

5 THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE
IN THE MATTER OF THE LOCAL GOVERNMENTS ACT CAP 243
AND
IN THE MATTER OF ELECTORAL COMMISSION ACT.
10 ELECTION PETITION NO. 027 OF 2021

WANELOBA STEPHEN :::PETITIONER
VERSUS

1. MASABA FRED JIM MIKE
2 .ELECTORAL COMMISSION:::RESPONDENTS

15 BEFORE: HON. JUSTICE DR. BASHAIJA K. ANDREW
JUDGMENT.

Waneloba Stephen (*herein after referred to as the “Petitioner”*) and Masaba Fred Jim Mike (*herein after referred to as the “1st Respondent”*) participated in the Local Government Councils elections on 3rd February 2021, for the position of Chairperson Local Council III, for Manafwa Town Council in the Manafwa District. The election was conducted by the Electoral Commission (*herein after referred to as “2nd Respondent”*) which declared the 1st Respondent as the winner and gazatted him as such.

Dissatisfied with the outcome of the election, the Petitioner filed this petition against the Respondents, seeking orders that the election of the 1st Respondent be annulled; that the 1st Respondent vacates his seat at Chairperson LCIII Manafwa Town Council; that the Petitioner be declared the winner of the elections, and in the alternative, but without prejudice to foregoing, fresh elections be organized, and the Respondents pay costs of this petition.

Mr. Nyote Davis Innocent represented the Petitioner, Mr. Mudhumbusi Daniel represented the 1st Respondent, while Ms. Gilda Katutu and Mr. Patrick Wetaka represented the 2nd Respondent. Counsel filed written submissions and attached legal authorities which court has taken into consideration in this judgment. In the joint scheduling memorandum, counsel and parties agreed on the following issues for resolution: -

- 1. *Whether the election of the first Respondent as Chairperson LCIII Manafwa Town Council was conducted in non-compliance with the electoral laws.*

- 5 2. *Whether the non-compliance, if any, affected the results of the election in a substantial manner.*
3. *Whether the 1st Respondent committed any illegal acts or electoral offences personally or by his agents, with his knowledge, consent or approval.*
4. *What remedies are available to the parties?*

10 In *Akurut Violet Adome vs. Emorut simon Peter EPA No.40 of 2016*, the settled position is that in an election petition, the burden of proof lies on the petitioner to prove to the satisfaction of court the grounds upon which he/she relies to get an election nullified. The burden does not shift. Further, in *Sematimba Peter Simon & NCHE vs. Sekigozi EP Nos.008 & 10 of 2016*, the petitioner is required to adduce cogent evidence to prove his or her case and it has to be the kind of evidence which is free

15 from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's favour. Cogent means compelling or convincing. It is also now well established that the standard of proof in election petition is higher than that which is applied in ordinary civil cases i.e.; on balance of probability, although it is not equal to the standard of proof beyond reasonable doubt that is applied in criminal cases. See: *Hellen Adoa and Electoral Commission vs. Alice Alaso, EPA Nos. 57 & 54*

20 *of 2016*. The other principle to consider is that the more serious an allegation or the more serious its consequences if proven, the stronger the evidence has to be before a court to find that the allegations were proved on balance of probabilities. The petitioner must offer proof cogent enough to secure judgment in his favour. See: *Mujuni Vincent Kyamadidi vs. Charles Ngabirano & EC, EPA No. 84*

of 2016.

25 Regarding elections petitions in respect of Local Government Councils elections, still the petitioner bears the burden of proof and the standard of proof shall be to the satisfaction of court in accordance with section 139 of the Local Government Act. This position was re-affirmed in *Mbaghadi Fredrick Nkayi and Another vs. Dr. Nabwiso Frank Wilberforce, EPA Nos. 14 & 16 of 2011*. With these principles in mind, court will resolve the issues in the order they were framed.

30 ***Resolution of the issues:***

Issue No.1: Whether the election of the 1st Respondent as Chairperson LCIII Manafwa Town Council was conducted in non-compliance with the electoral laws.

The electoral laws being referred to in this particular case is majorly the Local Government Act Cap 243 and the Regulations made thereunder and in addition, and the Electoral Commissions Act which

35 governs the Electoral Commission generally in the conduct of elections.

5 The first aspect of the Petitioner's allegation, as non-compliance with electoral laws, is bribery. He alleged, in paragraph 6 of his affidavit accompanying the petition, that he was informed by his agents, Wakhata Brian and Bwayo Peter, that at Bubwaya primary school polling station, the agents and supporters of the 1st Respondent, to wit; Ahamad Lukuya, Sulaiman Samaali Moiti and Samanya Krisando's, gave out Ug.Shs 80,000/= to the presiding officer, and Ug.Shs.20,000/= to the polling
10 assistant and to the police constable who were at the said polling station. That after this, the named agents and other supporters of the 1st Respondent started giving out Ug. Shs.3000/= to voters asking them to vote for the 1st Respondent.

In reply, the 1st Respondent, in paragraph 10(a) (b) and (c) of his affidavit in support of the answer to the petition, denied any knowledge of the persons named to be his agents or supporters at all. Further,
15 that if they committed any illegal acts as alleged by the Petitioner and his witnesses, they did so without his knowledge and consent or approval of such acts.

In evaluating the evidence on the particular allegation of bribery, court has revisited the court record. The Petitioner stated in paragraph 6 and 7 of the affidavit accompanying the petition, that he based the allegations of bribery on information supplied to him by his agents and supervisors. He named
20 Wakhata Brian and Bwayo Peter as agents and Malunda Simon and Mandu Ivan the supervisors at Bubwaya Primary School polling stations, as his sources of information. Of these witnesses, only Wakhata Brian swore an affidavit and stated, in paragraph 8 thereof, that he saw Samanya Krisandos in the company of Ahamada Lukuya and Sulaiman Samaali Moiti give Ug. Shs. 80,000/= to the presiding officer, Ug. Shs. 20,000/= to the polling assistant, and Ug. Shs. 20,000/= to the police
25 constable. Mulyanyuma Anthony who attested to the same incident of bribery in his affidavit, was never mentioned by the Petitioner as one of his sources of information. In fact, he was not mentioned anywhere at all by the Petitioner. Mandu Ivan, who stated that he was the overall supervisor for the Petitioner in Manafwa Town Council, swore an affidavit and claimed, in paragraph 3 thereof, to have attached proof of his appointment as letter "*Annexure B*". However, no such letter was attached as
30 proof of what he claimed to be. That left solely the evidence of Wakhata Brian to prove the allegation of voter bribery.

The standard of proof in allegations of voter bribery is well settled. In *Kamba Saleh Moses vs. Honorable Namuyanga Jeniffer EPA No. 027 of 2011* it was held that the standard of proof in bribery case is slightly higher than ordinary balance of probabilities but not as high as beyond
35 reasonable doubt in criminal cases, and it must be to the satisfaction of court. In addition, it was held

5 in *Mathina Bwambale vs. Crispus Kiyonga and Electoral Commission EP No. 007 of 2007*, that three things must be satisfied, to wit; a gift must be given by a candidate or his agent with the candidate's knowledge, consent or approval; and it must be given to a voter with the intention of inducing him or her to vote or not to vote for a particular person.

As already found above, of all the persons named by the Petitioner as his sources of information about the alleged voter bribery, only Wakhata Brian swore an affidavit to prove the allegation. Wakhata Brian stated that the persons allegedly involved were agents and supporters or agents of the 1st Respondent, but he did not state how he came to know that they were supporters or agents of the 1st Respondent. It was also not stated in his evidence that whatever they allegedly did was with the knowledge, consent or approval of the 1st Respondent. These crucial facts could not be ascertained based on Wakhata Brian's affidavit as to whether the allegedly bribed persons were indeed voters. Wakhata's evidence required other independent evidence to confirm its truthfulness, but such evidence was not forthcoming. Mandu Ivan's evidence was already discredited for his failure to prove that he was indeed a supervisor as he claimed to be. In addition, the Petitioner, in paragraph 7 of his affidavit in support, only mentioned him as merely a voter, but Mandu claimed to have been appointed as supervisor by the Petitioner. These grave inconsistencies were not satisfactorily explained, and it is trite law that they could only be resolved in favour of the 1st Respondent.

The evidence adduced by and for the Petitioner, fell far too short of meeting the standard required in proving the offence of voter bribery.

As was held in *Achieng Sarah and Electoral Commission vs. Ochwo Nyakecho Keziah, EPA No. 039 of 2012*, the allegations of voter bribery are very serious and cannot be proved merely by casual evidence in an affidavit. There is need for other independent evidence to confirm that a particular witness is telling the truth about voter bribery, due to the tendency by partisan witnesses to exaggerate claims of what might have happened. Applying the same reasoning to the instant case, the evidence of Wakhata Brian regarding bribery lacked other credible independent evidence to confirm its truthfulness. This was besides the firm rebuttal by the 1st Respondent that persons attributed to him as his agents and supporters, were unknown to him and were in fact, not his agents at all. The allegations of bribery were thus not proved to the standard.

(ii). Violence, intimidation and harassment:

In paragraph 13 and 10 of his affidavit accompanying the petition, the Petitioner stated that he was informed by his polling agents that at Bubwaya primary school, Bumwangu primary school and

5 Bumayeku trading center polling stations, the Declaration of Results Forms (DRFs) were filled before voting ended, which aided in the falsification of results. In paragraph 13, the Petitioner stated that the election was marred by violence, intimidation and harassment and chasing away of his agents, voters and supporters from polling stations of Bumayeku and Bubwaya. That these acts were done by the 1st Respondent's agents and supporters with support of police, army and Resident District Commissioner (RDC) Manafwa District with the knowledge and approval of the 1st Respondent.

10 In his reply, in the affidavit in support of the answer to the petition, paragraph 13, 14 and 15, the 1st Respondent denied all the above allegations. He stated that he has no control, authority or superiority over Government or security agencies and that he was not responsible for such actions of the said agencies, and that the Petitioner has not sued the Attorney General. Further that acts of police, army or RDC, are not attributable to him and that he never commanded the alleged motor vehicle LG-15 0005071 pick-up, nor did he have any connection with its users.

After carefully evaluating all the evidence together on these particular allegations, it became clear that the Petitioner premised on purely hearsay evidence to prove the very serious allegations. In paragraph 10, of the said affidavit, he stated that; "*he received reports from his polling agents*". He does not state or name the particular agents who were his sources of information. As was held in 20 *Abdu Serunjogi vs. Ssekito [1977] HCB 242*; and *Bombay Flour Mills vs. Patel [1962] EA 803*; where a deponent deposes an affidavit based on information, the sources of his or her information shall be disclosed. A deponent must specify the different sources of information. Failure to do so renders the affidavit defective in that regard and it shall not be acted upon.

25 In the present case, a blanket statement by Petitioner that he was informed by his agents whose identities he did not disclose, renders his evidence hearsay and it cannot be acted upon. Similarly, the evidence of the other witnesses who swore affidavits in respect of the alleged violence, intimidation and chasing away voters, could not be acted upon. The Petitioner, in paragraph 10 and 13 of his affidavit in support, did not name those witnesses as his sources of information.

30 Besides the above, Sarah Akol, the Returning Officer of the 2nd Respondent for Manafwa District, totally denied any involvement of police, army and RDC in the election. In her affidavit, under paragraph (l) and (m) she swore that there were no reports of violence, chasing away or the harassment of voters as alleged. Given the 1st and 2nd Respondents' rebuttals, and in light of the weak hearsay and uncorroborated evidence adduced by the Petitioner and his witnesses, the particular allegations 35 of violence, intimidation and chasing away of voters, have not been proved to the required standard.

5 **(iii). Ballot stuffing and failure to use the biometric machines:**

The Petitioner, under paragraph 12 of the affidavit accompanying the petition, averred that the 1st Respondent's supporters were allowed to vote without being identified through the biometric machines and voters register, and that there are variances of total voters on the biometric machine against voters register, as the number of people identified by the biometric machine and voters register
10 who voted exceeded the total number of voters counted and tallied, and that showed evidence of ballot stuffing.

In reply, the 1st Respondent, in paragraphs 11(a) (b) (c) and (d) of the affidavit in support of the answer to the petition, denied the allegations.

In paragraph 11(a) he averred that all the agents of candidates signed the DRFs for the impugned
15 polling stations and no one of them lodged any complaint to the 2nd Respondent or police. In paragraph 11(b) that the Petitioner only alleged ballot stuffing where he lost which were the areas of the 1st Respondent's strong hold. In paragraph 11(d), that all witnesses of the Petitioner were his voters/agents who are only bent on vitiating the 1st Respondents' election, that they are biased and their evidence uncorroborated.

For their part, the 2nd Respondents' Returning officer in her affidavit supporting the answer, under
20 paragraph 14, swore that the polling process was strict and polling officials ensured that only registered voters participated and that one was scrutinized and verified before accessing ballot papers. In paragraph 15, she stated that the process involved ascertaining whether one's name was on national voters' register and confirming their identity by scanning of prospective voters' finger prints on
25 BVVK machine; and as such absentee voters could not access ballot papers.

In resolving the issue, all the evidence on record pertaining to the use of the BVVK machine and tally sheet was evaluated. Court, however, never came across any instance that proved or suggested the alleged ballot stuffing or variances in total voters on BVVK machine and registered voters and those who cast their votes. The burden was on the Petitioner to prove his allegation which he made in
30 paragraph 12 of his affidavit, but he attached no such proof to help court come to the conclusion that there was indeed ballot stuffing.

In *Toolit Simon Akecha vs. Oulanya Jacob L'Okori & Electoral Commission EPA No. 19 of 2011*, ballot stuffing was defined as an election malpractice which involves voting more than once either in the names of people who do not exist at all or those who are dead or absent at the time of voting yet
35 they are recorded to have voted. In the present case, the Petitioner failed far too short of meeting the

5 basic elements of ballot stuffing. No evidence of figures to support the allegation of excess votes at polling stations was furnished. Also, the allegation of failure to use BVVK machines was not corroborated and it was effectively rebutted by the 2nd Respondent's Returning officer. There was no any evidence of a reported case either to the 2nd Respondent or Police of the alleged forgery, ballot stuffing or other illegal practices/ offences. The allegations have not been proved to the required
10 standard. *Issue No.1* is answered and in the negative.

Issue No.2: Whether the non-compliance, if any, affected the results of the election in a substantial manner.

Having resolved issue No.1 in the negative, it follows that the issue whether the non-compliance affected the results of the election in a substantial manner, does not arise. *Issue No.2* is answered in
15 the negative.

Issue No.3: Whether the 1st Respondent committed illegal acts or electoral offences personally or by his agents with his knowledge consent or approval.

Throughout the entire petition and the affidavit accompanying it, the Petitioner does not point to any illegal act or electoral offences attributable to the 1st Respondent or his agents. The would - be such
20 illegal acts and offences are only attributed to some "other persons" who the Petitioner and his witnesses failed to link to the 1st Respondent. In his affidavit in support of the answer to the petition, under paragraph 7, 8 and 9, the 1st Respondent rebutted allegations of falsification of results. In paragraph 10(a) (b) (c) he rebutted allegations of voter bribery and ballot stuffing in paragraph 11 (a) (b) (c) and (d) and election violence, in paragraphs in 16, 17 and 18 thereof.

25 Counsel for the Petitioner, in their submissions, conceded that there is no evidence to pin the 1st Respondent on the allegations under issue No.3, but that the 1st Respondent definitely knew what was happening and approved the same.

In light of this clear concession by the Petitioner and his counsel that there is no evidence linking the 1st Respondent to the allegations which the Petitioner personally levelled against him, it would follow
30 the particular allegations were not proved at all. *Issue No. 3* is therefore, answered in the negative.

Issue No.4: What remedies are available to the parties?

Having failed to prove his allegations, the Petitioner is not entitled to the remedies sought. The petition is accordingly dismissed in its entirety with costs to the 1st and 2nd Respondent.

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BASHAIJA K. ANDREW

JUDGE

30th September 2021.

10 Mr. Patrick Wetaka jointly with Ms. Gilda Katutu counsel for the 2nd Respondent also holding brief
for coubnsel for the 2nd respondent present.

The Petitioner and 1st Respondent present.

Ms. Dorothy Kenyange Court Clerk present.

Judgement read in open court.

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BASHAIJA K. ANDREW

JUDGE

30th September 2021.