

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT TORORO
ELECTION PETITION NO.0007 OF 2011

DR.OTIAM OTAALA EMMANUELPETITIONER

VERSUS

1. OBOTH MARKSONS JACOB

2. ELECTORAL COMMISSION.....RESPONDENTS

JUDGMENT

The petitioner herein together with the 1st respondent and three other persons were candidates in the Parliamentary elections in the West Budama County South constituency, which were held on 18th February 2011. The 2nd respondent declared the 1st respondent as the successful candidate. Mr. Oboth Marksons Jacob has since been sworn in and taken his seat at the Member of Parliament for that constituency.

The petitioner challenged the results of that election on two grounds which he set out in this petition, first that there was non compliance with the electoral laws, which non compliance affected the results of the election in a substantial manner. Eight instances of such non compliance were set out in paragraph 3 of the petition. Secondly, the petitioner complained that the 1st respondent personally or by his agents with his knowledge and consent or approval committed illegal practices contrary to the electoral laws. Five instances were set out in paragraph 4 of the petition.

The petitioner sought from court a declaration that the 1st respondent was not validly elected as a member of parliament for West Budama County South Constituency, and for that election to be annulled, and a fresh election ordered. He also prayed for costs of the petition. Several affidavits were filed in support of the petition.

The 1st and 2nd respondents opposed the petition. Each party also filed affidavits in opposition to the petition.

The petitioner was represented by Mr. Aggrey Bwire assisted by Mr. Geoffrey Ojok and Mr. Ambrose Tebyasa. The 1st respondent was represented by Mr. Dagira Suza and the 2nd respondent was represented by Mr. Kawuma Geoffrey.

At conferencing it was agreed by all parties as follows.

1. The petitioner and the 1st respondent were parliamentary candidates in the 18/2/2011 elections in West Budama County South constituency.
2. The 2nd respondent declared the 1st respondent as the duly elected Member of Parliament for the said constituency.
3. The 2nd respondent published the 1st respondent as winner of the said election in the Uganda gazette of 4th March 2011, with 17,210 votes against 16,034 votes for the petitioner.

The following issues were set down for court's determination;

1. Whether there was non compliance with the electoral laws and principles therein in the conduct of parliamentary elections in West Budama County South constituency.
2. If any such non compliance affected the results of the election in a substantial manner.
3. Whether any illegal act or offence was committed by the 1st respondent personally or by his agents with his knowledge and consent or approval.
4. The remedies.

The petitioner filled 41 affidavits with more than 58 documents in support of the petition. The 1st respondent filled 34 affidavits to which were annexed some 34 documents. The 2nd respondent filed 4 affidavits. These were all admitted in evidence. It was agreed at conferencing that all the affidavits would be deemed to have been read in open court. The Returning Officer of the 2nd respondent R35 Erikwaine Ngobi (RO) was the only witness called for cross examination.

Non Compliance with the Electoral Laws.

Disenfranchisement

This was the first issue. The complaints herein were set out in paragraph 3 of the petition. The complaint was that there was voter disenfranchisement in at least 6 polling stations. These were named as;

1. Bendo Nursery School polling station, with 330 registered voters;
2. Panyangasi Primary School polling station with 509 registered voters;
3. Rubongi Sec. School polling Station with 404 registered voters;
4. Rugoti Church polling station with 808 registered voters;
5. Mawele Primary School polling station with 563 registered voters; and
6. Siwa Pri. School polling station with 299 registered voters.

This is borne out from the Results Tally Sheet exhibit P1 which indicated '0' results for each candidate in respect of each of those polling stations. During cross examination the 2nd respondent's Returning Officer (RO) told court that results from six polling stations were not included in the final results tally. He named the six as above. He told court that he cancelled the results of Bendo Nursery School polling station and Panyangasi Primary School polling station because the total number of votes cast exceeded the total number of registered voters at these respective polling stations. He told court that the results of the remaining four polling stations of Siwa, Mawele, Rugoti church and Rubongi were not included in the final tally because the envelopes from those polling stations did not contain the Declaration of Results (DR) forms.

The RO Erikweine Ngobi R35 conceded that there was an irregularity and hence his decision to announce the results of the elections in the constituency minus those from these four polling stations. He told court that he was aware of the options under Section 53(3) and (4) of the Parliamentary Elections Act (PEA), of using the DR forms in the Presiding Officers report book, or in the ballot boxes, but he chose not to exercise those options. He justified his decision saying

that in any event, even if he had included the results from those polling stations, the final outcome would not have changed.

Odoki CJ, in *Ret. Col. Dr. Kizza Besigye v. Y.K. Museveni & Another* EP No. 1 of 2001 set out the principles underlying an election. These include the following.

1. The elections must be free and fair.
2. The elections must be by universal adult suffrage which underpins the right to register and vote.
3. The elections must be conducted in accordance with the laws and procedures laid out by parliament.
4. There must be transparency.
5. The results must be on the basis of majority votes cast.

There was no dispute that West Budama County South constituency comprised 99 polling stations. Exhibit P1 the results Tally Sheet shows that only 93 polling stations had results. 6 polling stations had zero results.

The evidence was that people voted at these six polling stations, but for reasons given by the RO, the results there from did not form part of the results of the elections of the constituency. The results of an election can only be ascertained from a tally of the results from the voting at the various polling stations. From this tally only can a determination be made as to which candidate obtained the majority votes.

The 1st respondent argued that there was no disenfranchisement of voters at the 6 polling stations. People voted but due to irregularities, the votes were not included in the final tally. That to me was a concession that there was an irregularity. The RO of the 2nd respondent equally conceded that there was an irregularity in so far as the envelopes from the four polling stations did not include the DR forms. He equally conceded that the 2 polling stations whose results were cancelled exhibited irregularities and those results could not be allowed to stand. The argument of the respondents in this regard was that the people voted and so were not disenfranchised as alleged.

Disenfranchise means to be deprived of the right to vote. The right to vote entails not only casting a ballot paper for a candidate of one's choice, but also and equally important, knowledge that that vote will be treated equally as all the other votes cast in the election, before a candidate is declared the winner thereof.

The Inter Parliamentary Council sitting in Paris in 1994 unanimously adopted a 'Declaration on Criteria for Free and Fair Elections'. It stated in paragraph 2 clause 6 thereof that,

'Every voter is entitled to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others.'

That is quite instructive as it is persuasive and it goes to the argument about disenfranchisement. In the USA a country said to be one of the leading democracies had issues about disenfranchisement in the State of Florida after the 2000 presidential elections. The US Commission on Civil Rights, a body with jurisdiction to examine allegations regarding the right of US citizens to vote and to have their votes counted said the following about disenfranchisement;

'disenfranchised voters are individuals who are entitled to vote, want to vote, or attempt to vote, but who are deprived from either voting or having their votes counted.'

In the present case, the voters of the six polling stations wanted to vote and indeed attempted to vote. Their votes were not counted in so far as those votes did not constitute or form part of the results of the elections at which these people attempted to vote a candidate of their choice for Member of Parliament. Their votes were not given equivalent weight as those from other polling stations as they were excluded or not considered in the final tally.

The RO in his duty to tally the results of votes from the polling stations so as to determine the candidate with the majority votes under Section 53(1) of the PEA, opened envelopes from four polling stations and the DR forms were not enclosed therein. Section 53(3) and (4) of the same PEA envisions exactly the scenario the RO encountered, where the DR forms are not in the envelope from the Presiding Officer, and directs that the DR form which is attached to the report of the Presiding Officer, or the DR form from the ballot box may be used instead.

This provision is intended to ensure that votes of all the voters are accorded equivalent weight, and are thus counted, meaning that they are considered and included in the final tally before the RO decides who of the candidates has the majority of votes and therefore is the winner of the election.

For unintelligible reasons the RO while claiming to be aware of the existence of these statutory provisions, chose to ignore them and proceeded to tally the results and he excluded these four polling stations.

In respect of the two polling stations whose results were cancelled, I agree with Counsel for the 2nd respondent that the Electoral Commission must be clothed with the power, in the appropriate circumstances to take whatever action that it deems necessary within the law, to ensure free, fair and transparent elections, including the power, where necessary to cancel elections at polling stations. That however should not be seen as derogation from their duty to uphold the constitutional right of the people of Uganda enshrined in Article 1(4) thereof,

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

The 1st respondent exhibited DR forms from the impugned polling stations in his affidavit in reply to the petition RA2 to RA7. The RO equally sought to rely on the same DR forms in his explanation that voting indeed took place in those respective polling stations. That was not impressive in the least. The 2nd respondent decided on 20th February 2011 when it declared the results of elections for West Budama County South parliamentary constituency that the results from the six polling stations could not be and indeed were not considered in the tally of results at which the winner of the election was determined. There was a zero return in respect of those polling stations. The respondent could not thereafter turn around and claim to have and even for whatever reason purport to rely on results from the same polling stations. Results from those polling stations were said to be unavailable for the purpose for which they were primarily required, i.e. to determine the candidate with the majority votes. It would be absurd to say the same results later surfaced and were now available to confirm a result made or arrived at when they were unavailable.

For the four polling stations where the DR forms were not available, the RO decided that he could not and did not use the forms which were in the report of the Presiding Officers or from the ballot boxes. The law availed him such an option but decided not to utilize it. One of his reasons was that there was no time to wait the arrival of the ballot boxes. The elections were held and concluded on 18th February. The RO announced the results on 20th February. It surely could not have taken two days for the ballot boxes to arrive. Whatever his reasons, the RO impugned the results from the four polling stations. So the DR forms which the 1st respondent annexed to his affidavit, being DR forms which were allegedly given to his agents at the respective polling stations were of no relevance.

The same argument goes for the two polling stations whose results were cancelled. The cancellation was because of irregularities. There were more votes cast than the number of registered voters. That was evidence that either persons voted more than once, or that there was ballot stuffing, both of which hallmarks of an unfair election, and are contrary to the law. Once cancelled, those results could not be of any value to anyone and any purpose, may be save to show that people cast their ballots at those polling stations.

Engwau JA, in *Bakaluba Mukasa v. Nambozo* held that the Electoral Commission has the constitutional duty to organize a free and fair election. Where an election is not free and fair, and where there has been non compliance with the law, the EC will be held to account.

For the above reasons I found that the people in the six polling stations who totaled 2,913 voters were disenfranchised contrary to Article 59 of the Constitution.

Failure to control use of ballot papers

The petitioner alleged in paragraph 3 (ii) that there was failure by the 2nd respondent to control the use of ballot papers contrary to Section 12(1)(b) of the Electoral Commission Act, which enjoins the 2nd respondent, ‘to design, print, distribute and control the use of ballot papers.’ The complaint being that such failure resulted in multiple voting, ballot stuffing and voting by ineligible persons including the dead.

The complaint was that the failure to control the use of ballot papers led to multiple voting, and or ballot stuffing, or ineligible voters voting. The evidence of this failure was from the RO

Erikwaine Ngobi R35, who told court that the results of two polling stations Bendo Nursery Primary School and Panyangasi Primary school were cancelled for the reason that the total number of votes cast exceeded the total number of registered voters. That was a clear and unequivocal plea of guilty by the 2nd respondent of its failure to control the use of ballot papers at those two polling stations. If the 2nd respondent had been in full and proper charge and control of ballot papers, there would not be any way in which the number of those voting at a polling station would exceed the number of those registered to vote there from.

In order to vote, a person had to be possessed of a ballot paper. The law is that each voter must be given one ballot paper and such person must cast his or her ballot paper once. There are administrative safeguards to ensure that a person votes only once. These include putting indelible ink on a conspicuous part of the body of the voter after casting the ballot.

The only people authorized to give out ballot papers were the representatives of the 2nd respondent. These were the only people who had custody of the ballot papers. After voting, the ballot papers were counted and the RO discovered that more ballot papers were counted in the ballot box than the actual number of people who were lawfully registered to vote at these respective polling stations. Hence the cancellation of the results.

One does not need to go further to seek proof that there was failure by the 2nd respondent to control the use of ballot papers. However, the RO further conceded in cross examination that at other polling stations, including at the impugned polling stations, there were significant discrepancies in the figures of the ballot papers given out and those actually used in the election. This was evident from the DR forms from these polling stations. Such polling stations included Kagwara COU, Nabuyoga County Headquarters, and Salvation Army Primary School.

The answer by the 2nd respondent to these complaints was that the figures in respect of the numbers of votes received by the various candidates were not impugned. It was claimed that these figures of the number of votes obtained by each candidate were correct. The discrepancies were to be found only in the numbers of ballot papers used as against those issued. It was submitted that the problem was purely arithmetical. There was failure by the Presiding Officers to properly add the figures and come out with correct entries.

While the figures of the votes obtained were not queried, it is not possible to dismiss incorrect figures in an election as being of no significance. The number of votes cast for each candidate determine whether or not the candidate won the election. Numbers are vital in an election. The correctness of the same is therefore an absolute necessity. If a Presiding Officer cannot add properly the number of ballot papers used and the spoiled ones to come out with a correct record of those not used, then the correctness of all the other figures given out by such Presiding Officer become suspect, and the fairness of such an election will be questionable.

Mr. Aggrey Bwire learned Counsel for the petitioner put it aptly when he said that ballot papers are the legal tender of the electoral process. Proper control and use of the same is important in ensuring a free and fair election. The complaint that the 2nd respondent failed to ensure proper control and use of ballot papers was proved to the satisfaction of court.

Voter Intimidation, harassment and violence

The petitioner complained in paragraph 3(ii) of the petition that his supporters were harassed and intimidated before and during the voting day. Others were beaten up. There was the affidavit of the petitioner in support of the petition in paragraphs 8 to 23, 26, 27, and 35 to 37. These alleged beating of supporters and agents of the petitioner, while others were chased from the polling stations. The petitioner attached exhibits P4 which were collective statements to the police, of supporters who were assaulted by the supporters of the 1st respondent on voting day. Many of them did not; as a result of the intimidation, harassment and the violence which marked the electoral process in the constituency, vote for the candidate of their choice.

Kirumi Eustace Mawele PA2 in his affidavit deposed that he was beaten by known supporters of the 1st respondent, and at one point went into coma. He reported to the police and a copy of his statement was exhibited. He named those who assaulted him as Oniang Charles, Okoth Ben, John Karori, and others. He attached a medical report which showed the injuries which he sustained, and also an extract of the 1st information to the police. In that 1st information which was recorded the day the incident allegedly took place, he said that he was assaulted by unknown persons. That was the same information he gave and which appears in the police medical report of the following day. The statement to the police in which names of the assailants were given was recorded on 10th March, more than three weeks later. That was not convincing.

Asale Joyce deposed that she was attacked by supporters of the 1st respondent and she bled profusely. She annexed the medical form showing the injuries she sustained from the assault.

Obbo George deposed that he was chased from Mawafu Christian Center polling station by the 1st respondent and his brothers Obonyo Jacob, Owora Yokosani and one Julius Abila among others, for the reason that he witnessed and protested multiple voting. However, in his statement to the police which was exhibited, he said that he was beaten up, and not just chased away.

Osinde Valerian deposed that he witnessed people claiming to be supporters of the 1st respondent beating Kirumi Eustace. This was at Panyangasi B polling station. He asserted that the DR form was also removed from the envelope, and another one whose origin and authenticity were unknown instead was inserted.

Ochwo Wilfred Mucupe deposed that he was chased from Nabuyoga sub county headquarters by a gang which was led or instructed by the District LC V Chairperson Osuna Emmanuel who was alleged to be a supporter of the 1st respondent. The vehicle which chased them, a mini bus registration No. UAP 536L was later intercepted and from it was recovered pangas, metals bars and clubs.

Owor Oketcho deposed that the 1st respondent came to Nabuyoga sub county headquarters polling station in a convoy of vehicles UAJ 875E, UAK 648Q, a double cabin red pick up and ordered him to leave the polling station lest he would be killed. He was beaten up. He saw stones, pangas clubs and huge sticks on the said pick up.

In answer to the allegations of voter intimidation, harassment and violence, the 1st respondent denied it all. He conceded in paragraph 39 of his affidavit that his supporters in a mini bus were arrested on allegations of being involved in or perpetrating electoral violence, but that they were later exonerated of any wrong doing and released. It was argued that the fact that the 1st respondent stood surety for these supporters did not mean that they or any of them was his agent, and in any event, by being exonerated, they were found to be blame less of any wrongdoing. I would agree that there was nothing to show that these were agents of the 1st respondent.

The case of *Kaija William & The EC v. Byamukama James* EPA No. 12/2006 was relied on. In that case, the Court of Appeal held that ‘a candidate is liable for the acts of his agents he

appointed or authorized, and but also for the acts of other agents employed by his agents, having authority to employ others. The crucial test is whether there has been employment or authorization by the candidate to do some election or adoption of the work done.' There was no evidence that the 1st respondent authorized the employment of the 22 suspects by any of his known agents. There was no evidence that he adopted or approved what they did. The only evidence was that these were his 'loyal supporters', and that he stood surety for them when the police detained them. That is what would be expected of a leader where his subjects or supporters find themselves on the wrong side of the law. In any event, the police exonerated these suspects.

I however do not agree that there was no wrongdoing. There was evidence that these persons were in possession of objects which could well be described as dangerous. Being unlawfully armed with dangerous objects in public is a criminal offence. This was election period. Violence was alleged in several instances. This was evidence of such violence.

There was evidence of a red pickup with clubs and huge sticks. The evidence was that some voters were chased by vehicles, and others threatened. This was evidence of violence. I agree that the entire electoral process should be conducted in an atmosphere free of intimidation, bribery, violence or anything that will subvert the will of the people. See *Rt. Col. Dr. Besigye Kizza* (supra).

It was not shown to the satisfaction of court was that these acts of violence were caused by the 1st respondent or by his agents with his knowledge and consent or approval.

Voting by the ineligible or/and the dead.

The allegation was from Oyeri Neggrey in paragraphs 10 and 11 of his affidavit. He deposed in paragraph 10 that at Muwafu Christian Centre polling station, there were a total of 599 registered voters. The 1st respondent received 596 votes, while the petitioner received 2 votes. There were no invalid or spoiled votes. That means the total number of votes cast were 598. That means all the registered voters except only one person cast their vote at that polling station.

In paragraph 11 of his affidavit, Oyeri Neggrey deposed that he was aware that some five persons who were registered voters at that polling station are dead. He named them as the following;

1. Sunday Moses voter ID No. 04125783
2. Owora Yonasan voter ID No. 04126010
3. Oketch Pinon voter ID No. 04126011
4. Obbo Patrick voter ID No. 04125952
5. Maka Kalim voter ID No. 04126218

The Results Tally sheet exhibit P1 showed the total number of registered voters at Muwafu Christian Centre polling station as 599. The results of the polling were as shown by Oyeri Neggrey and this is the same from the DR form which was annexed to the affidavit of the RO. The other candidates received zero votes at that polling centre.

If the five persons above are indeed dead, and they are part of the 599 registered voters at that polling station, yet the results in the tally sheet and the DR form show that only one person did not vote, then it means three of them had votes cast on their behalf.

The affidavit of Oyeri Neggrey was dated 21st March 2011. It was one of the very first affidavits filed along with the petition. Response to the allegation therein was vague and general. Mukula Mohamed was a police constable at Muwafu Primary School polling station, not Muwafu Christian Centre polling station. He deposed that Neggrey and his wife were agents of Yoweri Kaguta Museveni, and that polling proceeded smoothly at his polling station. That did not answer the allegation that dead people voted at Muwafu Christian Centre polling station.

Owor John was the police constable at Muwafu Christian Centre polling station. He was related to Neggrey. He deposed that voting went on smoothly at his polling station. Obonyo Charles while stating that Neggrey did not tell the truth in his affidavit, he, like Owor John did not make any mention of the serious allegation that the dead voted at Muwafu Christian Centre polling station.

Owor Moses Oliyo and Opio John Peter were at Muwafu Primary School polling station. They did not in any event mention or deny the allegations by Neggrey. Peresi Ochieng was at the

relevant polling station. She deposed that paragraphs 3 to 10 of the affidavit of Neggrey were false. That was not correct, because paragraph 10 of the affidavit of Neggrey gave details of the results of the polling at Muwafu Christian Centre polling station. These results were the same as in the tally sheet exhibit P1 and in the DR form annexed to the affidavit of the RO. But more significantly, Peresi Ochieng specifically excluded from the averments of Neggrey which were false, paragraph 11 which gave details of the persons who are dead in that polling station.

There was no denial by the 1st respondent of this allegation that the five people mentioned are dead or that they were not part of the 599 registered voters at this polling station, and this was his own polling station. There was no denial of this allegation from the RO, or from the Presiding Officer of this polling station. The affidavit of Neggrey was attacked by many deponents in support of the 1st respondent in many respects save this. The only inference I drew from the above was that this averment was true and correct. This was a serious indictment in the fairness of the results of the elections at this polling station, which had a turn up of 99.83 percent.

Use of Government vehicle.

The petitioner complained in paragraph 4(a)(v) of the petition that the 1st respondent improperly and unlawfully used government vehicle registration No. UG0200J during and for purposes of his campaigns. The evidence to that effect was from the wife of the petitioner Awere Phibby Otaala. She deposed that on 17th and on 18th February 2011, she witnessed the said vehicle being driven by Geoffrey Owara, a supporter of the 1st respondent for purposes of campaigns of the 1st respondent. This was the vehicle which the 1st respondent was using while in the civil service. She deposed that on 18th, that vehicle was impounded by the police and kept at Tororo CPS.

The 1st respondent denied these allegations. He deposed that he handed over all government property including the motor vehicle when he resigned his office as a civil servant as he joined active politics. Owora Geoffrey deposed that he was a driver with the Ministry of Justice, and his vehicle was registration number UG0200J. He denied the averments of Mrs Otaala. He denied that the vehicle was impounded by the police on polling day. He deposed that he was instructed to deploy police officers in West Budama constituency, and that was what he did. He annexed to his affidavit a document signed by ASP Katuramu PDC Tororo to the effect that the said vehicle was used as deposed by its driver, and only on polling day.

There was no evidence to contradict or controvert the above. I found the allegation not proved to the satisfaction of court.

Whether the non complaisance affected the results of the election in a substantial manner.

This was the 2nd issue. Section 61(1) (a) of the PEA provides that the election of a candidate as a Member of Parliament shall only be set aside if it is proved to the satisfaction of court that the non compliance with the electoral laws affected the results in a substantial manner. The results of the election of West Budama County South constituency were published in the Uganda Gazette dated 4th March 2011 exhibit P2 and the 1st respondent won the election with 17,210 votes. The runner up was the petitioner with 16,034 votes. The difference in votes between the winner and the runner up was 1,176 votes. The total number of votes from the six polling stations whose results were not considered in the final tally by the 2nd respondent was 2,913.

There was evidence from the RO that it was possible to obtain 100 percent votes cast for a candidate. From the tally sheet exhibit P1 the results showed that at Nabuyoga sub county headquarters the voter turn up was 99.74 percent. The winner at that polling station received 94.63 of the votes cast. At Muwafu Christian Centre polling station voter turn up was 99.83 percent. The winner at this polling station got 99.67 percent. With this kind of percentage turn up, it was therefore possible to secure a similar turn up at the polling stations where the results were not considered. The difference of 1,176 votes was far below the total number of registered voters in the 6 polling stations of 2,913 voters.

The difference of more than 1000 votes cannot be said not to have had a substantial effect on the results of the election. Even if only the 4 polling stations whose results did not appear in the envelopes were to be considered, the total number of registered voters would be 2,074, which is still greater than the difference between the two leading candidates. That was a substantial effect.

More to this, at Gule Primary School polling station the results shown on the DR form and confirmed by the RO in cross examination were 179 votes. What the RO tallied and is reflected in the Results Tally Sheet exhibit P1 is 129 votes. The RO said that was an error. By that error of the RO the petitioner lost out 50 votes. It obviously affected the results of the election.

Mulenga JSC, in the *Ret. Col. Dr. Besigye Kizza* petition (supra) held on substantial effect that numbers are important, but equally so the conditions which produced them. It was admitted that there were inconsistencies in the numbers in the DR forms. The court found that there was an atmosphere of violence during the electoral process. Some people sustained injuries. Violence marred the electoral process. The atmosphere was not conducive to the people freely choosing their representatives. The irregularities where non existing voters apparently voted all combined to make the election not a free and fair contest. I found the 2nd issue proved to the satisfaction of court.

Whether any illegal act or offence was committed by the 1st respondent personally or by his agents with his knowledge and consent or approval.

This was the 3rd issue. The petitioner in paragraphs 39 of his affidavit in support and 23 of his affidavit in rejoinder alleged widespread bribery of voters by the agents of the 1st respondent. Okongo Sam Ogola deposed that he was a polling agent of the petitioner at Abwel Primary School polling station. He stated that one Omalli Angeli came to his home on the eve of polling and describing himself as an agent of the 1st respondent gave his wife 2 sachets of salt.

It is surprising that an agent of an opponent was the one being bribed. That is not believable. Owor Jude deposed that on the eve of polling, he was with Gabriel Onyango and Oboth Vincent when they met Ogineri Oketch and Kapeli Oketcho who gave him shs 5000/-, so he would vote for the 1st respondent. He had to return 3000/- as his two companions refused the bribe. However, that evening, the same people waylaid them and beat them up, and threatened them so that they vote for the 1st respondent. That again appears weird. If a person has been offered money which he accepted to vote for a particular candidate, the last thing one would do to that person before polling day is to beat them up. It does not add up.

Okoth Thomas deposed that on the eve of polling, Ochola Joseph, Budesta Opendi and Okumu Luka went to his home and gave him 2 sachets of salt so that he should vote for the 1st respondent. He did not say whether he cast his vote as requested. However, he was given shs 5000/- on polling day, as he walked from the polling station for the same reason. He deposed that he took the money but did not disclose that he had already voted. That was a very dishonest person with a criminal mind. He admitted taking a bribe which is a criminal offence. He further

admitted taking money from Ochola under false pretenses. What else did he do or not do in order to gain materially. He is certainly an untrustworthy person. His evidence has to be treated with caution.

Onyango Gabriel deposed that he was offered as bribe by the agent of the 1st respondent but that he refused it. He stated that he was forcibly led to the polling station and forced to vote for the 1st respondent, after being 'forced' to accept 2000/-. Bribery connotes exercise of free will. Where one is forced to vote for a person other than a person of his own choice, that may be an unlawful act but it would not be called bribery.

Angom Jasper deposed that he saw Mboti giving money to voters. He could not state that this was a bribe. Only the recipients could tell with exactitude whether or not they received money from Mboti, and for what purpose.

The 1st respondent denied the allegations of bribery in paragraph 19 of his answer to the petition. He deposed that he was not aware that Mboti was his ardent supporter, or that said Mboti bribed voters.

Okoth Ogolla Mboti Vincent deposed that he participated in the voting like any other ordinary citizen with a right to choose those to represent him. He was not an agent of any of the candidates in the election, and he never gave any money to any person as a bribe for voting for any particular candidate. He denied giving shs 2,000/- to Cotilda Nyadendi or Alowo Berna.

Awor Rose Mary deposed that she was not given any bribe by Oketch Kapeli or Ogineri Oketcho or any other person during the elections. Kotilda Nyapendi denied in her affidavit having been bribed by Mboti or any other person. Alowo Berna similarly denied having been bribed.

The evidence of bribery was inconclusive. The offence of bribery is deeply frowned upon. A single act of proven bribery could suffice to overturn an election. The implications are that serious. Therefore before court could overturn an election based on allegations of bribery, it has to be satisfied by cogent and uncontroverted evidence in proof of the allegation. It is similar to proving fraud in a civil suit.

In *Mutono Lodoi & Another v. Steven Oscar Malinga* EP No. 6 of 2001 (Mbale), the issue of bribery was dealt with extensively. In that case there was evidence that the 1st respondent

personally dished out to voters sachets of salt and pieces of soap. There was evidence that his agents did the same. These same agents swore affidavits in support of the petition, and the 1st respondent deposed they were indeed his agents. Maniraguha J, (RIP) found and held that bribery had been proved to courts satisfaction and he overturned the election.

There was no evidence that the 1st respondent personally engaged in acts of bribery. The allegations of bribery were by people who were said to be his agents or supporters. There was no evidence that Ogineri and Kapeli were indeed his agents. But even if that was proved, it had to be further proved that the act of giving bribes was with the knowledge and consent or approval of the candidate. There was no such evidence. I found that the allegation of bribery was not proved to the satisfaction of court.

Use of defamatory language.

It was alleged that the 1st respondent used language which was defamatory of the petitioner during his campaigns. The petitioner in paragraphs 5, 6 and 7 of his affidavit in support of the petition deposed that at various election rallies, the 1st respondent referred to him as **'namunaka'** which meant that he was a Marabou stock, a greedy and insensitive person, a cannibal who was feasting on people's flesh, a person who was unfit to lead the people.

Adhola Simon deposed that on the eve of polling the 1st respondent in the company of three others who included Ochandi Mathew met him as he moved home and said Ochandi Mathew told him he was one of Namunaka's people. He was thrown into the boot of the car and dumped at Tororo CPS.

Ochwo Wilfred Mucope deposed that the 1st respondent during his campaign rallies severally referred to the petitioner as 'namunaka', meaning that he was insensitive to peoples' feelings.

A campaign manifesto of the 1st respondent was exhibited P43. At page 4 of the said manifesto under the heading; 'My Pledge When Elected' paragraph one thereof stated thus; 'Improve on health service delivery (health centres II – IV) must function well to eliminate the **'namunakas'** through lobbying government and NGOs. ...'

The 1st respondent did not deny the manifesto. There was no mention of any name of the petitioner or the other four candidates in that manifesto. The quoted part of the manifesto was in

reference to health services. The petitioner was not in the health sector. He deposed that he was a Minister in charge of Labour. The two deponents who mentioned the word namunaka did not allude to either the petitioner. Adhola Simon was threatened and assaulted for being one of the people of the namunakas. There was no reference in his affidavit that this was in reference to the petitioner. He did not depose that he was an agent or supporter of the petitioner.

Ochwo Wilfred Mucope deposed that the 1st respondent used to refer to the petitioner as namunaka at his rallies. He did not mention even one such rally. Surely if the derogatory word was used at public rallies, more than one person would have heard it and would have testified to such. There was none. I found that this allegation was not proved to the satisfaction of court.

Remedies

The last issue was on remedies. Section 61(1) of the Parliamentary Elections Act (PEA) provides that an election shall be set aside if any of the grounds therein set out is proved to the satisfaction of court.

I found that there was non compliance with the laws and principles of elections c/s 61(1)(a) of the PEA. I also found that the non compliance affected the results in a substantial manner. That was in the 1st and 2nd issues. I did not find that there were illegal practices or electoral offences under Section 61(1) (c) which were committed by the 1st respondent personally or by his agents with his knowledge and consent or approval.

In the premises the election of Member of Parliament for West Budama County South is hereby set aside. A fresh election shall be held to elect the peoples representative to parliament in accordance with the law.

The problems in the constituency from which this petition arose were to a large measure caused by or exacerbated by the non diligence of the 2nd respondent. The 2nd respondent shall therefore meet the costs of the petitioner. I award the petitioner a certificate of two counsel.

RUGADYA ATWOKI

JUDGE

23rd September 2011.