelopes containing the declaration of results forms were not sealed and were taken to the tally centre unsealed."**

In a related incident, in his affidavit dated 1st June 2011 a one Kirunda Muzamir stated as follows:

2. **"That on the 19th day of February 2011 at around 3.00 am I got information that votes from Mulwanda Mosque polling station had been forcefully taken away by Mukaga George, a brother and agent of the 1st respondent together with Abdul, son of Talwana. The declaration of results forms had equally been forcefully taken away and the Presiding Officer had gone with them.**

3. **That I … mounted search for the vehicle carrying the said voting materials and the said Mukaga George and Abdul, son of Tawana who we found at Lubanga at 3.30 am.**

4. **That I called police from Namayingo for help but George Mukaga and group drove to Mutumba police post, where three (3) unsealed boxes were removed from the vehicle. Mukaga George and Abdul … were arrested and taken to**

Namayingo police station together with the ballot boxes but were sooner released."

In his affidavit of rebuttal, the 1st respondent did not respond to the assertion of Barasa David Nambito on this issue, but denied the above allegations by Kirunda Muzamir. He stated:

22. **"That in reply to paragraph 2 of the affidavit of Kirunda Muzamir I state that it is fanciful because if it were true that Mukaga took away votes from Mulwanda Mosque polling station, which is denied, for purposes of election malpractices, which is also denied, there is no way the petitioner could have won at this polling station.**

23. **That the events in paras 3 and 4 of Kirunda Muzamir's affidavit are not known to me therefore."**

On this issue, under cross examination the petitioner conceded that he emerged winner at Mulwanda Mosque polling station, polling 270 votes against the 1st respondent's 132 votes, but could have garnered more votes than were declared. He stated that he had a lot of support in that polling station and though he won, at tallying he discovered that his votes at the station were more than the 270 that were declared. He stated that he was informed that tallying at that station was disrupted by a violent mob; and stated that 33 of his votes were wrongly invalidated by the Presiding Officer; there was swapping of votes and his agents were unable to clearly follow the vote-counting exercise as the Presiding Officer had instructed them to sit behind him and it was dark. He further stated that his team did not get the serial numbers and other details of the 33 invalidated votes because it was chased away by a violent mob; and he did not consider a recount within 7 days but brought the present petition on the belief that a recount as prayed for in paragraph 11(c) of the petition would help identify valid votes that were erroneously disregarded.

The import of the foregoing discourse is that 2 separate incidents of non-sealing of ballot boxes have been attested to. While the 1st respondent purports to rebut the incident at Mulwanda Mosque polling station, the incident attested to by Barasa David Nambito at Butejja polling station remains uncontroverted, and is therefore accepted by court.

On this issue, Ms Anne Tusingwire, the District Returning Officer for Namayingo District stated as follows (see paragraph 16 of her affidavit):

> **"That the election was a free will of the people of Bukholi South Constituency and the entire electoral process was free from acts of bribery, intimidation, harassment of voters, rigging, ballot stuffing, multiple voting, falsification of results and they were properly organised by the 2nd respondent."** *(emphasis mine)*

Ms. Tusingwire testified under cross examination that during the election she moved around the constituency; consulted her sub-county supervisors, and talked to candidates but received no complaint whatsoever. She did not specify the name of the candidates she talked to.

I must state that the petitioner struck me as a truthful if unduly talkative witness and I do take this into account as I evaluate his oral evidence. His oral evidence on this issue was cogent and credible. He attested to actions told to him by his agents, one of whose affidavit evidence is also on record. He stated that his team was chased away from Mulwanda Mosque polling station by a violent mob, and could therefore not have been at the polling station to talk to Ms. Tusingwire as she claimed. His description of the violence surrounding the election in Bukholi South Constituency is in tandem with the totality of the evidence on record that the election in Bukholi South Constituency was characterised by tribal-based incidences of violence and lawlessness. I do therefore accept his account of what transpired at Mulwanda Mosque polling station, and am satisfied that the omission to seal ballot boxes contrary to section 50(2) of the Parliamentary Elections Act has been sufficiently proved by the petitioner. I do therefore answer the first issue in the affirmative and hold there was non-compliance with the Parliamentary Elections Act.

The question then is whether non-compliance with section 50(2) of the Parliamentary Elections Act as has been proved herein affected the election results in a substantial manner.

As stated by myself in **Mwiru vs Nabeta and 2 Others Election Petition No.3 of 2011**, I do reiterate that the question of substantiality of non-compliance stipulated in section 61(1)(a) of the Parliamentary Elections Act recognises that no election can be impeccable and totally free of any mistakes. However, I do also restate here that the gravity and extensiveness of the mistakes made would determine the substantiality of the non-compliance complained of, and inform the decision on whether or not an election should be nullified.

Indeed, in **Morgan vs Simpson & Another (1974) 3 All ER 722 at 728** Lord Denning addressed the substantiality question as follows:

"I suggest that the law can be stated in these prepositions:

1. **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. That is shown by Hackney case (1874) 2 O'M & H 77, where 2 out of 19 polling stations were closed all day and 5,000 voters were unable to vote.**

2. **If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. That is shown by the Ishington case (1901) 17 TLR 210 where 14 ballot papers were issued after 8.00 pm.**

3. **But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated. That is shown by Gunn vs. Sharpe (1974) 2 All ER 1058 where the mistake in not stamping 102 ballot papers did affect the result."**

The first preposition would appear to address the overall quality of an election regardless of the numerical effect thereof. In my view, the sealing of ballot boxes as required by section 50(2) of the Parliamentary Elections Act is quite critical to the electoral process. Section 50(3) of the same Act outlines the contents of a sealed ballot box and these, in my view, go to the crux of an election. Indeed, section 52(1) makes it the responsibility of a Returning Officer to whom sealed boxes are delivered to keep sealed ballot boxes in safe custody until the settlement of all disputes arising from the election. Similarly, in the present petition the petitioner sought to rely on the contents of the ballot boxes to impeach the 1st respondent's election. Hence his prayer for a vote recount.

Against this background I find it unacceptable and grossly irregular for polling officials to omit to seal the ballot boxes and thus fail to preserve documents of weighty evidential value as to the validity of an election (or lack thereof), as happened in the present case. Indeed, the unsealed ballot boxes in the present case would render superfluous any order for a recount by this court as there is a real possibility of the ballots having been tampered with. While this omission has not been proven by the petitioner to have much bearing on the numerical result in the present case, it does certainly point to the quality of the electoral process in Bukholi South Constituency. Such

process, in my view, is not limited to the events of the Election Day but includes the processes leading up to that day.

The question is was the election conducted so badly that it was not substantially in accordance with the Parliamentary Elections Act, and therefore regardless of the numerical effect, it did affect the result substantially? Tied in with this is the question as to whether or not the omission to seal the ballot boxes did in fact affect the declared result.

In my view, the sum effect of section 50 of the Parliamentary Elections Act is that ballot boxes are sealed **after** the results of a polling station have been declared. Section 50(1), 50(2) and 50(4) read together would appear to suggest that upon conclusion of vote counting, declaration of results forms are endorsed by the presiding officer and candidates or their agents and thereafter the ballot boxes in respect thereof are sealed and transmitted to the Returning Officer. Clearly therefore, the anomaly of failure to seal ballot boxes has limited, if any, direct bearing on results declared before the sealing of ballot boxes. This position is borne out by the affidavit of Barasa David Nambito who, in paragraph 7, states that '**at the closure of counting of votes and announcing the winner, ballot boxes and envelopes containing the declaration of results forms were not sealed and were taken to the tally centre unsealed.'** Unfortunately, in the present case no single declaration of results form was presented in evidence. These forms could have assisted court verify whether indeed there was any falsification of results or tampering with the contents of ballot boxes, as alleged by the petitioner or at all.

In the premises, while the preservation of election records is a critical component of electoral accountability and the impunity with which such an important tenet of the electoral process was violated raises questions as to the validity of the election process, no evidence was adduced to satisfy court that this anomaly did in fact affect the election result in Bukholi South Constituency in a substantial manner. Accordingly, I do answer the second issue in the negative.

Issue No. 3: *Whether or not the 1st Respondent committed any illegal practices, in person or through his agents with his consent and knowledge*

The gist of the petitioner's case on this issue is that the 1st respondent personally or through his agents with his knowledge and approval, committed numerous election offences and illegal practices. The petitioner's averments on illegal practices and offences are set out in the general

provisions of paragraph 4 of the petition, and more explicitly in paragraph 9 thereof. The election offences and illegal practices complained of in the petition included violence, intimidation and torture; ballot stuffing; assault of rival agents; bribery; undue influence, and canvassing for votes on polling day. The 1st respondent denied commission of the alleged election offences or illegal practices, either in person or through his agents with his knowledge and consent.

The offence of bribery is explicitly defined under sections 68 of the Parliamentary Elections Act; while ballot stuffing is encompassed by section 76 (e) and (f), and canvassing for votes on polling day, by section 81(1)(a) and (2)(a) of the same Act. The petitioner also alleged the offence of undue influence, which he erroneously stated to have contravened section 80(1)(a)(iii) and (b) of the Parliamentary Elections Act. Section 80(1)(a)(iii) is non-existent. The correct legal provision should be section 80(1)(a)(ii) and (b), and the record stands duly corrected. Neither respondent raised this issue; they are therefore estopped from so raising it. I am fortified in this approach to the cited error by the decision in **Kiiza Besigye vs Electoral Commission & Yoweri Kaguta Museveni Presidential** (supra) where Odoki CJ enjoined courts to disregard irregularities or errors unless they have caused substantial failure of justice. I take the view that rectification of an obvious error, as in the present case, would enable the court to arrive at the merits of this petition and does not occasion a miscarriage of justice; on the contrary, it promotes substantive justice as was the import of the Learned Chief Justice's decision above.

I now revert to an evaluation of the evidence of record. I propose to handle the acts of violence, intimidation, torture and assault under the cluster of undue influence as they all appear to be manifestations of that offence.

In his affidavit of 30th March 2011, the petitioner attested to the following illegal practices:

i. He listed a number of his supporters and campaign agents who were allegedly assaulted by the 1st respondent's supporters and agents, and in respect of which action an assault case was reported at Namayingo Central Police Post.

ii. A one Sunday Ramathan was allegedly assaulted by the 1st respondent personally for supporting the petitioner.

iii. The 1st respondent allegedly engaged in mudslinging throughout the campaign, making false, malicious and divisive statements against the petitioner.

iv. The 1st respondent or his agents engaged in acts of bribery. He listed the agents.

The petitioner also attested to having been informed by his agents and/ or supporters about the commission of numerous illegal practices by the 1st respondent and agents thereof. He highlighted the following illegal practices and electoral offences.

i. The 1st respondent's agents allegedly assaulted the petitioner's polling agents at different polling stations, deprived them of their Declaration of Results forms, in some instances denied them the DR forms altogether, and took away ballot boxes.

ii. Named agents of the 1st respondent that 'hijacked' unsealed ballot boxes, took his polling agents' declaration forms and made off with ballot boxes. The same agents allegedly assaulted the petitioner's polling agents, deprived them of their declaration of results formed or denied them of the same altogether.

iii. He listed the agents and supporters of the 1st respondent who allegedly threatened, intimidated and assaulted his supporters all over the constituency.

24 additional affidavits presented by the petitioner entailed evidence of assault, intimidation and harassment of the petitioner's supporters; as well as allegations of disruption of the petitioner's campaign program by agents and/ or supporters of the 1st respondent; bribery by the 1st respondent's agents and supporters; obstruction of voters, and ferrying away of voter materials by agents of the 1st respondent.

An evaluation of the petitioner's evidence revealed that the following allegations were not pleaded: mudslinging of the petitioner by the 1st respondent including making false and malicious statements against him; taking the Declaration of Results forms of the petitioner's polling agents, in some instances denying them the DR forms altogether; ferrying away of voter materials, and obstruction of voters.

Order 6 rule 1(1) of the CPR requires every pleading '**to contain a brief statement of the material facts on which the party pleading relies for a claim**.' Such claim or cause of action is then proved by way of evidence. In election petitions such evidence takes the form of affidavits. Order 6 rule 7 of the CPR prohibits parties from departing from their pleadings. I therefore do note take the above allegations into account in so far as they were not pleaded and are thus tantamount to a departure from the petitioner's pleadings.

Further, no evidence whatsoever was adduced by the petitioner to prove his allegation of ballot stuffing. I therefore find that this allegation has not been proved.

With regard to the offence of bribery, the petitioner stated in paragraph 28 of his affidavit that the 1st respondent personally or through his agents committed acts of bribery. He listed the agents in question. This evidence was substantiated by the affidavit evidence of Barasa David Nambito, Ochieng Moses, Ochwo Joseph, Bwire Yoranimu, Alimansi Joel, Michael Ebu and Friday Ronald. Persons complained of include Ojambo, Namulaka and Oput Moses, allegedly the 1st respondent's campaign agents; Okeya Matyansi, Sibumba, Tigana Wandera, Najib, Tabu, Ojambo, Tabu John, Ouma Joseph and Natokyo Elizabeth, purportedly identified as the 1st respondent's supporters; and Sanyu Onyola, Okumu Onyara, Sibumba Onyora, Olunga Bwire Ronald and Okumu s/o Benedict.

However, under cross examination the 1st respondent named some of his campaign agents and none of the persons named by the petitioner's witnesses above featured. He specifically denied knowledge of a one Okumu Onyara, who was alleged by a one Michael to have bribed voters. This is in addition to a general denial in paragraph 17 of his affidavit of 15th April 2011 that he or his agents engaged in bribery; as well as the specific denials contained in paragraphs 10, 13, 14, 16, 17, 18 and 20 of his affidavit in rebuttal dated 13th June 2011. The specific denials in the paragraphs highlighted above are in respect of the affidavit evidence of Michael Ebu, Friday Ronald, Ochieng Moses and Alimansi Joel. No mention is made of the affidavits of Barasa David Nambito and Ochwo Joseph, save for the omnibus denial contained in paragraph 36 of the 1st respondent's affidavit of rebuttal.

I must state here that, contrary to the 1st respondent's averment in paragraph 36 above, Ochwo Joseph's affidavit does not depict him as a partisan witness but rather a neutral voter in the constituency. To that extent, I do attach more weight to his allegations of bribery and assault. For present purposes he attests to bribery by the distribution of salt sachets by Okeya Matyansi, Sibumba and Tigana Wandera, and names the recipients thereof, a one Juma Mumayi and the deponent's wife. He was not called for cross examination to test the truthfulness of his evidence therefore it remains uncontroverted. I might add that his evidence was in tandem with the totality of the evidence on record as far as the violence associated with the election is concerned. Accordingly, on a balance of probabilities I am satisfied that the bribery allegations against Okeyo Matyansi, a one Sibumba and Tigana Wandera have been proved. However, while the said Ochwo attributes this act of bribery to the supporters of the 1st respondent, there is no evidence that the said acts were undertaken with the 1st respondent's knowledge, consent or approval. To that extent therefore, his evidence does not satisfy the requirements of section 61(1)(c) of the Parliamentary Elections Act, and I so hold.

In this petition, the offence of canvassing for votes on polling day is closely linked to that of bribery. Indeed, Barasa David Nambito, Ochieng Moses, Ochwo Joseph and Bwire Yoranimu all attested to seeing various persons offering bribes to voters while urging them to vote for the 1st respondent. However, neither of them attested to such canvassing of votes having been within 100 metres of a polling station, or such attempt to otherwise influence voters as having been within 200 metres of a polling station as prescribed by section 81(1)(a) and (2)(a) of the Parliamentary Elections Act respectively. Neither, as already stated, did any of the above witnesses prove that the acts complained of were done with the 1st respondent's knowledge and consent. While it is incumbent on candidates in an election to endeavour to control the excesses of their supporters, the overzealous and illegal acts of such wayward supporters cannot be visited upon the candidate. I do therefore find that the offence of canvassing for votes on the polling day has not been proved.

Finally, I revert to the issue of undue influence. The offence of undue influence is entailed in section 80(1) of the Parliamentary Elections Act. The section reads as follows:

> **"(1) Where a person –**
> **(a) directly or indirectly in person or through any other person –**
> **(i) makes use of, or threatens to make use of, any force or violence;**
> **(ii) inflicts or threatens to inflict in person or through any other person any temporal or spiritual injury, damage, harm or loss upon or against any person,**
> **in order to induce or compel that person to vote or refrain from voting ... that person commits the offence of undue influence."**

In the present petition the offence of undue influence was pleaded in paragraphs 4 and 9(b) of the petition, and was characterized by the incidence of assault, violence, intimidation, threats and harassment premised on tribal connotations. The petitioner attested to acts of undue influence in paragraph 8, 9, 10, 11 and 21 of his affidavit, which averments were corroborated by numerous witnesses in his support. I propose to simultaneously address the alleged polarization of the election on tribal basis, which in itself is an offence under section 24(a) of the Parliamentary Elections Act.

On the offence of assault, in paragraph 8 of his affidavit the petitioner listed supposed agents and supporters of the 1st respondent that assaulted his supporters, while in paragraph 9 he listed a number of his supporters and campaign agents who were allegedly assaulted by the 1st respondent's supporters and agents, and in respect of which action an assault case was purportedly reported at Namayingo Central Police Post. However, he did not furnish court with any details of the case.

The list of the 1st respondent's agents outlined in paragraph 8 of the petitioner's affidavit was not substantiated by any direct evidence, and to that extent remains hearsay. This equally applies to the petitioner's averments of intimidation, threats, harassment and violence in the same paragraph. 18 witnesses did attest to the alleged assault, 8 of whom attributed the assault to

tribal bias; while 15 witnesses attested to the petitioner's averments of intimidation, threats, harassment and violence.

I do note however, that the affidavit of a one Constantine Ngerechi that attests to acts of assault, intimidation, threats, harassment and violence, contains a jurat stating that the affidavit was read back to a one Sulayi Barasa and not Constantine Ngerechi, the deponent thereof. Section 3 of the Oaths Act provides as follows:

> **"Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her true and full address, and his or her doing so shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her."** *(emphasis mine)*

Clearly, section 3 places a duty upon a person who writes a document for an illiterate person to include in the jurat of such document his/her address. Once this duty has been discharged, according to that legal provision, it is implied that such document was read over and explained to him. The question then is what are the implications of an author of a document acting beyond the call of duty and explicitly stating that an affidavit was read over and explained to its deponent; but, as in the present case, the affidavit states that it was read to a different person from the person stated as the deponent therein. In my view, acting beyond the call of duty as prescribed by section 3 is not a violation of that legal provision. However, should the clarity sought by so acting turn out to clarify that the affidavit was read over to the wrong person, such affidavit is in violation of section 3 of the Oaths Act.

In **Suggan vs. Roadmaster Cycles (U) Ltd [2002]EA 25** where an affidavit was not dated, Mpagi–Bahigeine DCJ held as follows:

> **"It is trite that defects in the jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit in view of Article 126(2)(e) of the 1995 Constitution, which stipulates that substantive justice shall be administered without undue regard to technicalities."**

However, in **Kasaala Growers Cooperative Union vs Kakooza Jonathan & Another Civil Application No. 19 of 2010**, Okello JSC drew a distinction between a defective affidavit and one that fails to comply with a statutory requirement and held that while the courts had adopted a liberal approach to defective affidavits, non-compliance with a statutory requirement was fatal to an affidavit. In the present case, failure to read back the affidavit to the write deponent amounts to non-compliance with the requirement of section 3 of the Oaths Act, and rendered the affidavit of Constantine Ngerechi fatally defective. Accordingly, I do expunge the affidavit from the record.

The foregoing notwithstanding, none of the witnesses that attested to the acts of assault, intimidation or violence was called for cross examination. Significantly, the evidence of Wandera Arazamani corroborated that of Pamba Frederick in respect of an assault suffered by the latter at a place called Sono. The assault in issue was allegedly committed by of Kassim Abdullah, Isma Abdullah, Geoffrey Matia and Okecho Siwa, supposed supporters of the 1st respondent. I find this evidence cogent and credible. Conversely, the 1st respondent responded with general averments in paragraph 5 or 10(ii) of his Reply to the Petition that are not substantiated by any evidence. The 1st respondent makes no reference to the assault incident or the averments of Wandera Arazimani and Pamba Frederick in either his affidavit in support of his Reply to the Petition or his affidavit of rebuttal. The issue is not raised in cross examination either such as to warrant clarification in re-examination. On a balance of probabilities, I am satisfied that the petitioner has sufficiently proved the commission of the offence of assault by Kassim Abdullah, Isma Abdullah, Geoffrey Matiya and Oketcho Silver in Sono. However, I find no evidence whatsoever that directly links this act of assault or indeed any other such allegation to the 1st respondent or other persons with the 1st respondent's knowledge and consent.

Further, while in paragraph 10 of his affidavit the petitioner attested to the assault of a one Sunday Ramathan by the 1st respondent personally, the said Sunday Ramathan did not depone any affidavit substantiating this allegation. It therefore remains uncorroborated and thus unproved. Furthermore, in paragraph 21 the petitioner purports to list agents of the 1st respondent who allegedly beat and harassed his (petitioner's) polling agents before making off with ballot boxes and declaration of results forms. This allegation amounts to hearsay given that it was not substantiated by any other evidence, and therefore remains unproved.

With regard to the petitioner's allegations of intimidation, threats, harassment and violence; while numerous affidavits did substantiate the petitioner's averments, each of this affidavit evidence in respect of different incidents with no corroboration thereof. To that extent, these allegations were not sufficiently proved.

Counsel for the petitioner and 1st respondent addressed me quite extensively on the question of the alleged tribal-laced intimidation of the electorate. I do agree with Counsel for the petitioner that there was no effective rebuttal of the allegations in respect thereof. In his affidavit in rebuttal, the 1st respondent made general denials of the persons named by the petitioner's witnesses, the acts attributed to them or that he authorised the said acts. Nonetheless, the

petitioner was required to prove his case to the required standard. The question is whether or not the petitioner's evidence on this issue sufficiently discharged this burden of proof.

I do revert to the established rules of evidence. Section 101(1) of the Evidence Act provides as follows:

> **"Whoever desires any court to give judgment as to any legal right ... dependant on the existence of facts which s/he asserts must prove that those facts exist."**

In the case of **Sarah Bireete & Another vs Bernadette Bigirwa & the Electoral Commission Election Petition No. 13 of 2002** the Court of Appeal held that "**a petitioner has a duty to adduce credible evidence or cogent evidence to prove his/ her allegation at the required standard of proof**."

Section 61(1)(c) is couched in such language as to impose upon the petitioner a duty to prove:

a. that an illegal practice or election offence was committed, and

b. that such illegal practice or offence was committed by the contested party and/ or any other person with such party's knowledge, consent or approval.

In the present petition, the petitioner did prove the commission of a couple of incidents of bribery and assault *per se*, but fell short on proof of the 1st respondent's privity, knowledge or approval of the said acts. In the absence of such proof, I do answer the third issue in the negative and find that none of the illegal practices and offences complained of has been satisfactorily proved by the petitioner.

Issue No. 4: *Remedies*

I hereby make the following orders:

1. In accordance with sections 87 and 88 of the Parliamentary Elections Act, I refer the following persons against whom prima facie cases of election offences have been established to the office of the Director Public Prosecutions for further investigation and possible prosecution.

a. For investigation for bribery allegations, Okeyo Matyansi, a one Sibumba and Tigana Wandera

b. For investigation for allegations of assault, Kassim Abdullah, Isma Abdullah, Geoffrey Matiya and Oketcho Silver

2. A copy of this judgment be served upon the office of the Director, Public Prosecutions.

3. Ordinarily, costs of any action should follow the event. Given that the petitioner was successful on the first issue, in exercise of my discretion, I do make the following orders as to costs:

    a. The respondents be jointly awarded two-thirds of the taxed bill of costs hereof.

    b. The petitioner be awarded one-third of the taxed bill of costs hereof.

This petition stands dismissed.

Monica K. Mugenyi

JUDGE

29th July 2011