THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT No. 17 OF 2005 (AS AMENDED)

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS (ELECTION PETITIONS) RULES SI 141-2

AND

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS HELD ON THE 18th DAY OF FEBRUARY 2011

AND

IN THE MATTER OF AN ELECTION PETITION BY KABUUSU MOSES WAGABA

ELECTION PETITION No. 0015 OF 2011

KABUUSU MOSES WAGABA …… PETITIONER

VERSUS

1. LWANGA TIMOTHY MUTEKANGA }

2. THE ELECTORAL COMMISSION } :::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

JUDGMENT

Kabuusu Moses Wagaba (hereinafter referred to as the Petitioner) was a Parliamentary candidate for Kyamuswa County Constituency, together with Nsamba Gregory, Sebalamu Ronald Herbert Mubiru, and Lwanga Timothy Mutekanga (hereinafter referred to as the 1st Respondent), in the February 18th 2011 Parliamentary elections. The 1st Respondent was declared the winning candidate with 3753 votes which was 51.68% of the votes cast, while the Petitioner was runner up with 3436 votes which was 47.31% of the votes cast. The other two contetants ended up with extremely insignificant votes, earning each of them less than 1% of the votes cast.

Accordingly, the 2nd Respondent gazetted the results in the Uganda Gazette as required by law. However, not being happy with the return made, the Petitioner brought this action asserting that: –

(a) The 1st Respondent was not validly elected as Member of Parliament for Kyamuswa County Constituency.
(b) The electoral process in Kyamuswa County Constituency was not conducted in compliance with the provisions and principles of the Constitution, the Electoral Commission Act, and the Parliamentary, Elections Act 2005.
(c) Failure to conduct the elections in compliance with the provisions and principles of the electoral laws affected the final result in a substantial manner, and benefitted the 1st Respondent.

The Petitioner further claimed that the 1st Respondent personally or through his agents, with his knowledge, consent or approval, committed numerous election offences and illegal practices, which affected the final results in a substantial manner. These alleged offences included directly or indirectly influencing voters to vote for him by bribing them with life jackets, alcoholic drinks, and feasts at or after public rallies. Other alleged illegal acts by the 1st Respondent were the procurement of voters to vote more than once, uttering false and malicious statements in various places and on radio disparaging the character of the Petitioner.

The other allegations against the 1st Respondent were that, on the polling day, at Buwanga polling station, he was dressed in a yellow long sleeved shirt with a yellow hat bearing wordings 'vote NRM' in the company of armed policemen including Owamanya Asaph, the O.C. Police Bukasa, and he usurped the powers of the presiding officer and gave orders to the polling officials and police on what to do; such as ordering the arrests of certain persons, ordering the presiding officer to allow ineligible voters to vote, chasing away the Petitioner's polling agents, intercepting voters on line at the polling station, or on their way to polling station, and those at Buwanga village; giving them money while telling them to vote for him.

The Petitioner further alleged that the 2nd Respondent together with
the 1st Respondent compromised the principle of transparency and impartiality thereby failing to conduct the elections in accordance with the law, by failing to restrain the 1st Respondent from bribing and compromising voters, appointing partisan NRM campaigners and

campaigners of the 1st Respondent to act as election officials for almost all polling stations in the constituency, failing during the campaigns and on polling day to restrain civil servants and law enforcement officers from intimidating voters who wanted to vote for a candidate of their choice.

The other allegations against the 2nd Respondent were that it denied the Petitioner some of the Declaration of Results forms for a number of polling stations in the constituency, failing to handle the process of polling in accordance with the law, conniving with the 1st Respondent to pre-tick or stuff ballot papers in favour of the 1st Respondent, permitting multiple voting to the benefit of the 1st Respondent, relocating a polling station without due notice, disenfranchisement of eligible voters, denying the Petitioner's polling agents the right to effectively represent him, failing to stop the police and armed personnel from beating and harassing people at various places prior to the polling day.

These breaches complained of, the Petitioner contended, were all designed to and did benefit the 1st Respondent; and they affected the results of the election in a substantial manner. He accordingly pleaded with this Court to declare and or order that:

(i) The Respondent was not validly elected as Member of Parliament for Kyamuswa County Constituency.
(ii) The election of the 1st Respondent as Member of Parliament for Kyamuswa County Constituency, Kalangala District be annulled and set aside; and fresh elections be conducted.
(iii) The 2nd Respondent reinstates the voters records which were wrongfully deleted from the voter registers, to enable them enjoy their constitutional rights of voting for leaders of their choice.
(iv) The Respondents pay costs of the petition.
(v) Such other remedy available under the electoral laws as the Court considers just and appropriate.

The Petitioner swore an affidavit on the 18th March 2011, which accompanied the petition. In it he stated on oath what he had asserted or alleged in the petition; and stated that owing to the failure of the 2nd Respondent to conduct the elections in compliance with the the provisions and principles of the Constitution, Electoral Commission Act, and Parliamentary Elections Act 2005, affected the final results in a substantial manner; and this benefitted the

1st Respondent. The petition was also supported by affidavits severally sworn by Wagaba Muhamed Nganda, Kawere Ramathan, Kalule Ibrahim, Nakazibwe Halima, Nsubuga Musajjaalumbwa Aminah, Nakyanzi Getrude, Senoga Wycliffe, Namukasa Fauzia Mubiru, Bamabalazaabwe Bernard Ssemakula Munyumya, and Ssebyala Cosma.

Both Respondents, in their answers to the petition, vehemently denied all the adverse allegations contained therein; maintaining instead that the election was conducted in accordance with the electoral laws, and that whatever non compliance that there could have been in the process in fact did not affect the outcome of the election. They accordingly both prayed that the petition be dismissed with costs. The 1st Respondent swore an affidavit in support of his answer; and two others in response, respectively, to the ones of Nakazibwe Halima, Bambalaabwe Bernard Ssemakula Munyumya, which the two had sworn in support of the petition.

His answer was also supported by individual affidavits sworn by Kadugala Musa, Musoke Meddie, Byekwaso Deo, Sam Kiyimba Hussein, Denis Ssebugwawo, Robert Lwanga, Katerega Francis, Joseph Luzindana, Lubuye Twaha, Gerald Katongole, Hassan Yiga, Wanyama Jackson, Kalule Ibrahim, Ssenkungu Tabius, Rogers Muwanga, Mugalu Lavasco, Kafeero Timothy, Yunusu Dibya, John Kabanda, Byensi Hassan, Bernard Kabogoza, Byekwaso Deo, Matungo Kamugisha, Walugembe Badru, Lubega Joy, Nyange Businge, Bakiranze Mike, Mujugu Pius, Patrick Mugwanya, Lukumbi Ivan, Kabugo Richard, Namuli Rebecca Sanyu, Namabira Jolly Pertua, Kizito Ronald, Lutiba Kasirivu Ronald, Nansubuga Rose, and Gertrude Nantongo.

Eng. Dr. Badru M. Kiggundu, the Chairperson of the 2nd Respondent affirmed an affidavit in support of the 2nd Respondent's answer. All these affidavits focused on negating particular adverse allegations made by the Petitioner or by those who had sworn affidavits in support of his claim as contained in the petition. Subsequently, there were a flurry of affidavits traded by the parties, either as supplementary, or in reply, or rebuttal. 44 deponents swore supplementary affidavits in support of the petition; and these attracted affidavits in reply from the 1st Respondent, and other persons who deponed in his support, as well as others sworn by witnesses for the 2nd Respondent in reply to and or rebuttal of those sworn by the Petitioner or his witnesses.

In compliance with Court's direction, Counsels for the parties filed a joint scheduling memorandum in which the facts agreed as not being in dispute were: the candidature of the Petitioner together with the 1st Respondent and two others for the Kyamuswa County Constituency Parliamentary elections, the 2nd Respondent's return of the 1st Respondent as the winner of the election with 3753 votes (being 51.68% of the votes cast), and the Petitioner as runner up with 3436 votes (being 47.31% of the votes cast), and the eventual publication in the Uganda Gazette of the said results.

ISSUES FOR COURT'S CONSIDERATION

The following issues were, by agreements of the Counsels for the parties, proposed for Court's consideration; namely: –

(1). Whether the 1st Respondent by himself or through his agents with his knowledge, consent, or approval procured his victory through the commission of the following illegal practices: –

(a) Bribery of voters.

(b) Procuring prohibited persons to vote.

(c) Publication of false statements as to the withdrawal of the Petitioner.

(d) Obstruction of voters.

(2). Whether the 1st Respondent by himself or through his agents with his knowledge, consent, or approval procured his victory through the commission of the following election offences: –

(a) False statements concerning the character of the Petitioner.

(b) Unauthorised voting or voting more than once.

(c) Undue influence.

(d) Prohibited activities on polling day.

(e) Obstruction of election officers.

(3). Whether the 2nd Respondent in connivance with the 1st Respondent and or their agents with their knowledge, consent or approval, effected ballot pre–ticking and ballot stuffing.

(4). Whether the 2nd Respondent failed to conduct the election in compliance with the provisions and principles in the Constitution, Electoral Commission Act, and Parliamentary Elections Act, by: –

(a) Disenfranchising eligible voters.

(b) Permitting multiple voting.

(c) Unlawfully changing polling stations.

(d) Making wrong returns of the election.

(5). Whether the 2nd Respondent failed to conduct free and fair elections by failing to: –

(a) Restrain armed personnel, police, civil servants, law enforcement officers, from harassing voters during the electoral period.

(b) Restrain the 1st Respondent from bribing and compromising voters, and interfering with the electoral process.

(c) Appoint neutral polling officials.

(d) Avail DR forms to the Petitioner.

(6). Whether if issues Nos. 2 to 5 are resolved in the affirmative, the final results were affected in a substantial manner.

(7). Remedies available to the parties if any.

POINT OF DISAGREEMENT AND PRELIMINARY POINTS OF OBJECTION

The Counsels were however irreconcilably in disagreement over the question of whether or not the nomination of the 1st Respondent by the 2nd Respondent, as a candidate for the Kyamuswa County Constituency Parliamentary election, should be made an issue for Court's determination. Accordingly, Counsel for the 1st Respondent gave notice, in the scheduling memorandum, of their impending objection, by way of preliminary point, to the following matters: –

(i) Filing of supplementary affidavits out of time without leave of Court or consent of the 1st Respondent.

(ii) Uncertified public documents annexed to pleadings.

(iii) Departure from pleadings, in that: –

(a) The 1st Respondent's nomination was not advanced as a ground of the petition.

(b) The petition does not refer to the supporting affidavits.

Before the commencement of the hearing, Andrew Kasirye Counsel for the 1st Respondent raised some of the objections stated above. He however dropped his objection regarding uncertified photocopies of such public documents as D.R. forms, tally sheets, and National Voters' Register, for the contested polling stations, attached to the petition and affidavits; and demanded that that certified copies of all these public documents be availed at the hearing. He also, rightly in my view, abandoned his objection against the affidavits that accompanied the petition without having been referred to in the petition. These affidavits accompanied the petition; and the Respondents fully responded thereto; hence, no injustice was occasioned by their non mention in the petition.

Mr Kasirye then urged Court to strike out the part of any affidavit that was based on information. He relied on the holding by Odoki C.J. in the case of ***Col (Rtd) Kizza Besigye vs Yoweri Museveni, Supreme Court Election Petition No 1 of 2001,*** for the authority that depositions made on information is not permissible in an election petition as such petition is not an interlocutory matter. Finally, he submitted that the contention by the Petitioner that the 1st Respondent had not been validly nominated, contained in his affidavit in reply to the 1st Respondent's answer to the petition and supporting affidavit, be struck out as it amounted to an ambush; and offended the rules of pleadings.

He further pointed out that in accordance with the provisions of section 15 of the Electoral Commission Act (Cap. 140 Laws of Uganda), if the Petitioner had been dissatisfied with the earlier decision of the Electoral Commission on the matter, he should have appealed against that decision. Mr Kyazze however contended that ground 5 (a) (b) of the petition, though couched in general terms, sufficiently made the matter of the 1st Respondent's nomination an issue. He argued that on the authority of ***Iddi Kisiki Lubyayi versus Sewankambo Musa Kamulegeya – C.A. Election Petition Appeal No. 8 of 2006,*** although the Petitioner had not appealed to the High Court from the decision of the Electoral Commission on the issue of nomination, he was not estopped from raising it in the petition.

Upon hearing learned Counsels' submissions, I only upheld the objection against affidavit depositions based on information; except for those which supported and accompanied pleadings. I reserved my ruling on the other matters to be delivered on notice; and directed that by the commencement date of the case, the parties had to have availed either side

certified copies of the documents each intended to rely upon at the hearing. In my ruling, which was read by the Registrar of my Court owing to my indisposition, I disallowed the other objections; and undertook to give in this judgment, my reasons for ruling; as I hereby do.

REASONS FOR THE RULING ON PRELIMINARY OBJECTIONS

(i) Affidavits filed in non compliance with direction of Court

(a) Affidavits based on information

It is now settled law that in an election petition, and this is peculiar to it, affidavits in support of and accompanying the pleading, although they are depositions, form part of the pleading; hence it is permissible for them to rely on matters based on information. Any other affidavit falling outside this category must be subjected to the rule regarding depositions based on information; namely that save in interlocutory matters affidavit depositions that are based on information are not permissible; which is really the rule against hearsay evidence. Hence, the part of any affidavit on record that offends the rule against hearsay is, per my ruling, expunged.

(b) Pleadings or affidavits filed outside the time allowed by Court

Owing to the constraint facing the parties in traversing the terrain and treacherous waters of the lake to reach far flung islands, in their quest to gather evidence, I had relaxed the rule and granted the parties ample latitude to file all pleadings and affidavit evidence within a definite time from the date the Court sat for directions; which was considerably more accommodating than the rule I had applied in the other petitions. It was therefore rather wrong for the Petitioner to act in non–compliance by, without seeking leave of Court, filing fresh affidavits, and in such great numbers, well beyond the period I had given; and, worse still, close to the commencement of the hearing well aware of the Respondents' right to respond thereto.

Despite this, I decided against striking out these affidavits, for the reasons that to do so would be an extreme measure; not in keeping with the spirit of rendering substantive justice, since no grave or incurable injustice would have been occasioned to the Respondents. While adopting this approach, I was however mindful of the fact that the Respondents would have similar difficulty in making responses to these belated affidavits; hence, I took a remedial

decision that in case of the Respondents' failure to respond to any adverse allegation raised in the belated affidavits, I would not unduly treat this to their detriment but instead take it that it was due to the constraint I have referred to above.

(ii) The issue of unlawful nomination of the 1st Respondent.

As I have pointedf out above, the issue of nomination, as a matter in dispute or at all, was not explicitly pleaded in the petition or accompanying affidavits; and it was only belatedly raised by the Petitioner in his reply to the 1st Respondent's reply. Despite this, I overruled the 1st Respondent's objection to the belated express mention of the matter. I consider that the complaint in paragraph 5(b) of the petition, that the entire electoral process in Kyamuswa County Constituency was conducted in non compliance with the provisions and principles of the Constitution of Uganda, the Electoral Commission Act, and the Parliamentary Elections Act 2005, admittedly stated in general terms, put the 1st Respondent's nomination in issue, as nomination is a stage in an election.

The issue of nomination not being an allegation of fraud, failure to expressly plead it in the petition, though it was defective pleading, was however not incurable. The Respondents could have cured it by seeking further and better particulars of what was averred in paragraph 5(b) of the petition, since what was contended therein was apparently quite wide and could not afford the Respondent adequate opportunity to prepare their defence. Article 126(2)(e) of the 1995 Constitution of Uganda enjoins Courts of Judicature, in the exercise of their mandate, to give primacy to the need to render substantive justice without undue regard to technicalities. The Constitution has therefore enshrined what was hitherto judge–made law that rules of procedure, being mere handmaidens of justice, should be overlooked; unless doing so would occasion injustice.

Second, although election petitions are part of the genre of the wider civil action, their rules of procedure differ somewhat from those applied in other ordinary civil suits. Section 63(2) of the Parliamentary Elections Act, and rule 13 of the Parliamentary Elections (Election Petitions) Rules require that election petitions be determined within 30 days from the commencement of the hearing; and to achieve this expeditious process, the Court must suspend all other matters pending before it. In keeping with the same spirit of expeditious disposal, rule 15 of those Rules provides that evidence in such petitions basically be by way of affidavits.

The other peculiarity is that affidavits accompanying the pleadings are themselves considered pleadings; hence stand out as exceptions to the rule against hearsay. It is my considered view that Courts should treat issues of amendment in that light, but with the caveat against the danger of possible miscarriage of justice that may result therefrom. In the instant case, the Petitioner introduced the express faulting of the 1st Respondent's nomination late in the course of litigation. While this was so, I think this was not too late as the hearing had not yet begun. And in any case the matter had been canvassed before the 2nd Respondent during the electoral process.

I wish to seize this moment to pay deserving tribute to the parties' Counsels for the due diligence, vigilance, and passion they put in the pursuit of their professional duty. The total number of affidavits filed in the petition, some 256 in all, was enormous and truly frightening. I was unenviably obliged to peruse and internalise all of them! Fortunately, the utmost commitment and commendable conduct exhibited by Counsels during the Court proceedings, as well as in their respective written final submissions, replete with cited authorities, were immensely useful. This made my task much less onerous than would, otherwise, have been.

THE BURDEN AND STANDARD OF PROOF

Before I resolve the substantive issues framed herein, I need to dispose of the question of burden of proof in an election petition. There was no dispute that the Petitioner, who has come to Court to overturn the election results, bears the burden to prove his case. Counsels however differed over the standard of proof required for Court to set aside the results. Counsel for the 1st Respondent urged me to follow the proposition of law enunciated by Odoki C.J. in the case of ***Col (Rtd) Dr. Kiiza Besigye versus Yoweri Kaguta Museveni & Electoral Commission - S.C. Election Petition No 1 of 2001,*** that standard of proof is; *'very very high just near beyond reasonable doubt'*.

Counsel also cited the ***Col (Rtd) Dr. Kiiza Besigye versus Yoweri Kaguta Museveni & Electoral Commission - S.C. Election Petition No 1 of 2006*** case, where the learned C.J. equated the standard of proof in election petitions with that required to establish an allegation of fraud in a civil action; which is also much higher than in ordinary civil suits. Counsel for the Petitioner contended otherwise; arguing that the learned C.J.'s dictum in the 2001 ***Col***

(Rtd) Dr. Kiiza Besigye case (supra), on the standard of proof in election petitions is now exclusive to Presidential election petitions. His basis for contending so was that Parliament has relaxed and lowered the standard of proof in Parliamentary election petitions by the provision of section 61(3) of the Parliamentary Elections Act, 2005 which requires proof to be to the satisfaction of Court on a balance of probabilities.

He therefore urged me to distinguish the position taken by Odoki C.J in ***Col (Rtd) Dr. Kiiza Besigye*** case of 2006 (supra), equating the standard of proof in election petitions to that required in claims of fraud in civil suits. He relied on the holding by Tsekooko J.S.C. in ***Mukasa Anthony Harris vs Dr. Bayiga Michael Phillip Lulume - S.C. Election Petition Appeal No. 18 of 2007,*** which differed from that of Katureebe J.S.C in the ***Col (Rtd) Dr. Kiiza Besigye*** case of 2006, and stated that the Presidential Elections Act has no provision similar to section 61(3) of the Parliamentary Elections Act 2005.

I must concede, I found the arguments put forward by Counsel for the Petitioner in this regard quite intriguing. I have therefore had to give it serious consideration. As I understand it, the dictum by the learned C.J., which places the standard of proof in election petitions on a balance of probabilities, but just below what is required in a criminal case although election petitions are civil actions, is on account of the importance that attaches to an election; hence the Petitioner carries a much heavier burden of proof than what is required in ordinary civil suits.

It is quite evident that the learned C.J. is cognisant of the peculiar fact that, unlike with ordinary civil suits, an election petition is not a matter between the parties named in the petition only. It is not gainsaid that any election, or the consequences of any petition that arises therefrom, directly impacts on the constituents who are invariably passionately involved, if not the entire population of the country whose interests are at stake; thereby necessitating that the Courts give primacy to the determination of any issue that arise therefrom. It is only logical therefore, that an election petition must attract a corresponding high premium for its standard of proof.

Analogous to this is the practice obtaining in civil actions founded on fraud. Owing to the gravity and criminal nature of such an allegation, it is now settled law that proof of such claim, while on a balance of probabilities, must be at a standard well above that required in ordinary civil suits; albeit below what is required in criminal prosecutions. It is noteworthy

that section 68 of the Parliamentary Elections Act, criminalises bribery; and bribery is fraudulent as it seeks to corrupt the recipient or some other person to act in accordance with the wishes of the donor.

Similarly, in divorce causes, owing to the sanctity of marriage, the standard of proof as was held by the Court of Appeal in ***Ruhara vs Ruhara – Divorce Appeal No. 1 of 1976***, while on the balance of probabilities, must, be above ordinary civil suits, but below criminal matters. Second, election petitions, whether Presidential, Parliamentary, or for lower elective offices, are all civil actions; proof wherein, it is trite, must be on a balance of probabilities.

However, common to both sections 59(6) of the Presidential Elections Act, and 61(1) of the Parliamentary Elections Act, is the provision that proof must be *'to the satisfaction of the Court'*; and yet the phrase *'balance of probabilities'* is explicitly and exclusively used in the Parliamentary Elections Act. That common use of the phrase *'to the satisfaction of the Court'* must therefore have been intended by Parliament to qualify the use of the phrase *'on balance of probabilities'*, placing it in a diferrent category from its ordinary or usual application. If that were not so, then in the light of the fact that an election petition is a civil claim, the provision in the Parliamentary Elections Act, that proof be *'on a balance of probabilities'* would be redundant.

To me, this is what the learned C.J. has given effect to in expounding the proposition of law in the two Presidential election petitions cited above. Otherwise, it would make no sense to apply different standards of proof in the various levels of elections. The fact that section 61(3) of the Parliamentary Elections Act states that proof be on a balance of probabilities, when in fact it is already settled law that all civil cases are proved on a balance of probabilities, should not be seen to whittle down the well thought out dictum of the learned C.J. cited above.

Furthermore, the practice which has amounted to law in both criminal and civil matters imposes on the person carrying the burden of proof, a premium proportionate to the gravity or seriousness of the allegation or claim made. In ***Andrea Obonyo & Others vs. R. [1962] E.A. 542,*** at p. 550, the Court cited, with approval, the case of ***Bater v. Bater [1950] 2 All E.R.458,*** and reproduced a passage from the judgment of DENNING, L.J. (as he then was), at p. 459, in which he stated as follows:

'In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.'

The Court then cited a number of civil cases, including those from East Africa, where this principle has been applied; stating that:

"That passage was approved in ***Hornal v. Neuberger Products Ltd. [1956] 3 All E.R. 970, and in Henry H. Ilanga v. M. Manyoka [1961] E.A. 705 (C.A.).*** *In* ***Hornal v. Neuberger Products Ltd., HODSON, L.J.,*** *cited with approval the following passage from* ***KENNY'S OUTLINES OF CRIMINAL LAW*** *(16th Edn.), at p. 416:*

'A larger minimum of proof is necessary to support an accusation of crime … the more heinous the crime the higher will be this minimum … The progressive increase in the difficulty of proof, as the gravity of the accusation…increases, is vividly illustrated in … ***LORD BROGUHAM'S*** *speech in defence of* ***Queen Caroline****:*

'The evidence before us … is inadequate even to prove a debt – impotent to deprive of a civil right – ridiculous for convicting of the pettiest offence – scandalous if brought forward to support a charge of any grave character – monstrous if to ruin the honour of an English Queen'."

The right of the electorates to elect a leader of their choice, through the democratic process, is a civil right of immense importance. This has been enshrined in our Constitution and the various electoral laws enacted to give meaning and effect thereto. Accordingly, in providing the common phrase in both the Presidential Elections Act, and Parliamentary Elections Act, that proof of claims brought under them must be to the *'satisfaction of Court'*, when proof in all civil claims is on a balance of probabilities, Parliament must have intended that the standard of proof in election petitions be at a premium different from that obtaining in ordinary civil suits.

The question to resolve is whether this level would be lower than in the balance of probabilities known in ordinary civil suits. I think not. The importance the Constitution, the various electoral Acts, and Rules made there under, attach to the entire electoral process, and by which it is provided expressly that the Courts put aside all matters pending before them in preference, and in order, to expeditiously dispose of election petitions, can only logically

mean that the standard is higher. This, to me is the proposition of law enunciated by the learned C.J.; as had also been adopted earlier by our Courts in civil actions based on fraud and divorce causes.

Issue No.1: **Whether the nomination of the 1st Respondent was lawful.**

Section 4(4)(a) of the Parliamentary Elections Act provides that in a multiparty dispensation, a public officer or a person employed in any governmental department, or body in which the Government has a controlling interest, wishing to stand for election as Member of Parliament shall resign his or her office not less than 90 days before nomination day. This is a replication of the provision of Article 80(4) of the 1995 Constitution. Article 175 of the Constitution, which interprets the provisions of Chapter 10 of the Constitution (the Public Service), clarifies what a public officer is.

In the instant matter before me, the specific allegation challenging the 1st Respondent's nomination was contained in the Petitioner's affidavit dated 15th April 2011, and intituled *'AFFIDAVIT IN REPLY TO THE ANSWER TO THE PETITION AND AFFIDAVITS THERETO'*. This affidavit was not an accompaniment to any pleading; and yet in it was the allegation that the 1st Respondent had not resigned from the Boards of the Broadcasting Council and Uganda Communication Commission. It relied on a letter by Godfrey Mutabazi, the Interim Executive Director of Uganda Communications Commission; a copy of which was annexed thereto.

The 1st Respondent's contention with regard to the two institutions in issue, was that owing to the instrument by the line Minister, directing for merger of the two institutions on whose Boards he had been, the two separate Boards had been dissolved; hence, in his understanding, until the Ministerial directive was complied with, and the new Board resulting from the merger was constituted, which had not yet been done, he was not on any Board; hence the question of his resignation could not arise. Otherwise he had fully complied with the requirements of the law and duly resigned from the Board of Phenix Logistics (U) Ltd whose chair he held; and this was because of the interest the Government of Uganda had in it.

In the light of this contention, even if it was a case of flawed interpretation of the Ministerial instrument, what the Petitioner needed to have done, after I was liberal enough to accept this matter to be raised as an in issue in the petition, was to adduce clear, cogent, and

unmistakable evidence controverting the contention by the 1st Respondent and placing him on the Board he claims he was not on. The letter from Eng. Godfrey Mutabazi, the Interim Executive Director of Uganda Communications Commission, was inadmissible hearsay evidence as it was not an affidavit by the author himself or an accompaniment to any pleading; hence it was of no value.

Had the Interim Executive Director who authored this letter sworn an affidavit where those issues were raised, or given evidence viva voce, it would have been admissible evidence on our records, which would have enabled either the 1st Respondent, or even Court to demand to seek further clarification from him on a number of things; inclusive of what he meant by the expression in his letter that the 1st Respondent was still serving on the two Boards '*around nomination time'* – an expression which was quite ambiguous and equivocal in many respects; and instead opened floodgates to more controversy.

Second, Counsel for the Petitioner contested the admission of the Uganda Gazette containing the Ministerial directive in issue. His contention was that if the Gazette is admitted in evidence, then the Interim Executive Director's letter in issue also be treated similarly; notwithstanding that he has not given evidence in Court. I cannot belabour, any further, the point that the letter from the Interim Executive Director was unacceptable hearsay evidence for the single reason that it was attached to an affidavit which was not part of any pleading; hence was not insulated by the liberal rule permitting deposition based on hearsay.

The Petitioner's Counsel sought to equate the Gazette with the letter from the Interim Executive Director; for purposes of admissibility in evidence. The law however makes different provisions with regard to the status of documents such as the Gazette, and the letter in issue. Sections 77 and 80 of the Evidence Act, to me, are pertinent; they distinguish the Gazette, amongst others, from the other public documents; and also the manner of their proof. Section 77 provides as follows: –

"(1) The following public documents may be proved as follows –

(a) Acts, orders or notifications of the Government or of the administration of a district –

(ii) By any document purporting to be printed by order of the Government …. …"

Section 80 of the Act provides as follows: –

*"**80. Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.***

The Court shall presume the genuineness of every document purporting to be the Gazette … printed by a Government printer …"

It is clear from section 80 that the Uganda Gazette, printed by the Government Printer, is a document the Court is obliged to take judicial notice of. It bears the Coat of Arms of the Republic of Uganda, and is manifestly shown to have been '*Published by Authority'*. It follows that for the Gazette, its authenticity could not be in dispute; and similarly its admissibility. It is certainly not in the category of other official documents, as for instance the letter from the Interim Executive Director was, which would first require that it be adduced in evidence to prove its authenticity, then followed by the explanation or construction of the import of its content.

The Ministerial instrument, directing the merger, was an act of the Executive; and was printed in the Gazette by order of Government. It satisfied the cited provisions of section 77 of the Evidence Act. Like any other instrument in the same category, there was no need to have it formally proved in evidence. This Gazette is not dissimilar from that in which the election returns were published, whose authenticity was never in dispute; and the parties relied on without the need to formally adduce it in evidence. It would therefore make no sense to selectively adopt different rules for various issues of the Uganda Gazette for Court purposes.

Third, an analytical perusal of the Ministerial instrument published in the Gazette contains interesting revelation as follows: –

"MINISTERIAL POLICY DIRECTION ON MERGING UGANDA COMMUNICATION COMMISSION (UCC) WITH BROADCASTING COUNCIL (BC)"

It then proceeds to state that the Hon. Minister was acting on the directive of the President that the two bodies be merged; and cites the Cabinet decision that mandated the Ministry of ICT to: –

"(i) Constitute a multi institutional committee of which UCC and BC were members to oversee the merger process".

Accordingly the Hon. Minister proceeded to: –

"Direct that the Uganda Communications Commission and the Broadcasting Council establish one administrative structure on this 15th day of March 2010 under the following guidelines:

1. *The transitional body shall be merged at both the Board and Administrative levels.*
   …
2. *The transitional body shall be headed by a Board comprising of members from the two existing Boards of the merging organizations and will be headed by the current Chairperson of the Uganda Communications Commission, Eng. Dr. A.M.S. Katahoire.*
   ……
5. *The transitional body will be headed by the Chairperson of Broadcasting Council, Eng. Godfrey Mutabazi as the Administrative Head.*
   ……
9. *The Uganda Communications Commission and the Broadcasting Council may conclude the details of this arrangement through a memorandum of understanding on the modalities of the day to day operation."*

It is unmistakably manifest from this Ministerial directive, dated 15th March 2010, regarding the Government's policy decision, required certain course of action to be taken at an unspecified future time from the date of the statement; other than that this had already been executed, and only awaited implementation. Hence, the use of the future tense by the Minister as for instance that: '*the transitional body shall be merged at both the Board and Administrative levels*', instead of that the 'transitional body is hereby merged at both the Board and Administrative levels'.

It also states that '*the transitional body shall be headed by a Board comprising of members from the two existing Boards of the merging organizations and will be headed by the current Chairperson of the Uganda Communications Commission, Eng. Dr. A.M.S. Katahoire*', other

than that the transitional body is hereby headed by a Board comprising of members from the two existing Boards; and furthermore it does not say all the members of the existing Boards, and yet it provides that *'The Uganda Communications Commission and the Broadcasting Council may conclude the details of this arrangement through a memorandum of understanding on the modalities of the day to day operation."*

In the light of the 1st Respondent's vehement contention in his evidence that he understood this to mean he was no longer on any of the two Boards, and was awaiting the merger process to be implemented, there was need for convincing evidence to counter this by showing that the Ministerial directive had in fact been executed; and that the 1st Respondent was actively on the Board of the merged body. This would have satisfied the provision of Article 257(3) of the Constitution (the Interpretation Article for the Constitution), which states that: –

"In this Constitution, unless the context otherwise requires, a reference to the holder of an office by the term designating that office includes a reference to any person for the time being lawfully acting in or performing the functions of that office."

This, the letter from the Interim Executive Director, even if it were admitted in evidence, did not state with clarity. It does not show that the 1st Respondent was performing the functions of a member of the merged Board. Instead, the letter still refers to the 1st Respondent as having been a member of the two Boards around the time of nomination; instead of that he was on the merged Board. Furthermore, this letter is on the letterhead of the Uganda Communications Commission; other than that of the merged body envisaged in the Ministerial instrument. All this begs the question, and leaves some lingering doubt and confusion whether the merger had in fact been effected by the time of nominations.

This could not sufficiently offer proof that at the time of his nomination, the 1st Respondent had not resigned from the transitional Board resulting from the merger. There was thus justification for the 1st Respondent's contention that until the Ministerial directive on merger of the two Boards was effected, he believed he was not on any of the Boards. In testifying that he was not an employee of the two organisations, I understood the 1st Respondent to be saying that while the employees of the two institutions were not affected by the Ministerial instrument, the two Boards were; hence, unlike the employees, he had no reason to tender any resignation.

It is also noteworthy that the 1st Respondent was so conscious of the requirements of the law in this regard; and in compliance therewith, he duly resigned from the Board of Phenix Logistics (U) Ltd., although I really doubt whether he had to, given the very limited extent of the Government's interest in the company. If he had the mind to duly comply with the law, with regard to Phenix Logistics (U) Ltd., where he was similarly on the Board, then it appears rather strange that he would knowingly act in defiance of the law with regard to institutions which to his full knowledge the government was the sole owner.

There was thus, compelling need to adduce cogent evidence that the Ministerial directive had been executed and the 1st Respondent was actively on the merged Board, contrary to his contention to the contrary. This, the letter from the Interim Executive Director did not clarify. Accordingly, I am inclined to give the 1st Respondent the benefit of doubt; and do find that the Petitioner has failed to satisfy Court that the 1st Respondent was unlawfully nominated.

Issue No. 2. **Whether the 1st Respondent by himself or through his agents with his knowledge consent or approval procured his victory through the commission of illegal practices.**

The Petitioner's case was that before or during the said election, the 1st Respondent personally, or through his agents, with his knowledge, consent or approval, and with intent to either directly or indirectly influence voters to vote for him, gave out money, life jackets, alcoholic drinks, and feasts, at or after public rallies in contravention of the provisions of section 68(1) and (4) of the Parliamentary Elections Act, 2005. Section 68(1) of the Parliamentary Elections Act prohibits the giving of money, gift, or other consideration, to a voter to influence such voter to vote or refrain from voting for any candidate. It terms this bribery; and provides for penal sanctions for the commission of such acts.

Section 61(1)(c) of the Parliamentary Elections Act provides for annulment of any election of which there is proof of commission of an illegal practice or any other offence under the Act, either by the candidate personally, or by his agents with his knowledge, consent or approval. Section 68(4) classifies commission of the acts prohibited in subsection (1) thereof as an illegal practice. The allegation in this petition is that those prohibited acts were committed both by the 1st Respondent himself, and by his agents acting with his knowledge and sanction. I now turn to them: –

BRIBERY OF VOTERS.

(i) Allegedly committed by the 1st Respondent personally.

(a) The giving of the life jacket: –

On this, the evidence of Nakazibwe Halima is crucial; hence, I will dwell on it in greater detail. In her affidavit She deponed on the 18th March 2011 she alleged that on the 28th January 2011, at Bubeke Lwazi, there was a rally which they had been told the 1st Respondent would use to mobilise people to go and attend presidential candidate Museveni's rally the following day at Namisoke which is the next fishing village. This rally, which at first she watched and listened to from the veranda of her clinic nearby, was initially poorly attended until the 1st Respondent promised free T–shirts bearing either candidate Museveni's portrait, or his.

The 1st Respondent then, she deposed further, ordered his aides Kiyimba, Rogers, Doctor, and Senkungu to distribute the yellow T-shirts, which improved the attendance at the rally. She got closer, and the 1st Respondent asked her to abandon the Petitioner, join his side, and become his friend. He boasted of selling the best quality life jackets in Uganda, and promised her a standard life jacket to save her life. He then ordered his aide Sam to bring a quality life jacket and a T–shirt from his speed boat; and he personally handed these items to her, and asked her if she would vote for him.

Her further deposition was that the following day, at presidential candidate Museveni's rally, the 1st Respondent gave her another T–shirt and promised to follow her up until she changed to his side and supported him; and promised to get her a well paying job in one of his pharmacies if she supported him. After the 1st Respondent's affidavit in rebuttal of her allegation, she swore a second affidavit on the 21st April 2011. In this, she stood by her earlier deposition, and added that the 1st Respondent used a disco microphone the whole day and night promising T-shirts having candidate Museveni's portraits or his, which attracted people, including her, to the rally; and he personally gave her a T-shirt.

In this affidavit, she deposed that she interacted with the 1st Respondent on that day, and competed with him in dancing Kiganda strokes in response to two songs which he danced with his coat tied round his waist, while she tied a sweater round hers; and that the 1st

Respondent promised to employ her in one of his projects at a salary of shs. 500,000/=. She then stated that the 1st Respondent:-

> *"…gave me the life jacket and a T-shirt bearing President Museveni's portrait, in the presence of everybody in the meeting, attracting ululations from the crowds that shouted that I had crossed to the 1st respondent's camp."*

Later in this affidavit, while replying to the deposition of one Ssenkungu, she stated that: *"This life jacket the 1st respondent promised to give me so as to keep my dear life to vote him otherwise all others in attendance were his supporters."* In her affidavit dated 1st June 2011, she stood by what she had deposed in her earlier affidavits; and then at paragraph 13 of this last affidavit, she deposed that when the 1st Respondent gave her the life jacket, he asked her to change to his side but she objected.

When she testified in Court as PW2, she stated that she attended only one rally of the 1st respondent, but not any of his planning meetings. She reiterated that the 1st Respondent gave her a life jacket, took a photo, and then declared that she had crossed to his side. She revealed that she started using the life jacket to travel across the lake immediately after the 1st Respondent gave her; but denied that she used it for her campaigns to become a Councillor. Her explanation for not reporting the life jacket incident to police was because the 1st Respondent had *'just given it'* to her, and she could not refuse it. She revealed that despite receiving the life jacket, she voted for the Petitioner.

Although at first she stated that the 1st Respondent had called her several times using his aide's phone, when she was confronted with evidence of the phone calls print out from and to her phone, she conceded that she had in fact initiated the calls; and there were some seven of them in all. It was also pointed out to her from the printouts that each time Sam Kiyimba communicated with her, the 1st Respondent was nowhere within his vicinity, and there had been no prior phone contact between the two around that time. It was also pointed out to her, and she conceded, that at no single time did the 1st Respondent ever initiate a phone call to her.

The 1st Respondent's rebuttal, in his affidavits and testimony in Court, was rather ambivalent. He first denied that he interacted with PW2 on the 28th January 2011; then retracted it, stating instead that PW2, whom he has known to be a Mistress of the Petitioner, got the life jacket

from his aide, upon her request for it openly at the rally. The 1st Respondent's inconsistent depositions and retractions, regarding this incident, were rather surprising. I do not understand why he sought to seek to retract his own testimony which was not given basing on any mistaken belief, or exacted under duress.

I find as a fact that indeed the life jacket in issue passed hands to PW2 from the possession of the 1st Respondent; and with his knowledge and sanction. All the evidence adduced in this regard on both sides point to this. The real issue, however, is whether in so doing, the 1st Respondent acted in breach of any provisions of the Parliamentary Elections Act. Counsel for the Petitioner argued in final submissions that because section 68(7) and (8) of the Parliamentary Elections Act, 2005 prohibits fund raising or the giving out of donations during the campaign period, and also contains penal provisions for breach of the prohibition, whether the 1st Respondent gave the life jacket out of his own volition or at the instance of PW2, he contravened the provisions of the law as, to his knowledge, PW2 was not his supporter.

Counsel for the 1st Respondent contended in the converse, urging Court to apply a strict rule of interpretation and give meaning to the true intention of Parliament in providing for prohibitions against fundraising and donations during the election period. Counsel's view is that it is donations or funds raised for the public good, owing to the possible effect of influencing the voters, which Parliament prohibited under the bribery provision. Hence, giving an item without the explicit or implicit intention that the recipient be influenced to vote or not vote in a particular manner does not meet the ejusdem generis rule; hence does not amount to bribery.

I understand Counsel to be saying that it is the circumstances under or discernible purpose for which any handing over of an item takes place that is the crucial consideration in determining whether such transaction offends the law prohibiting bribery or not. It is for this that the *mens rea* element accompanying a particular transaction is the main if not sole consideration for determining the purpose of any handout. It is manifest that Parliament intended so, when it made the qualification that there must be proof that an item given to a voter was for the purpose of influencing the recipient to vote, or refrain from voting, in a particular manner.

The issue, as it appears to me, is less problematic when the item is given at the instance of a candidate; as from this, the intention is either explicit, or may be implicit but clear, that such

transaction should yield the consequence prohibited by law. Where however, as with the instant case, it is contended that PW2 instigated and set in motion the process that resulted in the handing over of the life jacket, by requesting for it, there is need to establish whether mens rea is discernible in the action of the 1st Respondent, or the transaction was rather innocently executed with no apparent intention to influence the recipient in any particular manner at all.

The Petitioner was obviously conscious of this; hence PW2's deposition that upon giving her the life jacket, the 1st Respondent asked her if she would vote for him, and made a public declaration that she had crossed to his side, and also performed a jubilation dance with her. I have to carefully evaluate and weigh the adversarial accounts, characteristic of the very highly contentious situations all election litigations present, and subject the circumstance surrounding the alleged giving of the life jacket to serious consideration to resolve which of the two competing versions is persuasive.

PW2's account is that she joined the rally when T-shirts were promised. She however does not come out clear on how, and why, out of the multitude in attendance, she was singled out by the 1st Respondent for the public and singular award of the life jacket. There are a number of grave inconsistencies in her version of what really transpired that day with regard to the life jacket transaction. In her successive affidavit depositions, and testimony viva voce, she introduced a new twist to her version of the circumstance under which the life jacket was given to her, or what transpired in the course of the grant of the life jacket.

She claims that the 1st Respondent made a public declaration of her having crossed to his side and in jubilation, danced with her. Yet she proceeds to state rather inexplicably that the following day, at President Museveni's rally, the 1st Respondent still expressed to her his determination to follow her up until she converted to his side; and also promised her a better job if she did so. Why would a person who had declared the previous day, in public, that she had crossed to his side, which allegedly attracted ululation from the crowd, still express his determination the following day that he would ensure that she crossed over to his side?

This only serves to cast serious doubt on whether the 1st Respondent had, upon giving her the life jacket the previous day, really asked her to vote for him, and made the alleged public declaration that she had converted to his side. In her last affidavit, she deposed that when the 1st Respondent asked her in public to convert to his side, she objected. How then could he

have declared that she had converted to his side, and the crowd greeted it with ululation? Equally, I wonder which version I should take regarding what the 1st Respondent's alleged offer to her of a job was. Was it in a pharmacy or in a project, as she inconsistently states?

Katongole Samuel, PW3, in his supplementary affidavit, dated the 25th March 2011, in support of the petition, deposed that on that during the rally of 28th of January 2011, the 1st Respondent promised PW2 a life jacket and T-shirt, and at the end of it he gave her these items. This account of events instead cast more doubt onto PW2's version of what transpired. It certainly does not accord with PW2's alleged public transaction, followed by declaration by the 1st Respondent to the public of her conversion to his side, and the dancing in jubilation together, followed by public ululations; if it is not a negation of that version altogether.

Second, both PW2 and Katongole were explicit that the said rally was for mobilising the residents to attend President Museveni's rally in a nearby village the following day; and the 1st Respondent distributed T-shirts which Katongole states he insisted the recipients should all put on to welcome the President the following day. In view of this revelation, it is not inappropriate to conclude that the giving out of the life jacket and distribution of the T-shirts were for the benefit of candidate Museveni who was also seeking the same residents' votes. In which case, whatever might have been illegal in the act could not be visited on the 1st Respondent.

Third, it did come out in evidence that PW2 was also contesting for a Council seat. This gives strong ground for the inference that she needed a quality life jacket for her movement in the lake during her own campaigns; and supports the 1st Respondent's claim that when he talked of being a dealer in quality life jackets she asked for one. It would also explain why she did not report this alleged bribe at all, until after the elections went bad for her employer – the Petitioner. It would equally explain why she was quick to deny in cross examination that she used the life jacket for her campaigns; and yet she revealed that she used it immediately upon being given.

Fourth, I am of the view that in prohibiting the giving of gifts and donations during the electoral period, Parliament did not intend that during the campaign period, candidates become heartless beasts of the jungle; acting with abandonment of rationality, and absolutely averse to the need to be humane even in a situation that melts the heart. Suppose a candidate found a voter stranded with a broken down cycle who, because there is no space for a lift, the

candidate instead meets the costs of repairing such cycle or gives the voter money to board a vehicle to his or her destination, would this amount to a bribe or prohibited donation?

Should such a candidate then mindlessly pass by unconcerned, for fear of the accusing finger alleging commission of bribery? I think not. I have no doubt that Parliament intended no such thing; hence the rider that there must be express or discernible intent to corrupt the mind of the recipient. Were it to be otherwise, Parliament would have introduced in the legislation an objectionable absurdity that goes contrary to good conscience and the much cherished moral calling inculcated in all Africans, and which accords with the biblical neighbour principle espoused in the parable of the good Samaritan, and which enjoins us all to be our brother's keeper.

In the whole, I found PW2's demeanour quite wanting. I hold the view that in asking for the life jacket, which I believe she did, her intention was to use it to traverse the lake for her campaign for the post of Councillor; and the unsuspecting and well meaning 1st Respondent saw nothing wrong in giving her this item even if he believed she was a Mistress to his opponent. Her turn around was elicited by the loss of her employer. I find support for this in her conduct after the filing of this petition when, as has been shown by the various phone call print–outs from the various service providers, she initiated calls to the 1st Respondent through his confidante, only to shamelessly claim that it was the 1st Respondent who had sought her out to influence her to change her testimony in Court.

Unfortunately for her, this time round, she was caught in her track and the liar in her was neatly exposed and laid bare by cogent evidence through the wizardry of advanced technology! There was therefore need for the Petitioner to adduce some other evidence more convincing than the impugned testimony of PW2, to persuade me that the alleged handout of the life jacket amounted to bribery. This was not done. In what instead supports my holding that PW2's version of events was implausible Counsel for the Petitioner at p.13 of his written final submissions stated that: –

> *'rarely would a candidate paying bribes or indeed any person doing so announce in public that he is paying a bribe to a person to vote for him. It is not surprising that he or she would couch the language accompanying the gift in such a manner that it leaves the receiver in no doubt as to the intention and expectation of the giver while*

outwardly hiding the true nature of the gift, and this is exactly what the 1st Respondent did.'

This conclusively negatives PW2's testimony that the 1st Respondent, who in any case is not a stranger to the electoral process with its rules against soliciting votes by improper means, acted in breach of the law. True, the 1st Respondent himself unnecessarily entangled himself with contradictory depositions in this regard. This was, for sure, a foolish thing to do. Nonetheless, this neither shifted the burden of proof from the Petitioner, nor gave weight to the discredited if not altogether worthless testimony of PW2 on this issue of the purpose for the grant of the life jacket. I give the 1st Respondent the benefit of doubt, and find that it has not been proved that he handed over the life jacket to PW2 under circumstances that were in contravention of the law.

(b) Bribery through distribution of T-shirts: –

Similarly, for the T–shirts allegedly distributed by the candidate, there was need to prove first that these T–shirts were some attire, as for example *kikoy* linen, not connected to or displaying Party or candidate's symbol or campaign messages. If this were so, then the clothing items distributed would have contravened the provisions of the law forbidding the giving of gifts; for which I would easily have found for the Petitioner. Otherwise where the T-shirts are in Party colour, and or specially designed candidates' portraits or campaign messages strategically printed on them, they serve the same purpose as campaign posters which candidates dish out to all and sundry; and without fear of facing accusation of bribery.

It was therefore necessary for the Petitioner to prove that the alleged T-shirts could not in any way be associated with any Party or the candidate. The evidence was instead that these were candidate Museveni's and the 1st Respondent's T-shirts. In fact Murungi Carol who deposed for the Petitioner stated in her supplementary affidavit dated 25th March 2011, that the yellow T-shirts she saw people wearing bore the portraits of the 1st Respondent, with the caption *'Vote Hon. Tim Lwanga'*. Indeed the accusation that the 1st Respondent donned a long sleeved yellow shirt while voting, was inadvertent admission that yellow was associated with the NRM; and, like a poster, it was a medium for campaign. Hence, those T-shirts breached no provisions of the law.

(c) Bribery of voters with money: –

The allegation that the 1st Respondent gave money to voters to induce them to vote for him are contained in the affidavits of Gitta Ernest, Nalubega Adinasi and Nassolo Rehema who claim to have seen the 1st Respondent give money to team captains at Kachanga on 16th December 2010; and also Buyondo Ziriberi, Katongole Samuel, Mudde Joseph, Mirembe John Bosco, and others. These deposed severally to have either personally received various sums of money from the 1st Respondent, or witnessed his giving it out to others, in various places and occasions including at a polling station on polling day, for the purposes influencing voters to vote for him.

The 1st Respondent denied all these allegations; and even denying that he was in some of the places on the day he is alleged to have given the bribe, or that no such illegal act was committed by him if he was in any such place. Numerous persons named in the affidavits alleging bribery also swore affidavits in rebuttal. Some, as pointed out above, actually repudiated the depositions allegedly made by them. I must say I found this case a classical example of the adversarial type of evidence which their Lordships of the Supreme Court have warned Courts to expect in election petitions.

Second, I am deeply disturbed and constrained to have reservations about the affidavits sworn in support of the bribery allegations, in the light of the deposition in repudiation by such witnesses as Buyondo Ziriberi Musa, Miiro Muhammad, Kimula Denis, and Kalule Ibrahim, who denied that they ever made the adverse depositions bearing their names and accusing the 1st Respondent of bribery. These were indeed extremely serious contention which this Court cannot take lightly. These deponents were neither challenged nor summoned for cross examination so as to establish that they were merely indulging in a change of heart. Accordingly, their evidence in repudiation and rebuttal was most harmful to the Petitioner.

Furthermore, I noticed that a number of the affidavits deposed by witnesses for the Petitioner as supplementary affidavits in support of the petition, dated the 25th March 2011, exhibited a strange format. The penultimate pages of these deponents' affidavits contain two or three paragraphs, leaving a huge gap below and then leaping to the last page for the signature of the deponent and the commissioning; all of which could very well fit within the previous page. Noticeably, the pages of these affidavits are not numbered! Such practice, I found most inexplicable; and irresistibly led me to the inference that perhaps the deponents of these affidavits merely initialled the last page of the affidavit; then to these were added the preceding sheets.

These affidavits included the depositions by Ssematimba Jackson, Murungi Carol, Nakafeero Rashida, Wagaba Ismael, Namuyimba Henry Brian, Sseluwagi Godfrey, Nabikolo Ritah, Lukyamuzi Carolyn Namaganda (whose affidavit also has strange spacing of the paragraphs), Kaddu Gerald Nalumenya, Nalukwago Sulayah, Vvube Bob Daniel, Ndugga Tom (with the leap from the penultimate to the last pages of their affidavits most outrageous), and Chemtai Rose who is alleged to have been a polling agent for the Petitioner at Kachanga A-M polling station, yet the persons who signed the DR form for that polling station for the Petitioner were Nakayiiza Joyce and Miiro Richard. Given the repudiation of depositions by some witnesses my reservation is not without justification.

Among the deponents making the allegations against the 1st Respondent were agents of the Petitioner. Here were allegations of prohibited acts committed by the 1st Respondent in the period of the campaign, and with seeming impunity, yet no complaint was registered with the electoral authorities at all. Indeed Matsiko Emmanuel the Returning Officer, who was DW1 in Court, testified that he never at all got any complaint of any malpractice. Many of the allegations connecting the 1st Respondent with the alleged distribution of money were outright inadmissible hearsay evidence; hence, there was need to adduce cogent independent evidence to persuade Court that those malpractices did occur.

Owing to the highly partisan and passionate attachment which people have to the candidate and Party they support, to the extent that not infrequently they go to any length either to seek to establish an adverse claim, or to rebut it, it is advisable to look for cogent independent evidence in proof. I should add that it would be strange for a candidate to openly, and with impunity, dish out money or material benefits to voters for the purpose of influencing them. I suppose candidates who indulge in such breaches usually do so with utmost discretion; and yet the Petitioner's witnesses are here persistently alleging the very converse against the 1st Respondent; but without cogent proof thereof.

(d) Bribery through feasts and drinks:–

Lusobya Paul, Ndugga Tom, Nassolo Rehema, Kirabira Dickson, Nalubega Adinansi, and Kabega Robert alleged in their respective affidavits that the 1st Respondent slaughtered or sent cows for slaughter at various meetings. Numerous persons swore affidavits in rebuttal of these allegations; including by the 1st Respondent who deposed that on some of the alleged dates he was elsewhere not near the places he is alleged to have organised feasts. He only

conceded the meeting of 16th December 2010 which he contended was a campaign planning meeting; and the law expressly permits the candidate to feed and give refreshments to those in attendance.

Counsel for the Petitioner contended that this was not a campaign planning meeting but a public rally since it was convened in a football pitch, where a public address system was used. Suffice it to say here that there is no prohibition against holding campaign planning meetings in an open place, or a limit to the number of people who may attend campaign planning meetings, or further still that the use of public address systems is exclusively for public rallies. Public address systems are instruments of convenience, used even in meetings convened in much smaller areas such as conference halls. The purpose of using public address systems is to avoid the stress of having to shout one's voice hoarse, and to be able to reach everyone with minimum effort.

In like manner, there is no rule prohibiting the convening of campaign planning meetings to coincide with the day of the scheduled rally. Campaign period is very exacting and demanding on candidates; and they may not have the opportunity to visit the same place twice in the entire period of the campaign. It might therefore be convenient for a candidate to utilise the visit for a scheduled rally to, either before or after it, meet with own agents to assess the situation in the area and chart the way forward either for consolidation or change of strategy. In such meetings, provision of food, drinks, and other forms of facilitation is permissible.

(ii) Alleged commission of bribery through agents

Several deponents stated that the 1st Respondent committed bribery through his agents whom he directed, in public, to do so. It is, as I have already pointed out above, strange that a candidate would, in public, give money to his or her agents while instructing them to distribute to voters. One would expect candidates to be discreet in committing such acts which, known to them, offend the clear provisions of the law; and the 1st Respondent is not a stranger to this law. I am in full agreement, and can do no better than reproduce, here, the view the Petitioner's Counsel's aptly put in his final submissions; namely that:

'*in the nature of things, no candidate would openly and in public give consent or approval to his agents to commit illegal practice or other electoral offence'*.

With regard to alleged bribery by agents of the 1st Respondents, it was not enough to show that the persons distributing money or gifts were agents of the 1st Respondent. It was incumbent on the Petitioner to prove that the 1st Respondent knew of, and sanctioned such distribution of money or items. In our situation of simultaneous Presidential, Parliamentary, and Council elections, elections, where campaigns are either run in tandem, or overlap, with the same campaign agents not infrequently acting for two or more candidates, it may not be possible to say with certitude whose interest an agent is advancing when money is seen being distributed.

The case in point in support of the need for caution is that of Mugwanya Patrick (DW7), named as one of those who distributed money as an agent of the 1st Respondent. He was vehemently categoric in his denial; and quite firm in cross examination, that his involvement in the campaigns was not as an agent of the 1st Respondent, but rather in the capacity of a mobiliser for the NRM Party, deployed by the NRM Secretariat to cover the whole of Kalangala District, to ensure the success of the NRM Party thereat. It was, he stated, to the NRM Secretariat on Plot 10 Kyaddondo Road Kampala, that he was accountable. Of course the interest of the NRM Secretariat would be one with that of the 1st Respondent.

However, if some NRM supporters who were also known supporters of the 1st Respondent, did distribute money from the NRM, urging the recipients to vote only NRM candidates, but without his sanction, their action would still have been in clear breach of the law; but this could not be visited on the 1st Respondent albeit the benefit he would have derived from such prohibited manner of campaign. A situation similar to this is in the video recording evidence adduced by one Bambalazaabwe, and exhibited in Court in support of his claim that agents of the 1st Respondent dished out money to bribe voters. Court had the benefit of watching the video recording whose English transcription, exhibited in Court, read as follows:-

– *"Who is sitting where they are not meant to? Please go away quickly"*
– *"Eh, had you left me?"*
– *"But I don't know where you were posted"*
– *"They were too heavy for me."*
– *"But they were saying this and that!"*
– *"Let's go my friends! (Cheers and jubilations)"*
– *"Let's go Bambalazaabwe …"*

– *"What! Who? (Cheers)"*

– *"Long live honourable!"*

– *"Have you seen Bambalazaabwe?"*

I am afraid, I am unable to identify or discern anything in this recorded video evidence which even remotely suggests bribery. It is quite apparent that money is being given to a particular category of persons; hence the question that someone is sitting where he is not meant to be, and his place of posting is not known. Most presumably these were agents of some candidate posted to serve his or her interest in some place and were being facilitated (hence the use of 'honourable'). One has to keep in mind that at the time there were many candidates contesting either for the County or District Parliamentary seats.

The persons participating in the giving out and receipt of the money did recognise Bambalazaabwe as not belonging to this group; hence his presence here was questioned. Had it been otherwise, the video recording would have conclusively pinned the 1st Respondent as guilty of the alleged acts of bribery. Alternatively, in view of the alleged widespread acts of bribery committed by the 1st Respondent or his agents with abandon – grave conduct which exhibited utter impunity – there would certainly have been an outcry, leading to lodgement by the Petitioner of a complaint in writing well before the election day. This unfortunately was not so, thereby casting serious doubt on the alleged breaches; and it would be wrong for this Court to take the Petitioner's allegations of bribery lock, stock, and barrel.

(b) Procuring prohibited persons to vote.

The evidence relied on to prove the allegation that the 1st Respondent procured one Lukumbi Ivan to vote twice was the affidavit deposition by Bambalazaabwe Ssemakula who claimed he was told of this incident, and Nsamba Florence who claimed to have witnessed these malpractices. Bambalazabwe's deposition in this regard was entirely outright inadmissible hearsay. This was flatly denied by both the 1st Respondent, and Ivan Lukumbi in their affidavits in rebuttal. Lukumbi in fact denied that he voted at all as, although he is a registered voter in the polling station, his name was missing from the voters register.

Of course it is not uncommon to have those whose names on the register during the display period to find their names missing on voting day, for one reason or the other. Indeed the Petitioner's own witnesses – Nalubega Adinansi, Kabega Robert, Gyagenda David Nsubuga – deponed to have confirmed their names in the register during the display period only to find them missing on voting day. It was therefore necessary for a copy of the register for Ivan

Lukumbi's polling station to be availed to Court to determine what the correct or true position was. Second, the Petitioner testified that the agents he deployed in different parts of the constituency, as polling agents, were educated and competent to ensure that his interest was fully taken care of.

He testified in cross examination, that his polling agents had been trained and instructed in his presence to protect his interests by guarding against any unacceptable conduct on polling day. These polling agents such as Namanda Sharifah an undergraduate of Makerere University Business School, of Nsamba Florence, duly signed the Declaration of Results forms without any caveat; which would have been the only clear evidence that not all went well. It therefore becomes fairly difficult for me to determine that persuasive evidence was adduced, to the required standard, that the alleged prohibited acts did take place. I have to give the 1st and 2nd Respondents the benefit of doubt in this regard.

(c) Publication of false statements on Petitioner's withdrawal.

It was alleged by the Petitioner's campaign agents Gitta Ernest, Buyondo Ziriberi, Nakazibwe Halima, Mirembe John Bosco, Mulenga Robert, Kabega Robert, and Lusobya Paul, that while campaigning in their respective areas of Misonzi, Kitobo, Bubeke Lwazi, Mirindi, and Buyange, the 1st Respondent falsely and maliciously alleged that the Petitioner had withdrawn from the race, and, or that his candidature had been nullified by the Constitutional Court because he changed his Party status. The 1st Respondent and many other persons swore affidavits in rebuttal of these allegations. His contention was that he was quoted out of context.

Indeed, the Constitutional Court disqualified those who had been nominated after change of Party status; but without first resigning from the organisations they had gone to Parliament under; and ordered them out of Parliament. The execution of the order nullifying the nomination was only stayed by the Supreme Court. The Petitioner did not deny falling in this category. If all that the 1st Respondent said of the Petitioner was with regard to this, then it was a fair comment of what had transpired in Court. Had the Petitioner produced a recording of this statement from the radio, it would have brought out the precise words uttered by the 1st Respondent, and resolved the matter conclusively.

Instead all that the Petitioner presented to Court was the testimony of a handful of his witnesses with obvious partisan interests; and which only had the consequence of drawing the

predictable rebuttals by the 1st Respondent and his witnesses. In view of the standard of proof required of the Petitioner, it becomes even more difficult to believe him when there was the alleged radio broadcast at their disposal, which would have spoken for itself and conclusively resolved the dispute, and yet they chose not to bring it in evidence. The inference I am compelled to draw is that he knew that the radio recording would not bear him out.

Isuue No. 3. **Whether the 1st Respondent by himself or through his agents with his knowledge, consent, or approval procured his victory through the commission of the following election offences: –**

(a) False statements concerning the character of the Petitioner.

The evidence by a host of deponents was that the 1st Respondent made false statements during several rallies in various places, and over his personal Radio Station known as Radio Ssese 101.9 FM, referring to the Petitioner as a foreigner to the constituency, a man of no worth, heavily indebted, had disposed of all his properties, was facing imminent arrest, was not known to the President, and was a thief who had diverted the Constituency Development Funds and built with a school in Ssembabule his district of origin, thereby neglecting the people who had voted him to Parliament.

The Petitioner himself deposed that he personally heard the 1st Respondent make maliciously disparaging utterances against his person, on his radio (1st Respondent's) with wide listenership in the area, referring to him as a non native to the area. The 1st Respondent denied these and contended that his statements were quoted out of context. It was therefore important for the Petitioner to adduce independent evidence with specificity that the 1st Respondent made sectarian attack on him calling him a foreigner who should not be entrusted with the constituents' votes; which went beyond what is allowed as fair criticism.

If in the course of the campaigns a candidate attacks the opponent for only being physically in the constituency but not providing for the electorates or investing for their benefit, meaning the opponent is not living to the spirit of the law regarding representation, or that funds such as the Constituency Development Fund was diverted elsewhere, contrary to its declared purpose, that should be fair political campaign. All that the opponent need do is an effective rebuttal, with converse evidence of his or her contribution; and thereby lay bare the lies in the adverse claim.

A political contest, unlike the ideological or impersonal clash between capitalism and socialism or communism as competing socio economic orders for remedying societal woes, locks candidates' horns on individual policy and ability to have them implemented. It is, within certain parameters, therefore permissible in a political contest to attack or dispute an opponent's competence or suitability to serve the interest of the electorates. In this, the personality, personal conduct or performances of a candidate are, almost inescapably, the subject of serious exposure and criticism; some of which may in fact be quite hurting but turn out to be largely untrue, or grossly misrepresented.

This is the essence of the holding by Odoki CJ in the ***Col (Rtd) Kiiza Besigye vs Yoweri Kaguta Museveni & Anor; S.C. Election Petiton No.1of 2006,*** in which the learned C.J., citing with approval from a book titled ***'Election Laws: Commentaries on Representation of the People Act of India, 1951 by by S.K. Gosh, 3rd Edn. 1998'*** in which the learned author pointed out that the Supreme Court of India, noting that it is not uncommon for use of *'hyperboles or exaggerated language or adoption of metaphors and extravagance of expressions in attacking' one's'* opponent, cautioned that the Court must have regard to the *'substance rather than a mere form of phraseology'*.

The learned C.J. then cautioned on the need to treat political speeches in a different category; and other than picking out and analyzing each word, the context under which such words are used must always be had in mind as certain expressions which otherwise would be outright defamatory and actionable, may be permissible in a political contest. In the instant case before me, in view of the denial by the 1st Respondent, the prudent thing the Petitioner, who was crying wolf and on whom the burden lay, needed to do, was production of the objectionable words from an incontrovertible source to prove that such attack on his person went beyond permissible criticism.

He never at all raised the matter with the electoral authorities; and yet he claims that these disparaging and lampooning statements spanned the entire campaign period. Here too, as with the statement about his withdrawal or disqualification from the race, had he cared to present to Court a recording of these utterances, since he alleges they were made by the 1st Respondent on radio and he (Petitioner) himself heard them, it would have sufficed or greatly helped Court determine if the offending utterances went outside the bounds of fair comment. This need was the more compelling, in the light of the failed attempt to prove through video recording that money was distributed by the 1st Respondent's agents to bribe voters.

(b) Undue influence, commission of prohibited activities, on polling day, and obstruction of election officials by the 1st Respondent, and failure by the 2nd Respondent to restrain the 1st Respondent from interfering with the electoral process at Buwanga polling station.

The evidence by Nansamba Florence, Ssegawa Robert, Vvube Bob Daniel, Bambalazabwe Semakula, Nsubuga Godfrey and Nankinga Robina deponed in their several affidavits in support of the petition is that the 1st Respondent was, on polling day, dressed in a yellow shirt, and donned a hat on which was written the words 'VOTE NRM'; and in the company of a police officer called Womanya Asaph, usurped the role of the presiding officer generally, and ordered the arrest of Bambalazaabwe and Vvube. This was rebutted by the 1st Respondent, Womanya Asaph the named police officer, and Namabira Jolly the presiding officer of Buwanga polling station.

Police Officer Womanya Asaph testified that he was not in the company of the 1st Respondent when effecting the arrest in issue. Namabira Jolly the presiding officer deposed and testified in Court in cross examination owning up to having ordered for the arrest of Bambalazaabwe for interfering with the polling process; and denied that she was influenced by the 1st Respondent to do so. The 1st Respondent adduced in evidence photos of himself taken on polling day as he went through the process of voting; and they show that he donned a yellow long–sleeved shirt that day, but there was clearly no hat in his possession, leave alone on his head.

In any case, there is no prohibition against putting on any colour of attire; unless of course such attire bears some campaign words, or design, suggesting the tacit perpetration of campaigning. Further, Nanasamba Florence, a student of Nkozi NTC (Mitala Maria) the Petitioner's polling agent for Buwanga polling station went ahead to sign the DR form without any remark at all. In all, the various testimonies in support of the alleged malpractices fail to establish that truly any such incident did occur. I notice that the Petitioner has, in the main, recycled the same unconvincing witnesses in most of the major claims of alleged breach of the electoral laws by the 1st Respondent.

<u>Issue No</u>. 4. **Whether the 2nd Respondent in connivance with the 1st Respondent and or their agents with their knowledge, consent or approval, committed the offences of preticking and ballot stuffing.**

Evidence in support of the alleged ballot pre–ticking and stuffing was included from Wagaba Ismael, a student of Law of Nkumba University (who was an election supervising agent for the Petitioner), who claimed that he saw ballot stuffing at Misisi polling station by public lifting of unsealed ballot box and inserting a ballot paper; upon which he rang and reported the incident to the Returning Officer. Mr Matsiko, the Returning Officer, however denied that any complaint about any form of malpractice was lodged with him. Kasozi Gerald the Petitioner's polling agent for Misonzi polling station claimed he saw ballots being smuggled out to people and voters; to which he complained to the presiding officials.

Mulenga Robert, Petitioner's polling agent for Ggunga polling station deposed that he was ten metres from the table where ballots were being issued, hence had difficulties in ascertaining how many ballots were being issued to a voter; however, he claimed to have seen two pre–ticked ballots given to a voter! I really fault the deponents for the evidence adduced in support of this alleged malpractice. I fail to appreciate how these University under–graduates, who by their own account and that of the Petitioner, had purposely been identified, trained, and deployed to safeguard the interest of the Petitioner on polling day, could sign the Declaration of Results forms, as they did, without indicating their dissatisfaction with the process.

Furthermore, there was no evidence that in any of the polling stations, where either ballot stuffing or pre–ticking in favour of the 1st Respondent was alleged, there was a marked difference or any at all, from the other polling stations where there were no complaints. The various Declaration of Results forms tendered in evidence, as well as the final tally sheet shows a general uniform tally of voter turn up, and without any exceptionally high vote count generally or specifically for the 1st Respondent in any of the polling stations; thereby casting grave doubt onto the allegation that there was ballot stuffing and pre–ticking. The evidence adduced in this regard was not convincing; and from it, this Court could not determine that the result in any particular polling station might have differed.

<u>Issue No. 5</u>. **Whether the 2nd Respondent failed to conduct the election in compliance with the provisions and principles laid down in the**

Constitution, Electoral Commission Act, and Parliamentary Elections Act: –

(a) Disenfranchising eligible voters.

A number of witnesses for the Petitioner alleged having witnessed, or been victims of, disenfranchisement on account of names not being on the voter register; and yet these names had been thereon during the register period. It was alleged that these voters were disenfranchised as they were known supporters of the Petitioner. Given that the discovery of the deletion of the various voters' names took place at the polling station, this was a serious matter for polling agents to endorse in the Declaration of Results form to give weight to the claim. The Petitioner's polling agents, who had carefully been selected to avert any mischief detrimental to the Petitioner, signed the Declaration of Results without any reservation or complaint.

Second, deletion of names is not a function of polling presiding officials, but rather during the register display period which takes place long before the polling day; and involves tribunals put in place for that purpose. There is no evidence presented that the officials responsible for the display of the voter register were agents of the 1st Respondent, or that they colluded with the 1st Respondent or anyone acting in his behalf. In any case, the names deleted were not said to be of known campaign agents, so as to justify the allegation of foul play against a particular candidate.

(b) Permitting multiple voting.

The allegation that there were incidents of multiple voting is equally unsustainable. The Petitioner's polling agents, like Namanda Sharifah an undergraduate of Makerere University Business School, Petitioner's polling agent for Kitobo A, who complained of having been forced to sit far away from the table where ballot papers were being issued from, claimed to have seen two ballot papers given to a voter. Nakafeero Rashida student of Kyambogo University polling agent for Kisaba polling station claimed she saw a number of people being allowed to vote more than once by merely changing their names. The curious thing is that both agents, like others with similar complaints, signed the Declaration of Results forms certifying in effect that the process went well.

(c) Unlawfully changing polling station.

The change in the polling station complained of was from the recently gazetted location, back to the village where it was in the 2006 election. I do not see what substantial harm there was; if any. I really doubt that the bulk of the voters ever know of a change in the location of polling station until well near or on the voting day. Relocating the polling station back to Kande village where it was in the 2006 elections might have instead been a blessing in disguise. If this were not so, then the Petitioner had to prove that this change affected the voter turn up in that polling station. No evidence was adduced to show that.

(d) Making wrong returns of the election.

The Petitioner faulted the 2nd Respondent for not according the election officials adequate training or any at all; resulting in numerous errors in computation, outright forgeries, and wrongful invalidation of ballots to his detriment. Matovu John, a law student of Nkumba University, alleged witnessing the bias executed by polling officials at Lwazi–Jaana and the invalidation of Petitioner's votes. The Returning officer (DW1) testified that he trained the polling officials well before the polling day; and in fact decentralised the training to the sub county level. This was corroborated by Namabira jolly (DW3) whose testimony was that she and others were trained at Bukasa Primary School.

Counsel for the Petitioner seized this as contradiction. I do not understand. Does a Primary school not fall within a sub county? I thought the point the Returning Officer was making was that training was not conducted at the centre but decentralised to sub counties where the presiding officials were. I am satisfied that within the peculiar situation obtaining in the country, the election was conducted fairly in compliance with the laws regarding elections. No election can ever be all perfect; maybe in heaven. But that is utopian. What to look for is whether the failure to comply with the law was not an isolated case, but widespread and with recognisable impact on the outcome of the election as a whole.

Issue No. 6. **Whether the 2nd Respondent failed to conduct free and fair elections by failing to**: –

(a) Restrain armed personnel, police, civil servants, law enforcement officers, from harrassing voters during the electoral period.

No persuasive evidence was adduced to show that the police, other law enforcement officials and other members of the civil service harassed voters or acted outside their mandate. If such

a thing had occurred, the Petitioner or other candidates should have lodged a complaint with the electoral authorities for their action. There was no such complaint according to the Returning Officer (DW1). I am therefore inclined to find that the Petitioner has not proved this allegation to the standard expected in an election petition.

(b) Restrain the 1st Respondent from bribing and compromising voters, and interfering with the electoral process.

Similarly, in view of my finding that I do not believe the allegation of bribery levelled against 1st Respondent and or his agents, and my grounds for the disbelief includes that there was no report to any authority of such illegal acts which were allegedly widespread, the issue of restraint by the 2nd Respondent who was not in the know could not have arisen.

(c) Appoint neutral polling officials.

It was alleged seriously that the Returning Officer only appointed officials loyal to the 1st Respondent, and evidence was adduced that these served the 1st Respondent only interest on polling day. Murungi Carol of Nkumba University and Petitioner's polling agent at Lwazi Jaana, and Nalukwago Sulayah of Makerere Business School and Petitioner's polling agent at Buwazi polling station deposed that they had witnessed polling officials conduct themselves in clearly partisan manner, and to the advantage of the 1st Respondent whom some of them campaigned for at the polling stations.

The Returning Officer, DW1, was firm that the selection of polling officials followed the set down rules for determining who qualifies. This, he testified, began with advertisements for these posts using media which included radios. Those who applied were shortlisted, interviewed, and then the successful ones trained at the sub county level. He stated that there was no complaint against the process or the successful applicants. Furthermore, there was no complaint in whatever form against any of the officials on polling day; and yet he was in touch on phone with various persons, including the Petitioner, that day.

I think the idea that the officials were partisan and selected in a biased manner was an afterthought brought in to justify the challenge to the results of the election. Evidence is that the agents of the Petitioner were so alert to counter this type of thing. They would have made this a big issue well before the polling day; and for the misconduct allegedly committed by

the biased officials on polling day, the polling agents had been fully equipped with the instructions on what to do. This would have been the best opportunity for the Petitioner's polling agents, a good number of whom were actually elites from various universities, to protest in the Declaration of Results form, these alleged misconduct.

(d) Non – availing of DR forms to the Petitioner's agents.

With regard to Declaration of Results forms, what is essential is the endorsement on them even if for whatever reason they were not given to the agents. All the Declaration of Results forms were duly signed; and no polling agent denied the respective endorsement or the record in the tally, save that Nalukwago Sulayah of Makerere Business School and Petitioner's polling agent at Buwazi polling station stated that she was compelled to do so; which I find most unconvincing in the light of her status in society, and the express instructions the Petitioner had given all his polling agents.

Isuue No.7. **Whether if issues Nos. 2 to 5 are resolved in the affirmative, the final results were affected in a substantial manner**.

For the reasons I have given in resolving the foregoing issues, I am unable to find that there was any shortcomings or defect in the election that could have affected the final outcome of the process in any substantial manner. What I have been able to find were defects in the process were the type of things one expects of a process like an election to have. Such included errors in computation, or wrong entry which were easily discernible as such.

Issue No. 8. **Remedies available to the parties if any**.

In the event, owing to my finding that the Petitioner has not proved any of the allegations in the petition to the standard required by law, I uphold the 2011 election returns for Kyamuswa County Constituency; for which case, I am left with no alternative but to dismiss the petition, which I hereby accordingly do. It is trite law that costs ordinarily follow the event; hence I award the costs of the petition to the Respondents.

Alfonse Chigamoy Owiny – Dollo

JUDGE

14 – 11 – 2011