

IN THE HIGH COURT OF UGANDA AT GULU

ELECTION PETITION NO. 003 OF 2016

KIDEGA NABINSON JAMES**PETITIONER**

1. ACIRO LUCY OTIM}

2. ELECTORAL COMMISSION} RESPONDENTS

JUDGMENT

BEFORE HON. JUSTICE DAVID MATOVU

Kidega Nabinson James (hereinafter referred to as “the Petitioner”) filed a petition in this court
15 challenging the election of Aciro Lucy Otim(hereinafter referred to as the “1st Respondent”), as
the directly elected member of Parliament for Aruu North Constituency, in an election organized
by the Electoral Commission (hereinafter referred to as the “2nd Respondent” on the 18th day of
February 2016.

20 The Petitioner contended that the election of the 1st Respondent was not in compliance with the provisions of the Parliamentary Elections Act and specifically challenged the following acts:-

1. The failure by the Returning Officer to conduct a mandatory vote recount.
2. The failure to conduct a vote recount that had been ordered by the Chief Magistrate, Kitgum.

25 The Petitioner further contended that an electoral offence was committed by the 1st Respondent when she interfered with an election official in the performance of his duty thereby preventing the Returning Officer from conducting a vote recount.

The Petitioner sought the following orders from this court:

- a) The declaration by the Electoral Commission that the 1st Respondent is duly elected be set aside.
- b) The Petitioner be declared the person duly elected or,
- c) The election for directly elected Member of Parliament for Aruu North Constituency be set aside and a fresh election held according to law.
- d) Those found guilty of any offence under the Act should be referred to the appropriate organs to face the law.
- e) The Respondents be ordered to pay the costs of the petition.

10 In answer to this petition, the 1st Respondent contended that the Petitioner submitted a request for the mandatory vote recount to the Returning Officer two days after the declaration of the final results. She further contended that she did not stop the process of the vote recount as she had no authority to do so and as such she did not commit any electoral offences as alleged by the Petitioner.

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The 1st Respondent contended that there was tampering of ballot boxes recorded by O/C CID Nimanya Godson at 9.37 pm on 19th February 2016 vide CRB 2627. Pursuant to this tampering with ballots she applied to the High Court in Gulu vide MA No. 0021/2016 to stop the Chief Magistrate from conducting a vote recount.

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The 1st Respondent by way of counter claim set off contended that if there was any non-compliance, it was by the Petitioner who intimidated the 1st Respondent's voters and in any case she still won the election. She contended further that her sixty (60) votes were not added to the tally sheet and prayed for the dismissal of this petition with costs.

25 The 2nd Respondent on its part contended that the Petitioner's request for recount was submitted to the Returning Officer two (2) days after the declaration of the final results. It is further contended by the 2nd Respondent that the process of conducting a recount as ordered by the court

was frustrated by angry supporters of the contestants who grabbed the ballot boxes, destroying most of the ballot papers. The 2nd Respondent prayed for dismissal of the petition.

During the scheduling conference conducted on 19th May 2016, the Petitioner was represented by Mr. Walter Okidi Ladwar together with and Mr. Jude Ogik. The 1st Respondent was represented by Mr. Anyuru Geoffrey, Ms. Juliet Anyuru Otto and Mr. Samuel Odonga Otto, while the 2nd Respondent was represented by Mr. Peter Mulongo.

The following were the agreed facts at the scheduling conference;

1. That there was an election for the directly elected Member of Parliament for Aruu North Constituency duly held on 18th February 2016.
2. The Petitioner and the 1st Respondent participated in the afore mentioned election as candidates.
3. The 1st Respondent was declared winner of the elections with 8,599 votes and the Petitioner was a runner up with 8,597 votes.
4. There was a difference of only two (2) votes between the Petitioner and the 1st Respondent.
5. The Chief Magistrate Kitgum ordered for a recount of votes in this election but the same never took place.
6. The ballot boxes in this case were destroyed.

At the scheduling conference the following issues were agreed upon:

1. Whether the Petition discloses a cause of action.
2. Whether there was non-compliance with electoral laws in the conduct of the election for the directly elected Member of Parliament for Aruu North Constituency.
3. Whether the non-compliance if any, substantially affected the election of the Member of Parliament for Aruu North Constituency
4. Whether there were electoral offences committed by the 1st Respondent.
5. What are the remedies available to the parties?

All counsel involved in this petition agreed that they had read all the affidavits on court record and they were admitted in evidence as follows:

1. The affidavit of Kidega Nabinson James filed on 29th March 2016 was marked as Exhibit P1.
2. The Return form for transmission of results filed on court record on 29th March 2016 was marked Exhibit P1 (a).
3. The Notice of Application for recount dated 22nd February 2016 in the Chief Magistrate's court of Kitgum Miscellaneous Application No. 1/2016 was marked Exhibit P1 (b).
4. The order for a vote recount dated 25th February 2016 was marked Exhibit P1(c).
5. The affidavit of Omona Joseph filed to prove frustration of vote recount at Pader was marked Exhibit P1 (d).
6. The affidavit of Ojara Romeo Onok was marked Exhibit P1 (e).
7. The final ruling on recount delivered on 7th March 2016 in Kitgum Miscellaneous Application No.0001/2016 was marked Exhibit P1 (f).
8. The order in Kitgum Miscellaneous Application No. 0001 of 2016 is marked Exhibit P1 (g).
9. The results as published in the gazette of 3rd March 2016 is marked Exhibit P1 (h).
10. The supplementary affidavit of Unyergiu Richard filed in court on 29th March 2016 is marked Exhibit P2.
11. The results are marked Exhibit P2 (a).
12. The Returns form for transmission of results and the tally sheets were collectively marked Exhibit P2 (b).
13. Letter from Petitioner dated 19th February 2016 addressed to the District Returning Officer was marked Exhibit P2(c).
14. The supplementary affidavit of Rubangakene Denis filed on 29th March 2016 was marked Exhibit P3.
15. The supplementary affidavit of Akena Raymond filed on 29th March 2016 was marked Exhibit P4.
16. The letter appointing Akena Raymond as Polling Assistant was marked Exhibit P4 (a).

17. The supplementary affidavit of Labeja Simon filed on 29th march 2016 was marked Exhibit P5.

18. Three ballot boxes photographed by Labeja Simon which were allegedly declared invalid were marked Exhibit P5 (a), P5 (b), and P5(c).

19. The affidavit of Olara Ben Hillary filed on 29th March 2016 was marked Exhibit P6.

20. The tally sheet was marked Exhibit P6 (a).

21. The Declaration of Results form for Lapoya Okwee Teatika Polling Station was marked Exhibit P6 (b).

22. The supplementary affidavit of Oola Tonny filed on 29th March 2016 was marked Exhibit P7.

23. The letter appointing Oola Tonny as a Polling Assistant was marked Exhibit P7 (a).

24. The supplementary affidavit of Ojok Francis filed on 29th March 2016 was marked Exhibit 8.

25. The letter appointing Ojok Francis as a Polling Assistant was marked Exhibit P8 (a).

26. The Petitioner filed an affidavit in rejoinder to the petition on 16th May 2016 and it was marked P1A.

27. The affidavit of Nimanya Godson filed on 10th March 2016 was marked Exhibit P 9.

The affidavits for the 1st Respondent were as follows.

1. The affidavit of Achiro Lucy Otim filed on 27th April 2016 was marked Exhibit R1.

2. The Declaration of Results form for Atanga P. School was marked Exhibit R1 (a).

3. The affidavit of Ogenrwot Benjamin Okot filed on 27th April 2016 was marked Exhibit R2.

4. The letter of appointment of Ogenrwot Benjamin Okot as a Presiding Officer was marked Exhibit R2 (a).

5. The National Identity Card for Ogenrwot Benjamin Okot was marked Exhibit R2 (b).

6. The affidavit of Adong Lilian Sunday filed on 27th April 2016 was marked Exhibit R3.

7. The letter appointing Adong Lillian Sunday as a Polling Agent was marked Exhibit R3(a).

8. The affidavit of Onen Bosco filed on 27th April 2016 was marked Exhibit R4.

9. The letter appointing Onen Bosco as a Polling Agent was marked Exhibit R4 (a).
10. The National Identity Card for Onen Bosco was marked Exhibit R4 (b).
11. The affidavit of Odokonyero Sunday filed on 27th April 016 was marked Exhibit R5.
12. The letter appointing Odokonyero Sunday as Polling Agent was marked Exhibit P5 (a).
- 5 13. The National Identity Card for Odokonyero Sunday was marked Exhibit R5 (b).
14. The affidavit of Apiyo Sharon filed on 23rd May 2016 was marked Exhibit P6.
15. The Return form for transmission of results was marked Exhibit R6 (a).
16. The Declaration of Results form for Wiakado Primary School Polling Station was marked Exhibit R6 (b).
- 10 The 2nd Respondent informed court that it would rely on the affidavit of Omona Joseph and the same was marked Exhibit RR1.

Counsel for the 1st Respondent Mr. Geoffrey Anyuru informed the court that as legal representatives of the 1st Respondent, they were interested in cross examining the following witnesses who deponed affidavits in support of the Petition.

1. Kidega Nabinson James (the Petitioner)
2. Nimanya Godson.
3. Labeja Simon.
4. Rubangakene Denis.

Mr. Jude Ojik, Counsel for the Petitioner informed court that on their part they intended to cross examine the following witnesses.

1. Hon. Aciro Lucy Otim (the 1st Respondent)
2. Apiyo Sharon.
- 25 3. Ogenrwon Benjamin Okot.
4. Sunday Odokonyero
5. Omwona Joseph (the Returning Officer).

Counsel for the 2nd Respondent Mr. Peter Mulongo informed court that he could not determine which witnesses he intended to cross examine but indicated an interest to cross examine the Petitioner and Labeja Simon if he deemed it necessary.

5 PW1 Kidega Nabinson James, while being cross examined on his affidavit Exhibit P1 by Mr. Geoffrey by Mr. Geoffrey Anyuru, Counsel for the 1st Respondent, told court that he was at the tally Centre between the 18th -19th February 2016, when the results for Aruu North Constituency were declared. That on 19th February 2016, he wrote a letter to the 2nd Respondent requesting for a vote recount and this letter was served on the 2nd Respondent on 19th February 2016, at
10 10.00a.m.

He later clarified that he actually went to the offices of the Returning officer, Pader District on 20th February 2016, at 8.30 am and was able to serve him with the letter requesting for a vote recount at 10.00 a.m. on 20th February 2016.

He informed court that he had orally requested for a vote recount on 19th February 2016, as soon
15 as the Returning officer declared the results and was advised by the Returning officer to put this request in writing. This is when he put the request in writing and served it upon the Returning officer at 10.00 a.m. on 20th February 2016. Upon receipt of the written request for a vote recount, the Returning officer told him to wait as there was need to cross check with the Headquarters of the 2nd Respondent. This is when the Returning officer declined to handle his
20 request since he had already transmitted the results.

On 22nd February 2016, he applied for a vote recount in the Chief Magistrate's court of Kitgum and the order was granted on 25th February 2016 and the recount was due on the same day. However before the recount could take place, the 1st Respondent made an application to have her 60 votes erroneously left out in the tallying sheet for Wia Akado Primary School Polling
25 station added to her final result which application was rejected by the Chief Magistrate for lack of jurisdiction. The vote recount could not take place as Counsel for the 1st Respondent went ahead to raise issues about tampering with the ballot boxes. The Chief Magistrate then fixed the vote recount for the 28th February 2016 at 9.00 a.m.

On 28th February 2016, the Chief Magistrate ordered for the ballot boxes to be brought to court for a recount and the same were not brought as there was chaos and the ballot boxes and other election materials were destroyed. According to his agent one Labeja Simon, his valid votes at Atanga Primary School Polling station, were declared as invalid. In fact Labeja did not endorse the Declaration of Results forms. He received three photographs of such invalid votes from Labeja Simon.

PW2 Labeja Simon was cross examined on his affidavit Exhibit P5 and he stated that on 18th February 2016, he was at Atanga P.7 Polling station as a Polling agent for the Petitioner. That on this day voting started on time and went on peacefully but when it came to counting of votes six (6) votes were declared spoilt. Of these four (4) votes belonged to the Petitioner. He raised his concerns to the Returning officer about these four votes being declared invalid yet according to him they were valid and in favor of the Petitioner. He even refused to sign the Declaration of Results forms and managed to take photographs of three (3) such votes. He used his mobile phone to take these photographs and printed them at Kitgum, then delivered them to the Petitioner in Gulu.

PW3 Nimanya Godson was cross examined on his affidavit Exhibit P9 and he told court that he was the District CID Pader District a position he has held for one year and three months. He carried the Station Diary (SD) and CRB register for Pader Police Station to court. The relevant entries to this case were made by him on 27th February 2016 at 21.37, vide reference SD 26/27/02/2016, where he reported a suspected plan to tamper with election materials kept at Pader Police station by people yet to be identified. He stated that he heard Counsel for the 1st Respondent raise this issue in court on 26th February 2016, and that is why he recorded it in the Register. According to this witness, by 27th February 2016, the election materials relating to this election were still intact. However on 29th February 2016, he reported a case of destroying and tampering with ballot boxes at 12.28 hrs., but did not arrest anyone in connection with this case.

PW4 Rubangakene Denis was cross examined on his affidavit Exhibit P3 and he stated that he was a polling constable at Wipolo P.7 Polling station and voting stopped at 4.p.m. on 18th February 2016. He left Wipolo polling station and went to Atang P.7 Polling station where he found the voting counting exercise still ongoing. He saw Labeja Simon and he also had an

opportunity to see some of the ballots Labeja was complaining about. Labeja took photographs of these ballot papers using his mobile phone.

On their part, the 1st Respondent produced RW1 the 1st Respondent for cross examination and she categorically denied participation in the destruction of ballot papers. She was charged with
5 an offence relating to destruction of ballot papers and took plea denying this offence. The matter is still in court.

That on 29th February 2016, she was in Pader but was not at the Police Station when the noise started, although she later went to Pader Police Station carrying someone who had been shot in the chaos. She confirmed to this court that on 29th February 2016, ballot boxes were destroyed.

10 By 19th February 2016, she was already aware that ballot boxes were tampered with. On 28th February 2016, she was in court at Kitgum where she had made an application to have her 60 votes added to her final tally. She later made a similar application to the High court in Gulu but the same was withdrawn.

RW2 Apiyo Sharon was cross examined on her affidavit Exhibit R6 and stated that she was the
15 Presiding officer at Wia Akado Primary school and indeed had the original copy of the Declaration of Results form for this station Exhibit R6 (b). She confirmed to have received nine (9) bundles of ballot papers with each containing fifty (50) ballots. This made a total of four hundred fifty (450) ballot papers and not one thousand three hundred fifty (1,350) as indicated on R6 (b). She confirmed that the votes cast for each candidate were correctly entered and court
20 observed her as a truthful witness.

RW3 Odokonyero Sunday was cross examined on Exhibit R5 and he stated that he was at Atanga P.7. School polling station and Labeja Simon did not sign on the Declaration of Results form.

Finally the Returning officer RRW1 Omona Joseph was cross examined on his affidavit RR1 and
25 he stated that he declared the results for Aruu North Constituency on 19th February 2016. He received a letter requesting for a vote recount on 20th February 2016, but since he had already declared and transmitted the results he could not conduct a mandatory recount as requested by the Petitioner

He also received the court order from Kitgum Chief Magistrate's court sanctioning a vote recount but the process was frustrated by a group of unknown people. He admitted making an affidavit attached to the Petitioner's affidavits as Exhibit P1 (d). In respect of Wia Akado Primary School he transmitted the 1st Respondent's results 108 votes. In total there were 478
5 invalid votes in Aruu North Constituency.

Having heard all the above evidence, this court heard the oral submissions of Counsel on 30th May 2016.

The burden of proof in an election petition lies upon the Petitioner who is to prove all allegations in the petition to the satisfaction of the court. See **Court of Appeal Election Appeal No. 6 of**
10 **2011, Paul Mwiru vs. Hon. Igame Nathan Nabeta & others.**

Issue 1. Whether the petition discloses a cause of action.

This issue was framed to cater for the possible preliminary objection that could arise from paragraph 17 of the 1st Respondent's answer to the petition which reads as follows:-

**17- "The petition is premised on hearsay, without evidence, without merit and is bad in
15 law."**

Interestingly, the 2nd Respondent's answer to the petition paragraph 7 raises a similar objection and states as follows:-

7- "The petition is utterly without merit, is not supported by any evidence, is premised on hearsay, and is bad in law"

20 However, in his submissions in reply to this issue, Mr. Isaac Bakayana (counsel for 2nd Respondent) conceded that indeed the petition disclosed a cause of action.

On his part Mr. Anyuru Geoffrey, Counsel for the 1st Respondent argued that paragraphs 4 and 5 of the petition claim for a mandatory and court sanctioned recount, which cannot be a basis for an election petition. In addition, the election offences which can be the basis of an election
25 petition are specifically provided for in the Parliamentary Elections Act. These include bribery, procuring prohibited persons to vote, publication of false information as to illness, death or withdrawal of a candidate and obstruction of voters. However according to Counsel for the 1st Respondent, none of such offences were cited in this petition.

Mr. Ladwar, Counsel for the Petitioner correctly referred this court to the case of **Tororo cement co. ltd.vs. Frokina International Ltd. Supreme court Civil Appeal No.2 of 2001** as a guiding authority on this issue. He argued that the Petitioner participated in the parliamentary elections for Aruu North Constituency and when he lost he became aggrieved and sought a mandatory vote recount and when the same was rejected he proceeded to the Chief Magistrate's court and the vote recount was frustrated. To Counsel the Petitioner's right to have a vote recount was violated and according to him the 1st Respondent was responsible for violating the vote recount and the 2nd Respondent admits their failure to conduct a vote recount.

Under sections 54 and 55 of the Parliamentary Elections Act, a candidate has a right to seek a mandatory recount by the Returning officer and the Chief Magistrate respectively. In this petition this right was sought and the same was could not take place due to reasons to be analysed in the course of this judgment.

While on the same issue of whether a petition discloses a cause of action, Justice V.F. Musoke Kibuuka, in **Election Petition No. 23 of 2011, Kasibante Moses vs. Katongole Singh Marwaha P & Another** observed as follows;

“Anelection petition has another statutory character. It is no ordinary suit. The cause of action upon which it is based is statutory by merely glancing at the petition. Court is satisfied that it raises a cause of action within the perimeters of the provisions of S. 61 of the PEA.”

In this petition there was a right sought for a vote recount pursuant to S.54 & 55 of the PEA and this right could not be exercised due to reasons to be analysed later in the judgment. Court is therefore satisfied that this petition discloses a cause of action and the 1st issue is therefore resolved in the affirmative.

Issues 2& 4: Whether there was non-compliance with the electoral laws in the conduct of elections for Member of Parliament for Aruu North Constituency and if so whether such non-compliance substantially affected the final results in this election.

Counsel for the Petitioner argued that there was gross breach of the electoral laws which resulted in non-compliance with the legal requirements. He specifically dealt with the failure by the 2nd Respondent to conduct a mandatory vote recount as provided in S. 54 of the Parliamentary

Elections Act, plus failure to conduct a court sanctioned vote recount under S.55 of the same Act.

He further referred to other acts like the failure by the 2nd Respondent to appoint election officials in time. He specifically cited the case of Apiyo Sharon whose appointment letter as presiding officer for Wia Akado Primary School Polling station was dated 18th February 2016, which was the election date. Counsel contended that such late appointments pointed to lack of sufficient training and was responsible for the improper records at WIA Akado Primary School. Counsel referred this court to the case of **Joy Kabatsi Kafura vs. Anifa Kawooya Bangirana & Anor. Supreme court Election Petition No. 25 of 2007** where their Lordships held

“Matters as fundamental as appointing and gazetting Returning officers are not just a formality of informing the public as stated. Gazetting serves many purposes such as a purpose of letting voters know who is in charge so that complaints can be channeled to him or her in time for relevant remedial actions. Appointments of POs or Polling Assistants and training them on such fundamental matters as voting and voting procedure, counting of votes, signing of DR forms cannot be allowed to be taken care of under S.80 of the Act in the fashion it was done here. To do so is tantamount to authorizing chaos.”

Whereas I agree with the position of their Lordships in the above case, I find the explanation of Apiyo Sharon in the instant petition worth consideration. She told court that she received training on two occasions before conducting the 18th February 2016 elections. The fact that her letter of appointment is dated 18th February 2016, does not prove any incompetence on her part. This court actually accepts her explanation that she received nine (9) bundles of ballot papers and each bundle contained fifty (50) ballot papers. Accordingly, the figure of 1,350 appearing on the DR form for Wia Akado Primary School Polling station was a bonafide mistake.

Counsel referred to what transpired at Atanga P.7 school Polling station where six (6) votes were declared invalid and this act was questioned by Labeja Simon. He referred to the provisions of S.49 (1)b of the Parliamentary Elections Act as having been violated at Atang Primary school Polling station when valid votes in favor of the Petitioner were rejected. To support the relevancy of the photographs taken by Labeja Simon Counsel referred to the case of **Uganda vs. Engonu Conelius & Anor Soroti Criminal session case No. 29 of 2012**, where Lady Justice H. Wolayo held that

“The fact to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is relevant, the court is not concerned with how it was obtained.”

Counsel further submitted that given the difference of only two (2) votes between the Petitioner and the 1st Respondent, the non-compliance in this case affected the results in a substantial manner. He referred court to the case of **RTD. Col.Dr. Kizza Besigye vs. EC &Y.K. Museveni. Presidential Election Petition No. 1 of 2006**, where their Lordships held

“Where non-compliance and such irregularities affects the results of an election in a substantial manner, or causes a substantial failure of justice, the election should be set aside.”

He therefore urged the court to apply both the qualitative and quantitative tests to this petition.

In reply, Mr. Odonga Otto Counsel for the 1st Respondent submitted that controversy arose at Atanga P.7 polling station. He invited court to closely examine the DR forms for this station Exhibit R1 (a), which was duly signed by Acan Agnes on behalf of the Petitioner and there is no reason recorded by the presiding officer why Labeja Simon did not sign the same. He also invited court to accept the contents of Exhibit R 1 (a) as true and ignore Labeja Simon’s testimony

Counsel further argued that even the manner in which the alleged photographs Exhibit P 5 (a), (b) and (c) were taken by Labeja Simon is questionable ,since his brother Odokonyero never saw him take the photographs and this act contravened the guidelines of the Electoral Commission prohibiting the use of mobile phones at polling stations.

In addition to the above, Counsel for the 1st Respondent contended that the affidavit of Ogenrwot Benjamin Okot who happened to be the presiding officer at Atanga primary school polling station was not challenged in cross examination. Further Labeja Simon could not even tell the place from where he printed these photographs which were not even certified by the Electoral Commission He also suggested that these photographs could have been taken at Pader Police station on 29th February 2016, when election materials were destroyed.

Counsel further invited court to seriously consider the evidence of Apiyo Sharon who confirmed that the 1st Respondent got 168 votes at Wia Akado primary school polling station but due to an error, the tally sheet indicated 108 votes. That this witness explained how she received 450 ballot papers and not 1,350 as they appear in the DR form. This witness also confirmed having been
5 trained twice before the election of 18th February 2016. Counsel prayed that this court inserts the sixty (60) votes in favor of the 1st Respondent.

He further submitted that the results for Lapoyaokwe Teatika polling station where the presiding officer died in a motor accident are questionable as the total number of votes cast was 293 and the Petitioner obtained 129 votes. He argued that if the Petitioner is given the additional 62 votes
10 he claims at this station, then the votes cast will certainly exceed 293 and this would be an anomaly

Counsel for the 1st Respondent further contended that Nimanya Godson did not indicate in the Police Register, when, from where, and from whom the ballot boxes were received at Pader Police Station. He only entered SD/27/2/2016, when Counsel raised the concern of tampering
15 with ballot boxes in court. Counsel argued that this witness secured permission from the police authorities to testify in this case on 9th May 2016, before he was summoned by this court an indication that the Petitioner was using his office as a former RDC in this case.

Counsel finally submitted that there was full compliance with the electoral laws and referred court to the case of **Hon. Amama Mbabazi vs. Y.K. Museveni & 2 others. Supreme Court**
20 **Election Petition No. 1 of 2016** where their Lordships observed as follows:

“On the one hand, the court must avoid upholding an illegitimate election result and on the other, it must avoid annulling an election result that reflects the free will of the majority of the electorate whose rights are inherent in Article 1(4) of the Constitution.”

Counsel further stated that out of the 95 polling stations there are issues at only three (3) polling
25 stations. This proves the good quality of elections for Aruu North County Constituency parliamentary elections.

On his part, Mr. Isaac Bakayana, Counsel for the 2nd Respondent submitted that the presiding officer received a request to conduct a vote recount two (2) days after declaration of results and according to him S. 54 (1) of the Parliamentary elections Act permits the Returning officer to conduct a mandatory recount before declaring a winner. Counsel referred this court to the case of

5 **Byanyima Winnie vs. Ngoma Ngime Mbarara High court Civil Revision No.9 of 2001** which was to the effect that **once an electoral process has moved on and you miss a particular stage in the process you cannot reverse the electoral process**. He submitted that the 2nd Respondent could therefore not favor the Petitioner having filed his request late.

In regard to the court sanctioned recount, Counsel argued that according to S.55 (2) of the

10 Parliamentary Elections Act, a vote recount can only be done after four (4) days from the date of the application and in this case since the application was filed on 22nd February 2016, the recount could only be done by 26th February 2016. Counsel referred court to the provisions of S. 57 (2) of the Parliamentary Elections Act which allowed adjournment for a recount for an extra day and he contended that the recount could not have exceeded 27th February 2016. Counsel finally

15 submitted that since time frames were not adhered to the Petitioner's request for a vote recount was overtaken by events.

With regard to the invalid votes at Atang P.7 polling station, Counsel for the 2nd Respondent submitted that since the Petitioner had agents at this polling station their action bound the Petitioner. Counsel referred this court to the case of **Shaban Sadiq Nkutu vs. Asuman Kyafu**

20 **High court Election Petition No. 8 of 2011**. He argued that since Acan Agnes signed the DR form for Atanga P.7 polling station, this bound the Petitioner and confirmed that he approved what transpired at the said polling station.

Counsel attacked the evidence of Labeja Simon as referring to six ballot papers but he only exhibited three ballot papers and according to Counsel there were no thumb prints on

25 photographs as alleged by Labeja Simon. Counsel also argued that these invalid votes could even have been counted; the evidence by Labeja Simon was so unreliable that it cannot be acted upon by court.

For the Lapoyaokwe Teatika polling station, Counsel for the 2nd Respondent associated himself with the submission of the 1st Respondent.

As to whether the non-compliance if any affected the results in a substantial manner, Counsel for the 2nd Respondent agreed with Counsel for the Petitioner that court should consider both the qualitative and quantitative tests in deciding this petition.

Mr. Ladwar also made submissions in rejoinder which this court has studied and considered in
5 resolving these issues.

An election process does not start and end on polling day. It involves a series of activities from registration of voters, updating the voter register, nomination of candidates, actual polling, counting of votes, verification of results, recounting of votes, gazetting of winners, election petitions and election appeals. Throughout the electoral process, it is important to keep all
10 materials and records of what has been used in the process. This is the only way the election process can be checked to ascertain whether it complied with all electoral laws at all stages of the election. S.52 (1) of the PEA provides as follows:

**“ the returning officer shall be responsible for the safe custody of all election documents used in the district in connection with an election until the documents are destroyed in
15 accordance with the directions of the commission, but the commission shall not give such directions before the settlement of disputes if any arising from the election.”**

In the absence of such election documents court finds it difficult to audit the electoral process.

Mandatory vote recount:

S.54 (1) b of the PEA provides;

**“where, after the official addition of the votes, the number of votes separating the candidate receiving the highest number of votes and any other candidate is less than fifty, the Returning officer shall, if requested in writing by a candidate, a candidate’s agent or a voter registered to vote in the Constituency, in the presence of a senior police officer recount the votes, after giving a written notice of the intention to recount to all interested
25 parties.”**

The above legal provisions are mandatory but ought to be utilized before the Returning officer transmits the results to the Electoral Commission as provided in S.58(2) of the PEA.

In the instant petition, the Petitioner wrote a letter requesting for a recount on 19th February 2016 as indicated in Exhibit P2(c) and he served this letter upon the Returning officer on 20th February 2016, at 10.00.a.m. According to the Return form for transmission of results attached to the Petitioner's affidavit and marked P2(b), the results for Aruu North Constituency were
5 transmitted by the Returning officer of Pader District on 19th February 2016 at 9.50 a.m.

As correctly stated by the Returning officer, he could not carry out a recount after transmitting the results to the Headquarters.

I therefore find that the request for a mandatory recount by the Petitioner was received late and the process could not be stopped at this stage. The case of **Byanyima Winnie vs. Ngoma Ngime**
10 is relevant as regards mandatory recount is relevant in the instant petition.

The Petitioner moved fast and filed M/A No.1 of 2016 in the Chief Magistrate's court of Kitgum and this was done on 22nd February 2016, as indicated in Exhibit P1(b). I find that this application was within the seven days as provided for under S.55 (1) of the PEA.

The law provides that the Chief Magistrate was to conduct a recount within four days from 22nd
15 February 2016, with a permissible postponement provided under S.57(2). Ideally the recounting exercise by the Chief Magistrate should have ended by 27th February 2016.

I am guided by the decision in **Court of Appeal Election Petition No. 0001 of 2012 Okumu O. Robert vs. Alenyo Ezrom William & anor** on this issue of the Chief Magistrate proceeding with the recount up to 29th February 2016. The parties to this dispute were raising several
20 applications which in any way delayed the recounting of votes and I do find that the Chief Magistrate lawfully adjourned the recount to the 29th February 2016.

What transpired at the Magistrate's court at Pader on 29th February 2016 and at Pader Police station did not conform to the electoral laws of Uganda. The ballot boxes were destroyed and the Chief Magistrate was not able to conduct a recount as he had ordered. Similarly, this court
25 cannot expect to have a vote recount particularly at the polling stations of Atanga Primary school, Wiakado primary school and Lapoya Okwe Te atika polling stations, which could have perhaps have resolved this electoral dispute as provided for in S.52(1) of the PEA.

Further the events that took place at Atanga P.7 school polling station on 18th February 2016, could only be investigated by conducting a vote recount. The affidavit of Labeja Simon Exhibit P5 contains serious allegations in paragraphs 4 & 5. These allegations lead to Exhibits P5 (a), (b), & (c). With due respect I do not find the submissions of both Counsel for the Respondents
5 convincing enough for this court to ignore the contents of Labeja Simon's affidavit. It is only unfortunate that this court cannot get to the roots of these allegations because the ballot boxes were destroyed on 29th February 2016.

Similarly, the evidence of Apiyo Sharon cannot be underrated as submitted by Counsel for the Petitioner that considering her limited training, she was bound to produce erroneous results. I
10 carefully listened to Apiyo Sharon and she impressed me as a truthful presiding officer who was trained twice prior to the 18th February 2016 elections. She received nine (9) bundles of fifty (50) ballots each and this made a total of four hundred and fifty 450 ballot papers.

I therefore find that the results in respect to candidates on her DR form R6 (b) were genuine and the total number of ballot papers issued of 1,350 was a bonafide mistake.

15 However if the recount had been carried out as sanctioned by court these facts would have been more glaring and the 1st Respondent stood to benefit from the said recount.

Also the results for Lapoya Okwe Teatika polling station could only be verified by a vote recount. The findings at this station could either boost the Petitioner to get to the same level with the 1st Respondent or they could diminish the Petitioner's hopes if verified that indeed the
20 number of votes cast was to be in excess of the voters.

In conclusion, this court is satisfied that the failure to conduct a vote recount that was ordered by the Chief Magistrate Kitgum was non-compliance with electoral laws. By and large the election of the Member of Parliament for Aruu North Constituency was peaceful and this court finds the
25 quality of the elections to have been good save for what transpired on 29th February 2016 at Pader police station.

As correctly submitted by Counsel for the Petitioner and the 2nd Respondent, this court ought to consider the quantitative aspects of this election. The Petitioner obtained 8597 votes and the 1st

Respondent obtained 8599 votes, there being a difference of two (2) votes separating the two. If this court is to consider the disputes arising at Atanga P.7 school polling station, Wiakado Primary school and Lapoya Okwe Teatika polling station, this particular election could have been won by either the 1st Respondent or the Petitioner. It was therefore important to conduct a
5 recount as directed by the Chief Magistrate.

I find that there was non-compliance with electoral laws in the conduct of elections for Member of Parliament for Aruu North County Constituency. Further still I find that such non-compliance did substantially affect the final results in this election. I therefore resolve the two issues in the affirmative.

10
Issue 3: Whether there were any electoral offences committed in the conduct of these elections.

Counsel for the Petitioner submitted that the 1st Respondent was at Pader police station on 29th February and she obstructed the transportation of ballot boxes to court which contravenes S.83 of the PEA. He also submitted that the 1st Respondent committed an offence under S.76 of the PEA. He also referred to S.90 of the PEA. Counsel for the Petitioner cleared the Petitioner as a person who did not use his office to intimidate voters and no evidence was led to prove this allegation.
15

Counsel for the 1st Respondent submitted that the 1st Respondent did not commit any offence and has not been convicted of any such offence. While Counsel for the 2nd Respondent submitted that
20 the alleged offences could have been committed after elections in this case and should not be subject of this petition.

With due respect to Counsel for the 2nd Respondent, this court has already found that the election process is a continuous process until such a time when the final appellate court determines disputes arising from an election. Any offences committed during the entire process regardless of
25 the stage can be indictable.

I have carefully considered the evidence in this case. The Returning officer who ought to be aggrieved by what transpired on 29th February 2016, while in court was not willing to disclose the people who destroyed election materials in this case. Since there is a pending trial arising

from what happened on 29th February 2016, this court will not delve into the culpabilities of the parties.

I therefore find that no conclusive evidence has been adduced to prove that the 1st Respondent committed any electoral offences in this case.

- 5 Finally with the remedies, court finds that the vote recount ordered by the Chief Magistrate Kitgum was frustrated by unknown people and this led to non-compliance with electoral laws in the electoral process in Aruu North Constituency.

This petition is accordingly allowed.

- 10 I hereby declare that the election of the 1st Respondent as Member of Parliament for Aruu North Constituency is set aside and the 2nd Respondent should conduct fresh elections for the directly elected Member of Parliament for this Constituency.

- 15 With regard to the issue of costs, court finds that it was the duty of the 2nd Respondent and the Police at Pader police station to ensure the safe custody of all election materials which duty they did not execute diligently. I therefore do not condemn the 1st Respondent to pay any costs for this petition and order the 2nd Respondent to pay 50% of the costs of this petition.

Dated at Gulu this 14th day of **June, 2016**

DAVID MATOVU

- 20 **JUDGE.**