

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT SOROTI

HCT - 00 - CV – E.P – 0004 – 2016

IRIAMA ROSE NAROTHA:.....PETITIONER

VERSUS

1. ANYAKUN ESTHER DAVINIA

2. ELECTORAL COMMISSION:.....RESPONDENTS

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

The Petitioner, Iriama Rose Narotha was a candidate in the Woman Member of Parliament elections for Nakapiripirit held on 18th February 2016. She was dissatisfied with the results of the election in which the 1st Respondent, Anyakun Esther Davinia, was declared winner of the election by the 2nd Respondent, having beaten the Petitioner by 1,631 votes. The 1st Respondent has since been gazetted, sworn in and taken her seat as Woman MP representing Nakapiripirit district.

The Petitioner filed this petition in her capacity as a candidate who lost the election, challenging the 1st Respondent's practices during the election and the manner in which the 2nd Respondent conducted the election. The Petitioner seeks a declaration that the 2nd Respondent did not comply with the provisions of the law and set principles while conducting the election for Woman Member of Parliament for Nakapiripirit district and that the 1st Respondent committed illegal practices and engaged in electoral offences during the election.

The grounds upon which the petition is premised are clearly set forth in detail, both in the petition and the affidavits in support of the petition as required by Rule 4(8) of the Parliamentary Elections (Interim Provisions) Rules.

The petition's main ground is that the 2nd Respondent did not comply with the provisions of the law and set principles while conducting the election for Woman Member of Parliament for Nakapiripirit district. The other ground is that the 1st Respondent committed illegal practices and engaged in electoral offences during the election.

The Petitioner therefore sought declarations from this court that:

- There was non-compliance by the 2nd Respondent with the provisions of the law and set principles while conducting the election for Woman Member of Parliament for Nakapiripirit district
- The 1st Respondent committed illegal practices and/or electoral offences in breach of the Parliamentary Elections Act 2005
- That non-compliance with the provisions and set guidelines of the law affected the outcome of the election in a substantial manner
- That the 1st Respondent was not validly elected as Woman Member of Parliament for Nakapiripirit district
- That the election of the 1st Respondent as District Woman Member of Parliament should be annulled, set aside and a fresh election ordered,
- That the Respondents pay damages for inconvenience caused to the Petitioner and the costs of the Petition

The 1st Respondent's defense to this petition is that the election was conducted by the 2nd Respondent in compliance with the law and that she did not personally, or through her agents, with her knowledge and consent procure, provide or bribe voters with alcohol and local brew.

The 2nd Respondent's defense to the petition is that the election was conducted in a peaceful, free and fair manner in accordance with the principle of transparency established by the electoral laws.

For the determination of this petition, the parties agreed on a number of issues thus:

1. Whether the election was conducted in non-compliance with the electoral laws, that is, the 1995 Constitution, the Electoral Commission Act and the Parliamentary Election Act;
2. If so, whether the non-compliance affected the results in a substantial manner;
3. Whether the 1st Respondent committed the illegal acts/offences in connection with the election either personally or through her agents with her knowledge, consent or approval;
4. Whether the Petitioner is entitled to the remedies sought?

In a petition of this nature, Section 61(1) of the Parliamentary Elections Act places the burden of proof on the petitioner, who has to prove to the satisfaction of court, the grounds on which the election should be nullified. The Act further provides in Section 61(3) that the standard of proof in election petitions is on a balance of probabilities. These provisions have been interpreted and applied in a number of authorities, some of which include the Supreme Court in **Col. (RTD) Dr Besigye Kizza V Museveni Yoweri Kaguta & the Electoral Commission Election Petition No.1 of 2006, Mbowe V Elu Foo [1967] EA 240 and Margaret Zziwa V Nava Nabagesera Civil Appeal No. 39 of 1997.**

I will resolve the 1st and 3rd issue inter-changedly as they are similar. These two issues are in regard to whether the 2nd Respondent conducted the election in compliance with electoral laws and whether the 2nd Respondent or her agents committed illegal acts in connection with the election.

The Petitioner complained that from the very start she had insisted that the votes be recounted by the Chief Magistrate Moroto in Miscellaneous Application 4/2016 but the case was not heard. She stated that the 1st and 2nd Respondents had refused service but when asked whether she had been there, she said when service was attempted, she was not there. Under these circumstances, it was necessary for her to file an affidavit deposed by the process server and produce her for cross examination which she did not do.

In the premises, one cannot tell what transpired when the process server took court process for service. Under those circumstances, there is no evidence upon which court can fault the Respondents.

The Petitioner also alleged that during the election, in many polling stations the number of ballot papers issued exceeded the number of unused ballots, her agents were not allowed to sign the DR forms with no reason given, signatures of her agents were forged on the DR forms in some instances and that in some, the Presiding officers did not sign the DR forms. She further alleged that many of her validly cast votes were considered invalid where one could easily ascertain the choice of the voter and that vote counting was disrupted by insufficient light and rowdy gatherings. She contended that all these were violations of the provisions of electoral laws.

Mudong Anna, the Petitioner's agent at Namorotot Primary School claimed that many of the votes declared spoilt were actually not and that one could clearly see that the voter intended to vote for the Petitioner. However, Mudong does not say how many of these allegedly invalid votes belonged to the Petitioner nor did she produce any for court to ascertain what she alleged. She has also not exhibited to court her superior knowledge of what amounts to a spoilt ballot paper.

The Petitioner was asked to tell court what a spoilt vote is. Under cross examination, she said votes can be invalid where a signature is beyond the line and where one votes two people. She further said she did not see any votes that had been declared invalid but that she was simply told by her polling agents. These invalid votes were however never produced in court for court to ascertain that they had been invalidated wrongfully. The witnesses did not state how many of the Petitioners or 1st Respondent's votes were declared invalid so as to enable court to make a finding as to whether there was bias by the Presiding officers.

In paragraph 4 of Mudong Anna's affidavit, she said the results entered in the declaration form did not tally with the total number of votes counted and that they were more than the votes issued. I have looked at the Declaration form; it shows that at Namorotot Primary School where she acted as the Petitioner's agent, the 2nd Respondent issued 550 ballot papers. The total number of women and men who voted was 384 and the unused ballot papers were 166. I have done the additions and subtractions and it is my finding that if 550 ballot papers were issued and 384 were

used, there could only be a balance of 166 which was the case. Therefore this court does not see anything wrong with that declaration. In conclusion, there was no evidence to show that the declaration of the invalid votes was done wrongfully or that they all belonged to the Petitioner.

The Petitioner also alleged that at Lokale polling station, her agent Kiyonga Richard was chased away for trying to help an old woman vote. However, it was not his duty to do so. According to Section 37(4) of the Parliamentary Act, an election officer, an agent of a candidate or an observer at any polling station is not permitted to assist any voter impaired by illiteracy, blindness, old age or any other disability. Such a voter may be assisted by a family member or any other person of their choice and it was not shown that the elderly lady had asked Kiyonga to assist her. Even if she had asked him, the section specifically prohibited a polling agent to do such a thing. That notwithstanding, Kiyonga's absence did not leave the Petitioner with no representative because another polling agent, Anyankol Kazimiru remained in place. Furthermore, Kiyonga himself told court that he returned later and attended the counting of votes.

The Petitioner also claimed that at Nabokat A polling station in Namalu sub-county, her agent Akol Simon Peter was not allowed to sign the DR forms. The DR form of that place however shows that an agent called Aleper Paul signed as her agent. She did not disown this agent.

Her other agent Lomongin Solomon at Alamacar Primary School Polling station, Loregae sub-county claimed he did not sign but that his signature was forged indicating him as an agent of Awas Sylvia. The Petitioner stated that he could not have signed because had been chased away from the polling station. While she says her agent was chased from the station and that's why he didn't sign, Lomongin himself says he was at the polling station and even participated in the counting of the votes which turned rowdy. He said he did not sign because the counting was not accurate. From the affidavit of Lomongin, which contradicts the evidence of the Petitioner, his not signing was caused by inaccuracy in counting the votes but these are complaints that he should have recorded in the declaration form. The declaration form on the contrary is not only silent about chaos but specifically provides that voting at that station was peaceful. Nowhere in these proceedings are we told that a report was made to police or anywhere that an altercation had taken place at Alamacar Primary School.

In my view, the contradictions between the Petitioner and her agent Lomongin, point at the complaint of failure to sign declaration forms because of chaos as an afterthought.

The Petitioner also deposed that some presiding officers did not sign the DR forms and in this she relied on the DR form of Lokibui Polling Station in Namalu sub-county where the Presiding officer Asio Sharon Hilda did not sign which evidence remained on the record uncontroverted.

The Petitioner alleged ballot stuffing by contending that in many polling stations results did not tally as some of the participants were more than the votes cast or the number of unused ballot papers were more than those officially issued to the polling station. She deposed in her affidavit that this was the case in Loregae, Namalu, Lolachat, Kakamongole, Nabilatuk and Lorengedwat sub counties. She named 36 polling stations out of these sub counties where she said there was non-compliance by the 2nd Respondent. I have had the liberty to peruse these declaration forms for the various polling stations which included Loregae, Looi, Nakaumeimei, Akwakori, Nakasian, Alamachar, Napiananya, Lokibuiyo, AroundAbout, Kaiku Primary School, Lokwasinyon, Namatata, KalapalataLochoangikalei, Lokibui, Namalu Primary School, among others. It is evident that in some of these stations, the unaccounted for ballot papers went as high as 297. During cross examination, the 2nd Respondent's returning officer attempted to explain this away by stating that they were arithmetic errors. He stated that the high number of unused ballots appearing on the DR forms was a result of some presiding officers committing the error of adding up all the unused ballots for all the elections that took place that day, that is, Presidential, Directly elected Member of Parliament and Woman Member of Parliament elections. Be that as it may, this seemed to be the consistent trend in all the declaration forms of the sub-counties in Nakapiripirit district. The Presiding officers were agents of the 2nd Defendant who were trained and passed out to ensure free, fair and efficient elections. The large number of unused ballot papers in all polling stations cannot be explained away as simple arithmetic errors. It is my finding therefore that in this regard, the 2nd Respondent failed in its duty. Be that as it may, the Petitioner has not shown that this failure benefitted the Respondent vis a vis herself.

The Petitioner alleged that in some instances vote counting was disrupted by insufficient light and rowdy gatherings; in this she cited the example of Alamacar Primary School polling station where Lomongin was her agent. In his affidavit Lomongin deposed that the rechargeable lamps that were being used went off for lack of power and they were in darkness for two minutes and

then people resorted to use of their phone lights. He himself deposed that this lack of light was for a short period. From his affidavit it is clear that counting continued under this alternative light.

He said to him, the counting was not accurate because of the chaos the counting process had gone through. It is clear from his affidavit that it was the rowdy contestation instead of absence of light at the counting of votes which caused him to declare the votes inaccurate. Nowhere has it been proved that counting did not take place because of darkness.

In conclusion therefore, it is my view that there were difficulties in some polling stations but that notwithstanding, the Presiding officers were able to find alternative sources of light and in all circumstances quelled down any chaos that arose which enabled them to count.

Bribery;

The ingredients of the offence of bribery in elections were set out in **Achieng Sarah Opendi & Anor V OchwoNyakecho Court of Appeal Election Petition Appeal 39/2011** which relied on **Col. (RTD) Dr Besigye Kizza V Museveni Yoweri Kaguta&the Electoral Commission Election Petition No.1 off 2001** as thus:

- A gift was given to a voter
- The gift was given by a candidate or his agent
- It was given with the intention of inducing the person to vote.

The Petitioner claimed that there had been bribery at Namatata Primary School Polling Station. In this she relied on the affidavit of LeperaLodio in which he had deposed that Adopa Mariko, an agent of the 1st Respondent had organized local brew and invited people to drink and that Lepera had also drunk it. That while there, Adopa had told people that if the 1st Respondent won the election, they would drink more in the evening.

Mariko Adopa responded denying supplying the drink to voters and that he was instead attending to his sick wife. He even attached medical forms to his affidavit. The Respondents had asked to cross examine LeperaLodio but he was not produced by the Petitioner for cross examination. His affidavit was thus struck out and remained of no evidential value. The allegation that Adopa Mariko bribed voters with alcohol therefore remained unproved.

Still on bribery, the Petitioner also relied on Lolem Godfrey and LotteeLokedi. Lolem Godfrey said when he reached Nasinyonoit “B” Polling station at about 7:00am, he noted that youth and old men were already drunk and that an agent of the 1st Respondent, Lomogin John had been passing through the village the whole night buying brew and giving money to voters asking them to vote for the 1st Respondent. Further, that Lomogin John also distributed chapatti and soda to the voters on the polling day, asking them to vote for the 1st Respondent and that he attempted to distribute the same to polling officials and to Lolem himself. Lolem said he carried this complaint to the polling officials but was ignored.

In his affidavit, LotteeLokedideposed that he voted from Akwakori Polling Station. He stated that the Presiding officer ordered the closure of voting at 5:00pm when there were still 250 people in the line to vote. That he then saw people going to the home of Lottee Paul to drink local brew that had been prepared on behalf of the 1st Respondent and that the brew was delivered in the campaign vehicle of the 1st Respondent. Further, that the motor vehicle had posters of the 1st Respondent and that it delivered 40 litres of local brew and 70kgs of flour.

During cross examination, LotteeLokedi revealed that the place where the brew was delivered to was a dancing yard. In my view, a dancing yard was a place where local brew was bound to be found whether there was an election or not. He told court that he did not go to the place which was 120 meters away. At that distance, one wonders how he could speak with certainty that the brew brought was 40 litres and the rooted flour was 70 kgs. I also wonder how he would know that the contents were local brew and flour. Lottee Lokedi was an agent of the Petitioner who in this case was obviously partisan.

Such evidence would require corroboration and much more for him who had seen 40 litres of brew and 70 kgs of flour from a distance of 120meters.

The need for corroboration from an independent source was considered in **Wadada Rogers V Sasaga Isaiah Jonny & Anor Election Petition 31/2011** where the court held;

“While no number of witnesses is required to prove a fact, in election matters, partisan witnesses have a tendency to exaggerate claims about what might have happened during elections. In such situations, it is necessary to look for other evidence from an independent source to confirm the truthfulness or veracity of the allegation.”

In the instant case, the evidence given by LotteeLokedi that he could determine the quantity of local brew with such accuracy as 40 litres and flour of 70kgs in itself raised doubt of his truthfulness. That being the case, and in view of the case cited above, it made corroboration necessary in this case. I have gone through the evidence and found no other independent source to confirm the truthfulness of LotteeLokedi's allegations. There is therefore insufficient evidence to show that local brew was supplied by the Respondent or that if there was drinking at the dancing yard, it was not just business as usual but drinking intended to induce people to vote for the Respondent. That being the case, the ingredients of bribery namely the giving with intention to induce by the Respondent or her agents with her knowledge and approval has not been sufficiently proved.

Lottee Lokedi also deposed in his affidavit that at 5:00pm the Presiding officer closed the polls and proceeded to count when 250 people were still in the line. This was denied by the Respondents. In declaration forms, there are provisions where polling agents can refuse to sign and record the reasons. In my view, where 250 voters are prevented from voting, the Petitioner's polling agents should have clearly recorded this observation.

The Petitioner had two polling agents in this station, Angela James and Apuun Moses. Both of these agents signed the Declaration forms without any adverse comments. In my view, this was because they were satisfied with the manner in which the election at that station was conducted.

Furthermore, polling stations are issued ballot papers according to the numbers of registered voters. If they are more, they are usually not more than 20-50. According to Akwakori Polling Station's declaration forms, 705 ballot papers were issued. The total number of people who voted was 446 females and 259 males totaling 705. The number shows that all or almost all the voters in the area had voted by the time of closure. It is therefore not possible that 250 voters were still in the line.

As for Lolem Godfrey who complained that Lomogin John had distributed local brew throughout the night and soda and chapati during the day of voting, I find again that his evidence falls short. First of all, he does not state that he saw the distribution going on in the night. Secondly, an attempt to distribute chapatti and soda to the polling officials on duty is so grave that the polling agents of the Petitioner could not have failed to record or report it to the Police immediately.

The sum total is that the election at Akwokori and Nasinyonoit remains undented by the allegations which fell short of the required standard of proof.

Whether the non-compliance affected the results in a substantial manner;

Having found that there was no bribery on the part of the 1st Respondent, Court must determine whether the instances of non-compliance by the 2nd Respondent affected the results of the election in a substantial manner. In order to assess the effect, the court has to evaluate the whole process of election to determine how it affected the results and then assess the degree of the effect; **Amama Mbabazi & Anor V Musinguzi Garuga James Election Petition Appeal 12/2002**

At this point, it is pertinent to extract the results from the 36 polling stations which the Petitioner complained had had unaccounted for ballot papers as provided by the Declaration forms endorsed by the 2nd Defendant, many of which were signed by the agents of the Petitioner and 1st Respondent. They provided as follows

LOREGAE SUB COUNTY

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|----|-----------------------------|----------------------------------|
| 1. | Loregae Polling Station | Petitioner - 267 |
| | | 1 st Respondent - 213 |
| 2. | Looi Polling Station | Petitioner - 154 |
| | | 1 st Respondent - 290 |
| 3. | Nakaumeimei Polling Station | Petitioner - 76 |
| | | 1 st Respondent – 266 |
| 4. | Akwakori Polling Station | Petitioner - 688 |
| | | 1 st Respondent - 539 |

5. Nakasian Polling Station Petitioner - 125
1st Respondent - 23
6. Alamachar Polling Station Petitioner - 133
1st Respondent - 334
7. Napiananya Polling Station Petitioner - 209
1st Respondent - 34
8. Lokibuiyo Polling Station Petitioner - 114
1st Respondent - 503

NAMALU SUBCOUNTY

9. AroundAbout Polling Station Petitioner - 117
1st Respondent - 264
10. Kaiku Primary School Polling Station Petitioner - 173
1st Respondent- 145
11. Lokwasinyon Polling Station Petitioner - 70
1st Respondent - 236
12. Namatata Polling Station Petitioner - 143
1st Respondent- 490
13. Kalapalata Polling Station Petitioner - 92
1st Respondent - 170
14. Lochoangikalei Polling Station Petitioner - 138
1st Respondent- 172

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|-----|---------------------------------------|----------------------------------|
| 15. | Lokibui Polling Station | Petitioner - 200 |
| | | 1 st Respondent - 157 |
| 16. | Namalu Primary School Polling Station | Petitioner - 121 |
| | | 1 st Respondent - 175 |
| 17. | Nabokat “A” Polling Station | Petitioner - 133 |
| | | 1 st Respondent - 177 |
| 18. | Lomorunyangai Polling Station | Petitioner - 08 |
| | | 1 st Respondent - 203 |
| 19. | Lominoto Polling Station | Petitioner - 202 |
| | | 1 st Respondent - 851 |
| 20. | Nabokat “B” Polling Station | Petitioner - 134 |
| | | 1 st Respondent - 168 |
| 21. | Lomorimor Polling Station | Petitioner - 112 |
| | | 1 st Respondent - 217 |
| 22. | Nakuluny Polling Station | Petitioner - 139 |
| | | 1 st Respondent – 139 |

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|-----|---|------------------|---------------------------------|
| 23. | Lolachat Trading Centre Polling Station | Petitioner - 120 | 1 st Respondent - 94 |
| 24. | Nathinyonoit Polling Station | Petitioner - 66 | 1 st Respondent - 13 |

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|-----|------------------------------------|----------------------------------|
| 25. | Nachele Polling Station | Petitioner - 54 |
| | | 1 st Respondent – 46 |
| 26. | Lousugu Polling Station | Petitioner - 141 |
| | | 1 st Respondent – 97 |
| 27. | Nakaala ECD Centre Polling Station | Petitioner - 159 |
| | | 1 st Respondent – 157 |

KAKAMONGOLE SUB COUNTY

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|-----|---------------------------------------|---------------------------------|
| 28. | Tokora Trading Centre Polling Station | Petitioner - 268 |
| | | 1 st Respondent- 109 |
| 29. | Nadip Primary School Polling Station | Petitioner - 229 |
| | | 1 st Respondent- 54 |
| 30. | Lokadwaran Polling Station | Petitioner - 188 |
| | | 1 st Respondent- 179 |

NABITALUK SUB COUNTY

- | | | |
|-----|--|---------------------------------|
| 31. | Nataragita Polling Station | Petitioner - 219 |
| | | 1 st Respondent - 11 |
| 32. | Nathinyonoit Polling Station | Petitioner - 198 |
| | | 1 st Respondent - 08 |
| 33. | Nabalituk Trading Centre Polling Station | Petitioner - 119 |
| | | 1 st Respondent - 85 |
| 34. | Lojoor Polling Station | Petitioner - 135 |

LORENGEDWAT SUB COUNTY

35. Lonangat Polling Station Petitioner - 69

1st Respondent - 200

36. Naapong Polling Station Petitioner - 126

1st Respondent - 201

Out of the 36 polling stations in which there were unaccounted for ballot papers, the Petitioner emerged winner in 17 stations and tied with the 1st Respondent in one station in Namalu sub-county. Accordingly, the 1st Respondent emerged winner in 18 stations. It is evident from these results that had the alleged excess ballot papers been for the benefit of the 1st Respondent, then the margin of her win over the Petitioner in the entire election would have been way above 1,631.

The Petitioner contested the results in these particular 36 stations and not all the polling stations in Nakapiripirit district yet they all had unaccounted ballot papers. One can only infer from this that even in her own opinion, the Petitioner did not think that these excess unaccounted for ballot papers had affected the general result of the entire election.

I have gone through all the complaints raised by the Petitioner in which she claims that the results did not reflect the wishes of the people. Although she has mentioned several stations and her claim has received support from her polling agents through affidavits, there is not a single one who pointed out that this was the figure that the Petitioner received and it was changed to another figure or that this is what the Respondent got and it was changed to another figure. In many of them, the agents of the candidates signed the DR forms and in none of those did the agents of the candidates show that the additions in the forms were not correct.

If the agents of the Petitioner were not satisfied with the results, they would have declined to sign the declaration of results forms. The Presiding officers of polling stations begin their work very early. It is an activity done in a very charged environment. They have to guard against

misconduct, be aware of any signs of chaos, be alert the whole day scrutinizing voters and at the end of it all count the votes and declare results without knowing how people will react.

Under such a situation, mistakes are bound to occur; **Ngoma Ngime V Electoral Commission & Winnie Byanyima Election Petition 11/2002**. But these mistakes may not be so grave as to affect the general result of the election in a substantial manner.

As for the presiding officer of Lokibui Polling Station in Namalu sub-county, Ms Asio Sharon Hilda not signing the DR form, this was a single instance out of almost 100 polling stations. I have gone through the DR forms and found that on the whole, most of the results were declared as recorded with no complaints having been raised at the time of counting the votes. These DR forms, which were in most cases signed, were not accompanied with complaints that should have been recorded if at all the counting was not done properly.

It is true that some of the forms were not signed by the presiding officers or the polling agents but as Hon Justice Mpagi Bahigaine DCJ held in **Mbaghadi Nkayi & Anor V Dr Nabwiso Frank Wilberforce Election Appeal No. 14 & 16 of 2011**, *“that alone cannot be used as a sword where the agents signed most of them, to stop the mandate”* of the voters in electing the candidate of their choice.

As long as there were no complaints recorded on the DR forms, the results therein, in the absence of proof that the figures entered were false, should be relied upon as the true reflection of the peoples’ choice.

In conclusion, the petition fails on the ground that the Petitioner did not satisfy court on the validity of the grounds upon which the petition was based. Bribery allegations against the 2nd Respondent were not proved and the instances of non-compliance of electoral laws by the 2nd Respondent did not affect the result of the election in a substantial manner and it is therefore my

finding that the 1st Respondent was validly elected as Woman Member of Parliament for Nakapiripirit district. The petition is therefore dismissed with costs.

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David K. Wangutusi

JUDGE

Date: 25th July 2016