

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
ELECTION PETITION NO.0002
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT, 2005
(As amended)
AND
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS
(Election Petition)
Rules 1996
AND
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS HELD ON THE 18TM
FEBRUARY 2016 FOR MASINDI MUNICIPALITY

KABAKUMBA LABWONI MASIKO :::::::::::::::::::::::::::::::::::PETITIONER

V E R S U S

- 1. ERNEST KIIZA
- 2. THE ELECTORAL COMMISSION ::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

JUDGMENT

The Petitioner Kabakumba Labwoni Masiko, Lennox Mugume, Moses Kabboto Byensi Tugume, Rogers Kanti and Ernest Kiiza were candidates in the parliamentary election in Masindi Municipality Constituency held on the 18th day of February 2016. The 2nd Respondent declared the 1st Respondent, Ernest Kiiza winner of the said elections with 14125 votes as against the Petitioner, Kabakumba Labwoni Masiko who got 9076 votes. The number of valid

votes was 29329 against the total number of 1378 invalid votes.

The Petitioner was dissatisfied with the above results and she filed a petition contending that the election was conducted in contravention of the provisions of the Constitution of the Republic of Uganda and the Electoral Commission Act, 2005 (as amended). She contends that the 1st Respondent personally or with his knowledge and consent or approval committed illegal practices and electoral offences during the election. The Petitioner also contends that the 2nd Respondent, before and during the elections, failed to restrain the 1st Respondent's agents from bribing and compromising both its agents and polling officials and voters and also to stop the 1st Respondent from interfering with the electoral process. Additionally, that the 2nd Respondent, its agents or servants conducted or caused the election to be conducted in a negligent and fraudulent manner contrary to section 77 (a) and (b) of the Parliamentary Elections Act, 2005 as amended (PEA) when they allowed more than 1000 persons to vote more than once . The Petition was supported by 39 Affidavits deposed by the Petitioner herself, Mrs. Kabakumba Labwoni Masiko; David Karubona; Talemwa Richard; Tumusiime Daniel; Wamani Ronald; Maliyamungu James; Ayesiga Robert Manyuru; Mugosa Robert; Susu Medina; Aseera Ronald; Amanya Aldini; Bagonza Ronald; Rwakikara Simon; Jawiya Alex; Bagonza Geresomu; Mbitegeka Arajab; Julius Musana Robert; Monday Allan; Byaruhanga Sudaisi; Bingi Moses; Okwong Richard; Mateso Fred; Baguma Amos and Baganda Livingstone. Other Affidavits were sworn by Amandu Edison; Bigirwa Dan; Muhumuza Mubiito Lawrence; Baganza Margaret; Tugume Kenneth; Mugisa Emmanuel; Apio Grace; Monday Robert; Mungungeo Denis; Isingoma Charles; Mugarura Moses; Sunday Philemon; Wamani Ronald and Abdul Musa.

1ST RESPONDENT'S ANSWER

The 1st Respondent opposed the Petition

process was conducted in total compliance with the law and that he did not personally or with his knowledge and consent, at any time or place commit any electoral offence. He denied giving voters or any person money, sports jerseys, wear, food or building materials or using voters to distribute money or leaflets, photos as alleged by the Petitioner. The 1st Respondent

stated that he did not at any time use or approve of use of force, threats or intimidation and contended that none of the alleged acts ever happened, and if they did, they did not affect the result in a substantial manner.

AFFIDAVITS IN SUPPORT OF 1ST RESPONDENT'S ANSWER

The 1st Respondents Answer to the Petition was supported by 17 Affidavits deposed by Kiiza Monday Ernest; Mugisa Robert; Abdul Erias Moga; Tugume Kenneth; Odaga Godfrey; Kiirya William; Sunday Rose; Akugizibwe Robert; Pastor Kahoro Enock; and Afisa Karungi.

Others Affidavits

The Deponents include Geresomo Bagonza; Sanda Oryema; Businge Innocent; Amandu Edison; Isingoma Robert; Kaahwa Martin and Nyonyintono Matia.

At the Scheduling Conference, Counsel for the 1st Respondent agreed to have the Affidavit evidence of Geresom Bagonza; Amanda Edison; and Mugisha Robert expunged so their evidence was not considered by the court.

2nd Respondent's Answer to the Petition

The 2nd Respondent also opposed the Petition. On its behalf, it was averred that the Petition was without merit as the electoral process of Masindi Municipality Constituency was conducted fairly and legally in compliance with the provisions of the laws of Uganda and no complaints were ever received from the Petitioner in respect of the electoral process. The 2nd Respondent also pointed out that none of its officers ever engaged in defacing the Petitioner's campaign posters.

Affidavits in Support of the 2nd Respondent's Answer The 2nd Respondents Answer to the Petition was supported by Affidavits of Kizindo Ibrahim; Kyosaba Samson

Joshua; KugonzaSemu; Buberwa William; Kyalisiima Charles; Kusiima Mary; Lenia Winfred; MuhanuziHannington; Friday Ismail; Mugisa Emmanuel; MateekaHamidu; Alinaitwe Brian; Muhigwa Hosea; Kabasomi Juliet; Murungi Janet; Draru Gertrude and Tigara Vincent.

The Petitioner was represented by Mr. Mulalira Faisal Omar from Nabukenya, Mulalira & Co. Advocates whereas Mr. Kato Sekabanja of Sekabanja & Co. Advocates and Mr. Isaac Bakayana from Arcadia Advocates appeared for the 1st Respondent and 2nd Respondent respectively. Before commencement of the hearing, there were efforts to have the matter settled by mediation but this failed. When the parties appeared in Court, the Petitioner stated before the Court that she was amiable to mediation but the 1st Respondent stated that there was no possibility of having the matter disposed of through mediation as he was not willing to lose his seat as a Member of Parliament.

THE SCHEDULING CONFERENCE

The parties therefore proceeded to do scheduling where certain issues were agreed upon.

ISSUES AGREED UPON

Whether the 1st Respondent, directly or indirectly through his agents, committed any illegal practice or electoral offence under the parliamentary elections law either personally or through his agents and with his consent and approval.

- 1) Whether the election for MP for Masindi Municipality was conducted with non-compliance with the provisions of the Parliamentary Elections Act.
- 2) Whether the non-compliance if any affected the results of the election in a substantial manner. And

3) What remedies are available to the Parties.

Regarding authorities, Counsel Sekabanja stated that they were to rely on the authorities outlined on the Summary of Evidence and would seek leave of Court to substantiate them, if need be. Counsel Bakayana intimated that the 2nd Respondent had not filed authorities but had referred to them generally and that it would seek leave of Court to produce the authorities. Further, as regards cross examination of witnesses, Counsel Sekabanja, who represented the 1st Respondent, stated that they would not cross examine any of the Petitioner's witnesses in the interest of time. Counsel Bakayana for the 2nd Respondent shared the same position. Counsel Mulalira who represented the Petitioner stated that he would cross-examine 6 of the 1st Respondent's witnesses notably, Isingoma Robert; Businge Innocent; Afisa Karungi; Geresomu Bagonza; Amandu Edison and Mugisa Robert. Counsel for the Petitioner pointed out that these witnesses had deposed Affidavits for both the Petitioner and the 1st Respondent and he wished to clarify matters. This prompted Counsel Sekabanja to seek leave of Court to expunge the evidence of Geresom Bagonza, Amandu Edison and Mugisha Robert. Hence, by consent of both Parties the evidence of these witnesses was expunged.

Counsel Mulalira submitted that he would also cross examine Nyonyintono Matiya and Ms Zemei Suzan as far the 1st Respondent case was concerned. This was opposed by Counsel for the 1st Respondent. As regards the 2nd Respondent's case, Counsel Mulalira submitted that he intended to cross- examine Kizindo Ibrahim.

The grounds upon which the election of a Member of Parliament may be set aside are specified in Section 61 (1) of the PEA. Section 61 (1) (a) and (c) stipulates that:

The election of a Candidate as a Member of Parliament shall only be set aside on any of the following grounds, if proved to the satisfaction of the Court:-

- a) Non-compliance with the provisions of this Act relating to elections, if the Court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the non-compliance and the failure affected the results in a substantial manner.*

b) [.....]

c) *That an illegal practice or any other offence under this Act was committed in connection with the election by the Candidate personally or with his her consent or approval or*

d) [.....]

Burden of Proof:

It is now settled that the burden of proof in an Election Petition was upon the Petitioner who is required to prove every allegation contained in the Petition to the satisfaction of the Court. See section 61 (3) of section 61 of the PEA 2005, provides that “any ground specified in sub-section (1) shall be *proved on the basis of a balance of probabilities*. (See: Namboozie Betty Bakireke vs. Bakaluba Peter Mukasa and another H.C.E.P No. 14 of 2006).

Standard of Proof:

In Parliamentary Elections, the standard of proof is upon the balance of probabilities. (See section 61 (3) of the Parliamentary Elections Act) In this regard, therefore, I disagree with the standard of proof perceived by Counsel for the 2nd Respondent whereby he submitted that it was proof beyond reasonable doubt. He referred to the case of John Patrick Amama Mbabazi vs. Yoweri Kaguta Museveni and Supreme Court Election Petition No.1 of 2016 where the said standard was held to be the acceptable standard. However I hold that the two cases are clearly distinguishable as Counsel Mulalira submitted. Presidential elections being of such significant national importance cannot have the same standard of proof like Parliamentary elections that’s why, the standard of proof remains slightly higher than in an ordinary civil matter.

During his submissions in rejoinder, Counsel for the Petitioner raised an important issue pertaining to the evidence of the 1st Respondent and I wish to deal with this issue before I can proceed to analyze the evidence of the Parties pertaining to the real question to wit whether to dismiss or allow the petition.

Learned Counsel for the Petitioner put Court on notice that the 1st Respondent’s Affidavit in Reply to the Rejoinder to the 1st Respondent’s Answer to Petition dated 9/5/2016, was filed without leave of Court and even in his submissions, the 1st Respondent still did not seek Court’s leave. It was the Petitioner’s submission that S.III - 112 & 113 of Evidence Act were to

the effect that once Affidavits in Reply are filed and Affidavits in Rejoinder are filed then one can't file without leave of Court. Mr. Mulalira contended that the 1st Respondent's document was full of manufactured evidence which came about after reading the Petitioner's Rejoinder. That the 1st Respondent did not regularize his Supplementary Affidavit in Reply to the Rejoinder and so should not rely on it.

Learned Counsel Sekabanja's Reply in respect to the contested supplementary Affidavit

He submitted that at this stage of proceedings the evidence was closed. That when they appeared for scheduling the parties presented their respective Affidavits in Support of their case which they would rely on. That if he had filed the Supplementary Affidavit in Reply to the Rejoinder filed by the Petitioner without [leave], it was due to the fact that the Affidavits in Rejoinder were not "real" Rejoinder Affidavits, but were fresh Affidavits. Counsel then proceeded to seek leave of Court as per Article 126 (2) (e) of the Constitution of the Republic of Uganda that enjoins Court not to stick to technicalities. He prayed that Court grants leave to have the Supplementary Affidavits in Reply to the Rejoinder to form part of the Record.

Counsel Isaac Bakayana for the second respondent contended that S.I of the Evidence Act did not apply to Affidavits so it could not be invoked. That when you look at the Supplementary and Affidavit in Rejoinder of 22/4/2016, the Petitioner was bringing new evidence to Court. Counsel Bakayana contended that Article 28 (3) of the Constitution on fair hearing would automatically apply to the 1st Respondent Reply to the Petitioner's Affidavit in Rejoinder. Further, that the contested Affidavit, to wit, the Supplementary Affidavit in Reply to the Rejoinder was filed on 9/5/2016 and the matter came up between 17th and 18th June 2016. Hence, the Petitioner's Counsel had had ample time to consider them and respond to them and that there would be no prejudice to the petitioner whatsoever.

That it was in the interests of justice for Court to allow all evidence on Record up to 9/5/2016.

Mr. Mulalira's submission in rejoinder submitted that an illegality remains an illegality and no submission however colorful can make up for such illegality. He cited Makula International vs. Cardinal Emmanuel Nsubuga [1982] HCB 11 (CA), where it was held that an illegality overrules all forms of pleadings. He still maintained that the Evidence Act still applies. He argued that citing Article 126 (2) (e) was worrying. Counsel Mulalira contended that the article was not a magical wand but it refers to administration of justice "subject to the law."

Therefore, under S. 33 of the Judicature Act, it is still subject to the law. Moreover, the 1st Respondent cited no law under which he filed the Supplementary Affidavits in Reply to the Rejoinder of the Petitioner on 9/5/2016. Counsel Mulalira also cited the case of Kasirye Byaruhanga & Co. Advocates vs. UTEX, where it was held that Article 126 (2) (e) did not do away with our rules of procedure. Mr. Mulalira submitted that the 1st Respondent should have applied to have the Petitioner's Affidavits that introduced new evidence struck out but most importantly, the 1st Respondent should have sought leave before filing his Supplementary Affidavits after the Rejoinder had been filed since represented by a firm of senior members of the Bar.

Mr. Mulalira clarified that in the Byaruhanga case, refers to illegally filed documents but not smuggled into Court. He referred court to the authority of Interfreight Forwarders vs. EADB, SCCA No. 33 of 1992, as per Justice Oder of the Supreme Court, and FANG MIN vs. Belex Tours & Travel Ltd, SCCA No. 6113 to support his submissions. Counsel Mulalira submitted that Courts only relax Rules on document have been regularly filed and the Court should not close its eyes to illegally filed documents before it. That the 1st Respondent's Counsel had all the time to seek leave and throughout his submissions, the Lawyer did not refer to them at all. According to Mr. Mulalira, the Supplementary Affidavit was therefore inconsequential. He further contended that the Respondent could not rely on Article 126 (2) (e) of Constitution to seek leave to now allow an

illegally filed document. He submitted that an illegality can be brought up at any stage of the trial. In this regard, I do agree with Counsel Mularira. Counsel Sekabanja cannot seek to hide under article 126 (2) (e) of the Constitution in a matter where he clearly had an opportunity to seek leave of Court and more so where the documents in issue were systematically

During scheduling the Parties set out the issues for determination in the order already mentioned above, However, in my determination of this Petition, I will first deal with the second issue that is whether the 2nd Respondent failed to conduct the Elections in accordance with the provisions of the Parliamentary Elections Act and the principles therein and that non-compliance affected the results of the Elections in a substantial manner.

Counsel Mulalira submitted that the Election in issue was not conducted in accordance with the principles of free and fair Elections as postrated in Col. Rtd. Dr. Kiiza Besigye vs. Museveni Yoweri Kaguta;

1. That the Election was not free.
 2. That the Election was not by universal adult suffrage which underpins the right to register and vote.
 3. That Election in issue was not conducted in accordance with the law and procedure laid down by the Parliamentary Election Act.
 4. That there was no transparency in the conduct of Elections.
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5. The result of the Election was not based on the majority of the votes cast.
 6. The Election for MP for Masindi Municipality was not at all free and fair.
 7. Further that Justice Odoki pointed out that “to ensure that the Elections are

free and fair, the entire process should have an atmosphere free from intimidation, bribery, violence, coercion or anything intended to subvert the will of the people...”

Mr. Mulalira relied on the Affidavit evidence of Baguma Amos at pages 123 - 126 of the Petitioner's binder. The Affidavit in Support dated 21st March 2016, states in paragraphs 3 - 8 that there was voter intimidation. Mr. Baguma Amos deponed in this Affidavit that he witnessed a lot of voter intimidation by Hon. Ernest Kiiza and his close agents. On the 15th February 2016, at Kyema Cell, Kihuuba Division, Mr. Kasangaki was beaten by a bodyguard of Hon. Kiiza Ernest and was rushed to Master's Doctor Clinic where he was attended to. He had sustained injuries at the forehead, nose area and the right eye. Mr. Kasangaki was referred to the Police ;where he opened CPS/SDFE/70/26/01/2016.

Furthermore, Mrs. Esther Owobusobozi's house was stoned in the' night of 16““ February 2016 by agents of Hon. Kiiza who were led by Byenkya David, Ignatius Tumusiime and Akyalinda. The house was damaged and the roof was perforated as a result of the actions of the agents of Mr. Ernest Kiiza. The agents greatly accosted people and intimidated the eligible voters for the Petitioner and they withdrew support from the Petitioner for fear of their lives.

According to Counsel for the Petitioner, in the Affidavit of Businge Innocent deponed in Support of the Answer to the Petition, particularly paragraph 15, he denies knowledge of the contents in Baguma Amos' Affidavit but concedes under paragraph 9 that he was arrested and detained for beating up Mrs. Kabakumba's (Petitioner's) supporters. Learned Counsel Mulalira contended that if Businge had not been involved, he would not have been arrested and detained. Counsel referred to the record of proceedings at page 12, where during cross-examination, Businge stated on oath that he is 5 the NRM chairperson for the Youth and Kaahwa Martin Isaac was the Publicity

Secretary for NRM. Counsel contended that the evidence of these two witnesses could not be relied upon as according to him they were biased. Counsel Mulalira also submitted that, under paragraph 56 of the Affidavit of Mr. Kiiza Ernest, he denies the fact that his driver ever attacked Kabakumba but conceded to the fact that all those who were involved were arrested by Police and that one of them was his driver. Therefore, Mr. Mulalira argued that the fact remained that the Election of the Member of Parliament in Counsel Mulalira argued that the Petitioner's evidence 'Was buttressed by Abitegeka Arajab's Affidavit in Support found at pages 91-94 of the Petitioner's bundle dated 21st March 2016 as per paragraphs 3 -16. In the Masindi Municipality was marred with threats and violence by Mr.Kiiza Ernest and his supporters/agents Affidavit of Abitegeka Arajab it is stated that, on the 17th day of February 2016, while returning to his residence at about 11:00pm, he met Afisa Karungi and others holding pangas and they told him that they had come to finish him for supporting the Petitioner. Abitegeka raised an alarm forcing his wife to open the⁰ house. The group entered the house in disguise that they were looking for items which the Petitioner had sent whereof he apologized for supporting the Petitioner and was let free to go, Abitegeka fled his house to his father's house in Kihamyia, Mirya Sub-county, in Buruuli Constituency until the Elections were concluded. Throughout the Elections period Abitegeka lived in fear and he did not vote for fear of his life.

Counsel for the Petitioner pointed out that the Affidavit of Afisa Karungi in Support of the 1st Respondent's Answer to the Petition denied having attacked Abitegeka Arajab. However, she conceded to the fact that Abitegeka shifted with the entire family from his residence during the Election time in December 2015 as per paragraph 6 of his Affidavit. Learned Counsel submitted that this only goes to corroborate Abitegeka Arajab's evidence that the attacks by Afisa Karungi and her group forced him to abandon his home for protection of his life and family. Counsel further contended that Afisa Karungi was such an elusive witness whose evidence should not be relied on by Court. According to Mr. Mulalira, Afisa Karungi contradicted herself on the question of how Abitegeka Arajab paid for her iron sheets, the names of her children, the year when she got married and the year her husband passed on.

The Petitioner's Counsel also relied on the Affidavit of Kyarisiima pages 9- 11 dated 8th April 2016 and in particular, paragraphs 6 of the Affidavit in Support of the 2nd Respondent's Answer to the Petition, to submit that on the 18th day of February 2016, elections did not go on well. Voting started at 10:00am although Kyarisiima does not state when the Election ended. In the Affidavit of Mugisha Emmanuel, dated 8th day of April 2016, paragraph 6 of the Affidavit in Support of the 2nd Respondent's Answer to the Petition, at page 24 - 26 of the 2nd Respondent's binder, he deposed that, on the 18th day of February 2016, voting materials were delivered at 8:30am and voting started thereafter. In the Affidavit of Kabasani Juliet at pages 35 - 37 of the 2nd Respondent's booklet, paragraph 7 of the Affidavit in Support of the 2nd Respondent's Answer to the Petition, he stated that on the 18th day of February 2016, voting materials were delivered at 9:00am and voting started thereafter.

Furthermore, in the Affidavit of Tigara Vincent at pages 44 - 46 of the 2nd Respondent's binder dated 8th April 2016, in paragraph 6 of the Affidavit in Support of the 2nd Respondent's Answer to the Petition, he deposed that on the 18th day of February 2016, voting materials were delivered at 8:00am and voting started thereafter. Counsel submitted that when Kizindo Ibrahim was cross-examined, he stated that they used motor vehicles from Local Government and their drivers. Among the motor vehicles used, were UAK 125N, UAJ 043X, UAY 509E and UAN 163D.

Furthermore, that Mr. Kazindo Ibrahim confirmed that voting was to begin at 7:00am which was not fulfilled by the 2nd Respondent's agents in Masindi Municipality. That for all the Polling Stations where the Election started late there was no extension of time to allow voters to vote as directed by the

Chairman Electoral Commission.

Counsel Mulalira submitted that the non-compliance and failure depicted on the part of the 2nd Respondent affected the Elections in a substantial manner and falls within the qualitative and quantitative tests laid down in Col. Rtd Dr. Kiiza Besigye vs. Electoral Commission & Y.K Museveni (supra) where to apply and fulfils the qualitative test enunciated in the Amama Mbabazi vs. James Garuga Musinguzi Election Petition Appeal No. 12 of 2002.

With regard to the issue of "substantial effect," it is the Petitioner's case that she has proved the degree of non-compliance to justify the setting aside of the Election. The Petitioner's Counsel cited the authorities of Col. Rtd Kiiza Besigye vs. YK Museveni (supra) & Matsiko Winfred Komuhangi vs. Babihuga J Winnie Election Petition Appeal No. 9/2006. *The Learned counsel submitted that the electorate's power to have a free and fair election was abused and compromised due to non-compliance with the electoral laws.*

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In paragraphs 6 - 13 of Abdul Musa's Affidavit in rejoinder, he stated that Geresom Bagonza narrated how they pre-ticked ballot papers in favour of Mr. Kiiza Ernest. Abdul Musa recorded the conversation both audio and video with knowledge and consent of Geresom Bagonza. Counsel submitted that this evidence was not rebutted by the 1st Respondent's Supplementary Affidavit in Reply to the Rejoinder. Hence, the said evidence should be admitted as per the authority of Bakaluba Peter Mukasa

vs. Nambooze Betty Bakireke, Election Petition Appeal No. 4 of 2009 (SC). That the said witness deposed an Affidavit in Support of the. 1st Respondent's Answer to the Petition because of the threats, bribery and severe beating at the helm of the 1st Respondent as per the Supplementary Affidavit in Rejoinder deposed by Susu Media.

Counsel Mulalira submitted that as regards the test for "substantial effect" the Petitioner had proved that the degree of non-compliance justifies the setting aside of the Election. Counsel Mulalira maintained his submission that non-compliance and failure affected the Elections in a substantial manner and added the authority of Matsiko Winfred Komuhangi versus Balihuga J Winnie Election Petition Appeal No. 9/2006 to 'support his submissions.

Most of the contentions against Mulalira's submissions were from Counsel for the 2nd Respondent, Mr. Isaac Bakayana. Regarding threats/violence, Counsel for the 2nd Respondent, Mr. Isaac Bakayana submitted that the allegations of violence by Abitegeka Arajab at page 92 were unfounded. That the said Abitegeka Arajab claimed that he was attacked by one Afisa Karungi, her son Derrick and her husband who had pangas, stones and sticks/clubs. Mr. Bakayana argues that if this was the truth and these were neighbours, he should have known the name of the husband of Karungi. That the said Afiswa Karungi deposed an Affidavit whereby she stated that the said Abitegeka Arajab bought her iron sheets and moved away after failing to pay for them. That she also did not have a son called Derrick and that her husband was dead. Furthermore, that Abitegeka's claim that he reported to the Police and was turned away was halfhearted and did not appear genuine.

Counsel Bakayana faulted the evidence of Byaruhanga Sudaisi as being unreliable. Byaruhanga had alleged that a vehicle (Premio) and a Police Patrol had gone some people went to the LC.I Chairman, one Besasira in the night of the 17th January 2016

and knocked on his door and intimidated him. Counsel contended that the best person in this regard should have been Besasira but he had not testified and no reason was given why he did not testify.

Mr. Bakayana also found Mr. Bingi Moses's evidence to be wanting. Bingi Moses' evidence on voter intimidation/bribery was that the army was deployed and arrested people as per paragraphs 3 & 4 of his Affidavit but then his Affidavit did not show that it was wide spread or that this was instigated by the 1st Respondent. Further shortcomings appear in Baguma Amos's evidence. Whereas Baguma Amos refers to some people who were beaten in paragraph 4 (a) of his Affidavit, these according to Counsel, appeared to be isolated incidents which could not be attributed to the 1st Respondent and that the Police was handling. Counsel contended that it was the Petitioner who instigated violence as Baguma Amos had denied that he was the Chairperson of the Petitioner's youth brigade.

Having set out the contention and the responses to them. I will proceed to determine the issue at hand. In relation to the late delivery of voting materials, Counsel Mulalira had contended that the ballot papers were delivered after 7:00am and this meant that voting started late. Further that there was voter disenfranchisement as no time was given to allow voters to cast their vote. The evidence on record shows that voting materials were delivered at various times at 8:00am, 9:00am and even at 10:00am. Counsel argued that this affected the elections in a substantial manner.

According to section 29 (2) of PEA, voting shall commence at seven o'clock in the morning and close at five o'clock in the afternoon. Where there are voters in the line of voters who are qualified to vote but have not been able to do so by closing time, then the polling station is to be kept open to enable them to cast their votes. In the instant case, no evidence was adduced of those who wished to vote (and were qualified to) but were disenfranchised. However voters who arrived after the official closing hour are not to be allowed to vote, even if the polling station is still open. (See section 29 (5) PEA. As rightly submitted by Learned Counsel for the 2nd Respondent Mr. Bakayana, no evidence was adduced by the Petitioner that at the time of the official closing hour, there were voters who were qualified to vote but were not given the opportunity to do so. It was not enough for Counsel Mulalira to argue that no extension of time to vote was given. In my considered opinion, there had to be voters at that time to allow for the polling station to remain open. It is also possible that such voters went to the polling station after official closing time. However, the Court can only speculate on this issue, without any evidence to lend credence, to this allegation.

There were also allegations of pre-ticking Respondent and use of private vehicles

However, I found that the alleged audio recording of a conversation about pre-ticked ballots unreliable. This evidence was never tested before Court. As Counsel for the 2nd Respondent pointed out, no other evidence whatsoever was adduced by the Petitioner in the form of complaints or other to support this claim. While it may be the case that private vehicles were in some instances used to deliver voting materials, there was no proof of malpractices arising from this. On these premises, I find that the allegations of non-compliance with the Parliamentary Elections Act were not proved.

I will now revert to the allegations of the offence of undue influence characterized by threats, intimidation and violence inflicted on the voters. Section 80 (1) of the Parliamentary Elections Act prohibits threats, violence, intimidation by a person (or by a person through another person) in order to compel another person to vote or refrain from voting. Baguma Amos deponed in his affidavit that he witnessed one Kasangaki being beaten by a bodyguard of Kiiza Ernest. He sustained injuries and was rushed to a clinic. He referred the matter to Police. Businge Innocent and the driver of the 1st Respondent were also arrested for alleged acts of violence. (See paragraphs 15 of the affidavit of Businge and paragraph 56 of the Affidavit of the 1st Respondent) The allegation made by the Petitioner was that these acts were carried out by the 1st Respondents agents with his approval or knowledge.

As mentioned earlier, no further evidence in respect of these acts was furnished. For example, no details of the assault of the said Kasangaki, or his report were availed to the Court. The allegations of violence against Baguma and the 1st Respondent's driver were never supported by direct evidence and are thus considered hearsay. This also applies to all other averments made by the Petitioner and those who swore affidavits to support the Petition, alleging intimidation, violence and threats against his

supporters. None of those who claim they were assaulted by the 1st Respondent or his agents came out to substantiate these allegations through affidavits or otherwise. Such evidence was therefore unproved. (*See also Ochieng Peter Patrick vs. Mayende Stephen Dede & Anor (Election Pet. No 15 of 2011)*)

Further, even if the evidence of Abitegeka Arajab in relation to allegations of intimidation and threats were to be believed, there was no evidence to prove that the 1st Respondent had knowledge or approved such acts. In the premises, and having found the available evidence insufficient to prove such act, I find that the elections were conducted in accordance with the provisions of the PEA and its principles. I therefore hold that the Petitioner failed to prove this issue to the satisfaction of Court.

In line with the modified order of handling the issues adopted in this Judgment, I will consider whether the 1st Respondent committed illegal practices and Election offences either personally or through his agents with his knowledge and consent or approval. Pertaining to this very issue I will first deal with the question of defamation as one of the electoral offences

Utterances of false statements

Counsel Mulalira also made submission to prove the offence of false statements contrary to section 73 of the Parliamentary Elections Act, that is, false statements concerning characters of the candidates. The section provides: that a person who, before or during an election for purpose of effecting or preventing the election of a candidate, makes or publishes or causes to be made or published by words whether written or spoken, or by song in relation to the personal character of the candidate, a statement which is false;

1. Which he or she knows or has reason to believe to be false; or
2. In respect of which he or she is reckless to whether it is true or false commits an offence and is liable on conviction to a fine not exceeding twelve currency points or imprisonment not exceeding six months or both.

Counsel Mulalira submitted that in the Affidavit of Amany Alidini dated 21st March 2016 found at pages 68-71 of the Petitioner's binder in paragraphs 4 - 9 of the

Affidavit in Support of the Petition, Amany Alidini stated that Mr. Kiiza Ernest uttered statements referring to the Petitioner as "Kabalama." He further states that she had stolen land in Bujenje and that she had come to steal land in the Municipality. Additionally, that she was a thief and a vomit of the people of Bujenje and should not be voted by the people in the Municipality. The witness also deponed that Mr. Ernest Kiiza repeated the same utterances during the radio shows known as "nyatabwongo" aired on BBS Radio, on the 5th and 16th day of February 2016, at around 8:30 - 9:30 pm.

Learned Counsel for the Petitioner submitted that, since the program for campaigns attached to the Supplementary Affidavit of the 1st Respondent at page 37 of his Answer clearly indicates that on the 5th day of February 2016, the 1st Respondent canvassed for votes in Central Division,, Masindi Municipality where the railway ground is situate, it leaves no doubt that the 1st Respondent uttered the said words. Counsel further submitted that the 1st Respondent had not denied ever addressing the said rally on the 12th February 2016. That at page 45 of the program attached to the Supplementary Affidavit of the 1st Respondent, it was not indicated that the 1st Respondent was scheduled to campaign at the railway grounds. Counsel contended that many voters shunned the Petitioner because of the image painted by the 1st Respondent including

depicting the Petitioner °as a thief, land grabber, a person with no moral authority and whose integrity is questionable. Counsel also averred that the Petitioner was viewed as a person without a sense of belonging and worse of all a lawless person who could not be entrusted with their mandate.

Further, that in the Affidavit of Mateso Fred dated 21st March 2016, he deponed that ever since the official campaign for the Members of Parliament, Kiiza Ernest and his coordinators used to tarnish the Petitioner's name during campaigns. Furthermore, while holding a rally at Zebra Bulyango II with approximately 500 people, Mr. Kiiza Ernest and Kasumba Patrick who was MP for Bujenje and his coordinators referred to the Petitioner as a land grabber who had grabbed land in Bujenje and that she had come to grab land in the Municipality. That as a result people feared for their lives and properties. The Petitioner believed that, had it not been for such scandalous statements, the 1st Respondent would not have won the Parliamentary Elections for Masindi Municipality. It was pointed out that Amanyala Alidini's evidence was well corroborated by the evidence of Mateso Fred.

Mr. Mulalira, Counsel for the Petitioner submitted that, no single witness was produced to deny that on the 16th day of February 2016 at 8:30 - 9:30pm on a program "nyatabwongo" aired on BBS, the said words were not uttered neither were any witnesses produced to prove that when any of them attended a rally at workers railway ground in Masindi between 2nd& 5th day of February 2016, no defamatory words were uttered.

Concerning defamation attributed to the 1st Respondent was contained in paragraph 6 of the Supplementary Affidavit in Rejoinder by the Petitioner *whereby she stated*, "I personally heard his statements on Radio Kitara that I bought off 32 villages and that I was going to chase away people from Masindi Municipality the way I had done in Bujenje."

Counsel submitted that the Petitioner did not state when she heard the statements and what program it was, who hosted the program and in what language so as to give the Court the best opportunity to evaluate the content (sic) in which, if the words were said at all, they were said by the Respondent (or not). He underscored that these allegations had been denied by the 1st '.

Respondent in paragraph 4 of the Supplementary Affidavit sworn on the 6th May 2016. Further, that it was the Petitioner's evidence that the 1st Respondent made defamatory statements against the Petitioner. Counsel Sekabanja argued that the Petitioner did not state the language in which the words were uttered but instead stated them in English. He wondered what the exact words used were.

Mr. Sekabanja submitted that the 2nd Affidavit on page 182 paragraph 5, she deponed that the words were in the Runyoro language, which is understood by the largest percentage of people in Masindi Municipality. Counsel contended that this renders the words stated in the 1st Affidavit which were in English and those allegedly uttered at the Radio Station BBS as per paragraph 7-10 of the 2nd Affidavit of no importance to the populace because they were in English. Accordingly to him the words could not have been understood by the large percentage of the people in Masindi Municipality.

Mr. Sekabanja contended that to prove defamation, the words complained of importance and not the meaning attributed to them by the listener. The very words uttered must be clearly set out. Counsel Sekabanja submitted that in this case there was one witness who heard the words and he states them differently.

Resolution on defamation

I have carefully considered Counsel Sekabanja's submissions regarding the allegations of defamation. I concur with him that, on an allegation of defamation, the actual words complained of must be stated. This gives Court the opportunity to determine whether the alleged words were actually defamatory or not. However, I find no fault where the alleged words were translated in another language such as English provided the translation conveyed exactly the same meaning.

In this case, the exact defamatory words were not specifically extracted into the Petition. It is therefore difficult to establish whether the English translation actually reflected the defamatory statements. Another challenge that this evidence faced was that the language used was not specified. It should be noted that in election petitions,

the standard of proof is slightly higher than in ordinary suits. The speculation in the Petitioner's evidence did not help her case. The burden of proof in election petitions squarely falls on the Petitioner. In effect, I find that the Petitioner failed to prove to the satisfaction of Court that she was defamed by the 1st Respondent.

Now I shall consider the election offence of bribery in the alleged various forms and incidents as the Petitioner sought to prove. Counsel Mulalira submitted that the 1st Respondent committed the illegal practice of bribery of voters with gifts through the construction of wells at Kibwona-Kikorogo, Bulyango I, Kabalye, Nyangahya, Butoobe, Kyangulya, Katasenywa, Rwijere, Bulyango, Kizindizi, Kijogo, Mirasau/Masaka, Kyamujwara, Kirasa and Kisengenge; donations of money, salt, soap, footballs(sic) and jerseys.

Counsel relied on the Affidavits of David Kambona pages 25-34 paragraphs 4, 5, 6, 7, 8 & 9; paragraphs 5 and 6 of the Petitioner's Affidavit; Musana Robert pages 98 - 108 paragraphs 2, 3, 4, 5, 6, 7, 9 & 10, Monday Robert pages 34 - 38 paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, Talemwa Richard pages 35-38 paragraphs 2 & 3 and pages 43-46 in S paragraphs 3, 4, 5, 6, 7, 8, 9 and 10, Tusiime Daniel pages 39-43 paragraphs 10, 12, 13, 14, 15, 16 and 17; Wamani Ronald Affidavit; pages 44-47 paragraphs 2, 3a and 4 and paragraphs 3-14 at pages 67-70; and in the Affidavit of Jawiya Alex pages 80-83 of the Affidavit in Support and pages 21-25 paragraphs 2, 3, 4, 5, 8 & 9 of the Affidavits in Rejoinder to prove the allegation in issue.

The Petitioner deponed in paragraph 5 of her Affidavit in Support of the Petition that the 1st Respondent committed electoral malpractices and other offences personally or through his agents with his knowledge, consent or approval and for the benefit of the 1st Respondent. She contends that there was construction of several wells, notably a well at Kabalye Settlement, Kibwona, Kikorogo and Bulyango. According to the Petitioner's deposition in paragraph 6 of her Affidavit in Support of the Petition, she was informed by various persons including David Kambona, Talemwa Richard, Tusiime Daniel, Musana Ronald and Jawiya Alex. These were some of the people who swore Affidavits in Support of the Petition. In the Affidavit of David Kambona paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 pages 25-34, he deponed that on the 11th day of February 2016 at approximately 12:00pm, he saw Wamani Ronald driving truck Isuzu forward ferrying construction materials (stones and cement). Wamani informed him that he had been contracted by Abitekaniza Robert to ferry construction materials to Kabalye Settlement, Kibwona Kikorogo and Bulyango. On the 21st day of February 2016, David Kambona went with one Abdul Musa and a one Kigula to Kabalye Settlement well and found the well-constructed with inscription "FUNDED BY EARNEST KIIZA" dated 16/2/2016. Later, Kambona David received information from Musana Robert that the inscription "funded by Ernest Kiiza" was removed on orders of Ernest Kiiza whereupon David Kambona returned to Kabalye Settlement well and took photographs again.

According to the Petitioner, Mr. Musana Robert, Kambona David together with Musana and Kigula contacted Mr. Aligaruka who confirmed that he had constructed the well in Kabalye Settlement and Kibwona Kikorogo and Bulyango shared by the two villages and₂ was

constructed on 16/2/2016, Kambona David took photographs of the said well with Aligaruka and the said photographs were attached as annexures “C1” and “C2.”

In paragraph 10 of Kambona David’s Affidavit, he deponed that Aligaruka led him together with Musa and Kigula to Kibwona Kikoroga Well where they found an inscription at each Well stating *“funded by Ernest Kiiza”* and David Kambona took photographs of the same which were attached as annexure “D1” and “D2.”

In the Supplementary Affidavits in Rejoinder David Kambona at pages 7-11 paragraphs 3, 4, 5 and 6 clearly stated that he took photos of the various Wells in Bulyango, Kabalye Settlement, Kibwona and Kikorogo using an IPAD and took the photos to Kampala from where they used A USB Cable to transfer from the IPAD to a computer.

The evidence of Kambona David in this regard was corroborated by Musana Robert who stated in his Affidavit that during the campaign period for the period 2015 - 2016 general elections between the 13 - 18th February 2016 at Kabalye Settlement, they received a number of builders led by Eng. Aligaruka David on instructions of Hon. Ernest Kiiza to construct wells in the area and that he was offered a job of a porter at the site in charge of extending, mixing and forwarding materials to the senior builder at Kabalye Settlement and that among other foremen present at the site were Aligaruka David and Daniel Tumusiime throughout the execution of the construction that Engineer Aligaruka David kept on telling the people who would come to collect water to remember and vote for Hon. Ernest Kiiza since he had provided them with safe water.

That after construction of the Well they inscribed the words “funded or donated by Hon. Ernest Kiiza Apuuli” on all the Wells they had constructed. It was the Petitioner’s evidence that one Abdul, a known agent of Mrs. Kabakumba Matsiko took photos of the inscription and when Hon. Ernest Kiiza learnt about this development, he immediately directed Eng. Aligaruka David to erase the inscription as per photograph “marked “B”) showing the. erased inscription.

Learned Counsel for the Petitioner contended that Eng. Aligaruka David had never denied being contracted by Hon. Ernest Kiiza to construct the said Wells. Furthermore, the Affidavit of Kiirya William, which was deponed in Support of the Answer to the Petition conceded to the fact that the Well had an inscription “funded by Hon. Ernest Kiiza” and also conceded that it was removed thereafter. Counsel for the Petitioner argued that the allegation that the inscription “funded by Hon.

Ernest Kiiza" was put days after [sic] is unfounded.

Learned Counsel for the Petitioner submitted further that David Kambona's evidence was well corroborated by the evidence of Musana Robert and Bigirwa Dan who deponed that on the 17th day of February 2016, Hon. Ernest Kiiza came to Kabalye Miracle Centre presided over by Pastor Kahoho Enock and donated 5 crates of soda and pledged 5 bags of cement. That he further made a contribution of 150,000/= to solve the problem of scarcity of water.

He told him that Constance Mbohano was to help in the construction. Immediately after this statement, Ernest Kiiza told the gathering to use the money for other purposes as he was going to construct the Well himself. In fulfilment of his promise, shortly before the elections between 13th -17th February 2016, Hon. Ernest Kiiza returned with men led by Eng. Aligaruka and started constructing the Well. Furthermore, that on the 20th day of December 2015, when they were preparing the Christmas songs Bigirwa Dan found Mugisa Dickson with 5 bags of cement and he informed him that the cement had been sent by Ernest Kiiza in honour of his promise. The cement was delivered by one Happy, an agent of Hon. Ernest Kiiza using a tipper, white in colour.

Counsel for the Petitioner contended that the Affidavit of Pastor Kahoho Enock contains mere denials and should be rejected. He highlighted the fact that there was no dispute that the said Wells were constructed by Eng. Aligaruka with the inscription *"funded by Ernest Kiiza"* and photos were taken when the Engineer was just next , to the said wells as per annexures D1, B1, C1 & C2. In Counsel's opinion there was no reason whatsoever why more than four Wells had been constructed with inscription "funded by Ernest Kiiza," more so during the election period. This was done by a design with a purpose by the 1st Respondent to induce the electorate to vote him as Member of Parliament for Masindi Municipality.

Counsel Mulalira further submitted that the Affidavit of Odaga Godfrey and Kiirya William sworn on the 30th March 2016 were inadmissible in so far as they contain hearsay evidence. That they were not specific and contained general allegations. He argues that there were no resolutions to prove that any member of the said villages was to contribute 5,000/= and that not even the duo mentioned in this paragraph had ever contributed the said money as was stated in paragraphs 3-9 on pages 39-41 of the Affidavits in Rejoinder deponed by Mungungueo Denis. Also the purported Ugx.1,000,000 from Mr. Ben Mulumba and his family was not received by Odaga Godfrey nor Kiirya William personally or by any member

of the committee. In any event, the said Mr. Ben Mulumba never deposed any Affidavit to prove that he ever contributed any money for the (water cause).

Counsel for the Petitioner further submitted that Odaga Godfrey and Kiirya William did not dispute the fact that the construction materials were delivered by one Wamani Ronald to the said Wells or by his motor vehicle. Additionally, that none of the 1st Respondent's witnesses named the person who transported the construction materials for constructing the Well under a contract with Abitekanizza Robert. Counsel Faisal Mulalira contended that the entire village saw the Wells and that it had been proved that Aligaruka David constructed the said Wells assisted by Opari Geresio and Otim David.

The allegation that the said Wells were constructed by Opari Genesio and, Otim David was hearsay in so far as Opari and Otim did not swear Affidavits to that effect.

Mr. Faisal Mulalira again relied on the Supplementary Affidavit of Monday Robert who deposed that he was born in 1975 on Kabalye where he is a member of the water resource committee and that the Well had been damaged sometime back whereupon the residents agreed to contribute ₦10,000/= per home and had only managed to raise 135,000/= by the time Hon. Ernest Kiiza organized his rally at Kabalye Trading Centre attended by Monday Robert. That Hon. Ernest Kiiza promised that he would build the Well using his own money as an inducement to be voted as a Member of Parliament for Masindi Municipality. It was Mr. Mulalira's argument that money collected by the resident was to be given back

Indeed, on or about 11th - 12th day of February 2016, Monday Robert saw a tipper truck at around 8:00am ferrying building materials. The people on the truck sought for direction to the Well from one Constance Mbahona near her shop. Monday Robert also witnessed the events since he had followed to oversee the work as a Member of the Committee and he saw some construction materials being offloaded from the truck.

Monday Robert further testified that a day after these events, he saw Kiiza Ernest's car in which Hon. Ernest Kiiza was seated in the co-driver's seat followed by a white Dyna lorry/truck loaded with cement that was later offloaded at Nyonyitono Matia's home. Nyonyintono was the campaign agent of the 1st Respondent in Kabalye II. That they offloaded 12 bags of water proof cement and later the two cars drove off. Monday Robert in his Supplementary Affidavit, paragraph 17, deponed that whereas Dr. Sam Kahunde has land in Kabalye, he was a resident of Masindi Town and that he had never attended any meeting. There was also no meeting or resolution that had ever been passed to request Dr. Sam Kahunde to give ' the committee money. In addition, the said Dr. Sam Kahunde had never given the committee any money. Counsel for the Petitioner contended that this evidence had not been challenged in the Affidavit in Rejoinder by the P'Respondent and therefore should be admitted as per the authority of Bakaluba Peter Mukasa vs. Nambooze Betty Bakireke, Election Petition Appeal No. 4 of 2009 (Supreme Court). Monday Robert further deponed that Isingoma does not sit on the water committee and that he had never attended any committee meeting organized by the said committee.

On cross-examination of Isingoma by the Petitioner's Counsel, he admitted that he had never collected water from Kabalye Well; that he is not a resident of Kabalye and that he had never visited Kabalye well. Counsel for the Petitioner submitted that the evidence of Isingoma ought not to be relied on by this court as he was an elusive witness. That the Affidavit of Isingoma was inadmissible in so far as it is in plural and it does not specify in specific terms who actually received the money. That his evidence was hearsay and therefore inadmissible.

Learned Counsel submitted further that paragraph 19 of Monday Robert's Affidavit in which he states on oath that, earlier on the 15th or 16th February 2016, he had passed by Kabalye Settlement and found Aligaruka David constructing the Well and that he had also helped to have the work accomplished is pertinent. This evidence was not disputed. Counsel submitted that this leaves no doubt that the Wells situate at Kabalye, Bulyango I and Kibwona-Kikorogo were constructed by Mr. Kiiza Ernest during Elections to influence voters.

In order to buttress his position, Mr. Mulalira also summarized Talemwa Richard's evidence. Talemwa Richard deposed that between the period 14th to 18th February 2016, he was retained to plaster the Wells that were constructed by Hon. Ernest Kiiza at Kabalye Settlement Village. That throughout the process of the construction, Hon. Ernest Kiiza's agent, one Eng. Aligaruka David, would be calling in voters to come and see what Ernest had given them.

Mr. Mulalira implored Court to reject the 1st Respondent's denial that he never contracted Aligaruka David or Talemwa Richard to construct the said Wells. He referred to Talemwa Richard's Affidavit on pages 43 to 46 in which he deposed that Hon. Ernest Kiiza found him at BBS Radio Station and persuaded him to cross over to his camp since he had constructed the Wells as he had promised. That when Talemwa Richard met Aligaruka David in Amake Mark's bar he confirmed to him that Hon. Ernest Kiiza had contracted him to construct the wells. Both moved on Aligaruka's Bajaj to Negade well and started working.

Tusiime Daniel who deponed an Affidavit in Support of the Petition stated that on the morning of 13th February 2016, he was called on his cell phone by one Eng. Aligaruka David, who told him to find him at Masindi Hotel for some work that he wanted him to do.

According to Tusiime, Eng. Aligaruka came with materials and they started construction on the Well. They were later joined by locals who gave them support. On Sunday 14th February 2016, they worked at Bulyango Well and also set up the working site at Kabalye Settlement. On Monday, 15th February 2016, they worked and finished the Bulyango Well. On Tuesday, 16th February 2016, they worked on and finished the Well at Kabalye Settlement and the 1st Respondent's name was inscribed thereon since he had sponsored the work. Furthermore, that on the 17th February 2016, they were taken to Kibwona by Eng. Aligaruka David and Hon. Ernest Kiiza to finish the Well which they had earlier on constructed without finishing. Throughout the construction of the Wells, they were under strict instructions to inscribe the names of the 1st Respondent; Ernest Kiiza as the one who funded the construction. The construction was to be accomplished before voting day so that Mr. Ernest Kiiza would be voted as Member of Parliament for Masindi Municipality. Further still, the name "Hon. Ernest Kiiza" was inscribed on all the Wells. He requested the people to vote for him during the elections because of what he had done. In fact, the 1st Respondent promised on his rallies that he would fund the construction of the Wells mentioned.

The above evidence was corroborated by the evidence of Wamani Ronald who deponed in his affidavit in support of the petition that on the 11th and 12th day of February 2016, his truck was hired by Abitekaniza Robert, a campaign agent of Hon. Ernest Kiiza to go and work the whole day and he was paid 200,000/= as Ernest would fuel the car. That at approximately 6:30am he Wamani Ronald went with Robert to Kitwetwe, Mirya Sub-county, Masindi District and Robert paid for plastering sand at Ugx.20,000. This sand trip was taken to Kabalye Settlement Cell and they went back for another trip with Talemwa Sam the driver for Wamani Ronald.

In the Affidavit in Support deponed by Jawiya Alex, he states that on the 14th day of

February 2016 at around 8:30am, Mr. Ernest Kiiza sent construction materials for construction of a Well in Bulyango I; and Kabakagire Well. That the truck was being directed by Okura Benjamin his agent. Further that Eng. Aligaruka hired some village members namely; Opari Genesis and Oting David as a builder and porter respectively. Jawiya Alex deponed that later on; he went to the Well and found that work was on going. He saw Abitegeka, the Engineer of the site and the construction was concluded on 16th February 2016.

In Mungungeo Denis' Affidavit in Rejoinder, he states that while attending Mr. Kiiza Ernest's campaign rally at Bulyango I Trading Centre in company of his wife and some agents including Robert Abitekaniza, Byenkya David and Okura Benjamin he (Mr. Kiiza) introduced them as his agents.

Learned Counsel for the Petitioner submitted that in paragraph 42 of the 1st Respondent's Affidavit, he had denied that he did not know Benjamin Okura whatsoever yet under paragraph 32 of the same Affidavit, Mr. Ernest Kiiza stated that Benjamin Okura is known to him. Learned Counsel contended that such contradictions points to deliberate concealment of the truth. According to Counsel for the Petitioner, it was not in dispute that the materials for construction of the said wells were ferried? To the site by Wamani Ronald contracted by a one Abitekaniza Robert, an agent of Mr. Kiiza Ernest. That it was also not disputed that Robert paid money to Wamani Ronald for and on behalf of Mr. Kiiza.

Mr. Mulalira contends that there was no Affidavit on record to dispute that Wamani Ronald ferried the construction materials. Further, that there was no evidence from the 1st Respondent to deny that money had been received or to deny the statement that no citizen ever contributed money for construction of the Wells. Furthermore, there had not existed a list of members who had contributed to the construction of the Wells and how much they had paid.

Mr. Mulalira went on to submit that there was no evidence to prove that Dr. Kahunde contributed money. Also Musana Robert's evidence was not rebutted or disputed, in any way. He submitted that it was also not in dispute that on every Well constructed, an inscription "funded by Hon. Ernest Kiiza" was put. He posited that Aligaruka David had not denied anything stated in the Affidavit in Support of the Petition. Further, that there was no evidence to prove that the said Water Committee ever contacted Opari Genesis, Oting David or that they had the skills (to

do the required work).

Mr. Mulalira's further contention was that there was overwhelming evidence ^ to prove that the said Wells were constructed by Hon. Ernest Kiiza as all the wells were constructed with an inscription "funded by Ernest Kiiza."

He argued that there was ample evidence that Hon. Ernest Kiiza transported the workers, inspected the construction of the said Wells. He also requested all workers and residents in their respective villages to vote for him for having done a good job. Counsel pointed out that in accordance with the evidence on record, the said Wells were constructed from the 12th day of February to the 18th day to February 2016. Counsel Mulalira cited Election Petition Appeal No. 25 of 2006, Fred Badda & Another vs. Prof. Muyanda Mutebi C.A) where it was held that the act of shifting the football tournament from December to the Election period and the eventual donation of a cow to Kagoya football Club was an illegal practice and warranted the nullification of the Election.

Learned Counsel for the Petitioner deduced that construction/funding of the construction of the Wells by the 1st Respondent towards or during the Election period, constituted an illegal practice. He argued that it is trite law 'I⁰ that in an Election Petition, when evidence is led by one party and is rebutted by another party "some other evidence from an independent source is- required to confirm what actually happened." See Hon. Justice Monica K. Mugenyi's view in Paul Mwiru vs. Igeme Nabeta & 2 others, High Court Election Petition No. 3 of 2011. *On Appeal*, Hon. Justice Constance Byamugisha J.A (RIP) further held that, "in contradictions of oral testimony which occur in almost every case, the documentary evidence must be looked to in order to see on which side the truth lies."

Counsel for the Petitioner submitted that photos of the Wells that were constructed were availed bearing the relevant information to wit "funded by Hon. Ernest Kiiza..." In the face of such glaring evidence, Aligaruka David had not rebutted or denied the evidence in Support of the Petition. Counsel contended, therefore, that the Petitioner had proved her case to the required standard.

I will now address my mind to how Counsel for the 1st Respondent, Mr. Sekabanja countered the Petitioner's case on the construction of the Wells. Regarding the big

question of Wells construction as. an , aspect of the electoral offences Counsel for the 1st Respondent, Mr. Sekanbanja, in his analysis criticized several affidavits of the petitioner regarding their property and the averment of the deponents therein. First, he pointed out that the petitioner did not , at any time

in her Affidavit allege to have seen the 1st Respondent commit the alleged acts. Counsel Sekanbanja submitted that the Petitioner's Affidavit did not render any support to her case against the 1st Respondent. However, having carefully considered the law relating to Election Petitions, I am unable to agree with Counsel for the 1st Respondent regarding this particular question. Without the Petitioner's Affidavit in Support of the petition, Court would dismiss the petition instantly on a preliminary point of law.

Counsel for the 1st Respondent, Mr. Sekanbanja submitted that the Petitioner's witnesses were contradictory inconsistent and without detail in their testimony. He concluded that their evidence was unreliable, false and could not support the Petitioner's case on a balance of probabilities to the satisfaction of the Court. Before I can deal with those questions, I must deal with the common contention raised by Counsel for the 1st Respondent whereby he faults most of the Petitioner's affidavits to wit, that the first Affidavits were under certification and the affidavits in rejoinder were without certification.

Counsel for the Petitioner in this regard had submitted that they first subjected all witnesses to translation and that was when they would ascertain their literacy level. When this matter came up for hearing Counsel for the 1st Respondent decided not to cross examine the Petitioner's witnesses yet; it was the only open avenue through which he would have been in position to determine Whether the deponents were literate or not.

On finding that the deponents were illiterate in the English language Court would easily agree with Counsel to the 1st Respondent to expunge such affidavits that were not under certification. Court will now deal with the question of contradictions and

inconsistencies as pointed out by Counsel for the 1st Respondent to water down the Petitioner's case.

The legal position on contradictions and inconsistencies as rightly submitted by Counsel for the Petitioner is that only major contradictions and inconsistencies that go to the root of a matter would affect a trial but minor contradictions and inconsistencies can always be ignored. Having set forth the law on contradictions and inconsistencies I will now proceed to consider the arguments of both Parties against the evidence on record.

Counsel Sekabanja highlighted certain contradictions in the Affidavit of David Kambona. He pointed out that whereas in his Affidavit of 21st March 2016 in paragraphs 8, page 9 Kambona refers to the Well in Bulyango II where he took pictures as per annexure C1 & C2, in the 2nd Affidavit of 11th April 2016, in paragraph 4, he stated that he took photographs of the various Wells notably Bulyango I. This was contrary to the 1st Affidavit. Counsel raised a question regarding which Well actually David Kambona went to on the 21st February 2016.

Counsel Sekabanja argued that Kambona David claims that he had taken the photographs as per paragraph 4 of his 2nd Affidavit concerning the Wells in Bulyango I, Kabalye Settlement, Kibwona-Kikorogo and even went back to take photos a second time.

Mr. Sekabanja argued that contradictions aside, there were no photos of the 2nd visit. The only photograph attached to paragraph 5 as marked "B." the Affidavit does not state which Well the person in the photo is located or that he is allegedly Eng. Aligaruka. In any case. Aligaruka appears he was still dressed in the same clothes and holding the same bottle and a cake as in C2 page 32. Counsel Sekabanja contended that this was not a credible witness.

Furthermore, that if the 1st Affidavit of 21st March 2016 is read correctly, paragraph 5 states that on the 21st of February 2016, he went with Abdul Musa and Kigula to Kabalye Settlement Well and found a Well marked “funded by Ernest Kiiza.”

Counsel Sekabanja noted that in paragraph 10, 1st Respondent attached pictures annexed as Annexures D1 and D2 which were alleged to be those of Kibwona-Kikorogo Well. According to Counsel for the 1st Respondent, the picture in Annexure D1 was the same picture used/referred to by Ayesiga Robert Manyuru at page 52, paragraph 8 despite the fact that it was referred to as annexure “A,” which is the Well or the borehole in Kirasa. It was the same Annexure D2 of the Well referred to by Kambona and as of Kibwona- Kikorogo. Counsel posed a question regarding the truthfulness of any of these two witnesses.

Musana Robert’s evidence

According to Mr. Sekabanja, “D-1” alleged as the Well in Kibwona-Kikorogo was the same picture used by Musana Robert at page 98, as being that of the Well at Kabalye Settlement marked as Annexure “C.” Also the said Aligaruka has the same pose and was still holding the same paper. Counsel still raised the issue of authenticity and wondered who was telling the truth and deduced that this was a contradiction. Furthermore, that in his 2nd Affidavit of 11th April 2016, paragraph 4, Kambona stated that “I took all the photos of the various wells. Bulyango 1. Kabalve Settlement. Kibwona-Kikorogo and even went back on the directions of Musana Robert for the 2nd time.

That in paragraph 9, page 99 the same Musana Robert stated that “after realizing this had turned into a voter trap I called Abdu (a known agent of Kabakumba Matsiko who immediately came and took photos of the inscription)”. He attached the photograph as Annexure “C” which was the same photo claimed by David Kambona in Annexure “D”. Counsel again posed another question regarding this person who took the photos.

He contended that the photo does not show anyone at work. It just depicts a civilian standing next to the Well. The said person had not been identified as Aligaruka and the witness had not disclosed how he got to know Aligaruka neither had any other witness recognized the photographs or the person in the photos as allegedly Aligaruka. Counsel contended that these raised serious contradictions regarding the photos attached; the Wells referred to and the identity of Richard Talemwa's Affidavit the person who took the photos.

Furthermore, Counsel Sekabanja attacked the Affidavit of Talemwa Richard on the ground that in his Affidavit dated 21st March 2016, he affirmed and in the Affidavit of 13th April 2016, he swore. According to Counsel, in the 1st Affidavit, it is stated that he was retained to plaster the Well at Kabalye Settlement but could not say by who and how much he was paid. Counsel Sekabanja contended therefore that Talemwa was a “volunteer” and that his evidence was clearly contradictory. He noted that whereas in paragraph 3 of his Affidavit, Talemwa had deponed that voters who were coming were being told to vote for the 1st Respondent, he did not name a single person yet this is a well located in the same village as his residence was. Notably, no such person was called as a witness.

More to this, Counsel Sekabanja argues that in the 2nd Affidavit of Talemwa, he deponed, as an afterthought that the 1st Respondent had promised to repair two Wells in Kabalye (Bukisa village) and the other in Negadde (Wabyoli Well). Counsel Sekabanja submitted that these two Wells were not on the Petitioner’s list of Wells and that information was lacking as to whether this was the same Well as the Kabalye Settlement Well. According to Counsel, this was the first and only time that Kabalye Settlement is said

to have had two Wells. Counsel submitted that the lack of explanation caused further contradictions and inconsistency in the Petitioner's case.

Additionally, in the 2nd Affidavit, page 200, paragraph 8, Talemwa deponed that he was told that the 1st Respondent was constructing a Well by Aligaruka David who rode with him to Negadde Well. Under paragraph 9, Talemwa deponed that he put plaster on the Well and when he got tired, he left at 2:00pm. Counsel Sekabanja contended that Talemwa was a volunteer and that his evidence was full of contradictions. Talemwa did not mention anything about the writings on the Wells and in paragraph 5 where he mentions "safe & clean water" these words should have been in Runyoro if at all they were mentioned because these were in English and to the people of Masindi Municipality they were not ordinary words.

Tumusiime Daniel's Affidavit

Counsel Sekabanja then moved on to criticize the Affidavit of Tumusiime Daniel. Counsel contended that his Affidavit shows a pattern and a scheme to make up evidence. He claims to be a civil builder and states that he worked on the 13th and 18th at the Well in Kibwona, 14th February 2016 at Bulyango Well, 15th February 2016, Bulyango, 16th February 2016 at Kabalye Settlement Well and on the 17th February 2016, at the Kibwona Well. Counsel wondered whether Tumusiime actually did any of this work. In his submissions, Mr. Sekabanja he refers to him as "superman." He argues that the known Wells in Bulyango were either Bulyango I or Bulyango II. Hence, the question of which Well Tumusiime had worked on remained unanswered. According to Talemwa between the 14th to the 18th February 2016, Tumusiime was working with Aligaruka on the Well in Kabalye Settlement Village. However, according to Tumusiime himself, he was working with Aligaruka on the Well in Kibwona. He faulted the usage of the word "funded by" in English in an area dominated by Runyoro speakers.

Wamani Ronald's Affidavit Evidence

The next witness was Wamani Ronald who deponed two Affidavits set out at pages 44 and 22 of the Petitioner's binder. In paragraph 4, page 45, Wamani alleged that they took a trip of sand to Kabalye Settlement cell and went back for another trip and after offloading, he gave the truck to his driver 5 Tibagwa Sam. Counsel Sekabanja submitted that there was no evidence in answer to the question of whether he was paid and if at all he was paid, then who paid him? In the 2nd Affidavit, Wamani alleges that he was expecting to be given Ugx.200,000/= for fuel but he does not state whether he received the fuel. Mr. Sekabanja submitted that this particular witness contradicted himself when he stated that he - took one trip to Kabalye Settlement and that other trips were made by his driver contrary to his 1st Affidavit in paragraph 4.

This is an opportune stage to comment on Counsel Sekabanja's contentions on contradictions and inconsistencies pertaining to the evidence of David Kambona. I have carefully considered the submissions of Counsel pertaining to this witness. His concern is that Kambona 1st deponed that he took photographs of the well at Kabalye yet in his 2nd Affidavit, he deponed that he took photographs of all the Wells. In Counsel's view, this was contradictory. I agree with him. However I find that this was a minor contradiction as the fact remains that the witness remained on track when he stated that he took photographs of the Well(s). The major contradiction would be that he never took photographs which is not the case considering the evidence at hand. The mere fact that he did not attach photographs taken on the second occasion cannot be the basis for rejecting his evidence. Regarding Talemwa Richard's evidence, the highlighted contradiction concerned affirming and swearing as it appeared on his Affidavits.

Traditionally, to swear is used by Christians and affirming is used by the Muslims. However, I agree with Counsel Mulalira that the common meaning, when any of the two is used, would be to take oath. Besides this, regarding the issue of who retained

Kambona and how much he was paid, I am unable to find anything contradictory. The mere fact that a witness did not mention how much he was paid is not enough to deduce that he was not hired or that he was a volunteer. At least, Kambona stated in his evidence that he was hired. His failure to name the people who were being told to vote for the 1st Respondent when they came to the Well would be a strong point but this was not the big outstanding question. The unanswered question was whether the 1st Respondent committed the election offence of bribery by constructing the Wells in Masindi Municipality during the election period. At this moment, I am yet to determine whether the words “ funded by Earnest Kiiza” were ‘real’ or “imaginary. ”

Regarding Tumusiime Daniel’s evidence, on a simple analysis of his evidence, one would agree with Mr. Sekabanja that Talemwa and Tumusiime contradicted one another as each of them alleged to have worked with Engineer Aligaruka on two different Wells that is at Kabalye settlement village and Kibwona on the same dates. However, a critical analysis of the evidence points to another possibility: that Aligaruka would work on different Wells on the same day. Concerning Wamani Ronald , I am unable to find any contradiction as Mr. Sekabanja had submitted. The question of whether he was paid and by who cannot constitute a contradiction. The pivotal question would be: whether he was engaged or not but not the number of trips. According to the evidence on record, it is clear that at least Wamani Ronald took a trip and he was actually to be paid. In the instant criticism, I find no merit in Counsel Sekabanja’s submission that there were such contradictions in the Petitioners case that would lead Court to question the credibility and validity of these witnesses’ evidence. In my opinion, I find the Petitioner’s witnesses credible and I will rely on their evidence to determine the Petitioners case. Going straight to the question of Wells construction, I find that the Petitioner through the evidence of David Kambona, Talemwa Richard, Tumusiime Daniel and Wamani Ronald proved to the satisfaction of Court that the said Wells were indeed constructed with funding from Earnest Kiiza, the 1st Respondent. This explains why his name was severally inscribed on each of the Wells that were constructed in Masindi Municipality during the election period. This was clearly a well calculated inducement as everyone needs safe clean water.

The distribution of sports jerseys

The Petitioner also sought to prove another act of bribery to wit the distribution of football jerseys. To prove this act Counsel for the Petitioner in his submissions relied on the Affidavit of Jawiya Alex as shown on pages 80-83 of the Affidavit in Support

deponed on the 21st day of March 2016. Counsel Mulalira specifically relied on paragraphs 11 to 16 and paragraphs

5 to 9 of Affidavit in Rejoinder. Mr. Mulalira submitted that Jawiya Alex's evidence was to the effect that on the 14th day of February 2016, at around 5:30pm, at Bulyango Primary School, he saw Okira Benjamin, Kiiza Ernest's agent with a bulging kaveera. At the end of the training, Okira informed coach Awuchwa that he had come to deliver a gift to the footballers from Hon. Ernest Kiiza who is a Candidate for Masindi Municipality. Then he removed a yellow ball bearing NRM emblem. Okira handed over the ball to the coach who in turn gave it to Okwedda Etiano to be taken to the Secretary Bisendi Richard. The said act changed the mind of the footballers and induced them to vote for Kiiza Ernest.

Mr. Mulalira sought to demonstrate corroboration to this piece of evidence by relying on the Affidavit in Support deponed by Bagonza Ronald at pages 72-76, specifically paragraphs 1 to 14 where the said Bagonza Ronald stated

that Businge Innocent had called a meeting at 6:00pm for all the youth at Kihuuba Primary School playground. This was communicated through Alex alias Zanda who told the youth that Kiiza Ernest had delivered 14 pairs of shirts and shorts which he had earlier on promised so they should vote for him as their Member of Parliament.

There is another piece of evidence on record to confirm this aspect. In the Affidavit of Rwakaikara Simon in paragraphs 3 to 7 pages 70 to 77 of his Affidavit in Support of the Petition he confirms that, on the 18th day of February 2016, Businge Innocent gave out tops and shorts to the people of his village (Kabalye I). These were yellow in colour with black stripes. That the one for the goalkeeper was black.

Counsel for the Petitioner contended that the Affidavit of Businge Innocent should be rejected in so far as the Affidavit in support of the answer to the Petition since it offers a lack of knowledge of the contents in Bagonza Ronald's Affidavit. Should it be true that Busingye had taken his mother for medication, he would have attached the medical form or treatment form. Mr. Mulalira therefore argued that these were mere fabrications which should not be taken into consideration.

Learned Counsel for the Petitioner submitted further that, whereas Businge Innocent in his affidavit in Support of the Answer to the Petition, specifically paragraph 8 he deponed that Rwakaikara Simon told several lies in his Affidavit, Busingye does not deny that he gave out shirts, tops and shorts to the people of Kabalye I for and on behalf of Mr. Kiiza Ernest. Therefore Rwakaikara's evidence should be taken as the gospel truth.

Voter bribery and the 1st Respondent's arguments

Regarding the aspect of voter bribery, Counsel for the 1st respondent, submitted that this allegation contained in Bagonza Ronald's Affidavit had been ably destroyed through the evidence of Businge Innocent, who stated in cross-examination that he did not organize such meetings as alleged by Bagonza Ronald that Busingye had organized a meeting of all Youths at Kihuuba Primary School and gave out sportswear. In this respect, the Petitioner had failed to produce a single witness or a photograph of the same despite promising to do so at the trial.

The 1st Respondent's Counsel, Mr. Sekabanja submitted that the evidence of

Rwakaikara Simon goes to show a pattern by the Petitioner to stage evidence. Mr. Rwakaikara had deposed in his Affidavit found on page 78 of the Petitioner's bundle that, on the 18th February 2016, Businge Innocent gave out jerseys at Kabalye I. This evidence had been denied by Businge Innocent in cross-examination when he stated on oath that on the 18th day of February 2016, he was coming from the Police. Cells where he had spent the night and he was not feeling well. He was released at 10:00am. Mr. Sekabanja stated that Court ought to take note of the Petitioner's failure to prove her case in this regard. When the two sides are considered, I find the Petitioner's version of events more credible in this regard. The Petitioner produced several witnesses to prove this aspect of voter bribery. The 1st Respondent would only succeed in discrediting their testimonies through vigorous cross examination otherwise their evidence remained persuasive and I agree with Counsel for the Petitioner that there was distribution of football jerseys and a yellow ball. Busingye's allegation that he had taken his mother to hospital is not plausible since he attached no documentary evidence to prove this fact.

Distribution of salt

The other aspect of bribery of voters which the Petitioner sought to prove was the distribution of salt. Counsel for the Petitioner relied on the Affidavit of Bingi Moses found on pages 110 - 112 of the Petitioner's bundle. Specifically paragraphs 4 to 7 of Bingi's Affidavit. According to Bingi Moses, on the 17th day of February 2016, Isingoma Edward, the agent of Hon. Ernest Kiiza brought salt in a black Toyota car and gave it to Owino Santa and Kamanyire Richard with instructions to distribute it among the villagers.

Counsel Mulalira cited the authority of Rtd. Col. Dr. Kiiza Besigye vs. Electoral Commission & Yoweri Museveni, Election Petition No. 1 of 2001 where Oder J. considered the law on agency in Election Petitions and decided as follows;

“The law on agency and agents in election is important.....The general principle of the Law of agency applies to elections as well. However the relationship between an election candidate and his agent is more intimate than that which subsists between an ordinary principle and agent..... for regards a Parliamentary Election, the candidate is responsible for all misdeeds of his agents committed within the scope of his authority

although they were done against his express directions, and even in defiance of them. An agent is a person employed by another to work for him or her on his or her behalf either generally or in some particular transaction. The authority may be actual or implied from the circumstances. It is not necessary in order to prove agency to show that the person was actually appointed by the candidate so a man may become an agent of another in two ways, by actual employment or by recognition and acceptance. If agent, the next question is, what is he appointed to do or if not appointed what kind of service does he prefer to do which is accepted by the principle.

If a person were appointed or accepted as an agent for canvassing generally and he was to bribe a voter, the candidate would thereby lose Parliamentary seat”.

Counsel submitted that according to Halsbury’s Law of England 4th Edition Volume 15 paragraph 698 in order to prove agency, it is not necessary to show that the person was not actually appointed by the candidate or that he was paid. The crucial test is; whether there has been employment or authorization of the agent to do some election work or the adoption of his work when done. That the same test had been applied by J. Augustine Kania *in the case of* Byamukama K. James vs. Kaija William & Another, Election Petition No. 9 of 2001.

Counsel for the 1st Respondent, Mr. Sekabanja, submitted that, whereas there was alleged distribution of salt to Owino Santa and that Owino Santa was on the 18th February 2016 distributing salt his evidence had been rebutted through the Affidavit of Santa Owino who deponed at page 47 that on the night of 17th February 2016 she was away from her home till late. That on the 18th February 2016 she left at 5:30pm to go 15km away to Kihuuba where she was a Ward Election Supervisor for Presidential candidate Yoweri Museveni. Her letter of appointment was exhibited as RESP I at page 50.

Mr. Sekabanja submitted that Owino Santa therefore discredited Bingi’s testimony as a fabrication aimed at anybody. Santo owino stated that she had run away on a motor-cycle No. UAE 35QW. Mr. Sekabanja recalled Counsel for the Petitioner’s submissions in paragraphs 6.88 where he had conceded that the said Registration No. was for a motor vehicle. Bingi had lied that it was a motorcycle. He posited that therefore Mr. Mulalira’s attempt to correct the Affidavit would not be accepted. However, in my

opinion, this Court would be in error to hold that the testimony of Bingi Moses had been ably destroyed through the testimony of Owino Santa when the question of Isingoma Edward and Kamanyire Richard remained unanswered. It is the Petitioner’s evidence that Kamanyire Richard was among those who distributed the salt and this piece of evidence remained unanswered. It is the Petitioner’s evidence that Kamanyire Richard and Isingoma Edward were among those who distributed the salt and this piece of evidence remained uncontroverted. Resultantly I hold that the Petitioner managed to prove this aspect of voter bribery to the satisfaction of Court.

This brings me to the question of bribery using money. In this regard Counsel for the Petitioner cited the Affidavit of Susu Medina pages 62-64 of the Petitioner’s binder. In her Affidavit in Support of the Petition dated 21st March 2016 specifically paragraphs 2-8 Susu Medina deponed that on the 13th day of February 2016, approximately 340 women were at Ocham Penel’s home. The meeting was convened by Kiiza Ernest’s agent; including Okura Benjamin. When Kiiza Ernest came to where they were seated, he gave them money to buy salt that would be donated to the village.

Since Susu Media was the Chairperson for women Bulyango LC.I, she led a group of 20 persons and she was given money by Mr. Kiiza Ernest in Ugx. 1,000/= & Ugx.2,000/= denominations to distribute to her fellow women. Mr. Mulalira submitted that in the Affidavit of the 1st Respondent in Support of his Answer to the Petition paragraphs 31-33 the 1st Respondent denied ever giving out money to women on the 12th day of February 2016. Hence Mr. Mulalira contended that the fact that Mr. Kiiza Ernest convened a meeting and distributed money to the participants on the 13th February 2016 at Ocham Penel’s residence was undisputed by the 1st Respondent in his Affidavit in Support of the Answer to the Petition. Arguments were advanced on behalf of the Petitioner that the only disputed meeting was one of 12th February 2016. It is worth to note that Susu Medina’s evidence was corroborated by that of Apio Grace in her Supplementary Affidavit in Rejoinder specifically paragraphs 3 - 8 ,

pages 30 - 33 of the Petitioner's binder.

Counsel Mulalira further relied on the Affidavit in Rejoinder by Susu Medina who stated that she was requested by Benjamin Okura to meet Ernest Kiiza at Masindi Hotel. It was Susu Medina's evidence that Benjamin Okura informed her that Ernest Kiiza was buying out people who had deposed Affidavits for Kabakumba with big envelopes and would refund their transport by paying 10,000/=. Susu Medina deposed that inside the Hotel she found Mr. Ernest Kiiza and his lawyers including Katuntu, who showed her the photocopy of her identity card and read her Affidavit.

Susu was intimidated, beaten and forced to deny knowledge of her Affidavit. However, she managed to escape and reported the matter to the Area Chairperson. Later, she reported the matter to the Police vide No. 49/29/03/2016 which led to the summoning of Benjamin Okura to the Police. Thereafter, Benjamin Okura returned to her home and apologized. He requested Susu to go back to Hon. Ernest Kiiza and sign documents for which she would be paid 2,000,000/= which she refused.

Counsel for the Petitioner submitted that this was sufficient evidence to prove that the 1st Respondent gave out money to women at Ocham Penel's place. He cited the authority of Mukasa Anthony Harris vs. Dr. Bayiga Michael Phillip Lulume, SCCA No. 18/2007. In that case, while analyzing the Affidavit of Asadi in Rejoinder, who had deposed an Affidavit for the Petitioner, and for the 1st Respondent and later a Rejoinder for the Petitioner. Court observed that "if this Affidavit is believe it says a lot about the way some witnesses are made to sign the Affidavits... It

contains serious allegations about the appellant and one would have expected the deponent to be subjected to vigorous cross-examination. It was not... I therefore find that the 1st Respondent offered shs. 150,000/=." Counsel prayed that the same line of thought, Susu Medina's evidence be admitted as the whole truth, that Kiiza Ernest gave out money to the voters in Ug, shs 1,000/= and Ug. Shs 2,000/= denominations.

Mr. Mulalira also pointed out that according to the Affidavit of Ayesiga Robert Manyuru on pages 52 -56, of the Petitioner's binder, Mr. Moga, a known campaign agent of Hon. Ernest Kiiza, knocked on his car and delivered to him Ugx. 10,000/= to vote for Mr. Ernest Kiiza. On voting day, after about 3 hours, of voting, the same Chairperson Moga emerged at the Polling Station and started bribing voters who had lined up to vote. He gave each Ugx. 2,000/= as he persuaded them to vote for Mr. Ernest Kiiza. Ayesiga found this act offending so he approached the Police Election Constable, who instead of acting, chased him away leaving his friend Kaija behind.

Furthermore, Ayesiga later found a one Hamza, an agent of Mr. Ernest Kiiza opposite Kirasa II Health Centre giving money to some of the people coming to vote. Hamza would instruct them to vote for Mr. Ernest Kiiza. Ayesiga raised an alarm and one Busobozi Bashiri came to his rescue and arrested Hamza. They reported the matter to the Polling Officials but were not assisted as the Officer at the Polling Station contended that they were not Police Officers to arrest Hamza. Counsel for the Petitioner contended that the evidence of Abdul Erias Moga in Support of the 1st Respondent's Answer to the Petition should not be believed by Court as it contains a lot of denials. Moreover, Moga does not tell Court the exact time he cast his vote or the exact time he returned to his residence. Further that he did not explain why he was seen by different people at different places and that he was elusive and should not be believed.

Counsel for the Petitioner also referred to the Affidavit of Maliyamungu James who depones that on the 18th day of February 2016, he had found Akugizibwe Robert giving out money in Ugx. denominations of 2,000/= and soda at Pag Nursery School near Kijura North and Kijura Central Polling Station where he was surrounded by around 100 people. That this evidence was corroborated by the Affidavit of Isingoma Charles pages 47-52 of the Petitioner's binder and paragraphs 3-19 of the Affidavit in Rejoinder.

Counsel for the Petitioner submitted that the Affidavit of Akugizibwe Robert in Support of the 1st Respondent's Answer to the Petition contained mere denials and that it should not be relied on by Court. That he did not tell the truth.

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Several other incidents of bribery of voters were cited by Counsel for the Petitioner in his written submissions and these included those at Masindi Secondary School Polling Station. Concerning this Polling Station, Monday Allan explained that on the 18th day of February 2016 at Masindi Secondary School Polling Station, he saw Akugizibwe Robert campaigning in the line the people to vote for Mr. Kiiza Ernest, Akuguzibwe started giving out money in ugx. 2,000/= and 5,000/= denominations. Kaija Julius in paragraphs 2-11 of his Affidavit in Support of the Petition deponed that there was bribery at Kirasa Madarasa Primary School Polling Station where he saw Moga, the chairperson LCI with a huge bundle of 1,000/= ug. shs from which he kept on distributing to voters with instructions to vote for Mr. Ernest Kiiza.

At Gorora Cell Bigando Ward, Byaruhanga Sudaisi, in his Affidavit in Support of the Petition, deponed that on the 17th day of February 2016, he saw Gerald, the campaigning manager of Mr. Kiiza Ernest given money by Byenkya, a senior agent of Hon. Ernest Kiiza. Gerald gave out money in Ug. shs denomination of 5,000/= to be distributed among Byaruhanga Sudaisi, Robert and Stephen. In fact, Nongwa Maryamu was given Ug. shs 2,000/= on the 18th day of February 2016. Also Walumen Olyemu gave money to the _voters, who were heading for elections. In this regard, one Busobozi was given Ug. shs 5,000/= and Bagonza was given 3,000/= many voters were compromised and did not vote for a candidate of their choice.

Further Counsel Mulalira referred to the evidence of Bingi Moses who deponed in his Affidavit in Support of the Petition, that on the 18th day of February 2016, at around 9:30 he found Owino Santa, giving money to voters. When Santa saw Bingi Moses, he ran away using motor vehicle Reg. No. UEA 350W owned by Lopio James. He also found Anyoni Joseph giving 1,000/= to people at Bulyango 1 to vote. That motorcycle UED 639 and UDL 297D were being used to ferry people to go and vote and that they were (given 1,000/=,

Cash money given out at Bulyango II

More evidence pertained to bribery by giving out money to voters at Bulyango II Church of Uganda Polling Station. This evidence was contained in the Affidavit of Okwongi Richard, who stated in paragraphs 3-11 of his _Affidavit in support found on pages 114-118 of the Petitioner's bundle that, on the 18th day of February 2016, he saw Sunday Rose at Bulyango II Church of Uganda Polling Station, together with Owiny Charles. These two were agents of Mr. Ernest Kiiza and had a lot of money. They were stationed at a distance of 30 metres behind a car near the Polling Station and started _distributing money. Immediately after a one Atinye Alex told Okwongi that he had received 5,000/= ⁴₉ from Sunday Rose with instructions to vote for Mr. Ernest Kiiza. On the same day,

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Awino Santa who was also an agent of Mr. Kiiza Ernest was found distributing money at the main Road on the junction coming from Buliisa to Bulyanga.

She stopped people who had come to vote **and** gave each of them Ugx. 1,000/= whilst instructing them to vote for Mr. Kiiza Ernest. After the counting of votes, Okwongo heard many people jubilating for having voted Mr. Ernest Kiiza as a reward for having repaired their boreholes/Wells.

counsel for the Petitioner submitted that Sunday Rose in her Affidavit in Support of the Answer to the Petition had not disputed the fact that she distributed money for and on behalf of Mr. Kiiza Ernest and had not disputed the fact that he was a campaigning agent for Kiiza Ernest. Counsel relied on the authority of Bakaluba Peter Mukasa vs. Nambooze Betty Bakireke, Election Petition Appeal No. 4 of 2009, (SC) (p.30) to submit that if the facts as set in the Affidavit are not rebutted, they are admitted.

Awino Santa Oryem depones in Support of the 1st Respondent's Answer to **the** Petition that she did not distribute any money during voting time and **that** she returned late at night after vote counting since vote counting ended **at night**. Mr Mulalira refuted these allegations contending that they were false and should not be believed by Court. Counsel submitted that the evidence **on** record shows that vote counting only ended in **the evening not at night** as Awino Santa Oryem alleged in her Affidavit.

According to counsel the evidence of Bingi Moses was well corroborated by the evidence of Okwongi Richard. Both witnessed Awino Santa Oryem distributing money to voters on the Election Day. Learned Counsel intended that Awino Santa Oryem's appointment as President's Supervisor not restricted her movement. Rather she was facilitated and could easily move from one place to another

On motor vehicle registration number UEA 350W as per the affidavit of Bingi moses in support of the petition paragraph 9. Counsel further relied on the Affidavit of Bagenda Livingstone found on pages 128 - 132 of the petitioner's bundle dated 21st March 2016 paragraphs 5 - 9 of his Affidavit in Support of the Petition where he stated that on the 18th day of February 2016 at 4:30 before Elections started Monday and Asiimwe who were known mobilisers of Mr Ernest Kiiza came with brown envelopes and stated giving out cash to people who were in the line waiting to vote.

At this time Busobozi was given Ug shs 5,000/= and Bagonza was given Ug shs 3,000/= with the result that these voters were compromised. Further, that in the Affidavit of Muhumuza Mubiito Lawrence found on pages 139 - 142 of the Petitioner's bundle dated 21st March 2016 and particularly paragraphs 3 - 9 of the

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Affidavits in Support of the Petition, deponed that, on the 17th day of February 2016, a group led by Wabyona Wahab Byonabye who was a well known village mobiliser of Mr. Ernest Kiiza in Kitojo village gave out money to all people above 18 years. On the 18th day of February 2016, at around 8:55am, while at Kitojo Cell Polling Station, Wabyona and his group parked approximately 50 metres from the Polling Station and started giving out money to voters whilst directing them to vote for Mr. Ernest Kiiza.

There was another incident of bribery noticed at St. Jude Polling Station Katama Cell. Counsel relied on the evidence of Bagonza Margaret found on pages 143-145 of the Petitioner's bundle. In her Affidavit in support, of the petition dated 21st March 2016, paragraphs 3 - 10 she stated that, on the 17th day of February 2016, she had received a call from Abdul Rahim informing her that a group supporting Mr. Kiiza Ernest was distributing money at St. Jude Polling Station, Katama Cell. He went there with Kanti Rogers and one Jamil upon arrival, they found Kaahwa Martin a campaigner and one of the agents of Mr. Kiiza and Kahwa a manager of his Radio Station BBS. He was giving money to the voters. Mr. Ernest Kiiza created fear and the voters failed to exercise their rights to choose a leader of their choice. Counsel submitted that Kaahwa Martin in his Affidavit in Support of the Answer to the Petition, in paragraph 3, he denies ever distributing money but he does not deny his presence in the mentioned premises.

Hence, whereas Kaahwa Martin is a Publicity Secretary of NRM, the official Party of the 1st Respondent and Radio Manager for the 1st Respondent's Radio Station, he was bound to be compromised unlike Bagonza Margaret who was the agent of the Presidential candidate Amama Mbabazi. Bagonza's evidence was from an independent source which went a long way in confirming what had actually happened. Further, that at Kirasa II Catholic Church there was voter bribery. In the Affidavit dated 21st March 2016 for Mugisha Emmanuel found at pages 150 - 153, of the Petitioner's bundle, particularly paragraphs 2 - 11 of the Affidavit in Support of the Petition, he stated that, on the 18th day of February 2016, he saw Moga the LCI Chairperson with the daughter of the LC.I Chairperson Kirasa II sharing bundles of donations of Ugx. 1,000/= ,Mugisha reported Moga to the Election Constable and immediately a scuffle ensued. The Chairman went to Kirasa LC.I. That when he followed him there, he found him giving out money to voters in denominations of Ugx. 1,000/= and requesting them to vote for Mr. Kiiza. The Police was not helping. Instead was asking for photos yet Mr. Ernest Kiiza did not have a camera. Mr. Mulalira submitted that this was adequate evidence to have the issue at hand answered in the affirmative, that is, in favour of the Petitioner.

Voter bribery and Counsel for 1st Respondent's submissions

Regarding voter bribery Counsel for the 1st Respondent, Mr. Sekabanja first dealt ⁵₁ with the Affidavit of Muhumuza Mubiito Lawrence, who alleged in his Affidavit that money was

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distributed by one Wabyona Wahab Byonabye to all persons in the village, who were above 18 years. Counsel Sekabanja wondered how the witness was able to tell that all persons who received the money were 18 years and above. He argued that this was a familiar story orchestrated by the Petitioner to appear credible but was actually overcooked or as I understand it exaggerated. He considered the Affidavit of Bagonza Margaret who alleged that a group of the 1st Respondent's campaigners were giving out money to voters. Among the distributors of the money was Kaahwa Martin Isaac, an agent of the 1st Respondent. This allegedly happened at a Polling Station. Bagonza made no attempt to report to the Polling Officials or the Police Constable. She did not also state how she came to know that Martin was a known agent and was acting with the authority of the 1st Respondent. Counsel submitted that this was denied by the said Kaahwa Martin at page 59 of the 1st Respondent's Affidavit.

In his analysis, of Mugisa Emmanuel's Affidavit regarding the allegation of bribery, Learned Counsel for the 1st Respondent, Mr. Sekabanja submitted that the said Mugisa Emmanuel alleged in his Affidavit that he saw Mugisa and others waylaying voters and asking them to vote for the 1st Respondent. Counsel contended that this Affidavit was not enough evidence to show that they were acting with the knowledge and consent of the 1st Respondent because these sort of allegations had been propagated by other witnesses. According to Mr. Sekabanja it was important to note that Kirasa II was one of those Polling Stations where the Petitioner stated that the 1st Respondent was using money, palm size photos and leaflets to influence vote is. Counsel submitted that apart from the allegations of money, none of the leaflets or palm size photos were brought to Court in evidence.

Counsel for the 1st Respondent, Mr. Sekabanja dealt with the Affidavits in Rejoinder. He considered the Affidavit of Susu Media. Counsel contended that if the Petitioner wanted to prove that any witnesses were bribed in order to change their stories, she should have called them on to take the stand and be cross-examined and declare them hostile and show that there was a motive for changing their story. That this was one of the witnesses famous for seeing the 1st Respondent's agents distributing money in notes of Ug. shs. 3,000/= as per paragraph 6 page 63.

In his submissions on bribery, learned Counsel for the 1st Respondent, Mr. Sekabanja pointed out that Apio Grace who was one of the deponents in Support of the Petition in paragraph 1 of her Affidavit. It is shown that she is male yet her attached national ID showed that she is a female resident of Kibwona Cell, Kibwona Ward. Also in paragraph 3, Grace Apio deponed that she returned home at Bulyango I Trading Centre. Counsel submitted that these were different⁵₂ places. That the said witness deponed that all she got was 700/= and she voted for the 1st Respondent

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because of this inducement. Counsel contended that the 1st Respondent on the 13th February 2016 was in Nyangahya as per the PROG 1 and not in Bulyango or Kibwona.

Furthermore, the Affidavit of Susu Medina is another controversial one. She deponed in paragraph 5 of her Affidavit that the 1st Respondent came with a lot of money that was to be used to buy salt for distribution. In paragraph 6 she deponed that she had received money in the denominations of Ugx,1,000/=, 2000/= and 3,000/=. Counsel faulted this witness for alleging that she saw a Ugx.3,000/= note. That she does not state how much she received or whether she actually received the³ money or bought the salt and distributed it.

That all these allegations had been denied by the 1st Respondent. He stated that on the 13th February 2016, he was at Nyangahya Division, Kikwanana Ward, Kisengya, Kakwese I & II, Kijambura and Biizi according to Annexure PROG I. The last witness in this respect was Aseera Ronald. That the said witness in his 1st Affidavit he mentions Businge Innocent giving out money but in his 2nd Affidavit, he changes to Businge David. In paragraph 5 he also refers to David Kambona who made no reference to this incident. Hence, this Affidavit was of no use to the Petitioner's case as the deponent therein refers to two different people.

I have reviewed Counsel Sekabanja's submissions regarding the issue of voter bribery by giving out money and I only agree with him in one respect concerning the evidence of Apio Grace who deponed that she was male and yet her annexed identity card showed that she was female. Also the particulars of where she resided did not match. Moreover, I had allowed the Petitioner's prayer that her evidence expunged. Regarding the evidence of Mugisha Emmanuel and taking into account the law on agency as rightly cited by Mr. Mulalira, I am unable to agree with Counsel for 'the 1st Respondent. I deduce that the agents were were acting for and on behalf of the 1st Respondent. I equally find Mugisha's evidence concerning voter bribery well corroborated by other witnesses like Susu Medina. Her evidence proves that bribery using money was not a one off incident. Whereas she did not state how much she was given, her evidence goes to prove that there was distribution of money as a way of bribing voters. I am cognizant of Counsel Sekabanja's questioning of Medina's evidence that she saw a Ugx.3000 shilling note. This part of her Affidavit can be expunged and I accordingly do so. I therefore hold that the Petitioner managed to prove to the satisfaction of Court that there was voter bribery by the 1st Respondent in the elections conducted in the Masindi Municipality.

Conclusion

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Having made my findings on the electoral offence of bribery, on the several incidents and in the various forms, to wit; construction of wells, donations of money, football jerseys, a ball and salt. I hold that the Petitioner managed to prove to the satisfaction of court that the first respondent directly or indirectly through his agents, with his consent and approval committed the said electoral offence.

The Petitioner has proved to the satisfaction of this Court that there were several acts of bribery committed by the 1st Respondent. It is trite law that proof of a single act of bribery would suffice to set aside an election. See; Bakaluba Peter Mukasa v Nambooze Betty Bakireke SCEPA No. 04 of 2009 Pg. 37 to 38. And Paul Mwiru v Honourable Igeme Nathan Nabeta Samson & 2 others. Election Petition Appeal No. 6 of 2011 at pg. 18. Where it was held that the commission of an illegal practice once proved to the satisfaction of court is sufficient ground in its self under Section 61 of the PEA to set aside the election of a candidate as a Member of Parliament.

In the instant Petition, the Petitioner, proved more than one act of bribery, committed in various occasions, by the first Respondent. These acts of bribery where wide spread and well calculated. This was tended to tilt the balance of the results of the election against the Petitioner for instance the construction of wells and inscribing the first Respondent's name on each of the wells constructed. These actions in sum, amounted to illegal practices, particularly, the bribery of members of the community that drew water from the Wells.

1. Since illegal practices, particularly Bribery has proved to the satisfaction of this Court, it is enough to warrant the setting aside of the election pursuant to S.61 (1) (c) of the Parliamentary Elections Act and accordingly set the Elections for Member of Parliament of Masindi Municipality aside.

2. I make the following declaration and orders:

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This Petition is hereby allowed and I order as follows;

1. The process of conducting the elections for Masindi Municipality contravened the provisions and principles of National Electoral laws and other laws.
2. The 1st Respondent was not validly elected as Member of Parliament for Masindi Municipality in Masindi district and accordingly, Court hereby declares the Parliamentary seat for Masindi Municipality vacant pursuant to S. 63 (6) (b) (i) Parliamentary Elections Act.
3. The 2nd Respondent is hereby directed to organize and: conduct fresh elections in the Masindi Municipality constituency as is prescribed by the law in sections 61 (2) and 63 of the Parliamentary Elections Act.
4. The Petitioner is also awarded costs against the first Respondent. The 2nd Respondent will bear his own costs.

You have a Right of Appeal within 15 (fifteen) days from this decision.

Hon. Lady Justice Elizabeth Ibanda Nahamya

Judge

DATE: 20th July 2016