

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT TORORO**  
**HCT-04-CV-EP-0019-2011**

**AGGREY AWORI SIRYOYI ..... PETITIONER**

**VERSUS**

**1. KEVINA TAAKA WANAHAN WANDERA .....1<sup>ST</sup> RESPONDENT**

**2. ELECTORAL COMMISSION .....2<sup>ND</sup> RESPONDENT**

**BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI**

**JUDGMENT**

The Electoral Commission conducted elections for directly elected Member of Parliament for Busia Municipality constituency on 18<sup>th</sup> February 2011. The petitioner and the 1<sup>st</sup> respondent were among the candidates who were nominated for and stood for elections as Member of Parliament in the said constituency. The Electoral Commission declared the 1<sup>st</sup> respondent as the winner of that election, and at the time of hearing this petition, she had been sworn in as such and was the sitting member of Parliament for Busia Municipality.

The petitioner filed this petition contesting the results of that election. He filed two affidavits of his own plus affidavits from other deponents with supporting documents all in support of his petition. Both respondents filed replies to the petition with supporting affidavits and documents. During the scheduling and following the precedent of *Rt. Col. Dr. Besigye Kiiza v. Yoweri Kaguta Museveni & The Electoral Commission* EP. No. 1 of 2001 (SC), it was agreed that all affidavits on record would be presumed to have been read in open court in accordance with the law.

Also during scheduling a number of facts were agreed as follows.

1. That at the Parliamentary elections held on 18/2/2011 for Busia Municipality Constituency, six candidates participated. They obtained results as shown in the tally sheet – annexure A to the petition, whereupon the 2<sup>nd</sup> respondent declared the 1<sup>st</sup> respondent as the winner of the election as the directly elected Member of Parliament for Busia Municipality.

2. Results from 5 polling stations were cancelled by the Returning Officer of the 2<sup>nd</sup> respondent, one Sam Agaba. There were;
  - a) Nangwe Mugungu A (A – M) - with total registered voters being 868.
  - b) Arubaine A (A – J) Eastern New Market – with total registered voters being 903.
  - c) Arubaine B (A – M) Green School Polling Station – with total registered voters being 982.
  - d) Arubaine B (N – Z) Hatari’s palace – with total registered voters being 597.
  - e) Nangwe Primary School – with total registered voters being 808.
3. According to annexure A to the petition – the tally sheet, the Returning Officer stated to have considered the results from 40 polling stations.

The following issues were set down for determination by court.

1. Whether the affidavits of:
  - a) Kassim Masha;
  - b) Obara Sam;
  - c) Sheikh Mohammed Kadoli;
  - d) Sumaiya Kagoya;
  - e) Mutwalibu Waiswa;
  - f) Kuzaima Ahmed;
  - g) Erias Wamusi;
  - h) John Kaigwa;
  - i) Magala Basalirwa;
  - j) Amos Gad Wafula and
  - k) Awaz Isabirye,

are competent affidavits in reply to the petition.

2. Whether the 1<sup>st</sup> respondent was qualified to be nominated to stand as member of parliament;
3. Whether the 1<sup>st</sup> respondent committed electoral offences c/ss 68 and 73 of the Parliamentary Elections Act personally, or by her agents with her knowledge and consent or approval.
4. Whether the 2<sup>nd</sup> respondent conducted the elections in accordance with the law, in so far as it cancelled the results of 5 polling stations.
5. Whether the non compliance with the law by the 2<sup>nd</sup> respondent, if any, affected the results of the election in a substantial manner.
6. The remedies available to the parties.

During the hearing, Kamba Hassan together with Murangira Owen and Kiggundu Paul represented the petitioner. Komakech Geoffrey with Wegoye Sam appeared for the 1<sup>st</sup> respondent while Ninye Francis appeared for the 2<sup>nd</sup> respondent. The petitioner and the 1<sup>st</sup> respondent were called and cross examined upon their respective affidavits. Counsel from both sides submitted on the issues in the order in which they were set out herein. I will do likewise.

It is now settled law under subsection (3) of Section 61 of the PEA that proof of any ground for setting aside an election of a candidate as a member of parliament is on a balance of probabilities.

### **Impugned affidavits.**

It was submitted that the impugned affidavits deposed to matters which were not in any way related to the complaints in the petition. They were not by any means an answer to the allegations in the petition. They referred to the person of the petitioner and at times in a derogatory, if not defamatory manner. The case of *Ngoma Ngime v. The Electoral Commission and Winnie Byanyima* E.P No. 11 of 20002 (C.A.) was cited in support. In that case, the 2<sup>nd</sup> respondent in her answer to the petition made what amounted to a counter claim or cross petition, when she stated that the petitioner had no locus to file the petition in the first place as he was not possessed of the requisite academic qualifications to stand as a

member of parliament. She annexed to her affidavit in support of her answer to the petition, documents in support of her allegation.

If the court had taken the allegations and these were proved, that would have disposed of the petition. Byamugisha JA. in the lead judgment stated thus;

‘The 2<sup>nd</sup> respondent as a candidate who won the elections could not raise by her answer to the petition matters concerning the appellant at all. He made allegations that irregularities were committed during the electoral process by the 2<sup>nd</sup> respondent with her agents. Her duty was to reply to those allegations and stop there. On the basis of the rule I have cited, she could not raise other matters especially those that were intended to defeat the petition. In my view she was estopped to raise the issue of the appellant’s academic qualifications. The law as I understand it, is concerned with the candidate who was elected a member of parliament.’

In the case before me, the affidavits complained of which were set out in the 1<sup>st</sup> issue were 12 in number. During the cross examination of the 1<sup>st</sup> respondent some other 6 affidavits were mentioned. I will examine each of them briefly and see whether they were not answering the allegations raised in the petition.

The affidavit of Kassim Masha was dated 18<sup>th</sup> April 2011. In para 3 he said that on the eve of Idd Aduha, 7 bags of rice were brought to the mosque by Awori, and one bag was to be distributed to each mosque after prayers.

In para 5 he stated that Awori was one of the visitors on Idd day and he told the worshippers that since he had already provided them with food, he had now brought money – shs. 2 million. The witness stated in para 13 that this demeaned him and many Muslims hence his not voting for Awori.

In his petition and affidavit in support, the petitioner alleged that Muslims did not vote for him because of the hate and defamatory campaign of the 1<sup>st</sup> respondent. This was an answer to that allegation. This Muslim did not vote for Awori not because of the hate campaign of the 1<sup>st</sup> respondent, but because of the demeaning statements by Awori himself.

Obara Sam deposed an affidavit on 18<sup>th</sup> April 2011. In para 2 thereof he deposed that he was the LCIII Chairperson and doubled as the NRM Secretary for mobilisation in his North C

parish. He was an ardent supporter of Awori but did not vote for him this time round because he failed to fulfil his past and present promises.

This was in reply to allegations that support for the petitioner faded because of the hate and defamatory campaign of the 1<sup>st</sup> respondent.

Sheikh Mohammed Kadoli also affirmed to an affidavit on 18<sup>th</sup> April 2011. He deposed that on 17<sup>th</sup> February 2011, Awori went to their village of Musimisowo and donated shs 200,000/-. When the witness distributed this money to potential voters, he was assured that despite this, they were not necessarily going to vote for Awori. Their anger stemmed from what he called many lies and unfulfilled promises to the voters by this candidate.

This deposition was similar to that of Sumaiya Kagoya who was present at the time the incident took place in their village and testified similarly as Sheikh Kadoli.

These were in answer to allegations in the petition about voting patterns having been influenced by the smear campaign of the 1<sup>st</sup> respondent.

Mutwalibi Waiswa deposed his affidavit on 18<sup>th</sup> April 2011. In para 3 he stated that in the past he voted for Awori, but for reasons that Awori failed to fulfil promises made, and in spite of donations of 3,000/- to each of those who attended his meeting at the home of Kuzai, he did not vote him as he was a liar. Meaning that though a Muslim, he never voted for Awori for reasons different from those alleged in the petition.

Kuzaina Ahmed swore his affidavit on 18<sup>th</sup> April 2011. In para 3 thereof he deposed that on 11<sup>th</sup> February 2011 the Chairperson of Moslems in Busia District Haji Maloba told them that Awori donated shs 1 million to build a septic tank for the mosque. In spite of this he did not vote for Awori, not because he was influenced by the 1<sup>st</sup> respondent.

Erias Kwamusi deposed that he never voted for Awori because of the many unfulfilled promises of the past. In para 3 he stated that on 18<sup>th</sup> February 2011 Awori went to their mosque and begged to address them. Because of their anger at him for unfulfilled promises of the past, they denied him permission to make his address.

John Kaigwa deposed an affidavit in support of the 1<sup>st</sup> respondent's answer to the petition. He said he used to be Awori's campaign manager. Awori deceived them in previous campaigns that he was going to supply to even the voters with grass thatched houses with electricity. He further deceived them that since the President had no money, he would use his own funds to

make roads in the council. All these were not fulfilled. In para 9 he deposed that in view of all this, he decided not to vote for Awori.

This was in answer to the allegations of smear campaign of the 1<sup>st</sup> respondent being responsible for the voting pattern of Muslims in that constituency.

Magala Basalirwa deposed in para 3 of his affidavit dated 18<sup>th</sup> April 2011 that a group called Kundusi which was associated with or linked to candidate Awori disrupted voting at polling stations where eventually the results were cancelled. This was in answer to the allegations by the petitioner of the 2<sup>nd</sup> respondent's failure to conduct elections in accordance with the law, an issue in this petition.

Amos Gad Wafula was the supervisor of elections for the 1<sup>st</sup> respondent. In his affidavit dated 18<sup>th</sup> April 2011, he stated in para 3 that the chaos caused by the Kundusi group was partly responsible for the cancellation of results at some polling stations. In para 8 he made specific answers to the affidavit of Mercy in respect of the allegation of bribery by the 1<sup>st</sup> respondent at a women's group.

Awaz Isabirye in his affidavit made specific answers to the affidavit of Sheikh Habib Ibrahim which was to the effect that the 1<sup>st</sup> respondent went along mosques telling Muslims not to vote for Awori, as he had satisfied them with rice. This witness testified that it was the Sheikh Habib who told Muslims that Awori had made donations to them including sponsorship of one Muslim woman to go for Hija in Mecca.

These were the affidavits named in the 1<sup>st</sup> issue. Those which were mentioned during cross examination were the following.

Kavuma Kasirye. His affidavit was dated 18<sup>th</sup> April 2011. He was a candidate for Chairperson of West Division and so was too busy campaigning for himself to do what was alleged in paras 23 and 24 of the affidavit of Kasumba Frank. In para 5 thereof he deposed that he was not aware of the group called Muno Mukabi as alleged by Kasumba Frank.

Juma Moses was a member of the Notoola Soluwa group of Customs Road B. In his affidavit dated 18<sup>th</sup> April 2011, he deposed that Kasumba's affidavit was false in paras 25 to 27. Kasumba was not invited to and did not attend the group's meeting of 13<sup>th</sup> February. He also deposed that the group did not receive shs 30,000/- from the 1<sup>st</sup> respondent. The group had

nothing to do with the pilgrimage of women Muslims to Mecca, and that the group never voted as a block, but individually.

Semakula Abdullatiff in his affidavit dated 18<sup>th</sup> April 2011 in para 3 stated that on 12<sup>th</sup> February at Masjid noor Mosque the District Khadi Sheikh Ibrahim Habib Wandera asked Muslims to vote for Awori for giving them 50 iron sheets, bags of rice and shs 1 million. In para 4, the witness deposed that Sheikh Habib Ibrahim Wandera repeated his call to Muslims to vote for Awori for the same reasons on 18<sup>th</sup> February 2011 at Masjid Taqua mosque. He stated in para 6 that the issue of rice to Muslims came up first in Awori's manifesto. This annoyed Muslims and it was demeaning of them.

This was in specific answer to the depositions of Sheikh Ibrahim Habib Wandera in his affidavit dated 5<sup>th</sup> April 2011, where the Sheikh deposed that it was the 1<sup>st</sup> respondent and her agents who spread the matter of Awori giving rice to Muslims, thus demeaning them. The affidavit of Kalema Badru dated 13<sup>th</sup> April 2011 was similarly in answer to that of Sheikh Ibrahim Habib Wandera.

Haruna Abbasi deposed an affidavit dated 18<sup>th</sup> April 2011. He was the agent of the 1<sup>st</sup> respondent at Arubaine Eastern New Market polling station. In para 5 he deposed that the polling Assistant, the daughter of one Mukasa allotted Awori 2900 votes on the DR form yet the total number of voters was 930. When he opposed this, members of Kundusi group associated with Awori swung in action and assaulted and caused chaos.

This was one of the polling stations which it was agreed at scheduling that results were cancelled.

The last of the impugned affidavits was that of Sumba Charles. It was dated 18<sup>th</sup> April 2011. This was a Chairperson of Kalifa's place polling stations A and B. She and her deputy were chased away by rival candidates agents especially those of Awori who threatened to assault them. She had to call in the police for protection. She attended the graduation party of Mabachi and at that party the 1<sup>st</sup> respondent did not give anyone money.

This answered the bribery allegation plus the fact that chaos if any at polling stations was not due to mismanagement by the 2<sup>nd</sup> respondent. The petitioner also had a hand in the same.

From all the above analysis, it is clear the affidavits sought to be impugned were in answer to the specific and general allegations which were raised by the petitioner in his petition. Other

affidavits were in answer to specific allegations raised in the affidavits of the deponents in support of the petition.

There was nothing in the answer to the petition and nothing in the impugned affidavits which fell in the category of what was prohibited by Byamugisha JA in the *Ngoma Ngime case* (supra). None of these affidavits sought to raise what could amount to a cross petition.

The petitioner in paras 5 and 6 of his petition alleged that the Muslims did not vote for him due to the smear campaign by the 1<sup>st</sup> respondent. In his affidavit in support, paras 10 to 15, and particularly para 16 those allegations were repeated. In the affidavits of his supporters, Frank Kasumba in para 8 of his affidavit, and Sheikh Ibrahim Habib Wandera in paras 4, 5 and 6 of his affidavit thereof, these allegations were repeated. The petitioner should not therefore complain when affidavits were sworn by both Muslims and non Muslims to show that in fact, the Muslims vote was influenced by his own actions or non actions, but not the hate campaign of the 1<sup>st</sup> respondent and or her agents as alleged. I did not find that these affidavits were not competent to answer the petition. The 1<sup>st</sup> issue therefore fails.

### **The academic qualifications of the 1<sup>st</sup> respondent.**

The complaint in this regard was that the 1<sup>st</sup> respondent presented to the Returning Officer (RO) in proof of her academic qualifications papers which bore names which were at variance with the names by which she was nominated. The implication being that those academic papers did not belong to her, and therefore she did not possess the requisite academic qualifications to stand as a member of parliament.

It was submitted that at the time of nomination and in compliance with S. 11 of the Parliamentary Elections Act (PEA), the 1<sup>st</sup> respondent submitted to the RO and was registered in the names of Taaka Kevinah Wanaha Wandera. Those are the which names appear on the National Voters Register for the 2011 general elections provisional register as of 17/11/2010 exhibit R4. They are the names which appear in the final declaration of results form for the directly elected member of parliament for Busia district code 042 dated 19<sup>th</sup> February 2011, exhibits P1 and P12.

It was not disputed that at the time of nomination and in proof of her academic qualifications, the 1<sup>st</sup> respondent presented to the RO a Uganda Advanced Certificate of Education bearing

the names Kevina T. Wanaha, with index number U0731 864, of Progressive SS, Bweyogerere P.O.BOX 30903 Kampala, and was for the examinations of November 1998. This was exhibit R17. She also presented a results slip for the Uganda Advanced Certificate of Education for Nov./Dec.1998 examinations in the names of Kevina T. Wanah, at Progressive SS P.O.BOX 30903 Kampala.

It is worth noting that in these two documents, the index number was U0731 864. The subjects and the grades were identical. Also identical were the names and address of the school and the year of sitting. The results slip was exhibit R16.

A singularly notable difference between these two documents was that in exhibit R16 the name therein was Wanah i.e. ending with letter 'h', while in exhibit R17 letter 'a' was added as the last letter to read Wanaha.

The argument of the petitioner was that these documents did not belong to the 1<sup>st</sup> respondent as the names differed from those under which she was nominated, i.e. Taaka Kevinah Wanaha Wandera, yet the documents bore in R16 'Kevina T. Wanah', and R17 'Kevina T. Wanaha'.

*Halsbury's Laws of England* 4<sup>th</sup> edition Vol. 15 at para 476 states that a nomination paper must contain the full names of the candidate and his address. This is similar to S. 11 of the PEA which provides in subsection (1)(a) thereof that nomination of a candidate is made by two registered voters presenting to the RO a nomination paper containing a statement under oath by the candidate specifying inter alia, his or her name, age, address and occupation.

According to Agaba Sam the RO OF Busia district, in his affidavit, he deposed that the 1<sup>st</sup> respondent complied with the all legal requirements for nomination of a candidate for election as a member of parliament. That would therefore mean she duly handed in a statement under oath in which she specified her names as they appeared in the declaration of results form exhibit P12.

The petitioner argued that these were the names by which the 1<sup>st</sup> respondent was known. She had not, so far as was known, legally changed her names. That therefore mean that documents in names other than the above could not belong to her.

The case of *Serunjogi James Mukiibi v. Lule Umar Mawiya* E.P.A. No. 15 of 2006 (CA) was heavily relied on. In that case the appellant presented to the RO at the time of nomination 'O' and 'A' level certificates. Court at first instance found that both certificates did not belong to

him. On appeal court upheld the trial court's decision. The 'O' level certificate had the names 'Serunjogi James'. The 'A' level certificate bore those names and in addition the initials SMJ. The nomination form only had the names Serunjogi James. His explanation in his affidavit to the RO at nomination was that he inherited them from his late father. Evidence was adduced to show that his father was Semwogerere Charles and not Semwogerere Mukiibi John which the letters SMJ allegedly stood for.

In cross examination he changed and said he changed his names at will when he registered for 'A' level examinations and added the letters SMJ. There was evidence that he even changed the epitaph on his father's grave to add the names Mukiibi John, which were not there when the petition was filed in court. There was evidence of a witness who went to the school claimed and knew a person with the initials SMJ, but this was not the appellant. The appellant made elementary error when he could not pronounce the subject 'poetry' which he claimed to have done at 'A' level. He named his best subject in European History as Napoleon, and this was the leader of Germany.

Byamugisha JA reading the lead judgment said, *'the contradictions in the appellants explanation were not minor and could not be glossed over. They were deliberate lies that were intended to suit the circumstances of the petition.'*

In the present case the 1<sup>st</sup> respondent presented the 'A' level certificate. There was no intimation that the 'A' level certificate exhibit R17 which was presented at nomination was a forged document. The same can be said of the examination results slip exhibit R 16. The only argument in para 4 of the petition and para 6 of the petitioners affidavit in support was that these documents possibly belonged to someone else but not the 1<sup>st</sup> respondent.

Unlike in the *Mawiya case*, (supra) the 1<sup>st</sup> respondent only presented the 'A' level certificate. The petitioner applied for a court order exhibit P4, in which he sought verification from UNEB whether Kevina Taaka Wanaha was a candidate for 'a' level at Progressive SS, Bweyogerere, in November 1998. The court order exhibit P3 was duly served on UNEB who responded in exhibit P5 dated 31/3/2011 that Kevina T. Wanah was a candidate for 'A' level examinations of November 1998 at Progressive SS under index number U0731/864. Her results were given. This verification was at the instance of the petitioner.

These results are exactly similar to those on the results slip exhibit R16. Interestingly the number of the slip falls within the numbers which UNEB sent to Progressive SS. These

results are what appear on the certificate which the 1<sup>st</sup> respondent presented to the RO at nomination exhibit R17.

There was an affidavit of one Kaahwa Erisa Amooti dated 27<sup>th</sup> May 2011 in which he stated that he founded Progressive SS Bweyogerere and was its Headmaster between 1996 and 2006. He deposed in para 4 of that affidavit that Kevina Taaka Wanaha was a student in his school where she sat her UACE (A) level exams in 1998 under index number U0731/864, and that her records were available at the school.

This witness stated in para 5 and 6 of his affidavit that her name was miss pelt as Wanah instead of Wanaha, and on that account, the school sent them back for correction of the name. That would explain the spelling of Wanah in the results slip, but the right spelling in the certificate. This is the spelling in her other documents, like her marriage certificate which was annexed to her affidavit in reply to the rejoinder dated 27/3/2011, where she got married to a Charles Wandera Mato on 31/12/1989.

On her identity card of Progressive SS, Bweyogerere exhibit R1 the same names appear. On the Electoral Commission voters information sheet which was printed on 5/12/2007 the names appearing are Taaka Kevinah Wanaha Wandera, the last name obviously being her marital name. This is petitioners exhibit P2.

There are other relevant documents where the names of the 1<sup>st</sup> respondent appear, like the Makerere University Business School testimonial where she is named as Wanaha Taaka Kevinah where she is said to have completed studies leading to the award of Bachelor of Business Administration degree, majoring in Accounting. This testimonial is dated 19/4/2005, well before matters relating to this petition were conceived let alone being born.

The impugned certificate R17 was verified by the issuing authority UNEB in a letter of verification dated 11/5/2001, almost ten years ago exhibit R15. The letter of verification states that Kevina T. Wanaha sat for 'A' level exams at Progressive SS under index number U0731/864 in the year 1998. Her results are given. The quoted index number and indeed all the details given are the same on the certificate exhibit R17 and on the examination slip exhibit R16.

The same UNEB by their letter of verification dated 11/5/2001 addressed to the Headteacher of Gayaza High School showed that Kevinah Wanaha sat for her EACE at Gayaza High School in 1973 under index number U013108. Her results were set out.

Unlike in the *Umar Mawiya case* (supra) there was no evidence from any of these schools disputing what was stated by the 1<sup>st</sup> respondent and verified by UNEB. On the other hand there was evidence to corroborate her evidence.

In this case there was no evidence from any person claiming to be the owner of the impugned certificate. In the *Umar Mawiya case* (supra) there was evidence at the trial from a witness who attended the same school as the appellant and knew a student by the names SMJ but this was not the appellant.

In the case of *Nabutala Nabisi & another v. Mumia Michael & E.C.* , E.P.Nos. 1 and 7 of 2001 (Mbale High Court), the 1<sup>st</sup> respondent in that case presented a certificate to the RO which was found to be a forgery. He sought to rely on another which was not a forgery, but which he did not present to the RO at the time of nomination. There was evidence that that certificate belonged to another person. There was further evidence that the 1<sup>st</sup> respondent did not in any event attend that school as he claimed. Court overturned his election as a member of parliament.

In the present case the 1<sup>st</sup> respondent told court in cross examination that the documents belonged to her. The name Taaka which was in some of the documents abbreviated as T. was her family name. Later she added the name Wandera which was her marital name, being married to Wandera. She had never had to change her name, which the Justice of Appeal in the *Umar Mawiya case* (supra) criticised as it had not been done in accordance with the law. A woman upon marriage assumes the name of her husband by operation of law. There was no forgery alleged or proved. Unlike that cited case, there were no contradictions in the evidence of the 1<sup>st</sup> respondent in regard to this issue. I did not see any lies and none was pointed out to me.

The petitioner had the burden to prove on a balance of probabilities that the 1<sup>st</sup> respondent was not possessed of the requisite academic qualifications at the time of nomination. It was not enough to point out some minor discrepancies in the spelling of the name, which discrepancies were in any event satisfactorily explained. He failed to discharge that burden.

In the event, I was satisfied and I find that the 1<sup>st</sup> respondent had the requisite academic qualifications to stand for election as a member of parliament at the time of nomination.

**Illegal Practices And Electoral offences.**

The petitioner in para 9 of the petition alleged that the 1<sup>st</sup> respondent committed illegal practices and electoral offences c/s 68 and 73 of the PEA respectively, personally and by her agents with her knowledge and consent or approval.

It was alleged that the 1<sup>st</sup> respondent committed acts of bribery and also made donations of cash to various groups during the campaign period which acts contravened the law. In para 9 of the petitioner's affidavit in support, he deposed that these incidences of bribery and other electoral offences were highlighted in the affidavit of Frank Kasumba.

Section 68 of the PEA deals with bribery. Subsection (1) thereof defines the offence of bribery thus;

(1) Any person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy two currency points or imprisonment not exceeding three years or both.

Subsection (4) states that an offence under the above provision is an illegal practice. Subsection (7) prohibits a candidate or his or her agent from carrying out fundraising or giving donations during the period of campaigning. Subsection (8) makes contravention of the above law an illegal practice.

Bribery at election is defined by Black's Law Dictionary, 6th Edition, as the offence committed by one who gives or promises to give or offers money or valuable inducement to an elector, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, or as a reward to the voter for having voted in a particular way or abstained from voting.

Therefore in order to establish the illegal practice of bribery the following ingredients must be proved:-

- That money or a gift was given to a voter
- That the money or gift was given by a candidate or his agent.

- That the money or gift was given to induce the person to vote for the candidate or (refrain from voting the other.)

As stated earlier, the standard of proof is to the satisfaction of the Court on a balance of probabilities like it is for all other grounds for setting aside an election of a member of parliament.

I will deal with each of the incidents complained of and decide whether the illegal practice of bribery c/s 68(1), or giving donations c/s 68(7) of the PEA is made out.

In dealing with this issue, I will keep in mind what was held in the case of *Engineer Katwiremu v. Mushemeza & Others*, (Mbarara) Election Petition No. 1 of 1996 (unreported), that unless there exist compelling and aggravating circumstances, an allegation of an illegal practice or election offence should not be taken to have been proved to the satisfaction of court by the evidence of a single witness to the act, even if that happens to be the witness who allegedly received the bribe or donation.

The consequences of such an allegation are so grave that court ought to be convinced by testimony which is backed by other, or independent testimony of the commission of such an illegal practice or election offence by a candidate in an election. A single act of bribery is capable of vitiating an election. See *Dr. Lulume Mwesigye Francis v. Returning Officer & Kakuru John* (Mbarara) EP No. 002 of 2002. The reason is because courts of law cannot allow a person to win an election by underhand and subterfuge methods. See also *Kirunda Kivejinja Ali v. Abdu Katuntu & EC* (CA) EP No. 24 of 2006.

### **Bucica Primary School**

The incident at Bucica primary school took place on 8<sup>th</sup> February 2011 at Bucica Primary School. In paras 4, 6 and 9 of the affidavit of Kasumba Frank, he was one of the invited guests at the PTA meeting of the school at which one Egesa Wycliffe was the master of ceremony. That the 1<sup>st</sup> respondent attended and donated shs. 50,000/=, and asked those present for votes.

The minutes of that meeting were exhibited R21, together with the denial by the 1<sup>st</sup> respondent in her affidavit in reply at paras 27 and 28. Egesa Wycliffe the MC at that function deposed in his affidavit dated 18<sup>th</sup> April 2011 that he was at that meeting at which no

parliamentary candidate donated any money. That only candidate Kasumba Frank offered to sponsor whoever passed in the 1<sup>st</sup> grade.

One Baraza Patrick in his affidavit dated 29<sup>th</sup> May 2011 deposed that he attended the PTA meeting of Bucica Primary School on 8<sup>th</sup> February 2011, but did not see any parliamentary candidate giving any money or gift to the school.

It was not intimated that Egesa Wycliffe or Baraza Patrick were supporters of the 1<sup>st</sup> respondent. Egesa Wycliffe was mentioned in the affidavit of the petitioner's supporter Kasumba Frank. He would therefore have no reasons to lie. In submissions to court, Egesa's testimony was not assailed. On the other hand, Kasumba was a candidate in the elections who failed in his bid. He therefore had an axe to grind against the winning candidate, the 1<sup>st</sup> respondent. She trounced him badly and he practically pulled the tail in the elections save for one person. That incident of gift donation at Bucica Primary School was not proved at all let alone on a balance of probabilities.

#### **Mubaki's Graduation Party.**

This was the 2<sup>nd</sup> incident of alleged bribery. Kasumba Frank in his affidavit deposed in paras 14, 15 and 16 that he and all other candidates were invited at the graduation party of Egesa Godfrey s/o Mubaki. At that party the 1<sup>st</sup> respondent donated to the graduate a wall clock and cash shs 50,000/-. The said graduate in his affidavit dated 29<sup>th</sup> April 2011, admitted receiving the two items cash and a wall clock. The 1<sup>st</sup> respondent admitted in her affidavit giving the graduate a donation of a wall clock.

What was missing in all the above depositions was whether this fresh Engineering graduate was a registered voter. He did not state so, and none of the deponents said he was one. That makes whatever gifts whether by way of cash or in kind which may have been made to him innocuous. For a gift or money to qualify as a bribe under the electoral law, such must have been made to a registered voter. That incident therefore fails.

#### **St. Jude Catholic Church.**

The 3<sup>rd</sup> incident is alleged to have taken place at St. Jude Catholic Church on 13<sup>th</sup> February 2011. In paras 17 to 22 of Kasumba Frank's affidavit it was deposed that the 1<sup>st</sup> respondent contributed sh. 50,000/= towards the construction of the nursery school at the church. She handed the shs. 50,000/= note to a catechist called Mark.

The said catechist Mark Wabwire swore an affidavit on 18<sup>th</sup> April 2011, in which he stated that he was not in St Jude Catholic Church on 13<sup>th</sup> February 2011. He was at Mawero sub parish that Sunday on assignment of duties. He did not therefore receive any shs 50,000/= from the 1<sup>st</sup> respondent as alleged. One Matruda Agutu a regular faithful at that church, in support of the petition deposed in her affidavit dated 29<sup>th</sup> April 2011, that the two politicians each held a basket and the faithful deposited their respective contributions therein. That at the end, the 1<sup>st</sup> respondent pulled out 50,000/= and announced that she had contributed that amount. Noticeably, this deponent did not say that the 1<sup>st</sup> respondent handed the money to the catechist, yet she claims to have been present like Kasumba Frank. So which of these two was telling the truth, they were both in support of the petition.

The petitioner presented two contradictory pieces of evidence in respect of the same incident. The catechist who allegedly received the bribe denied even being in that church that Sunday. One would be more inclined to believe him in the circumstances. That to me disposes of that matter.

#### **Munno Mukabi Youth Group.**

This was the 4<sup>th</sup> incident of alleged bribery. The indomitable Kasumba Frank deposed in paras 23 and 24 of his affidavit that on 9<sup>th</sup> February 2011, he met one Kavuma Kasirye, the chief campaign manager of the 1<sup>st</sup> respondent who gave a donation of 30,000/= to the group on behalf of his candidate.

The said Kavuma Kasirye deposed in his brief affidavit dated 18<sup>th</sup> April 2011 that he was a flag bearer of FDC for post of Chairperson of the Western Division in Busia Municipality. He was very busy looking for votes for himself and so did not have the time to campaign for the 1<sup>st</sup> respondent. He had no knowledge of a Youth group known as Munno Mu Kabi in Maweno West.

If the person who is alleged to have given the bribe deposes in an affidavit that he was neither the campaign manager as alleged because he was busy campaigning for himself, nor had any knowledge of the existence of the group allegedly bribed in the area, court would need independent evidence to prove such allegation. There was none. It is of course possible that if Kavuma Kasirye gave out any money he was probably doing it for himself, after all, he was also a candidate in the election though at a different level. That incident was not proved.

#### **Notola Sholua Group.**

Para 25 of Kasumba Frank affidavit stated that on 13<sup>th</sup> February 2011, the 1<sup>st</sup> respondent donated shs. 30,000/= to the Notola Sholua group at Custom's road. Tibihwa Farida in support of the petition stated in her affidavit that she was a member of the association. On 14<sup>th</sup> February the 1<sup>st</sup> respondent gave their association shs. 10,000/=. Juma Moses another member of the group deposed in his affidavit dated 18<sup>th</sup> April 2011 that Kasumba Frank was not invited to, and certainly did not attend, their function of 13<sup>th</sup> February 2011. The association did not receive 30,000/= from the 1<sup>st</sup> respondent as alleged. Namulundu Hanifa in her affidavit dated 18<sup>th</sup> April 2011 stated that she was a member of that association. The 1<sup>st</sup> respondent indeed went to their association on 13<sup>th</sup> February 2011 at their invitation, but that she did not give them any money.

If the incident described by Tibihwa Faridah was different, as submitted by Counsel for the petitioner, then he ought not to have used it in support of the alleged bribery of the 13<sup>th</sup> February 2011. Nabwire Annet in her affidavit dated 24<sup>th</sup> May 2011 deposed that she knew Tibihwa Faridah very well. She was not a Chairperson of the group. The witness attended the group's meeting at Faridah's place on 14<sup>th</sup> January 2011. That the 1<sup>st</sup> respondent arrived and left in the presence of this witness, but no money or gift was donated at this incident by her to Faridah or to the group.

With that conflicting evidence in respect of the same incident and the same person it could not be said that the petitioner proved on a balance of probabilities that the 1<sup>st</sup> respondent committed an act of bribery or that she made an unlawful donation at Notoola Sholua group.

The incident alluded to by Tibihwa Farida was denied by the 1<sup>st</sup> respondent in her affidavit dated 27<sup>th</sup> May 2011. The allegation by Kasumba Frank was that on 13<sup>th</sup> the 1<sup>st</sup> respondent donated money to that group. Then this witness alleges that the very following day, the same person donated more money to the same group. That appears to be farfetched that the same candidate would be making donations to the same group twice in two days. I do not find that incident proved.

#### **Esyange Sihira Esyefe Women's group.**

The incident of bribery herein was deposed to by Mercy Wabudi in her affidavit dated 5<sup>th</sup> April 2011. The allegation was that the 1<sup>st</sup> respondent was invited to their fundraising on 22<sup>nd</sup> January 2011. She however went to their group on 29<sup>th</sup> January 2011 and donated to them shs. 20,000/=. On 18<sup>th</sup> April 2011 the same Mercy Wabudi swore another affidavit in which she

disowned the earlier affidavit of 5<sup>th</sup> April 2011 in support of the petition. That made the evidence of this witness totally unreliable and could not be relied on.

The affidavit of Nyanzi Christine was to the same effect as that of Mercy Wabudi in support of the petition.

Amos Gad Wafula the election supervisor of the 1<sup>st</sup> respondent in the elections swore an affidavit on 18<sup>th</sup> April 2011 in which he stated in paras 7 and 8 that he was with the 1<sup>st</sup> respondent on their way to campaign when they met the group seated at John Baraza's place. They only greeted the people. That there was no way the 1<sup>st</sup> respondent could have done anything to sway the people at that place, let alone the members of the Esyange Sihira Women's group, when it was common knowledge that John Baraza was an agent of the petitioner.

It was not denied that the group was at the home of the agent of the petitioner when the alleged bribery took place. It surely would be foolhardy for anyone let alone a person standing for election as an MP, to bribe voters in his or her opponent's compound. That is not realistic or practical and sounds highly improbable. The petitioner did not prove that incident on a balance of probabilities.

### **Defamatory Statements.**

The last aspect in this regard were the alleged utterances by the 1<sup>st</sup> respondent which were said to be defamatory. This was contained in paras 5 to 8 of the petition, and paras 10 to 16 of the affidavit of the petitioner in support of the petition. Kasumba Frank in paras 7, 8, 26, 27 and 28 of his affidavit similarly deposed to these utterances at the Bucica primary school PTA meeting, and at the Notoola Sholua group meeting composed predominantly of Muslim women. The allegations of utterances where Muslims were allegedly demeaned by the petitioner were repeated in the affidavits of Sheikh Ibrahim Habib Wandera and Sheikh Hamisi Kibirige. That these utterances were made or perpetrated by the 1<sup>st</sup> respondent or her agents.

The utterances complained of were set out in para 5 of the petition to the effect that the petitioner;

‘was a liar who had deceived Muslims in the various mosques that he would take Muslim women to Mecca for Hija.

That he had embarrassed Muslims by claiming that once they eat rice, which he had purported given them or was to give them their stomachs would bulge and they would think nothing but somebody who fed them with the rice.’

The 1<sup>st</sup> respondent denied ever making the utterances as alleged or that any of her agents did so. In cross examination she told court that as a non Muslim and a woman at that, there was no way she would go into, or be allowed to address Muslims in, a mosque.

It was submitted that the issue of rice contributions by the petitioner were a matter he brought up himself, long before these campaigns started. But more recently in his campaign manifesto exhibit R 5, which stated in part 2 thereof that the petitioner contributes to mosques and to various religious festivals including Idd. This was not denied. This showed that the petitioner during his campaigns was either boasting or reminding his constituents and particularly the Muslims, of his magnanimity as a regular contributor to Muslims during their Idd festivities.

A candidate who imputes contributions to a religious sect during that sect’s festivities should not complain when his or her opponent questions whether that is all that the members of that sect will base upon in deciding who to vote for. It is not expected that a candidate in an election campaign will portray an opponent as a saint, or his or her actions as saintly. It is said that politics is not for the meek or faint hearted. Others describe it as a dirty game.

The petitioner boasted of making contributions to Muslims during the Idd festivities. He even put it into his campaign manifesto. I did not see that it was defamatory for his opponents to talk about it. But in any event, the 1<sup>st</sup> respondent denied making such utterances. I agree that it would be highly improbable that a woman and a non Muslim would be allowed to make campaign speeches in a mosque.

The petitioner’s witness Habib deposed in para 3 of his affidavit dated 29<sup>th</sup> April 2011,

‘That during the campaigns some politicians including Kasumba Frank, Idd Kiribaki confused Muslims when they went around saying that Aggrey Awori was painting Moslems in bad light by claiming that he gave Moslems rice which changed their minds.’

The said Kasumba Frank was the petitioners very strong supporter, and he claimed to be an eye witness to virtually all the allegations of bribery against the 1<sup>st</sup> respondent. This was the same person who was de campaigning the petitioner. It was all preposterous.

In para 2 of his affidavit this witness deposed that, in respect of the 1<sup>st</sup> respondent, it was only rumours that those in her camp were alleging that Awori deceived Muslim women that he would take them to Mecca, which was false.

The evidence of Sheikh Hamisi Kibirige was contrary to what the petitioner alleged, and this was his witness. Juma Moses swore an affidavit on 18<sup>th</sup> April 2011 in which he stated that his group had nothing to do with the Muslim women's pilgrimage to Mecca. Therefore the affidavit of Kasumba Frank was false.

Mutwalibu Waisswa stated in his affidavit that he was a supporter of the petitioner, but this time round he never voted for him due the many unfulfilled promises he made in the past. Meaning that his change of mind had nothing to do with alleged utterances.

Kassim Masha stated in his affidavit that Awori brought 7 bags of rice to their mosque on eve of Idd Aduha. This was revealed to the congregation by Sheikh Habib. Each bag was to be distributed to each mosque. The witness stated that by putting his contribution in his manifesto, the petitioner was demeaning the Muslims. Namulundu Hanifa stated the same thing in her affidavit. Semakula Abdalatiff stated in his affidavit dated 18<sup>th</sup> April 2011 that the District Kadhi Sheikh Ibrahim Habib Wandera told the congregation in the mosque at Masjid noor on 11<sup>th</sup> February 2011 that Awori donated to them 50 iron sheets and bags of rice plus cash.

Sheikh Abdu Awali affirmed that he is the Chairperson of Masjid Uthman Mugungu, and that the Imam Sheikh Muhamoud Were informed his congregation that the promise of Awori to send a woman to Mecca could not be fulfilled as the money Awori donated of shs. 1 million was not sufficient for even one woman's trip. The money was converted to purchase a generator for Masjid Uthman Mugungu. The same Sheikh Mohamoud Were informed them that Awori bought them rice. Wavamuno Badru in his affidavit confirmed the above and received his share of the rice donated by Awori.

The totality of the evidence was that there were unfulfilled promises made by the petitioner which did not go well with his constituents. There were utterances involving the contributions which the petitioner made to Muslims earlier during the festive days. His own witnesses alluded to them. There was nothing defamatory in those utterances in so far as they referred to the truth that Awori made contributions to Muslims during their festive days, a matter he included in his own manifesto.

The petitioner alleged that at certain campaign stations which he named, he was abused by Muslims for reasons that he demeaned them. If that occurred, then surely Awori should credit his constituents with sufficient intelligence to do only that which they believed to be right. If there were unfulfilled promises he made, or and if he made allusions to them that he was their benefactor in the rice contributions he usually made and was bold enough to add this to his manifesto, to their chagrin, then he harvested what he sowed.

The court was not satisfied that there was any truth in the allegations that the 1<sup>st</sup> respondent made any defamatory statements against the petitioner c/s 73 of the PEA.

In the result I did not find that the 1<sup>st</sup> respondent whether personally or by her agents with her knowledge and consent or approval committed any illegal practice or any electoral offence c/s 68 and 73 of the PEA. The 3<sup>rd</sup> issue is answered in the negative.

**Whether the 2<sup>nd</sup> respondent conducted the elections in accordance with the law, in so far as it cancelled the results of 5 polling stations.**

It is not disputed that the 2<sup>nd</sup> respondent cancelled the results of 5 polling stations. The declared results of the election were from 39 polling stations, not 40 as originally stated. The results in Exhibit P1 which were said to be from 40 polling stations were exactly the same as in exhibit P12 where 39 polling stations were considered. It was an agreed fact that the five polling stations whose results were cancelled were;

- a) Nangwe Mugungu A (A – M) - with total registered voters being 868.
- b) Arubaine A (A – J) Eastern New Market – with total registered voters being 903.
- c) Arubaine B (A – M) Green School Polling Station – with total registered voters being 982.
- d) Arubaine B (N – Z) Hatari’s palace – with total registered voters being 597.
- e) Nangwe Primary School – with total registered voters being 808.

The Returning Officer (RO) Sam Agaba in his affidavit dated 9<sup>th</sup> May 2011, in para 6, stated that he cancelled those results after it was discovered that there was non compliance with electoral laws during the voting process. In para 7 he stated that at Eastern New Market polling station, the number of votes had been inflated. The votes cast far exceeded the number of registered voters.

In para 8 the RO stated that at the other polling stations whose results were cancelled, while the results of the presidential candidates and those of the district woman MP were present, those of the directly elected MP were missing, hence their cancellation. The RO stated that the cancellation affected all the candidates.

The 1<sup>st</sup> respondent deposed that she was leading in the cancelled polling stations. In that event therefore the said cancellation affected her more than the petitioner. She attached to her affidavit DR forms of said results which she obtained from her polling agents. These were exhibited as R7 for Mugungu 'A', R8 for Eastern New Market, R9 for Arubaine B, R10 for Hatari Palace and R11 for Nangwe Primary School. She stated that if the results at these polling stations had been considered, she would have won with an even bigger margin with 111 more votes.

Wandera John was the Presiding Officer at Mugungu 'A' polling station. In his affidavit in support of the petition he deposed that 554 ballot papers were used out of the 900 supplied. That Awori won by a very big margin, but he could not recall the figures. He disowned the DR form R7 which was exhibited by the 1<sup>st</sup> respondent. In that form, Awori indeed won with 145 votes while the 1<sup>st</sup> respondent got 135 votes.

Taaka Joyce was the Presiding Officer at Nangwe Primary School polling station. She stated in her affidavit dated 29<sup>th</sup> April 2011 that voting and counting of votes at her station went on smoothly. She handed over all the materials to her supervisor Ojambo. She was surprised to be arrested on the grounds that results declaration forms for her polling station were missing. She recalled that Awori won at that polling station.

Exhibit R11 showed that Awori won at Nangwe Primary school polling station with 141 votes while the 1<sup>st</sup> respondent got 123 votes. This form was duly signed by the agents of the petitioner and the 1<sup>st</sup> respondent. The Presiding Officer also signed. The figures herein tallied.

Haruna Abbasa was the agent of the 1<sup>st</sup> respondent at Arubaine Eastern New Market polling station. He deposed that 950 ballot papers were supplied, and the registered voters were 930. Awori got 77 votes while the 1<sup>st</sup> respondent got 108 votes. The witness deposed in para 5 of his affidavit that a polling assistant the daughter of Mukasa gave Awori 2900 votes, which was more than the registered voters. The witness protested and for his pains he was roughed up by kundusi group of youth mobsters associated with the petitioner.

Exhibit R8 shows that figures were super imposed on others. There are numerous crossings. The figure of 2900 is clearly visible as the total votes cast, but another figure of 950 is super imposed. When one adds up the figures they certainly do not tally. That was one of the polling stations whose results were cancelled.

Amos Gad Wafula deposed that he was the supervisor of elections for the 1<sup>st</sup> respondent. He deposed that the kundusi group which was associated with Awori, as they even travelled in his pick up caused chaos at the polling stations leading to the loss of the results declaration forms once they realised that their candidate was losing. Magala Basalirwa another agent of the 1<sup>st</sup> respondent deposed similarly. Nakembo Juliet was the polling agent of the 1<sup>st</sup> respondent a Mugungu 'A' polling station. She confirmed what was deposed by Wandera John that voting thereat was peaceful. Awori got 144 votes while her candidate got 135 votes.

From the evidence on record, there was some chaos caused by a group of youths known as Kundusi. These were partly or mostly to blame for the cancellation of results at the stated polling stations. This group was not disowned by the petitioner in the respective affidavits he filed in support of his petition. The chaos was meant to benefit the candidate of these marauding youths.

The RO stated that he cancelled the results because the results in respect of those stations were missing. He took administrative action of having those he believed to be the perpetrators of the malpractices to the police. Taaka Joyce and Wandera John stated so in their respective affidavits.

The mandate of the Electoral Commission, the 2<sup>nd</sup> respondent herein (EC) is derived from the constitution in Article 61(1) which provides for its functions which are inter alia, to ensure regular free and fair elections.

Article 62 gives the EC independence to act without the direction or control of any person or authority. Under its enabling law, the Electoral Commission Act (ECA), in section 12 enjoins the EC to;

- (e) take measures for ensuring that the entire electoral process is conducted under conditions of freedom and fairness.

Where the EC realises that the electoral process has been derailed by whatever person or party, it is within their mandate to take immediate corrective measures, as will ensure, so far

as is possible fairness and transparency. Where for example votes have been inflated to such numbers that outmatch the registered voters in the polling station, and this will obviously be found out after the election, one of the ways of ensuring fairness is the cancellation of the results at such polling station. The issue of first consulting the parties or seeking advice from some person before the EC takes action in such a case would be impractical and against the letter and spirit of the law which gives them independence to take such measures as would ensure fairness without direction or control of any person or authority.

From the above, I was not satisfied that the elections were not conducted in accordance with the law. The 4<sup>th</sup> issue is answered in the negative.

The 5<sup>th</sup> issue was whether the non compliance if any affected the results in a substantial manner. Having found that there was compliance with the law, it would be academic to deal with this issue. But nonetheless, I will add that even if I had found that there was non compliance, my view is that this cancellation did not affect the results of the election in a substantial manner.

Dealing with Section 58 of the Presidential Elections Act, 2000 which is similar to S. 62 of the Parliamentary Elections Act, their Lordships the Supreme Court Judges did exhaustively deal with this issue in the Besigye-Kizza Petition No. 1/2000. Odoki C.J. at page 159 citing two English cases had this to say:-

*“What is a substantial effect?...The effect must be calculated to really influence the result in a significant manner. In order to assess the effect the Court has to evaluate the whole process of election to determine how it affected the result, and then assess the degree of the effect.*

*In this process of evaluation, it cannot be said that numbers are not important just as the conditions which produced those numbers, numbers are useful in making adjustments for the irregularities. The crucial point is that there must be cogent evidence direct or circumstantial to establish not only the effect of non-compliance or irregularities but to satisfy the court that the effect on the result was substantial.”*

The total number of registered voters at the cancelled polling station was 4158. The total number of those who voted were 1470 only. The winner of the election won by a margin of

over 840 votes. If the results had not been cancelled, and at polling stations where there were obvious malpractices, the petitioner led, if all these were added, still the 1<sup>st</sup> respondent would have won by at least 111 votes more. What is more, as I stated above, the petitioner was not entirely blameless for some of the cancelled results, according to the evidence on record. The cancellation of the results of the 5 polling stations did not affect the results of the election in a substantial manner.

In the result, this petition fails and it is dismissed with costs to the respondents. I award a certificate of two Counsel to the 1<sup>st</sup> respondent.

RUGADYA ATWOKI

JUDGE

11/07/2011.