

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

ELECTION PETITION NO. 4 OF 2016

MUGISHA VICENT.....PETITIONER

V

KAJARA ASTON PETERSON.....1ST RESPONDENT

MULAMIRA BARBARA.....2ND RESPONDENT

ELECTORAL COMMISSION.....3RD RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The petitioner lost the 2016 Parliamentary Elections in which the 1st respondent was published as winner of Mwenge South constituency in the Uganda gazette dated 3rd March 2016. It was an agreed fact that the petitioner got 18560 votes while the 1st respondent got 25009 votes. The petitioner being aggrieved, petitioned this court for various remedies outlined in the petition including nullification of results, declaration that he was the winner, costs, among other remedies.

The petition is premised on numerous grounds that can be summarized in five grounds.

1. That there were grave irregularities and non compliance with the provisions of the Parliamentary Elections Act and other election laws that affected the results in a substantial manner.
2. Bribery of voters
3. Illegal donations
4. Intimidation of voters
5. Spreading false and malicious information with the intention to defame the petitioner

The respondents in their answers denied the irregularities and illegal practices and prayed that the petition be dismissed.

Both parties in the joint scheduling memorandum agreed on five issues that I will refer to in this judgment.

Preliminary objections

At the commencement of the trial, three preliminary points of law were raised which I overruled and promised to give reasons in the judgment.

Counsel Byamukama for the petitioner argued that there were no answers to the petition because he was served on 28th April outside the prescribed time frame as the answer ought to have been served by 18th April in accordance with rule 8(4) of the Parliamentary Elections rules.

In response counsel Christine Ntambirweki for the 2nd and 3rd respondents submitted that the rule on service is directory citing **Supreme Court Election Petition Appeal No. 18 of 2007**

Mukasa Harris v Bayiga Michael Lulume in support. I have examined the record and found that while the respondents filed their answers on 14th April, within the time stipulated, and fees paid on 15th April, there was an omission to serve the petitioners in time as stipulated by the rules. This finding notwithstanding, the petitioner filed a rejoinder to the respondents' answers. It also transpired that the petitioner did not give an address for service within five km of the court registry as required by rule 4(7) (a).

In accordance with the Lulume decision cited by counsel for the respondent, and bearing in mind article 126(2) (e) of the Constitution on the responsibility of courts to administer justice without undue regard to technicalities, I found that no injustice was occasioned by the late service and I overruled the objection with costs in the cause.

The other objection raised by counsel Christine Ntambirweki was that the second respondent was wrongly joined as a party as she was acting in her official capacity. Counsel for the petitioner countered the objection arguing that section 49 of the Electoral Commission Act does not exempt an official who acts in bad faith in the performance of the official functions.

I overruled this objection having found that there is no bar to citing the 2nd respondent as a party to an election dispute and having regard to rule 3 of SI 141-2 that defines respondent to include a returning officer. In his submissions, counsel Luwum for the 2nd respondent argued that the second respondent ought to have been sued as the 'returning officer' and not in her personal

capacity. Whether the second respondent was cited by name or by her office does not detract from the fact that she was properly cited as a party .

Evidence considered

Counsel for the respondents submitted that this court should consider only 41 affidavits that accompanied the petition and leave out 121 affidavits filed after the date of filing. Counsel argued that these later affidavits were filed out of time prescribed by section 60(3) of the PEA and that time prescribed in a Statute cannot be extended .

I have addressed myself to the authorities cited by counsel and to recent precedents. What happened in this case is that the petitioner filed the petition and 41 affidavits and others followed. By 23. 5.2016 when scheduling took place, I ordered that no more affidavits would be filed after that date save for the respondent whom I allowed to file some additional affidavits. The admissibility of the affidavits served after 1st April 2016 but before 23rd May 2016 never arose at the scheduling.

Even if it had arisen, I would have dismissed any objection to these affidavits because I was not present at the station before 16th May to entertain applications for extension of time. As argued by counsel for the petitioner, rule 8(4) of the PEA rules provides that the petition shall be accompanied by the petitioner's affidavit and other affidavits in support may follow. Counsel for the petitioner cited **Fort Portal Election Petition No. 9 of 2006 Byamukama James v Kaijja William** in support. In that case, the High Court allowed affidavits filed outside the time prescribed for filing a petition on the grounds that they raised no new matters. The affidavits in support filed after 1.4.2016 and before the scheduling conference will be admitted in evidence.

The respondents filed affidavits in answer to the petition on 14th April 2016 and filed additional affidavits, supplementary affidavits days after that date . These affidavits in support of the answer to the petition will be considered in evidence.

However, I agree with counsel for the respondent that the rejoinder by the petitioner and affidavits in rejoinder were filed without any legal basis. Rule 8(5) of the PE rules only provides for a response by the petitioner where the respondent has applied for further and better

particulars . No such request was made by the respondents and therefore there was no reason for the petitioner to file a rejoinder and affidavits in rejoinder.

Similarly, the respondents' reply in surrejoinder and affidavits in surrejoinder by the respondent were improperly filed because no such replies are envisaged by the PE Rules. These too will not be considered in the evaluation of evidence.

The other legal point raised by the respondents' counsel was on affidavits not cross examined on by counsel. It was their submission that such affidavits ought to be rejected outright and **cited Ngoma Ngime v EC and Anor Mbarara EP No. 1 of 2001** where the High Court held that the evidence of such affidavits was of the weakest kind.

Sarkar on evidence cited by counsel for the respondent opines that the key point is that there must be an opportunity for counsel to cross examine the witness and where the right is not exercised, it is taken as if the witness has been cross examined.

The right to cross examine , notwithstanding, rule 15 (1) of the PEA provides for evidence at the trial to be by affidavit read out in open court. Under rule 15(2) cross examination of witnesses on affidavit evidence is by leave of court. This means the court has discretion to disallow cross examination. This in turn means the rules envisage that evidence in election petitions shall be principally by affidavit.

Counsel for the respondent applied to cross examine all witnesses . I gave the order for all witnesses to be availed but only 42 were cross examined in the two days allotted to the respondents counsel .

Similarly, the respondent presented all the 38 witnesses requested by petitioner for cross examination.

Needless to say, although the witnesses who were cross examined were tested on their truthfulness, the court has a duty to evaluate their evidence as indeed evidence of those who were not cross examined in order to arrive at the truth. All the evidence admitted will be subjected to scrutiny and considered . This evidence includes affidavit evidence, documentary evidence and oral testimony on cross examination and examination in chief.

Non –disclosure of particulars in the petition.

Counsel for the respondent also raised the issue of non-disclosure of particulars in the petition.

Under rule 4 of the PE rules the petitioner must state the grounds for annulling the election divided into paragraphs with each paragraph confined to a distinct portion. As much as possible this is what the petitioner did.

I now turn to the issues.

1. WHETHER THERE WAS NON-COMPLIANCE WITH THE PROVISIONS OF THE PEA

To prove non-compliance, the petitioner relied on affidavit evidence, documentary evidence and oral testimony to prove non –compliance.

I will largely follow the categories in the petitioner’s submissions to facilitate evaluation of evidence .

a) Late delivery of voting materials

Under section 27 of the PEA, the returning officer is required to furnish presiding officers sufficient number of ballot papers within 48 hours before polling day.

The petitioner alleged that in areas where he had strong support, voters were disenfranchised by late delivery of voting materials, e.g. Kihura sub county, Butunduzi town council , Kisonjo sub county , and Kigarale sub county.

I came across one affidavit that touched on late delivery of voting materials. The affidavit of Kwikiriza Robert who testified as PW27 shows that polling materials at Damasco primary school in Kihuura sub county started at 12.30 p.m and ended at 4 p.m which meant many people did not vote.

The DRF for this polling station shows a total of 514 voters voted against 850 ballot papers issued of which 453 votes were in favour of the petitioner .

The DRF for Butunduzi Town council Butunduzi primary school polling station shows 486 ballot papers were issued and all ballot papers were cast with 262 votes in favour of the petitioner.

Contrary to the petitioner's complaint, I find that even if there was late delivery of voting materials, this did not affect voting as the majority of voters participated in the exercise.

b) Failure by the 2nd and 3rd respondent to control voting materials

Under section 28 (2) of the PEA political parties and independent candidates are entitled to the serial numbers of ballot papers supplied to each polling station and serial numbers of seals affixed to ballot boxes supplied to all polling stations. Therefore by implication, ballot papers are specific to a polling station and transfer from one station to another is not contemplated by the law.

The petitioner alleged illegal transfer of voting materials at Rogorra L-Z, Kyakwatwire church of Uganda , Kigarare Health Unit, Butubiri community school A-K, Mukonomura L-Z, Butinduzi primary school among others. The petitioner relied on annexure D , set of DRFs as evidence . DRFs only show results of polling stations and therefore they are not useful as evidence of transfer of ballot papers. Furthermore, I did not come across any affidavit in support of this irregularity.

The 2nd respondent denied transfer of ballot papers and I have no reason to disbelieve her.

In the absence of tangible evidence of transfer of ballot papers, I find that this irregularity has not been proved.

c) Ballot stuffing and multiple voting

Voting more than once is an offence under section 31 (4) of the PEA therefore the petitioner has a higher burden than in the case of an election irregularity.

The petitioner alleged multiple voting and ballot stuffing at Kyanuta primary school and Matiri polling stations and other unnamed stations. The DRF for Matiri parish exhibited by the 2nd respondent shows 700 as ballot papers issued and 467 as total votes cast. Therefore there could not have been multiple voting at Matiri parish, Ganyinayo bore hole polling station.

Byamaraki Spriano in his affidavit in support of the petition deposed that at Matiri church of Uganda polling station, he saw one Ronnie place an unknown number of pre ticked ballot papers in favour of the 1st respondent. The petitioner did not attach the DRF of Matiri church polling station therefore I am unable to verify his allegation and I am compelled to go by the 2nd respondent's word that there was no ballot stuffing .

Muganyizi Livingstone in his affidavit in support of the petition deposed that he received a call from Aliganyira James that agents of the 1st respondent were stuffing ballot papers in the ballot box at Nyarukoma primary school. This is obviously hearsay evidence that is inadmissible.

From the foregoing analysis, the petitioner has failed to discharge the burden that the offence of ballot stuffing was committed whether by the 1st respondent or his agents or by the 2nd and third respondent's officials.

d) Disenfranchisement

The petitioner alleged that voters were disenfranchised by early closure of the polling stations, non use of the Biometric Voter Verification Kits(BVVK) , and chasing away voters.

Akuguzibwe Moses in his affidavit in support of the petition deposed that he was parish supervisor at Kabirizi Leaf Shade polling station where the person who was operating the BVVK was taking 30 minutes to verify each voter whereupon he was replaced at about 4.30 pm.

Aliganyira Solomon in his affidavit in support of the petition deposed that at Rubona Polling station, when the BVVK failed, the 2nd respondent and 1st respondent's agent went to the sub county headquarters to collect a replacement.

I find that there was no intention on the part of the 2nd and 3rd respondent to disenfranchise voters through the non use of the BVVK . Failure of the machines to operate optimally does not imply disenfranchisement as voting took place in all polling stations in the constituency.

Twinomugisha Peace deponed in her affidavit in support that at Kabamuhike polling station, at 3 p.m, voters were prevented from voting. The DRF for this polling station was not attached to the affidavit therefore I am unable to compare the number of voters with the ballot papers issued. However, the 2nd respondent tendered a DRF for this polling station and it showed that 398 votes were cast out of 550 ballot papers issued. The DRF was endorsed by the petitioner's agents Alinaitwe and Byasigaraho.

Byamaraki Spriano in his affidavit claimed he had attached a list of people who were denied the right to vote but the list was not attached except that he attached 10 copies of national IDs. This cannot be proof that the holders of those IDs did not vote.

None of the people who were allegedly disenfranchised deponed an affidavit to that effect.

I therefore find that this irregularity has not been proved to the required standard.

e) Voting and Counting of votes in different polling stations like Ihamba, Galihuma, Birenga, Kabirizi c/s 32 of the PEA done in the absence of petitioners agents

While section 32 provides for attendance of agents at polling stations to safeguard interests of the candidate, no offence is created under this section in the event that the agent is prevented from performing his or her duties.

The above notwithstanding, the DRF for Kabirizi Leaf Shade exhibited by the 2nd respondent showed that it was endorsed by the petitioner's agents Kamihanda and Nabulunda.

Therefore , I find no merit in this complaint .

f) Boxes received from Kampala without seals at Kigando sub county c/s 12 (b) of the PEA.

Section 12 is with respect to factors that do not invalidate nomination papers. This notwithstanding, the 1st respondent in his affidavit in support admitted that the boxes arrived with broken seals but they were re-sealed in the presence of all candidates' agents.

Furthermore, the affidavit of Kiiza Richard Polite in support of the petition confirms that the boxes were resealed in his presence by the 2nd respondent. The 2nd respondent confirmed this position. I therefore find no merit in this complaint.

g) Canvassing for votes by 1st respondent's agents , distribution of 1st respondent's posters and fliers at Butunduzi and Kihura sub counties and giving of cash 2000/ to voters.

The affidavit of Mujuni Sharifu in support of the petition shows that on polling day, he saw one Sunday, agent of the 1st respondent distribute fliers and 2000/ to voters. The omission to give the full name of the alleged agent raises doubts about the veracity of this affidavit.

The affidavit of Loyce Namara gives details of how the 1st respondent gave 400,000/ to Balam in her presence and instructed him to buy votes which illegal activity she participated in and that she saw Balam give 2,000/ to voters on polling day.

While Mujuni saw Sunday, Namara saw Balam. This is an inconsistency that exposes the lies being paraded by the two witnesses .

I find that this complaint has not been proved to the required standard.

h) No official tallying and declaration of results

It was alleged that tallying commenced in the morning on 19.2.2016 and at about 3 p.m, the 2nd respondent stopped the exercise and asked the candidates to return the next day but when the petitioner returned, the centre was closed.

Section 54 of the PEA prescribes the tallying process. It is done in the presence of all candidates and when it is adjourned , the ballot boxes are expected to be well guarded.

It was alleged by the petitioner that the 2nd respondent declared the results on 21st February 2016 at about 2 p.m. In her response, the 2nd respondent conceded the late declaration but she denied it was contrary to the law.

Section 18(4) of the PEA as submitted by counsel for the petitioner gives a time line of 48 hours from polling day which ended at midnight on 18.2.2016. This means the results should have been declared by close of business on 20.2.2016.

The 2nd respondent explained that the tally system soft ware broke down therefore she could not transmit the presidential elections results on line whereupon she was compelled to travel to Kampala to deliver those results hence the delay to declare the results in the parliamentary

elections . In cross examination, the 2nd respondent confirmed she issued provisional results on 20th February and final results on 21st February 2016.

The affidavits of Ategeka Wilson who testified as PW 20 and Ngabirano Jonathan and Muhumuza David who did not show up for cross examination show that tallying commenced on 19.2.2016 in the morning and adjourned at 3 p.m by the 2nd respondent who asked the agents to return the next day 20.2.2016.

As advised, Ngabirano was at the tally centre in the morning of 20.2.2016 but found it closed. Ngabirano then went to the 2nd respondent's office at Kyenjonjo Town council where she informed him that she was proceeding to Kampala. According to Ngabirano, he heard the results for Kyenjonjo district over the radio on 22.2.2016.

As the 2nd respondent admits she issued final results on 21.2.2016, I find that this was outside the time prescribed by section 18(4) of the PEA.

Citing Nangiro v Loriti and anor Court of Appeal Election Appeal No. 20 of 2006 , counsel for the petitioner submitted that failure to tally the results vitiates an election . In that case, the returning officer was forced to abandon tallying under duress from an armed intruder. In the instant petition, tallying was completed as evidenced by the tally sheet that was exhibited by the petitioner. The Nangiro case can therefore be distinguished.

Nevertheless, the fact that the results were announced on 21.2.2016 outside the official time is an indictment on the 2nd respondent . Although there are no sanctions attached to section 18(4) of PEA, it was a grave breach of the PEA.

i) Alteration of DRFs, counting of votes in the absence of petitioner's agents, denial of DRFs to petitioner's agents.

Another irregularity highlighted by counsel for the petitioner was alteration of DRFs.

Without going into details of which alterations were made, I agree with counsel for the respondent that corrections on forms per se is not usually a critical issue. It simply means a mistake was made and the presiding officer or returning officer corrected the error. The authority of **Ngoma Ngime v EC and anor HCEA. 11 of 2012 refers.**

It becomes a grave issue where the results do not add up and where there is proof of other irregularities like ballot stuffing and multiple voting .

I therefore find that this irregularity was not proved to the required standard.

An examination of the tally sheet annexure H to the petition and the DRFs shows no major inconsistencies in the results entered. The petitioner prepared a table that he alleged showed DRFs not fully filled by the presiding officers but whose results were used in the tallying exercise.

For Ihamba polling station, the results were recorded on a piece of paper. This document cannot be relied on because it was not commissioned. Nevertheless, the tally sheet shows results from all polling stations were entered.

All the DRFs exhibited by the 2nd respondent were signed by presiding officers.

The allegations of counting votes in the absence of the petitioner's agents and denial of DRFs to his agents have not been proved. In his submissions, counsel for the petitioner failed to direct me to any specific affidavit.

I therefore find that these specific irregularities have not been proved at all.

j) Illegal participation of civil servants.

This is a serious allegation that called for a distinct paragraph. The admission by Kyamanywa Wilson GISO Kihura sub county that he participated in managing the election simply shows that he was performing his official duties . Therefore, no illegality was committed .

2. WHETHER THE RESPONDENT THE 1ST RESPONDENT COMMITTED ANY OF THE ILLEGAL PRACTICES/ELECTION OFFENCES PLEADED IN THE PETITION PERSONALLY OR BY AGENTS WITH HIS KNOWLEDGE AND CONSENT OR APPROVAL.

In discussing this issue, I will restrict myself to the complaints in the petition and affidavit in support of the petitioner. Any incidences that are named in affidavits of witnesses but not mentioned by the petitioner will be disregarded.

Bribery c/s 68 of the PEA

In the petition, the petitioner formulated the bribery and related illegal practices in para 8(c) (i) and para 8 (C) (ii) as follows:

The 1st respondent personally and through his agents and supporters committed numerous illegal practices and offences :

- i) Bribery c/s 68 of the Act. For example to Katoosa Catholic church where the 1st respondent personally gave 10,000,000/ ; 50 chairs to Hakatoma women groups at fundraising; 25,000/ to every household in Kinyatale, Kigando and Kabirizi parishes; 1,000,000/ to Nyakatoma SACCO; 50,000/ to every LC 1 chairperson in Butunduzi and Nyabuhara sub-counties; 7,000/ per person to about 120,000 people in Kinyatale church of Uganda; 10,000/ per person to about 70 people in Kigando restoration church; 600,000/ cash and uniforms to Katumba football players.
- j) ii) Illegal donations c/s 68(7) of the PEA for example the 1st respondent donated electricity poles in Kisojo, Rwaitengya, Kikoda, Mirongo, Nyabuhurwa, Mbale, Kyakatwire trading centres.

These are the alleged acts of bribery I will examine.

a) 10,000,000/ allegedly given to Katoosa Catholic church by the 1st respondent.

Although the date when the bribe was allegedly given is not mentioned in the affidavit in support, in cross examination, the petitioner gave the date as 27th January 2016.

It is now well established that the standard of proof for an alleged offence in an election petition is slightly higher than balance of probabilities. The authority of **Odo Tayebwa v Basajjabalaba EPA 13 of 2011** cited by counsel for the petitioner gives the key elements of bribery, namely,

- A gift is given
- The gift is given by a candidate or his agent
- The gift is given to induce the person to vote for the candidate.

According to the petitioner he was present when the said money was given to the church. The other person who supported the petitioner Henrietta Kitembo testified in court that she did not know English and therefore her affidavit that did not contain a jurat cannot be relied on. The other person Warugaba Laurent was not available for cross examination.

Moreover, the petitioner admitted that he has a dispute with Father Mutangirizi whom he accused of wishing the petitioner death. Under these circumstances, the petitioner's ability to say a good thing about the priest is very unlikely.

The respondent in his affidavit denied this allegation and stated that Fr. Mutangirizi only thanked the 1st respondent for introducing the church to Rural Electrification Agency that gave the church electricity after being in darkness for years.

He was supported by Fr. Mutangirizi who confirmed that the 1st respondent introduced the church to the project that gave them electricity. He denied getting a donation of 10,000,000/ and that this money was the cost the church would have incurred .

The 1st respondent attached a letter citing the areas the project would cover. It was a government program and as a minister, the 1st respondent had a responsibility to monitor implementation of a government program.

Counsel for the petitioner submitted that father Mutangirizi admitted in cross examination that it was FERDUSULT to implement the project and not REA. At this point it is irrelevant which company would implement the project as long as it was a government program. Furthermore, no money was actually donated to the church that day. As earlier mentioned, it was the petitioner's word against the respondent and father Mutangirizi .

I am therefore not satisfied that the 1st respondent donated the church 10,000,000/ for the parishioners to vote for him.

b) Donation of fifty chairs to Hakatoma women's group.

Under section 68 (7) a candidate shall not carry out fundraising or giving of donations during the campaign period.

The women's group was variously referred to by different witnesses as Nyakatoma or Hakatoma. The petitioner in his oral testimony referred to the group as Nyakatoma. PW32 Tusiime Veronica referred to the group as Hakatoma and so did Mbabazi Reste.

According to Tusiime, on 9th February 2016, the 1st respondent while attending a women's function pledged 50 chairs. Mbabazi Reste testified as much.

Section 68(7) of the PEA outlaws the giving of donations but is silent on a pledge.

The fact that no donation was made means no illegal practice was committed.

This finding notwithstanding, the confusion between the two names means the 1st respondent was hard put to defend himself on vague particulars of an alleged illegal practice.

k) Donation of 600,000/ to Katumba football players

In his submissions, counsel referred to donation of uniforms to Kaihura FC and Kanyinya football gala, but there was no mention of these acts in the petition. I will therefore only discuss the alleged donation to Katumba football club.

No dates and the individuals involved were named under this allegation. However, the affidavits in support of Tugume Joseph was countered by affidavit of the same Tugume Joseph Chrisitan RW2 in support of the respondent who stated that the donation was made in September 2015 well before nomination of candidates for elections. This same Tugume's affidavit in support of the petitioner did not give the dates when the donation was made .

This being the case, the petitioner has failed to prove the alleged donation to the required standard.

l) Electricity poles

The petitioner alleged that the 1st respondent donated electricity poles in Kisojo trading centre, Rwaitengya trading centre, Kikoda trading centre , Mirongo trading centre, Nyabuharwa trading centre, Mbale trading centre, Kyakwitire trading centre.

The evidence on this incident is not convincing. According to Ngabirano Jonathan on 16.2.2016, he was called by his candidate Muhumuza David to pick electricity poles distributed by Rural Electrification Agency(REA) . Therefore, his feeble attempt to link the distribution of these poles to the 1st respondent are not lost on me.

With respect to Kisembo Teopista, it was not the 1st respondent driving the truck that was distributing the poles, a fact confirmed by Jonathan Ngabirano. Most of the affidavits cited by counsel for the petitioner only cite the poles issue in passing.

I am therefore not satisfied that the 1st respondent donated electricity poles which is essentially a government program during the campaign period.

The respondent in his affidavit stated that his role in the project ended in 2014 when he lobbied for the program to reach Kyenjojo.

m) Nyakatoma SACCO

The petitioner alleged that the 1st respondent's agents donated 1,000,000/ to the SACCO during campaign period. However, the said agent Owesigire Benard in his affidavit stated that the money was given on 22nd February 2014 before the campaign period. The affidavit in rejoinder of Kyomukama Jackline that the petitioner relies on is one of those I ruled inadmissible because the rejoinder filed by the petitioner is not provided for by the rules.

The other affidavit relied on is that of Tumusiime Federiko who was not cross examined by the respondent's counsel. Furthermore, he simply stated that on 11.2.2016, the 1st respondent donated 1,000,000/ to the Sacco but does not state where this donation was made and to which individual. He goes on to say in February 2016, the money was taken to the Sacco with instructions to vote for the 1st respondent. The Sacco members who received the money are not named.

This means the alleged illegal donation of 1,000,000/ was not proved at all.

n) Kawuruju parish

The petitioner alleged that on 17.2.2016, the 1st respondent gave his agent Balam 400,000/ to distribute to voters in Kawuruju parish on polling day. The petitioner relied on affidavit of Namara Loyce in support.

Namara deponed that she was present when Barlam was given the money and that on polling day she saw him give Biryomumaisha Ngwansi, Agaba, Mary and others 2000/ each. Barlam Tumwekwasi appeared at the court premises but he was not available for cross examination. Bribery by agent being a grave offence, it was necessary that he be cross examined especially as the 1st respondent denied him as a campaign agent. Indeed in his affidavit, the said Barlam stated he had fallen out with the 1st respondent thereby making him an unreliable witness on account of personal grudges with the 1st respondent.

Namara's evidence is that of an accomplice and therefore requires corroboration. In the absence of such corroboration from Barlam whether in his affidavit or through cross examination, it cannot be relied on to find that the 1st respondent committed the illegal practice of bribery by agent.

o) Kigando restoration church

The petitioner alleged that 10,000/ was given per head to about 70 people on 16.2.2016 to vote for the 1st respondent. The petitioner relied on affidavits of Kyaligonza Julious, Kemiyyondo Batty, Komuhendo Moreen who claim Pastor Kakuzi who gave them the money said it was from the 1st respondent.

The said Pastor Kakuzi deponed an affidavit denying the bribery.

This means it is the testimony of the petitioner's witnesses against that of Pastor Kakuzi. Kyaligonza Julius in his affidavit alludes to 5000/ as the money given to about 50 voters by pastor Kakuzi moreover at his home. Kamiyendo Batty stated it was 10,000/ that was given to people although she did not attend the meeting.

The inconsistencies render the evidence of the petitioner's witnesses unreliable.

In the premises, the alleged bribery by agent has not been proved.

p) Bribery by agent at Kinyantale COU

It was alleged that Kakiiza Solomon, agent of the 1st respondent bribed voters with 7,000/ each. The petitioner relied on the affidavits of Kyaligonza Julius and Kemiendo Batty . While Kemiendo Batty states 7,000/ was given to voters by Kakiiza Solomon agent of the 1st respondent on 12.2.2016, she did not attend the meeting where this money was allegedly distributed.

Kyaligonza Julius in his affidavit is silent on whether he attended the meeting at this church.

In the premises, the alleged act of bribery at this church has not been proved.

q) 250,000/ NRM funds

I have examined the petition and the affidavit in support of the petitioner but found no mention of this alleged act of bribery. Therefore, I need not look into this specific allegation.

r) Intimidation, harassment, and violence c/s 80 of the PEA.

The petitioner alleged intimidation , harassment, and violence by Major Brown and by the 1st respondent .

The petitioner made general allegations without specifics. In cross examination, he relied on affidavits of other persons. Affidavit of Ngorogoza Turyamwijuka showed that he reported to the police vide on 26.10.2015 vide 32/29/10/2015 . This was before nomination.

With respect to Major Mwebesa Brown, the allegation was that on an unknown date, the major arrested and detained Bahemuka Julius at Nyabuharwa . Bahemuka Julious in cross examination conceded that he was never detained as alleged at the police station but was released the same day. This means the said Bahemuka was in lawful custody albeit briefly and in any case, it is Major Brown who ought to have been arrested if the allegation of intimidation is to be believed.

He also stated that on polling day, Aliganyira aka Dubai agent of the 1st respondent was on a government vehicle with policemen. That the group surrounded a polling station which forced voters to stay away.

The presence of police at a polling station gives voters a sense of security therefore I find it odd that the witness should state the opposite. Secondly, the violence that occurred before nomination was outside the campaign period and therefore does not constitute an election offence.

Bampabura Simon in his affidavit in support of the petitioner stated that at Kawaraju polling station, armed men ordered voters to stand in queue. These were most probably police constables on official duty.

Musementa Stephen in his affidavit in support stated that on 25.10.2015 at Kassina on 29.2.2016 at the High Court in Fort Portal he was assaulted and threatened by the 1st respondent and his political assistant. Apart from the fact that these dates are outside the campaign period and polling day, mere reports to the police is not proof that an election offence was committed. The nature of the assault and the threats made were not given.

The petitioner alleged that on 19.11.2015 at Kasiina, the 1st respondent threatened him with violence. Its not clear whether this is the same incident mentioned by Musementa . Whatever the case, the threats made were not explained in detail. The offence of threatening violence requires that the actual words used by the aggressor are given as evidence.

In light of the foregoing analysis, I find that there was no intimidation of voters by the 1st respondent or his agents during the campaign period and on polling day.

s) Incitement of hatred and disharmony against the petitioner

It was alleged by the petitioner that the 1st respondent campaigned against him on ethnic grounds and that he spread malicious and false information with intention to defame him.

No serious effort was made by the petitioner to prove these allegations. More details were required to prove these grave allegations. Without the words uttered by the 1st respondent, it becomes difficult for the court to rely on affidavits of other people who allegedly heard the malicious messages. The petitioner had a duty to give particulars of the malicious campaign.

In the premises, I find that the petitioner failed to prove illegal practices to the required standard.

3) WHETHER NON COMPLIANCE AFFECTED THE RESULTS IN A SUBSTANTIAL MANNER.

The only proved act of non compliance was the breach of section 18(4) of the PEA by the 2nd respondent when she declared results of the elections outside 48 hours after polling day.

This breach was mitigated by the fact that results were finally released on 21.2.2016.

The test is if it had not been for this breach, would the results have been different?

I find that as the 2nd and 3rd respondents conducted the rest of the segments of the election in compliance with the provisions of the PEA and Electoral laws, the declaration of results outside the time prescribed by section 18(4) of the PEA did not substantially affect the results.

The petition is dismissed and I make the following orders.

1. The 1st respondent Kajara Aston Peterson was validly declared as winner for Mwenge South Constituency
2. The petitioner shall pay costs of the 1st respondent only.
3. 2nd and 3rd respondent will bear their own costs except for disbursements which will be paid by the petitioner.
4. A certificate for two counsel is issued.
5. Counsel Victor Busingye shall not get fees for court attendance and transport on 23.5.2016 as he had not renewed his practicing certificate which he renewed on 17th May 2016.

DATED AT FORT PORTAL THIS 24th DAY OF JUNE 2016.

HON. LADY JUSTICE H. WOLAYO

Representations:

Byamukama and Kansiime for the petitioner.

Ngaruye Boniface, Cosma Kateba and Victor Busingye for the 1st respondent

Christine Ntambirweki and Adoch Luwum for the 2nd and 3rd respondents.