The Republic of Uganda

In the High Court of Uganda, At Kampala

Election Petition No.43 of 2011

Makumbi Kamya Henry :::::::::::::::::::::::::::::: Petitioner

Versus

1. Kaddu Ssozi Mukasa
2. The Electoral Commission ::::::::::::::: } Respondent

Before: Hon. Mr. Justice V.F. Musoke Kibuuka

JUDGMENT

INTRODUCTION

The petitioner and the first respondent stood as candidates for election to the Parliamentary seat for Mityana South Constituency. The elections were held on 18th February, 2011 throughout Uganda. The second respondent organized and conducted those elections in pursuit of it's constitutional mandate under Article 61 of the Constitution. Two other candidates, namely, Ssebbombo Edward and Kaggwa Cyrus, were also candidates.

The return showed that the petitioner polled 19,249 votes or 47.32%. The first respondent polled 20,611 votes or 50.66%. The other two candidates did not feature very significantly. Ssebbombo Edward polled some 611 votes or 1.52%. Kaggwa Cyrus managed to secure only 203 votes equivalent to 0.50%, of all the votes cast in the Constituency.

Upon the basis of those results, the second respondent declared the first respondent as winner of the Parliamentary seat. He has since assumed that seat in Parliament.

PLEADINGS:

The Petitioner filed this petition, in court, on 23rd March, 2011. He made the following allegations against the respondents:

a) - that the first respondent was not validly elected as the Member of Parliament for Mityana South Constituency;
b) that the electoral process in Mityana South Constituency was not conducted in compliance with the provisions and principles of the constitution of the Republic of Uganda, the Election Commission Act and the Parliamentary Elections Act, 2005;
c) that the failure to conduct the elections in compliance with the principles and provisions of the electoral laws, affected the result in a substantial manner and benefited the first respondent;
d) that the first respondent personally or through his agents, with his knowledge, consent or approval, committed numerous election offences and illegal practices;
e) that the second respondent together with the first respondent compromised the principle of transparency and impartiality thereby failing to conduct the elections according to the law, which affected the result in a substantial manner.
f) that the second respondent failed in it's constitutional duty of conducting a free and fair election;
g) that when the petitioner applied for a recount, the first respondent organized hooligans who intimidated the chief magistrate and made it impossible for the chief magistrate to proceed with the vote recount;

The petitioner particularized his allegations with grounds contained in both the petition and his affidavit, PA1, in support of the petition. He filed several affidavits from witnesses in support of the petition.

The petitioner, with regard to those allegations, sought the following reliefs from this honourable court:

i)- a declaration that the first respondent was not validly elected Member of Parliament for Mityana South Constituency;

ii) an order setting aside the election of the first respondent as Member of Parliament, Mityana South Constituency;

iii) an order requiring the second respondent to re-instate, on the voters' register, the names of voters which were wrongfully deleted from it, in order to enable them enjoy their constitutional right of voting for leaders of their choice in future.

iv) in the alternative, and without prejudice to the above, an order requiring the court to carry out a recount of the votes;

v) an order awarding the costs of this petition to the petitioner; and

vi) an order awarding any other relief to the petitioner;

The first respondent filed an answer to the petition on 8th April, 2011. In his answer, he denied all the allegations made against him by the petitioner. In particular, the first respondent denied;

- chasing away of the petitioner's agents from any polling stations;
- committing any illegal practice or election offence before or during the elections personally or through his agents with his knowledge, consent or approval;
- procuring any of his supporters to vote more than once;
- making any malicious statements against the petitioner;
- bribing or compromising voters or in any way interfering with the electoral process in Mityana South Constituency; and

- influencing the appointment by the second respondent election officers in order to have the election conducted in his favour;

Like the petitioner; the first respondent filed numerous affidavits from other witnesses in support of this answer.

The second respondent too, filed it's answer on the same day, like the first respondent; 8th April, 2011. Similarly, the second respondent denied the allegations made against it by the petitioner in the petition. In particular, the second respondent asserted that it conducted the entire electoral process in Mityana South Constituency under secure conditions that were free from intimidation and bribery and that it conducted and supervised the campaigns and the polling process very diligently. The second respondent contended that if there was any non-compliance with the provisions and principles laid down in the electoral laws, such non-compliance did not affect the result of the election in a substantial manner.

ISSUES:

Five issues were agreed upon for determination in this petition. They are:

a) whether the answers to the petition are competent;

b) whether the Parliamentary elections in Mityana South Constituency were conducted in accordance with the law and the principles set out in the Parliamentary Elections Act;

c) if so, whether the non-compliance affected the results in a substantial manner;

d) whether the first respondent committed any illegal practice or election offence personally or through his agents with his knowledge and consent or approval; and

e) what remedies are available to the parties?

It is no longer necessary to discuss the questions of who bears the burden of proof and what is the level of the standard of proof in election petitions. It appears to be settled law now that both these matters are statutorily regulated.

Section 61(1) requires the person seeking from the court an order setting aside an election of a Member of Parliament to prove the allegation to the satisfaction of the court. Section 61(3) provides that any ground for setting aside an election of a Member of Parliament is proved to the satisfaction of the court if it is proved upon the balance of probabilities. However, a petitioner remains with the duty to adduce credible and cogent evidence to prove his or her case. The level of probability being higher than that required in ordinary civil suits. See *Mukasa Anthony Harris Vs. Dr. Bayiga Michael Phillip Lulume, SC Election Petition Appeal No.18 of 2007* and *Masiko Winfred Komuhangi Vs. Babihuga J. Winnie, Court of Appeal, Election Petition Appeal No.01 of 2002*.

Before analyzing evidence in relation to the issues, it is necessary to mention that there were some preliminary matters raised by learned counsel for the first respondent in the final submissions. The matters raised by learned counsel in the final submissions are:

- that the affidavit PA1, by the petitioner in support of the petition be struck out for containing untruthfulness and for offending order 19 rule 3 of the Civil Procedure Rules;
- that several affidavits deponed by the first petitioner's witness did not comply with the requirements of section 3 of the Illiterates. Protection Act, Cap.78 and section 7, of the Commissioner For Oaths (Advocates) Act, Cap.5;

- that in the effort to prove the allegation made by him in paragraph 6 of the petition (illegal practices and election offences) the evidence adduced by the petitioner, amounted to a departure from his pleadings.

I propose not to engage in any discussion of these matters now. I shall do so at any appropriate time should it appear to be necessary to do so later in this judgment.

ISSUE No.1:

Whether The Answers To The Petition Are Competent

First Respondent's answer:

It is submitted on behalf of the petitioner that the first respondent's answer was not filed in accordance with the provision's of rule 8(2), of the Parliamentary Elections (Interim Provisions) Rules. But, of course, those rules are no longer good law. They were repealed and substituted by the Parliamentary Elections (Election Petitions) rules S.I. No.141-2. Court is alive to the fact that the citing non-existing rules cannot vitiate the objection. In *Alcon International Ltd. Vs. The New Vision Printing And Publishing Co. Ltd. SC Civil Application No.04 of 2010*, Okello, JSC, as he then was, stated,

"Citing a wrong provision of the law or failure to cite a provision of the law under which a party seeks redress before court is a mere technicality which should not obstruct the cause of justice. It can safely be ignored in terms of Article 126(2)(e) of the Constitution".

Rule 8(2) of the Parliamentary Elections (Election Petition) Rules requires the answer of a respondent to an election petition to be filed with the registrar together with six copies of it. Learned counsel for the petitioner argues that the words "**shall be filed with the registrar."**

means that the answer must be presented before the registrar personally and having the registrar must append his or her signature on it as proof that the answer has been filed with the court. The complaint is that the registrar did not append his signature upon the first respondent's answer, a fact which, according to counsel, would render the answer incompetent.

Learned counsel has drawn court's attention to order 9 rule 1, of the Civil Procedure Rules, in comparison to rule 8(2). He submits that the requirements, in either case, are the same. However, court has not found any requirement, under order 19 rule 1, of the Civil Procedure Rules, for the registrar or as is called, **the proper officer**, to specifically and personally append his or her signature on the defence. All that is required is the officer to seal the defence with the official seal and show the date on which the defence has been sealed. The first respondent's answer has fulfilled those requirements. Court does not agree with the argument that because the word **"shall"** is employed in rule 8(2) of the Parliamentary Elections (Election Petitions) Rules, that fact renders that rule to be mandatory. To court, the rule is clearly directory and it does not require the registrar personally to receive the answer and sign it personally in order for the answer to be properly filed.

It is common practice, which court ought to take judicial notice of, that the current practice for filing suits in the High Court is to present the plaint or defence officers in the relevant registry. Those officers act on behalf of the relevant registrar. In my view, the procedure set out under the Parliamentary Elections (Election Petition) Rules is not different. It would appear that to attribute the interpretation learned counsel for the petitioner proposes to rule 8(2), of the Parliamentary Elections (Election Petitions) Rules, would result into bagging down efficiency in

the High Court registries and causing inconveniences to anyone wishing to file a petition or an answer to a petition. Court finds the first respondent's answer to be competent and it holds so.

In respect of the answer of the second respondent, the petitioner's objection is that when the second respondent filed it's answer on 8th April, 2011, it did not pay the requisite court fee of shs.50,000/=, as required under rule 8(3)(b) of the Parliamentary Election (Election Petition) Rules. Counsel argues that the failure to pay the fee at the time of presentation of the answer was fatal to the answer and it cannot be saved under Article 126(2)(e), of the Constitution. Counsel relies upon *Ssali Godfrey Vs. Uganda Electoral Commission And Kabaale Sulaiman, Election Petition No.13* of 2011, a decision of this court, per Kabiito, J.. He also relied upon *Utex Industries Ltd. Vs. Attorney General, SC Civil Application No.52 of 1995*(unreported).

On his part, learned counsel for the second respondent agreed that the fee of shs.50,000/- was not paid when the answer was presented on 8th April 2011. Instead, the fee was paid on 13th April, 2011, after assessment.

It is evident that rule 8 of the Parliamentary Elections (Election Petition) Rules, which regulates filing an answer to an election petition, does not have the equivalent of rule 5(4), of the same rules. The omission cannot be taken to be accidental. There appears to be a deliberate regulatory difference between filing an answer to the petition and filing the petition itself, in as far as the payment of filing fees is concerned. In the case of filing the petition, rule 5(4) requires the registrar not to accept the petition if the fee of shs.150,000/= is not paid. The same requirement appears under rule 5(4) of the Parliamentary Elections (Appeals To The High Court From Commission) Rules, S.I. 141-1. But even under those rules when it comes to filing the answer to

such petition, rule 8 does not contain the equivalent of rule 5(4), of the same rules. That fact appears to mark a fundamental difference in the procedural requirements between to filing a petition under either set of rules and filing an answer to a petition filed under either set of rules.

Accordingly the decision of this court in *Ssali Godfrey Vs. Uganda Electoral Commission And Kabaale Sulaiman (*Supra), which learned counsel for the petitioner sought to rely upon is not relevant to the situation at hand because it related to filing a petition under S.I. 141-1. It did not concern filing an answer whose regulatory requirements have the fundamental difference pointed out above.

Similarly, I have perused the recent decisions of this court in *Amoru Paul Omiot Vs Okot Ogong Felix And The Electoral Commission E.P. Case No.001 of 2011 at Lira* and *Otim Nape George William Vs Ebil Fred And Electoral Commission, Election Petition No.17 of 2011, also at Lira.* The position of those two decisions do not differ from the decision in *Ssali Godfrey Vs. Uganda Electoral Commission And Kabaale Sulaiman* (supra). They all concerned with filing petitions and not answers.

Furthermore, court would agree with learned counsel for the second respondent that the non-payment of the requisite fee of 50,000/=, at the time of the presentation of the answer to an election petition is a mere irregularity or deficiency which court can cure under section 97, of the Civil Procedure Act. That appears to be the position stated by the court of Appeal in *Lawrence Muwanga Vs. Stephen Kyeyune, Civil Appeal No.12 of 2011*, to the effect that a complaint against non-payment of court fees is a minor procedural and technical objection which should not affect the adjudication of substantive justice as envisaged under Article 126(2)(e) of the Constitution. The position was approved by the Supreme Court an appeal in that case. The same

position was adopted by the court of appeal in *Musinguzi Garuga James Vs. Amama Mbabazi & The Electoral Commission, CA Civil Application No.19 of 2002*.

Furthermore, the decisions in *Muwanga Stephen Kyeyune's* case *and Musinguzi Garuga James* were made later than the decision in *Utex Industries* case (supra).

Court also agrees with learned counsel for the second respondent that the facts and circumstances in *Utex Industries Ltd. Vs. Attorney General, Civil Application No.52 of 1995*, are distinguishable from those in the instant petition.

Court has, as well, to take judicial notice of the changes that have since taken place in the payment procedures with regard to court fees. It is no longer possible to present cash to the registrar as it was the case in 1995. Today, court fees are only payable to URA and directly in the bank after assessment. In some cases the transaction may not be completed in one day. Accordingly, when interpreting rule 8(3) (b) of the Parliamentary Elections (Election Petition) Rules, court has to bear in mid the current court fees payment procedures as well. The wording of the rule has not got to be taken literally.

For the reasons given above, court would hold that both answers to the instant petition are competent. The first issue is answered in the affirmative.

ISSUE NO.2

Whether The Parliamentary Elections In Mityana North Constituency Were Conducted In Accordance With The Law And Principles Set Out In The Parliamentary Elections Act

The allegations relating to this issue are contained in paragraph 7, of the petition. They are aimed at mainly the second respondent. The petitioner claimed that the second respondent failed to fulfill the requirements of section 12 of the Electoral Commission Act, in that it did not ensure that the elections were conducted under conditions of freedom and fairness. The petitioner listed, in the petition 7 allegations under this category. They are that:

- the second respondent failed to restrain the first respondent from bribing and compromising voters and interfering with the electoral process;
- the second respondent appointed partisan election officials who were compromised by the first respondent;
- the second respondent failed to restrain the civil servants from intimidating voters who wanted to vote for a candidate of their choice;
- the second respondent denied the petitioner some of the DR forms from a number of polling station;
- the second respondent's agents connived with the first respondent's agents at church of Uganda, Busimbi CUB and multiple voting took place, which was aided by use of an ink pad which could easily be rubbed off other than indelible ink;
- the second respondent changed Kitavujja polling station and transferred its voters to Bbira polling station whereby it disenfranchised eligible voters;
- the second respondent denied access to the petitioner's agents to the polling stations and refused some to carry copies of the voters' registers or to sit near the polling assistants.
- Similarly, that the second respondent failed to seal some ballot boxes during and after the voting process; and that the second respondent treated some valid votes cast for the petitioner into invalid ones;

Court will deal with some of these allegations in respect of which some evidence was led during the trial. Others, in respect of which court finds no evidence on record at all or evidence which is not worth discussing, court will just over look.

Alleged Disenfranchisement of Voters of Kitavujja Polling Station

The key witness with regard to this allegation was PW6, Matabaalo Damiano. His testimony was that a number of voters of Kitavujja village did not vote because they discovered that their names had been removed from the nearly polling station of Kasangula and transferred to Bbira polling station which was a good distance away from their village. Some of those who managed to get to Bbira polling station were turned away as they were not residents of the area. PW11, Peninah Nuwagaba, the returning officer for Mityana District, conceded that some of the names of the voters of Kitavujja village appeared on the register for Bbira Polling station instead of the nearby Kasangula. She could not tell the number. PW6, who was LCI Chairman, for Kitavujja, however, testified that there were only 94 voters in Kitavujja village. He could not tell how many of those had their names transferred to Bbira and how many appeared on the voting roll at Kasangula. He could not tell how many voters were turned away at Bbira polling station.

From the evidence on record, court is unable to tell how many voters were disabled to vote as a result of this mess-up in the respective polling stations. It is unable to say whether those who missed voting would have voted in favour of the petitioner. Although Matabaalo claimed to be a registered voter, he had no evidence to prove that he was.

Another witness who testified, but very generally about voters being denied to vote was PW14, Byansi Ambrose. He testified that he was the chairperson of Bbuye Kikumbi LCI. He claims that on polling day, he received very many voters who claimed that they had been denied to vote at Bright Angel Polling station by a group led by one Mrs. Rwamiti. However, PW14 could only name his wife, Nyirikuhirwa Dora, as having been turned away from voting from the polling station. He said that he had reported the matter to the police but even the police could not positively assist him.

This evidence too was far from being cogent because it did not disclose clearly that Nyirikuhirwa was a registered voter at that polling station. It did not disclose the identities of the other voters whom Byansi Ambrose claims that they were denied voting. PW14 claims to have received complaints from many voters. He could not tell how many they were if they existed at all. Court can only conclude that at Bbira polling station some voters of Kitavujja village were denied to vote. The number is unknown but it was insignificant.

Alleged Invalidation Of Many Voters Cast For The Petitioner

This complaint was contained in paragraph 3 of both the petition and affidavit PA.1, in support of the petition. Related evidence is from one Mugerwa Ronald in his affidavit PA5. It is also contained in the affidavit of PW3, Namuteete Nathan.

Mugerwa testified that he was supervisor for the petitioner at St. Gregory polling station. He claims to have noticed very many votes of the petitioner invalidated on account of the fact that the mark of choice had been placed in the symbol or the picture of the petitioner instead of the appropriate box on the ballot paper. He claimed that there were a large number of the

petitioner's votes that were invalidated upon that account. He could not tell how many they were. However, on cross examination, Namuteete Nathan conceded that there were only 4 invalid votes at that polling station, and that the agents of the petitioner duly signed the DR forms.

However, on cross-examination, the petitioner conceded that overall, the difference in votes between him and the first respondent was 1,362 votes. The invalid votes in all were 1,072 votes. He conceded that even if all the invalid votes in the constituency had been his, still he would not have won the election because he would still be short of victory by some 290 votes. Hence the futility of the entire claim that because his would be valid votes had been invalidated he lost the election. That claim has not been proved to the satisfaction of this court. The allegations by Mugerwa Ronald were effectively rebutted by the affidavit of Allen Nabaweesi, RA2.5. Nabaweesi was the presiding officer at St. Gregory P.S. polling station.

Alleged Beating And Chasing Away The Petitioner's Agents From Polling Stations, etc.

The petitioner's witnesses to these claims were:

- Sserwano Musasizi Enock, PW13
- Namuyiga Jane Rose, PW9
- Kiggundu Abdalla, PW11
- Mugerwa Bashir PW10, and others.

Court has examined and analysed the evidence of the petitioner and his witnesses against the evidence in rebuttal by the respondents mainly from Peninah Nuwagaba the returning officer and other relevant affidavits. I find that the petitioner's evidence hardly makes out a case with regard

to the allegations in question. The evidence is not only very scanty. It is also trivial, to say the least. The allegation is not proved to the satisfaction of this court.

ISSUE NO.3:

Whether Non Compliance Affected The Result in A Substantial Manner;

Court agrees with learned counsel for the second respondent that the test for a substantial effect of non-compliance with the provisions and principles of the electoral law would best apply where the petitioner has adduced cogent evidence to prove not only that there was non-compliance but also that the non-compliance operated to place the victory of the winning candidate in serious doubt. The doubt must be that had it not been for the non-compliance the winning candidate's score, in terms of votes obtained, would have been drastically much lower than that which was declared. The case of *Edward Byaruhanga Katumba Vs. Siraje Nkugwa Kizito And The Electoral Commission Court of Appeal Election Petition Appeal No.17 of 2001*, where Byamugisha, J.A, stated at 2.13, **" To my understanding, therefore, the expression "non-compliance affected the result of the election in a substantial manner" can only mean that the votes a candidate obtained would have been different in a substantial manner, if it were not for the non compliance substantially. That means that the petitioner that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced. Such reduction, however, would have to be such as would put the victory in doubt."**

Talking about the application of the same quantitative test, Karokora JSC, in *Rtd. Col. Kizza Besigye Vs Electoral Commission And Yoweri Kaguta Museveni, Election Petition No.1 of 2001*, stated:-

"In my opinion, there is no way we can avoid considering numbers of votes a candidate got over the other. If the numbers of votes were used in determining the winner of the election, how can we hear the election petition challenging the winner that he unfairly won the election without considering the number of votes – we obviously have to consider the numbers got from each station and district."

On his part, Mulenga, JSC, talking of the qualitative test for determining the effect of non-compliance, stated, in the same case,

"I had, therefore, to consider the alternative, namely, whether in the absence of direct proof, the effect could have been inferred from the proved non-compliance. In my view, for the petitioner to succeed that way, the court would have to find that the only irresistible inference to be drawn from the evidence on the several aspects that constituted non-compliance is that the non-compliance affected the result of the election in a substantial manner."

On the basis of the evidence, court has already found as a fact that there was insignificant non-compliance in this case. Whatever test one may employ; either **quantitative** or **qualitative** the result is bound to be the same. That insignificant non-compliance did not affect the result of the election in any substantial manner. The petitioner has not proved his allegation in that regard to the satisfaction of the court, upon the balance of probabilities. The third issue is, therefore, answered in the negative.

ISSUE No.4:

Whether The First Respondent Committed Any Illegal Practice Or Election Offence Personally Or Through His Agents With His Knowledge And Consent Or approval

In paragraph 6 of the petition, the petitioner enumerates numerous illegal practices and election offences allegedly committed by the first respondent personally or through his agents with his knowledge and consent or approval. The allegations in the petition under this issue fall into three distinctive categories:

a) bribing voters contrary to S.68(1) and (4), of the Parliamentary Elections Act;

b) procuring voters to vote more than once contrary to section 77, of the Parliamentary Elections Act;

c) making malicious statements against the petitioner about:

i) selling to himself land and a house belonging to Mityana Hospital;

ii) killing one Mugwanya Robert;

iii) stealing money meant to develop Mityana Town Council and used it to build his personal secondary school at Mityana;

iv) mismanaging Mityana Town as mayor;

v) being anti-Buganda and not supporting the Kabaka of Buganda;

Allegations of Bribing Voters

There are three allegations of bribing voters:

- Distribution of money by one Kabubu and quencher by one Nabadda at Kabuwambo Church of Uganda polling station; Key witness being Namuyiga Jane Rose, PW9, affidavit PA12.
- Donation of shs.200,000/= to Kisaana village for repair of the village borehole; Key witness being PW8 Musinguzi Paul, affidavit PA15 and PW7, Charles Walusimbi, Affidavit PA17;
- Bribing voters at Naama Health Centre on 27th January, 2011, with a meal consisting of meat and rice; Key witness being PW20, Nanyanzi Betty, Affidavit PA7.
- Distribution of money to voters allegedly by Rashid and Ssalongo in Busunju Town Board on 17th February, 2011. Key witness being PW17 Muyingo Simon, affidavit PA9;

Before analyzing the evidence briefly in relation to each of the four allegations of bribery, court notes that the offence of bribery as set out in section 68(1) of the PEA has four elements namely:

- that the respondent gave out money or gift';
- that the money or gift was given to a registered voter;
- that the giving was to influence the voter to vote or to refrain from voting;
- that the respondent gave the money or gift personally or through his agents with his knowledge and consent or approval. See *Mukasa Anthony Harris Vs. Dr. Bayiga Michael Phillip Lulume, SC Election Appeal No.18 of 2007*.

Secondly, with election petitions, a court trying an election petition will normally not regard an allegation of bribery as proved to its satisfaction unless the evidence before court is cogent and quite compelling. The reason being that in an election dispute, witnesses who testify for either party are often those persons who were either supporters or campaigners or agents of the parties

to the election dispute. They do not come to court without their desire to see their candidate score victory. For that reason, the court will subject the evidence to very strict scrutiny and will in some cases seek corroborating evidence.

Lastly, while it is true that where averments made in affidavit and no affidavit in reply is filed, court may ordinarily infer that the respondent has implicitly admitted those averments. See *Cleaver Hume Ltd. Vs. British Tutorial college (Africa) Ltd. [1975] E.A. 323 And Ssengendo Vs. Attorney General [1972] E.A. 140*. However, that can only be the case subject to the court believing the averments as constituting credible evidence. As Okello J.A. as he then was observed in *Amama Mbabazi and Electoral Commission Vs. Musinguzi Garuga James, Election Petition Appeal No.12 of 2002*, at p.45, on the issue of credibility, **"it is the trial judge who is in the best position to gauge and his or her impression and finding should be respected especially where the witness testified viva voce or was cross examined."**

Now, on alleged distribution of money by one Kabubu and quencher by one Nabadda at Kabuwambo church of Uganda polling station, on polling day, the only witness to these two allegations was Namuyiga Jane, PW9. She testified that Kabubu gave the money to voters who were with him in the line at the polling station. She also testified that Nabadda had one bottle of quencher where she was sitted and she would give a bit of that to some voters. Surely, if these two alleged acts had been bribery actions a lot more people, including the presiding officer, would have witnessed them and probably stopped them. But even if they had been bribery acts, there is no nexus between them and the first respondent. The fact of being an agent or supporter of a candidate is not enough. The evidence must show that the act was done with the motive of getting the voter to vote for a candidate or refrain from voting for one. The giver must be an

agent of a candidate who must give the gift with the knowledge and consent or approval of the candidate. The evidence of Namuyiga Jane Rose on these two allegations falls very short of proving that. The allegations are, therefore, not proved to the satisfaction of the court.

On the alleged donation of shs.200,000/= to Kisaana village for repairing a borehole two witnesses testified on that, PW8, Musinguzi Paul and PW7, Charles Walusimbi. The evidence of these two witness, upon cross examination, contradicted each other materially. While Walusimbi Charles testified that it was the village LCI Chairperson who asked the first respondent for money to repair the bore hole, Musinguzi testified that he himself was the one who asked for the money. While Walusimbi testified that the money was handed over to the village LCI chairperson, Musinguzi says it was not handed over to chairperson but to one Nanyonjo, an ordinary resident of the village. While Walusimbi alleged that spare parts were purchased and the bore hole was repaired, Musinguzi's evidence was that the bore hole has never been repaired. That kind of evidence cannot pass the high level of scrutiny court referred to earlier in this judgment. The allegation has not been proved to the satisfaction of this court.

Regarding the alleged bribing of voters with a meal at Naama Health Centre on 27th January, 2011, the only witness was PW20, Nanyanzi Betty. Court watched this witness as she testified, upon cross examination. She was calm and confident. She was never shaken. Court could not resist the conclusion that she was a truthful witness. That meal must have taken place as she described it in her evidence.

However, according to her, the organisers of the meal were Mande, Nalubega, Ssendagire, Charles Ssekyanzi and others. She claimed these were agents of Kaddu Mukasa. Apart from her

word, there is nothing else to show that they were. Kaddu Mukasa, according to the evidence, did not attend the function. He never appeared at the venue. There is, therefore, no nexus between him and the alleged meal. Even if all or any of the organizers of the meal were his agents, that would not be enough for the purposes of section 68(1) of the PEA. The evidence must show that agents were acting with the knowledge and consent or approval of the candidate. There is no evidence to that effect on record in this petition.

Court has no option but to conclude that this allegation too is not proved to the satisfaction of the court.

As to the allegation by PW17, Muyingo Simon, that Rashid and Ssalongo went distributing money to residents of Misigo where he stayed at Busunju, on 17th February, 2011, court finds the evidence of Muyingo equally inadequate to prove that allegation to the satisfaction of the court. He appeared for cross examination. Court did not assess him to be a credible witness. He knew only one name of each of the two persons whom he alleged to have distributed the money. He testified that the money was in a kavera and it was in coins. He even said some of the money was offered to him but he refused it. Yet he could not tell what denomination the coins were. If he saw that money when it was offered to him, he could not fail to tell the denomination.

PW17 testified that the money was being distributed only to Kaddu Mukasa's supporters. He was not a Kaddu Mukasa supporter yet he claims some of that money was offered to him. He said that the money was for bribing voters to vote for Kaddu Mukasa yet it was being given to those who were already his supporters. Apart from his word that Rashid and Ssalongo were supporters of the first respondent, there is nothing more to show that they were his agents or that

he provided the coins or that the coins were being distributed with his knowledge and consent or approval.

This allegation too, court finds, has not been proved to its satisfaction.

On procuring voters to vote more than once, court finds no evidence on record relating to the allegation of procuring voters to vote more than once contrary to section 77 of the PEA. There is nothing worth analyzing. Court, therefore, concludes that the allegation has not been proved to its satisfaction.

The last allegation under paragraph 6 of the petition concerns alleged malicious statements against the character of the petitioner. By way of quick elimination, court can right away state that it was not found any evidence led regarding the allegations of the petitioner selling to himself land and a house belonging to Mityana Hospital. Similarly, there is hardly any evidence on record relating to the allegation of the petitioner stealing money meant to develop Mityana Town Council. The same applies to the allegation of the petitioner mismanaging Mityana Town Council while he was it's mayor.

In respect of those three allegations court concludes that no proof to the satisfaction of court has been made.

What remains are the allegations relating to being anti Buganda and the alleged killing of one Mugwanya Robert.

It is notable that with regard to all the allegations relating to the making of what the petitioner called malicious statements, unlike in the case of all the other election offences he alleges in the petition, that the first respondent committed, he cited no specific provisions of the PEA, in the

petition, that he thought had been breached. In the final submissions, however, learned counsel for the petitioner sought to place those allegations under sections 22(6) and 73(1), of the PEA. (See pages 8 and 10 of the petitioner's final submissions).

Clearly, the provisions of section 22(6) of the PEA cannot be applied to the three incidents that is to say:

- statements made in the video as shown in the evidence of PW22, Wandera Moses;
- statement allegedly made at Banansi Traders rally at Mityana, as testified to by Nantongo Amina, PW19;
- statement allegedly made at Busunju town tax park, as testified to by Nsubuga Wilberforce, PW12;

The reason why the provisions of section 22(6) of the PEA, cannot apply to those instances, is because subsection (6) of section 22 must be read in conjunction with subsection (5) of the same section. What is prohibited under those provisions, is a candidate using ***private electronic media*** to decampaign any other candidate. In all the three incidents mentioned above, there is no evidence showing that the statements complained of were made by the first respondent using private electronic media. Hence the clear inapplicable of section 22, of the PEA.

With regard to section 73(1), of the PEA, the offence created by that provision is making, by a candidate, of false or wreck less statements concerning the character of a candidate. The offence under this particular section would be committed whether the statement is published before or during an election as long as it is established that the statement was made for the purpose of effecting or preventing the election of the candidate against whom it was made.

In the final submissions, learned counsel for the first respondent raised the issue of improper pleading with regard to the allegations constituting this alleged offence, under section 73(1), of the PEA. His objection was that the petitioner did not set out verbatim, in the petition, or the affidavit in support, the exact words that were used or allegedly used by the first respondent. According to learned counsel for the first respondent, that omission renders the pleading fatally defective. He relied upon the decision of the Supreme Court of Uganda, in the reasons by Odoki, C.J., in *Rd. Col. Dr. Kizza Besigye Vs. Electoral Commission And Yoweri Kaguta Museveni, SC Election Petition No.01 of 2006*. The Supreme Court was dealing with the provision of section 24(5) of the ***Presidential Elections Act*** which is in **pari material** with section 73(1), of the PEA. Several allegation of statements concerning the character of the petitioner were alleged to have been made by the second respondent to that petition. Objection was raised by learned counsel for the second respondent that the charges under the petition did not contain or set out the facts upon which the petitioner relied or the particulars of the offence.

The learned chief justice quoted, with approval, the following passage from *Bullen & Leake and Jacobs, Precedents of Pleadings, 12th Edition, 1975, at page 626*, where it is stated that libel must be set out verbatim in the statement of claim. It reads:

"The libel must be set out verbatim in the statement of claim, it is not enough to set out its substance or effect as "the precise words of the document are themselves material." (see Ord. 18 v 7(2); *Collins V Jones* (1995) IQB 564). The book, or newspaper or other document from which the words are taken should be identified by date or description. Where the defamatory matter is part of a longer passage, the defamatory part only need be set out provided the remainder of the passage would not vary the meaning of the defamatory matter *Sydenham Vs. Man* (1617) Cro. Jac 407)

where the defamatory matter arises out of a long Article or "feature" in a newspaper, the plaintiff must set forth in his statement of claim the particular passages referring to him of which he complains and the respects in which such passages are alleged to be defamatory *{DDSA Pharmaceuticals Ltd. V. Times Newspapers Ltd* (1973) 1 Q.B. 21 CA} and if the part complained of is not clearly severable from the next of a single publication; the whole publication must be set fourth in the statement of claim, even though the defendants may be entitled to plead justification or fair comment in respect of the other parts of the publication (*S. & K. Holdings Ltd V. Throughmorton Publications Ltd* (1972) 1 WlR 1036."

The learned chief justice then concluded:

"I accept the submission of Dr. Byamugisha that the charges in the petition relating to false, malicious or defamatory statements were defect fully framed as they did not set out verbatim the statements complained of in the petition. Words take their meaning from the context, and if the context or background is not provided or the full statement reproduced their malicious or defamatory effect may not be easy to discover. The particulars of the statement also enable the respondent or defendant to know what case he or she has to meet and defend."

Upon the facts and circumstances of the instant petition, this court cannot make a different conclusion. The pleadings in the petition, in as far as the allegations relating to malicious statements against the character of the petitioner are concerned, were fatally defective as pleaded in the petition.

There is, of course, the evidence of PW22, Wandera Moses. Court watched the video which he annexed to his affidavit. Wandera Moses was, clearly, not a professional in that field. His production leaves a lot to be desired and raises a number of an un answered questions. That apart, the witness himself testified, in cross examination, that annexure A to his affidavit was not original but an edited product, not by himself, by some other firm. Clearly the evidence is secondary evidence which can only be admissible in evidence under specific circumstances which are non-existence in the instant petition. Being not admissible upon that account, the evidence is of no evidential value whatever.

Whether The Petitioner Merits The Reliefs He Seeks:

An election petition of a Member of Parliament can only be set aside when the petitioner has proved to the satisfaction of the court any of the four grounds set out under section 61(1) of the PEA. The petitioner in the instant petition has not proved any of those grounds to the satisfaction of this court. He does not merit the reliefs which he seeks through his petition. His petition fails. It is dismissed with costs to the first respondent. As between the petitioner and the second respondent each shall meet own costs.

V.F. Musoke-Kibuuka

Judge

3rd November, 2011