

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT Jinja**

HCT-03-CV-EP-0016-2011

MRS. WALUUBE KYALYA MAUREEN FAITHPETITIONER

VS

**1. ELECTORAL COMMISSION }
2. NABIRYE AGNES } ::::::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: THE HON. LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

INTRODUCTION:

The Petitioner Waluube Kyalya Maureen Faith, the Second Respondent Nabirye Agnes, and five other candidates participated in the election for Women Member of Parliament for Jinja District held on 18th February, 2011, organized and conducted by the First Respondent.

At the conclusion of the election, the First respondent returned the Second Respondent as the winner with 45,919 votes against 37,175 votes of the Petitioner. The Second Respondent was gazetted by the First Respondent as winner of the Election on the 02nd day of June, 2011. The Second Respondent was accordingly sworn in as woman member of Parliament for Jinja Municipality.

Contesting the election, the Petitioner filed this petition in the High Court Jinja, contending that, the election was conducted in contravention of the provisions and principles of the Constitution of Uganda, The Electoral Commission Act and the Parliamentary Elections Act and that the non compliance with the law affected the final result of the election in a substantial manner, to the detriment of the Petitioner. That the election and the results declared was therefore invalid and erroneous and contrary to the will and consent of the people of Jinja District.

It was further contended by the Petitioner that the entire electoral process in Jinja right from the campaign period was characterised by acts of unfairness, lack of freedom and transparency, commission of numerous electoral offences and illegal practices/acts all
5 contrary to the law.

It was also the contention of the Petitioner that, the 2nd Respondent did not qualify to stand as candidate for Woman Member of Parliament of Jinja District as she did not have the required Uganda Certificate of Education to enable her to proceed to the Advanced Level
10 Standard.

That fully aware that she did not qualify, the 2nd Respondent nevertheless illegally presented herself for nomination and participated in the attendant election. And that the First Respondent therefore breached its mandate and authority when it failed to bar the 2nd
15 Respondent from participating in the electoral process.

Further that, all the illegal acts afore said were committed by Respondents and or their agents, officers and supporters with the knowledge, consent and approval of the respondents; and that therefore the respondents are liable for all the illegal acts and non compliance with
20 the law.

The Petition was supported by the affidavit of the Petitioner, list of documents and other affidavits that are on record. The petitioner then prayed for the following remedies:

- A) A declaration that the 2nd Respondent was not validly elected as a woman member of
25 Parliament for Jinja District.
- B) The annulment and setting aside the election of the 2nd respondent.
- C) The declaration of the petitioner as winner and validly elected Member of Parliament as she was returned second with 37,175 votes.
- D) An order for recount of the votes issue to ascertain the number of votes cast for each
30 candidate and thereafter declare the petitioner winner.
- E) Alternatively but without prejudice to the foregoing, a new election be organized and conducted **under S.63 (4) (c) of the Parliamentary Elections Act.**
- F) The court issue any other remedies deemed just and appropriate in the circumstances.

In answer to the Petition, the 1st Respondent denied all the allegations of the Petitioner and contended that the election was conducted in accordance with all the provisions of the law relating to elections; and with transparency whereby all the candidates and their agents were allowed to witness polling, counting of votes and final tallying; and all allegations of alteration and forgery of results were vehemently disputed.

It was also asserted that the 2nd Respondent was nominated on the basis of information contained in her nomination papers which showed that she was academically qualified to stand for the elections.

Denying being aware of or being a party to any wrong doing at all, the First Respondent pleaded in the alternative but without prejudice that , if at all there was any non-compliance with the electoral laws, the said non-compliance did not substantially affect the outcome of the election. It was then prayed that the petition be dismissed with costs. The answer was supported by the affidavit of the Head Election Management of the First Respondent.

The 2nd Respondent also denied any wrong doing in the election and insisted that the election was conducted in accordance with all the electoral laws and that there was neither fraud nor wrong tallying of results. That if the entire electoral process had been marred by malpractices, lack of transparency and unfairness, then the petitioner and her agents would have lodged complaints with the Presiding Officers or with the Electoral Commission, which they never did.

The 2nd Respondent also insisted that she is academically qualified to stand as Woman member of parliament and that all allegations to the contrary were baseless and vexatious and should be treated with the contempt they deserve.

Alternatively, but without prejudice to the fore going , the 2nd respondent stated that if at all there was non-compliance with the electoral laws, then such non-compliance did not affect the result of the election in a substantial manner and she was validly returned as the winner having polled the majority votes.

Declaring that the Petitioner was not entitled to the reliefs sought, the 2nd Respondent prayed for the dismissal of the petition with costs.

Her answer was supported by her affidavit and many others that were to be relied upon at the hearing.

The joint scheduling memo set out the agreed facts, the issues to be determined, and the affidavits and documents to be relied upon by each of the parties. The memo was signed by the parties, their counsel and the trial judge then.

The agreed issues were the following:

1. Whether the 2nd Respondent qualified to be a Member of Parliament under the law.
2. Whether there was non-compliance with the electoral laws.
3. Whether the non-compliance affected the results in a substantial manner.
4. Whether the petitioner won the elections.
5. Whether the petitioner is entitled to the remedies sought.

When the petition was called for hearing on 10.11.11.; court was informed that it had been agreed at the scheduling conference that 212 ballot boxes were to be produced before court for verification of results, beginning with 30 boxes where there was evidence of altering/switching results. Dates for the exercise were agreed upon and a list of names of two agents per candidate and officers of the first Respondent to witness the exercise was to be provided.

On 29.11.11 only 211 ballot boxes were produced at court. Out of these 160 boxes had intact seals, 51 boxes had broken seals, while one box was reported missing.

Thirty boxes were agreed upon and the verification exercise took off with 14 of those which had seals, after they were identified and listed. Needless to state, the exercise was tedious. After sampling 4 boxes and noting the apparent malpractices, court halted the exercise on 01.12.11 upon realising that it was in futility. The reasons for the halt are set out in the court's ruling of that date and there is no need to repeat them here.

The list of witnesses to be cross-examined by either side was presented and the affidavits were marked with guidance of court. Hearing was then fixed for 07.12.11.

On that date, the witness of the petitioner who was to be cross-examined by the Respondents was not in court. Upon the application of counsel for the Petitioner, the witness's affidavit

(P3) was expunged from the record. The Petitioner's case was then closed and the respondents' case began.

DW1 Flavia Mujulizi is the Returning Officer of Jinja District. She was cross-examined on the two affidavits she swore in response to the petition. In reference to the affidavit of 26.09.11, she told court that that results are being filled in the declaration of results forms is done in alphabetical order. However that, some presiding officers make the entries in a different order which confuses the tally clerks and they enter the figures wrongly for all the candidates.

The witness admitted that there were errors in filling the declaration of results forms and then the tallying of results, such that the results of 10 polling stations did not reflect the actual results as they were wrongly entered in the tallying sheets.

She gave an example of Polling station Maternity C_N_Z where the Declaration of results forms were not in alphabetical order. On the declaration of results from R1a the 2nd respondent has 51 votes while on the tally sheet the 51 votes were given to one Sewali and 2nd respondent was indicated to have received no votes.

Nabukenya has no votes on the declaration of results form while she has one on the tally sheet.

Dr. Namboze Josephine has one vote on the Declaration form and 10 votes on the tally sheet.

On the declaration of results form Nambooze Betty has 10 votes and on the tally sheet she has 6 votes.

The petitioner has 64 votes on the declaration of results form, while on the tally sheet she has two.

Ruth Tuma has 6 votes on the declaration of results form and 64 on the tally sheet.

Kalule Sewali has 2 votes on the declaration of results form and 51 on the tally sheet.

The Returning Officer explained that the declaration of results form contains results from the polling station and that the tally sheet is supposed to match. The winner is announced using the tally sheet.

5 She admitted that by the time she declared results she had not seen the errors on the tally sheet and did therefore not correct them. As a result of the errors the petitioner lost 62 votes at the polling station, while Kalule Sewali gained 49 votes that were not hers. Out of the total number of 135 votes cast at that station, the petitioner lost 45.9%.

According to the declaration of results forms, the Petitioner had won at that polling station,
10 but according to the tally sheet, Tuma Ruth won. However that, the error did not alter the will of the people, as the winner is announced after totalling of votes for the whole district.

The other polling stations where there were errors are: Maternity C (NZ), Kyabazinga 3, Buwagi Ibungu, Kivubuka, Mutai 2, Mutai 3, Universal Apostles' Church, Buwenge South (NA-NAM). Two other stations not mentioned in the affidavit are Lake View Primary School
15 and Kambona Pine Tree Plantation.

Going through the results of Lake View primary school, the witness concluded saying that 274 people voted. The percentage ratio lost by the petitioner was 37.2%. According to the declaration of results form the Petitioner won but the tally sheet indicates Ruth Tuma as the
20 winner after gaining 71 votes.

At Kambona Pine Tree Plantation Polling station, it is again apparent that the Petitioner won. She got 90 votes on the declaration of results forms but 9 is indicated on the tally sheet. Kalule Sewali got 3 votes and the tally sheet indicates 84, while the 2nd Respondent got 84
25 votes and the tally sheet indicates 90.

While the petitioner had won at all the 3 polling stations, according to the tally sheets she lost a total of 245 votes.

30 The witness informed court of 4 other stations where the results entered on the declaration of results form were different from what was entered on the tally sheet. She contended that she discovered the errors by looking through the tally sheets after the petitioner brought the errors to her notice. The polling stations where errors were identified were eight but more came up later.

When the results were added the witness asserts that she realised that the margin between the Second Respondent and the First runner up was still high and she therefore did not inquire any further. The difference in votes between the two parties was 8,744. The petitioner got a total of 37,175 votes while the Second Respondent got 45,919 votes. The second Respondent was therefore declared winner. And once the winner was declared, the matter was out of the hands of the First Respondent.

However, the witness acknowledged that none of the candidates ought to have been given votes not cast in their favour. She pointed out that while the votes got mixed up in tallying the person who got the highest number of votes was the winner. Insisting that the errors did not make much difference, although the witness was not aware of how many polling stations were queried out of the total of 348.

It was noted that 211 boxes were produced in court for the recount, out of which only 4 were opened.

DW2 Bakubye Joel Simon a teacher at a primary school was the presiding officer at Isiri Polling Station during the February, 2011 elections. He showed court one of the many declaration forms he filled out on that date. The declaration of results form contains the results. Once filled out the results are announced. On this form, the figure of the total number of unused votes had been crossed out from 201 to 197. The words were also crossed out. The declaration of results form no.00206 indicated the total number of unused ballots as 201 and not 197. The order of appearance of candidates is also different.

Seven copies of the form were filled out and distributed to the agents of the candidates after they signed the forms. The copy for the Returning Officer was sealed in the ballot box, which was then handed over to the county with all the other materials used. Unused declaration of results forms were sealed in an envelope and handed over at the county desk. The witness stated that any ballot box without a declaration form would necessitate the recounting of votes to determine the winner. However, that he was not responsible for security and did not know the box without the declaration form.

DW3 was the Second Respondent. She testified that her full names are **Nabirye Agnes Tibalongerwa Waiswa**. When she was born on 07.07. 1972, she was named **Tibalongerwa**

Nabirye Agnes after her paternal grandmother. At Kamuli Girls Primary School she was known as Agnes Waiswa.

Upon joining Trinity College Nabbingo in 1987, the school policy required students not to use their father's names. She therefore registered by the names of **Nabirye Agnes** and used them until completion of Ordinary Level Certificate and to join higher Institutions of learning.

The 2nd Respondent asserted that from the first day she joined Nabbingo she became **Nabirye** and that is how **Waiswa Agnes** who completed Kamuli Girls Primary School became **Nabirye** at Nabbingo. That the name Waiswa appeared in brackets in the school register and therefore could not appear on her certificates.

Denying that she was ever known as **ADNES**, the 2nd Respondent informed court that she sat for her Primary Leaving Examinations in 1986 under index no: 19/036/061. No certificates were issued but a sheet of paper with all names of the candidates and their results was issued with the name of the candidate highlighted. The Head teacher would also issue a sheet of paper with names and results.

The results form from UNEB for the year 1986 was shown to court. The names indicated thereon are: "**Waiswa ADNES**". It was explained that the form is dated 20.07.11 as the original form she received got lost. And that the spelling mistake of the name Agnes may have come from UNEB. The 2nd respondent asserted that she could never have become a member of the School Management if she had never attended the school.

Maintaining that she was born on 07.07.72 and was therefore 39 years at the time of hearing of the petition, the 2nd Respondent acknowledged filling a nomination form on 09.11.10. The age indicated on the form is 37 years although she says she was by then 38 years of age. The difference was said to be a mistake.

While the certificate of completion of formal education indicates that 2nd Respondent was born on **17.07.72**, she asserted she was the one referred to and that indeed she was born on **17.07.72** and not on **07.07.72** as earlier claimed.

The form the 2nd Respondent filled to join advanced Level at Nabbingo shows her date of birth as **03.12.72**. The witness told court that the date is not correct.

Another document dated 06.06.87 in the names of **Waiswa Agnes** filled in on the date of admission shows date of Birth as **16.07.72**. It was explained that this was the first day 2nd Respondent joined Nabbingo.

5 Shown a Cumulative Guidance Record for Senior Secondary School, the 2nd Respondent acknowledged it as her form. The sir names on the form are: **Waiswa Nabirye**. Other names are: **Agnes Waiswa**. The name **Waiswa** is crossed out and the name **Nabirye** added. Still the 2nd Respondent asserted that she completed senior 4 and has her original certificate in the names of **Nabirye Agnes**; the same as **Waiswa Agnes** who sat for primary leaving at
10 Kamuli.

The argument of the 2nd Respondent is that if she had not sat for primary leaving she would never have been admitted at Nabbingo. And that if she had not sat for her senior 4 she would not have sat for A level. Admitting that she had heard of a deed poll she stated that she had
15 never sworn one for change of name.

Shown the letter from UNEB dated 20.09.11- Verification statement index no.19/036/061 in the names of **Waiswa Adnes**, the 2nd Respondent was adamant that the results are hers. Adding that she joined Nabbingo as **Waiswa Agnes** but due to the school policy changed to
20 **Nabirye**. That the result of the year 1986 show Waiswa ADNES, the error is in the letter **D**.

Referring to the letter dated 22.07.11 with her photograph; the 2nd Respondent stated that the letter was written by the Headmistress of Nabbingo one Nakate Kikomeko C.B. who was a fine art teacher when 2nd Respondent was in the school. This letter was recalled for “**further**
25 **clarification and management**” by another one dated 08.09.11.

On agreement of counsel, the birth certificate of the 2nd Respondent was presented to court. The birth date indicated on the certificate is **17.07.72**, while the admission form to Trinity College Nabbingo shows the birth date as **16.07.72**.

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DW4 Alex Waiswa is the father of the 2nd Respondent. He is a retired Civil Servant. In his affidavit paragraph 9 he stated that he registered the 2nd Respondent at Nabbingo as **Waiswa Agnes** but says this was wrong as the name should have been **Nabirye Agnes**. That where the signature of the pupil is indicated as Waiswa Agnes, it should have been Nabirye Agnes.

In paragraph 10 the witness acknowledged signing the admission form but pointed out in paragraph 11 that subsequently, the school required the students to use their own names as opposed to family names and the 2nd Respondent was then called Nabirye Agnes. That the
5 very day the forms were signed, the school began calling the 2nd Respondent Nabirye Agnes.

The witness stated that the 2nd Respondent was born on 17.07.72 but they never got a birth certificate. She is not a twin. He could not recall if the certificate was required at school.

10 The cumulative form was filled by the 2nd Respondent herself. The sir names were indicated as **Waiswa Nabirye** and other names as **Agnes Waiswa**.

In primary school the 2nd Respondent was known as Waiswa Agnes and from senior 1- 4 as Nabirye Agnes.

15 DW5 Bajula Grace Justine is a teacher. She explained to court that to sit for senior 4 a candidate must have passed primary 7 and registers on presentation of a P.7 pass slip, together with 2 photographs. One photo for the school and the other for UNEB. That before UPE, students could change names and even add others but this changed when UPE was introduced.

20 In 1989 the schools registered students who sat for senior 4 following the information registered at senior one.

While this witness was a teacher at Nabbingo during the period under question, she was not working in the registry and therefore does not know if birth certificates were a requirement.

25 Counsel for the Respondents then informed court that he was dispensing with the last witness and applied to court to expunge her affidavit from the record. The affidavit R33 was accordingly expunged.

Both counsel applied to be allowed to file written submissions and time frames were set. The
30 Petitioner's submissions were to be filed by 20.12.11 and those of the Respondents by 16.01.12. Rejoinders if any were to be filed by 20.01.12.

Judgment was to be on notice.

From the outset, I also wish to remind myself of the burden of proof in such petitions. It has been recognised and reiterated in a number of decided cases that the burden of proof in an election petition lies upon the petitioner to prove every allegation set out in the petition to the satisfaction of the court. “**proof to the satisfaction of the court**” has been held by the Supreme court of Uganda to imply that the matter has been proved without leaving room for the court to harbour any reasonable doubt about the occurrence or existence of the matter. The standard of proof is on the balance of probabilities.

The degree of proof is also been established to be higher than that which is required in an ordinary civil suit because of the public importance and the seriousness of the allegations often contained in the petitions. See: **MBOWE VS ELIASAFU [1967] E.A 240; BAKU.R.OBUDRA VS AGARD DID AND ANOTHER ELEC.PET.0004/01; AND COL. (RTD) KIIZA BESIGYE VS Y.K. MUSEVENI AND ANOR (S.C.) ELEC.PET. NO. 1/01**, among others.

It has also been repetitively pointed out by the courts that “election petitions are matters of public interest which concern not only the parties to the election petition but also the general body of the electorate in the affected area. They are the democratic expression of the will of the people as to whom they wish to be represented. For those reasons elections cannot be lightly set aside on light and trivial grounds”. ...the objection must be something substantial, something calculated really to affect the result of the election”. See **Morgan vs. Sampson [1974] 3 All ER** cited with approval in **Besigye Vs Museveni (supra)**.

Consequently, to determine all the issues set out in the present petition, court has an obligation to consider and appraise all the evidence on record, taking into account the above said principles.

It should be noted that all Counsel made lengthy submissions in support of their clients’ cases, and lengthy responses too that will all have to be taken into consideration in resolving these very important issues raised by the petition.

It was argued by counsel for the petitioner that it is critical to determine whether the 2nd Respondent under her current names of Agnes Nabirye is the same as Waiswa Agnes who sat for her primary leaving examinations at Kamuli Girls Boarding Primary School. It was

asserted that from the evidence on record, the person who sat as candidate No. 19/036/061 and got the Primary seven certificate was **ADNES WAISWA**.- Exhibits P2(b) and R2(a). Yet the person who sat for senior four and got O-Level certificate was **Nabirye Agnes**.

5 It was pointed out that the 2nd respondent claims that she was called Waiswa Agnes. - Exhibits R21 (b) and R21 (c); but that due to the school policy at Nabbingo she abandoned the use of her family name **Waiswa** and assumed the name of **Nabirye**. And Exhibit R22 the affidavit of the father of the 2nd Respondent attempts to confirm this claim by stating that the 2nd Respondents maiden name was **Nabirye** and the family name was **Waiswa**. However,
10 exhibit R21 was withdrawn by the author vide exhibit P2 (f), while during cross-examination the father of the 2nd Respondent distinctly states that the 2nd Respondent has never had a birth certificate and none was ever submitted to Nabbingo.

Counsel submitted that exhibit R21 (b) sought to illegally change the names of the 2nd respondent from Waiswa Agnes to Nabirye Agnes without following the requirements of the
15 law under the Births and Deaths Registration Act sections 12 and 13. Further that the same exhibit tells a lie about itself when it makes reference to a non-existent birth certificate.

It was also contended by counsel that Exhibit R21 contradicts Exhibit R22 and it annexures, when it states that the name was changed to Nabirye ages on admission during registration;
20 whereas according to Exhibit R22 the 2nd Respondent registered as Waiswa Agnes, (Registration Form attached as R2) and subsequently changed to Nabirye Agnes to conform to the school policy.

The admission form exhibit P2 shows alterations and erasures from Waiswa to Nabirye and
25 during cross-examination, the father of the 2nd Respondent changed his earlier statement to say that the change of name was on admission, so as to be in agreement with the 2nd Respondent.

In addition, the 2nd respondent gives different dates of birth and age from what appears in her
30 nomination papers. And incredibly she did not know that her name as per UNEB results had been misspelt as “**ADNES**” instead of “**AGNES**” and without explanation presents exhibit R21 that shows Adnes Waiswa as the candidate with index no. 19/036/061. The letter from Kamuli Girls Boarding School does also not explain the error and neither could her primary teachers verify her change of name from Waiswa to Nabirye. - See exhibits R25 – R28.

Referring to the evidence of Rw5 counsel argued that it was not very helpful as she testified that she was too junior and therefore not involved in administrative and policy matters. – Exhibit R24; thereby giving no plausible explanation as to how Waiswa Agnes who sat for
5 P7 sit for O-Level as Nabirye Agnes.

Counsel then concluded stating that the Petitioner had on the balance of probabilities proved that if the 2nd Respondent is Nabirye Agnes then she could not have sat for O-Level as Waiswa Agnes. That the burden had shifted to the 2nd Respondent to explain the differences
10 in her names but that her explanations were full of lies and contradictions and thereby failed to create a nexus between the two persons under the names of Waiswa and Nabirye. Counsel prayed that the first issue be answered in the affirmative.

In response, it was submitted for the 2nd Respondent that Waiswa Agnes who sat for primary
15 leaving under index no.19/036/061 is the same Waiswa Agnes who was admitted to Trinity College Nabbingo. That while the verification letter refers to Waiswa Adnes the list of students from Kamuli Girls Primary School for that year does not have a student of those names. That therefore, the student is Waiswa Agnes who was admitted to Nabbingo as per R25 (a-i) and R26 (a-i). This is confirmed by the letter of the headmaster and the results slip
20 R21 (a).

Counsel was adamant that the 2nd Respondent clarified that her name was wrongly spelt by UNEB but the index number is the same as that of her primary school otherwise she would never have been admitted to secondly school. That this was confirmed by her teachers and
25 her father.

Further that, the circumstances under which her name changed from Waiswa to Nabirye at Nabbingo were also adequately explained. The school policy was confirmed by letter of the Headmistress P2 (g) or R21 (b), although the letter was later withdrawn it is not denied that
30 the 2nd respondent was a student at Nabbingo This is confirmed by the Uganda Certificate of education and her pass slip – R21 (d). And it is also not stated as to whose instance the letter was withdrawn.

It was stressed that the several police statements the petitioner attached as evidence that the 2nd Respondent is not the true Nabirye Agnes could not be relied upon as none of the said Police Officers had sworn any affidavit to verify the findings of their purported investigation.

5 Court was urged to note that contrary to requirement of the law, the petitioner was trying to change her pleadings which were that the 2nd Respondent did not sit for her O-Level examinations and that she was Waiswa Agnes and not Nabirye Agnes to and fraudulently used someone else's results to join higher institutions; to that the 2nd Respondent is not Nabirye Agnes and if she is, then she did not follow the law in changing her name.
10 Nevertheless, the petitioner has miserably failed to adduce cogent evidence to prove her allegations. More so as no one evidence of existence of another person who claims that she is the true Nabirye Agnes.

Emphasizing that the evidence of the 2nd Respondent was not rebutted, counsel submitted that
15 in absence of clear evidence that the 2nd Respondent does not have the requisite academic qualifications; documents cannot be the basis of denying the identity of the 2nd Respondent. The cases of **Florence Mutyabule Vs Nyago Lydia Kibwika and Electoral Commission Elect. Pet. 10/2006; Ongole James Michael Vs Electoral Commission Election Pet. 008/2006 and Kabaale Kwagala Olivia Vs Beatrice Magoola and Electoral Commission**
20 **Elect. Pet. 03/2006** were cited in support.

Upon careful consideration of the evidence adduced by the parties and the submissions of both counsel, as well as the various authorities relied upon I find that there is a lot of suspicion created by the discrepancy in the names used by the 2nd Respondent and that her
25 evidence and that of her father Rw4 was so contradictory and so unreliable as to be implausible. Nonetheless, decided cases are to the effect that **“mere suspicion cannot be a basis for saying that the names refer to someone else who has not been availed by the Petitioner”**. – See **Engole's case** (supra).

30 Furthermore Court is also persuaded by the various High Court decisions to hold that, if the Petitioner wanted court to believe that there was another **Waiswa Agnes and or Nabirye Agnes** who sat for Primary Leaving examinations at Kamuli Girls Boarding School and O-level examinations at Trinity College Nabbingo respectively; then they or their relatives

ought to have sworn affidavits to that effect. **Mutyabule's case** (supra) and **Kabaale's case** (supra) followed.

While I take cognisance of the fact that the petitioner went to great lengths to point out the
5 inconsistencies in the 2nd Respondent's purported dates of birth; querying the erasures and
alterations in the 2nd Respondents admission form to Nabbingo; and having police investigate
the identity of the 2nd Respondent and attaching the police statements said to have been taken
from some of the 2nd Respondent's former teachers, to her petition; as pointed out by counsel
for the respondents and rightly so in my view, none of the police officers swore affidavits or
10 appeared in court to verify their findings. If they had done so, their evidence would have
gone a long way in confirming the suspicions of the Petitioner and thereby convincing court
as to the truth of her allegations.

As stated earlier in this judgment, while the standard of proof in petitions is on the balance of
15 probabilities, it is a higher burden than in ordinary civil cases. It is therefore not sufficient to
raise mere suspicions; court has got to be satisfied as to the truth of the Petitioner's
allegations, which cannot be the case without definite evidence.

The only way to definitely prove the allegations that the 2nd Respondent Nabirye Agnes is not
20 one and the same as Waiswa Agnes and that she fraudulently used someone else's certificate
to join higher institutions of learning and was therefore at the time of the election not
qualified for election as a member of Parliament is by carrying out more concrete
investigations.

25 As to the alternative submission of the petitioner that the 2nd Respondent failed to follow the
provisions of the Births and Deaths Registration Act when changing her names from Waiswa
Agnes to Nabirye Agnes, It is the 2nd Respondent's submission that she was given various
names at birth. Without a birth certificate having been issued at the time of her birth, this
assertion has not been disproved. The allegation by itself cannot be relied upon to nullify the
30 election.

For all those reasons the first issue is answered in the affirmative.

This brings me to the second issue as to whether there was non-compliance with the electoral
laws:

It was submitted for the Petitioner in this regard that there was non-compliance with the electoral laws that include the Constitution, the Parliamentary Elections Act and the Electoral Commission Act. It's the petitioner's contention that the instances of non-compliance were massive and wide spread in the entire Constituency of Jinja District at about 212 polling stations.

Counsel for the petitioner cited as examples contravention of sections 47, 50 and 53 of the Parliamentary Elections Act to wit:

- Failure to sign declaration of results (DR) forms by the Presiding Officers.
- Omission of the polling agents to counter sign on the DR forms before the declaration of results.
- Failure of the Presiding Officers to record in case of refusal to sign DR forms by the polling agents or in absence of polling agents.
- DR forms were not deposited and sealed in the ballot boxes.
- Ballot boxes were not properly sealed and filled with the prescribed election documents.
- Election materials, records, and ballot boxes were not properly and safely kept in safe custody.
- The Returning Officers did not properly tally the votes cast for each candidate.
- Tallying by the Returning Officer's was done in absence and exclusion of the candidate's agents.

Counsel for the Petitioner declared that some of the allegations were admitted by the 1st Respondent in the affidavit of DW1 Mujurizi Flavia the Returning Officer.-Exhibit R1 and in paragraph 9 thereof and in cross-examination admitted mistakes in entries on the tally sheets and the DR forms at various polling stations. This witness also admitted and showed court as a sample the wrong tallying at four polling stations. This evidence was in addition to the re-count exercise conducted by court in respect of the said polling stations.

Of the four ballot boxes opened, three had no DR forms contrary to the law while the other had its results switched during the tallying. Dw2 also admitted to errors in the entries on the DR forms that he made personally, together with giving different DR forms to the agents and to the 1st Respondent. That all this evidence goes to show that there was non-compliance with the electoral laws and consequently the issue should be answered in the affirmative.

On the other hand it was argued for the Respondents that in as much as the said anomalies were not brought to the attention of the First Respondent or to the Police as provided under Article 61 (1) (f) of the Constitution, the Petitioner could not turn around and complain that the 1st Respondent failed in its duty to stop or prevent the irregularities. It was then contended that the complaints of the Petitioner in this case were an afterthought upon losing the election as they were not corroborated by independent evidence of the bodies that would have investigated the complaints or allegations.

Further that failure by any candidate to follow the procedure set out in the provisions of SS. 46, 48 and 50(4) of the Parliamentary Elections Act renders the petition highly suspect and baseless, since the provisions are mandatory and therefore must be observed by anyone who intends to contest an election.

Going through the irregularities complained of by the Petitioner one by one, counsel for the Respondents submitted that in absence of concrete evidence by the petitioner to prove that the allegations or to counter the evidence of the Respondents in this respect, coupled with the fact that some of the irregularities were only discovered upon opening of some ballot boxes during the recount, the allegations of the petitioner could not be sustained.

That mere allegation of falsifications of results, forgeries on DR forms and forgery of signatures without cogent evidence is baseless and has no merit. Signatures of agents are an indicator that everything was in order. And that in an exercise of such magnitude mistakes are bound to occur and an election cannot be set aside unless it is established that the anomalies complained of undermined the conduct of a free and fair election. The cases of **Sitenda Sebalu Vs Sam Njuba and Electoral Commission Elect. Pet. 25/2006; Babu Edward Francis Vs Electoral Commission and Another Elect. Pet. 10/2006; Nyakecho Kezia Ochwo vs. Electoral Commission and Another Elect. Pet.11/2006; Akileng Abu Meric vs. Olirah Patyer Masao and Electoral Commission Elect. Pet. 27/2011; Ngoma Ngime Vs. Electoral Commission and Another Elect. Pet. Appeal 11/2011 and Mutebi David Ronnie vs. Dr. Bayiga Lulume Elect. Pet. 12/2011** were cited in support of the arguments.

Counsel then prayed court to resolve the 2nd issue in the affirmative and instead find that it was the Petitioner who failed to comply with the provisions of the law by not reporting the said irregularities at each stage of the election.

5 The evidence adduced by the Petitioner in this case, and confirmed by the verification of results done by the court and as admitted by DW1 the Returning Officer indicates that there was non-compliance with some provisions of the electoral laws. The non-compliance was evidenced by the following:

10 When court ordered a verification it was directed that 212 ballot boxes be produced for the exercise. The boxes had been identified by the Petitioner as the ones from the polling stations where there was dispute. On 29.11. 11 when the boxes were produced at court, only 211 boxes were offloaded. Of the 211 boxes only 160 had intact seals. Among the 51 boxes some had either no seals or the seals had been broken. One box was missing.

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The District Police Commander of Jinja who witnessed the loading of the boxes at the Ministry of Works Offices, Bugembe, and was responsible for their safe delivery to court informed court that, out of the 212 boxes requested for 47 boxes had been tampered with and one box was missing. Of the 47 boxes that had been tampered with, two had been picked

20 from the offices of the 1st Respondent and they were open.

Ten of the polling stations out of the 212 had been admitted in pleadings as places where results on the tally sheet differed from the results on the DR forms. The boxes were listed as follows and the contents were verified”

- 25
- Maternity C: N –Z: The 2nd Respondent got 51 votes. The tally sheet showed zero. The Petitioner got 64 votes while the tally sheet indicated two.
 - Kyabazinga 3: The Dr form showed that the Petitioner got 130 votes, but the tally sheet gave her an excess of 10 votes making the total 40. For the 2nd Respondent the results on the DR form tallied with the tally sheet.
- 30
- Mutayi 2: The Petitioner got 144 votes. The tally sheet indicated 05. The difference is 139 votes.
 - Mutayi 3: according to the DR form the petitioner had 165 votes. The tally sheet indicated 07. The difference was 158 votes.

- Universal Apostles Church: 2nd respondent got 149 votes. The tally sheet showed 85. Difference 64 votes. The Petitioner got 85 votes. The tally sheet showed 07. Difference 78.
- Lake View Polling Station: The Petitioner got 118 votes. Tally sheet 16. Difference 102 votes.
- Buwenge South Polling Station: 2nd Respondent got 170 votes. Tally sheet 07. Difference 163 votes. The Petitioner got 84 votes. Tally sheet 170. Excess 86 votes.
- Kivubuka polling station: 2nd Respondent 272 votes. Tally sheet 12. Difference 260 votes. Petitioner 109 votes. Tally sheet 272. Excess 163 votes.
- Ibungu Polling Station: 2nd respondent 177. Tally sheet 8. Difference 169.
- Kambona Pine Tree: 2nd Respondent 84 votes. Tally sheet 90. Difference 6 votes. Petitioner 90 votes. Tally sheet 09. Difference 81 votes.

Out of all the errors committed the Petitioner lost 361 votes while the Respondent lost 701 votes.

Out of 30 sealed boxes 14 were chosen for verification of results: The findings were as follows:

- Bugembe Parent 11: there was no DR form. The box had 11 bundles of votes. Out of the eleven bundles 7 bundles were for Petitioner and 2nd respondent. The Petitioner got a total of 144 votes, while the 2nd respondent got 165 votes.
- Isiri Primary school: No DR form in the box. Petitioner got 80 votes while 2nd Respondent got 142 votes.
- Korokoto: No DR form. 2nd respondent got 33 votes, and Petitioner 54.
- Box 4 Wanyange Hill: There were 3 DR forms. 2nd respondent got 149 votes, while petitioner had 108. The forms were not signed. The refusal to sign was not recorded neither were the reasons for the failure give. There was no signature of the presiding officer. The DR with the parties was signed by agent but was contested.

It is apparent from the above findings that a number of provisions of the Parliamentary Elections Act had not been followed. These included SS. 46. – registering of complaints at polling by candidate’s agents or any voter present; 47.-signing and retaining a copy declaration form and announcing results before sharing them with the returning officer;48. - raising objections during the counting of votes. It is optional, while keeping a record of such complaints and deciding questions arising out of objections by the presiding officer is mandatory;50 refers to declaration of results forms and includes sealing of ballot boxes under

subsection (2), sets out the items to be contained in sealed ballot box (3); and signing of DR forms by Presiding Officer, the candidates or their agents present and who may wish to do so, and then announcement of results before communicating them to the returning officer (4) is mandatory; 52.- safe keeping of election materials and records by the returning officer is mandatory.

The evidence of DW1 the Returning Officer further confirmed the failure to follow the electoral laws. She told court that when results are being entered in the DR form it should be in alphabetical order but when some presiding officers make the entries in a different order, the tally clerks are confused and they enter the figures wrongly for all candidates. This witness openly admitted that there were mistakes and errors in the DR forms and then the tally sheets. She gave example of results from 10 polling stations that do not reflect the actual results as they were wrongly entered in the tally sheets. The witness went through the polling stations already referred to herein above and clarified that the DR forms contain the results from the polling stations and the tally sheet is supposed to match. The winner is announced using the tally sheet. Where the errors on the tally sheet were not noticed results were announced with the errors.

It was pointed out that at one polling station the total percentage of votes lost by the petitioner was 45%. While the DR form indicated the Petitioner as winner, the Tally sheet indicated another of the candidates as winner. However, despite the various errors pointed out the witness was adamant that the errors did not make much difference and accordingly did not alter the will of the people.

DW2 did not help matters either. He was a presiding officer at one of the polling stations and showed court one of the DR forms he had filled but had made alterations in respect of total number of votes used. While asserting that the DR form for the Returning Officer is sealed in the ballot box, in the same breath he stated that the DR forms were sealed in envelopes and handed over at the desk at the County offices where all ballot boxes were taken after polling.

Another DR form no. 00206 Vol. (2) signed by this witness also had a difference in the total number of unused ballot papers. The form shows 201 ballots when it should have been 197. At the back of the form the order of candidates is different. He emphasised that where a ballot box lacks a DR form there would be need for a recount in order to determine the

winner. Nonetheless, the witness denied any knowledge of the ballot box from Isiri that lacked a DR form.

From all the above evidence, court is satisfied and finds that the Parliamentary Elections Act and the Constitution were not complied with in conduct of the elections. It was the Responsibility of the 1st Respondent to ensure a free and fair election by following the provisions of the law. The kind of errors pointed out and admitted by its officers show lack of fairness and transparency; Inadequate training and or gross negligence which resulted in breach of the electoral laws.

The holding of the Supreme Court of Uganda in the case **Col. (RTD) Dr. Kizza Besigye Vs. M. Y. Kaguta and the Electoral Commission Elect. Pet.01/2001** fortifies my decision. It was categorically laid down in that case that “**elections must be conducted in accordance with the law and procedure laid down in the electoral laws. Fairness and transparency must be adhered to at all stages of the electoral process. An electoral process that fails to follow the law is defective**”.

For all those reasons the second issue is answered in the affirmative. The submission of counsel for the Respondents that it was the fault of the Petitioner who failed to comply with the provisions of the law by failing to report the malpractices cannot be sustained. Failure of the Petitioner or her agents to report was not a licence for the officers of the 1st Respondent not to comply with the law.

This brings me to the third issue which is, **whether the non-compliance affected the results of the election in a substantial manner.**

Having found that the election was characterised by various malpractices which included wrong tallying and switching of results; alteration of information on DR forms; failure to seal ballot boxes; exclusion of DR forms from the ballot boxes; loss of ballot boxes; failure to keep election materials, records and ballot boxes in safe custody and omission of presiding officers to sign DR forms inter alia; and that as indicated by sample of ballot boxes brought to court the malpractices were wide spread the only reasonable conclusion is that the non-compliance with the law affected the results in a substantial manner. This is because the percentage losses and gains of votes that resulted in a number of instances was high and

affected all candidates. My decision is based on the evidence of DW1 in cross examination, that of DW2-Exhibit R32 and that of Namuluuta Helen –Exhibit P28. Errors were established in about 11 stations and that was just a tip of the iceberg! While Court has taken cognisance of the fact that decided cases have established **that “no election is entirely flawless”** It is the finding of this court that the flaws in the current case went to the root of the election thus affecting the results in a substantial manner.

As rightly pointed out by counsel for the Respondents, the phrase **“affecting the results in a substantial manner”** has been clarified in a number of cases to mean that **“the votes candidates obtained would have been different in a significant manner, if it were not for the non-compliance...That means to succeed; the petitioner does not have to prove that the declared candidate would have lost. It is enough to prove that the winning majority would have been reduced. Such reduction however would have to be such as would put victory in doubt”**. Refer **Elect. Pet.01/2001 (supra)** cited with approval in **Edward Byaruhanga Katumba vs. Electoral Commission and Another Election Pet. Appeal no.17/2002**.

With due respect I differ from the submission of counsel for the Respondents, and hold that I am satisfied that the evidence adduced by the Petitioner in the present case met the above test that was set up by Justice Mulenga S.C.J.; although the magnitude of error could only be ascertained for sure through a recount, the recount could not be done to its conclusion as most of the ballot boxes had been tampered with, which in itself greatly contributed to the uncertainty in the outcome of the election.

The fourth issue was **whether the Petitioner won the election**. In this respect the Petitioner argued that she would have won the election if court found that the 2nd Respondent was disqualified from contesting in the elections. While both counsel agreed that the issue was premised on a recount /verification of results that was never completed and was therefore overtaken by events, nonetheless I wish to comment that, in the circumstances as established in issues two and three, it is impossible to determine which of the candidates actually won the election.

The final issue to be determined by court is **whether the petitioner is entitled to the remedies sought**. It was the submission of counsel for the petitioner in this regard that the Petitioner had proved her case to the required standard and was therefore entitled to the

reliefs sought in the petition. On the other hand, counsel for the Respondents alleged that the petitioner had failed to prove her allegations to the satisfaction of the court and that the petition ought to be dismissed with costs.

- 5 The remedies sought by the Petitioner were set out in paragraph 9 of the petition and were replicated earlier in this judgment. Considering the findings on the range of issues, the finding of this court is that the Petitioner is only entitled to two remedies. That is the annulment and setting aside of the election of the 2nd Respondent and the order that a new election be organized and conducted under S. 63(4) (c) of the Parliamentary Elections Act.

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The election of the 2nd Respondent is accordingly hereby annulled and set aside and it is ordered that a new election be organized and conducted under the provisions of the law above cited.

- 15 The Petition is allowed on those terms. The costs of the Petition to be met by the First Respondent whose officers failed to abide by the provisions of the Electoral Laws.

FLAVIA SENOGA ANGLIN

20 **JUDGE**

14/06/2012