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**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT MBALE**

**IN THE MATTER OF PARLIAMENTARY ELECTION ACT, 2005**

**ELECTION PETITION NO. 10 OF 2021**

**BANTALIB ISSA TALIGOLA ::: PETITIONER**

10

**VERSUS**

**1. ELECTORAL COMMISSION**

**2. ORONE DERRICK ::: RESPONDENTS**

**BEFORE: HON. LADY JUSTICE IMMACULATE BUSINGYE BYARUHANGA**

**JUDGMENT**

15 **Introduction:**

This is an election petition was instituted on the 17<sup>th</sup> day of March 2021 by Bantalib Issa Taligola (hereinafter referred to as the petitioner) against the Independent Electoral Commission (herein after referred to as the 1<sup>st</sup> respondent) and Orone Derrick (hereinafter referred to as the 2<sup>nd</sup> respondent), whereof the petitioner challenged the results of the parliamentary election for Gogonyo County, Pallisa District.

The petitioner contended that the above election was conducted in contravention of the 1995 Constitution of the Republic of Uganda, Electoral Commission Act and Parliamentary Elections Act, 2005 which affected the integrity of the entire parliamentary election hence affecting the petitioner's results in a substantial manner rendering the declaration of the 2<sup>nd</sup> respondent as the winner of the Gogonyo County parliamentary seat winner as opposed to the petitioner.

The petitioner prays that court declares that the 2<sup>nd</sup> respondent was not validly elected as Member of Parliament for Gogonyo County, the election of the 2<sup>nd</sup> respondent as directly elected Member of Parliament should be set aside, a declaration that the petitioner is the validly elected Member of Parliament for Gogonyo County having obtained the highest

votes, a declaration that a fresh election be conducted in the said constituency, the Respondents pay the costs of the petition and any other remedy available under the electoral law as the court deems fit.

35 The petition was duly served on the respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed answers to the petition together with accompanying affidavits on the 26<sup>th</sup> day of March 2021 and 29<sup>th</sup> day of March 2021 respectively. The petitioner filed his supplementary affidavits on the 19<sup>th</sup> day of April 2021. The 1<sup>st</sup> respondent filled additional affidavits on the 7<sup>th</sup> day of May 2021 while the 2<sup>nd</sup> respondent filed his supplementary affidavits on the 9<sup>th</sup> day of August 2021.

#### 40 **Background**

On the 14<sup>th</sup> day of January 2021, elections for Member of parliament were conducted in Gogonyo County, Pallisa District. Among the candidates were the petitioner, 2<sup>nd</sup> respondent, Bona Gerald, Emurwon Micheal, Mukula Francis and Ourum Okiror Sam. The second respondent emerged with a total of 6,280 (six thousand two hundred and  
45 eighty) votes while the petitioner came in second place with a total of 6,214 (six thousand two hundred and fourteen votes). The 1<sup>st</sup> respondent declared the 2<sup>nd</sup> respondent winner of parliamentary election and the 2<sup>nd</sup> respondent was gazetted and sworn in as the Member of Parliament of Gogonyo County, Pallisa District.

The Petitioner filed this petition in his capacity as a candidate who lost the election,  
50 challenging the manner in which the 1<sup>st</sup> respondent conducted the election and alleging that the 2<sup>nd</sup> respondent committed election offences either personally or through his agents with his knowledge and approval during the election.

The grounds upon which the petition is premised are set down, in the petition and explained in the affidavit in support. The Petitioner's main grounds are that the 2<sup>nd</sup>  
55 respondent did not conduct the parliamentary election in compliance with the relevant electoral law. The other grounds are that the entire electoral process in Gogonyo county constituency was characterized by acts of intimidation, lack of freedom and transparency, unfairness and commission of numerous electoral offences and illegal practices contrary

60 to the provisions of the Parliamentary Elections Act, 2005, the Electoral Commission Act  
and the Constitution of the Republic of Uganda.

The 1<sup>st</sup> respondent on the other hand prayed that the petition be struck out on grounds that the entire electoral process including the campaigns, polling, counting, transmission, tallying, declaration, ascertainment and gazetting was all conducted under a free, fair and transparent atmosphere devoid of any complaint from any stakeholder.

65 In his answer to the petition, the 2<sup>nd</sup> respondent contended that the petition should be dismissed with costs because it is incompetent, devoid of merit and does not show any prejudice caused to the petitioner.

### **Representation**

The petitioner was represented by Counsel Okalany Richard of **M/s Alliance Advocates**  
70 **while** the Counsel Godfrey Musinguzi appeared for the 1<sup>st</sup> respondent and the 2<sup>nd</sup>  
respondent was represented by Counsel Mudde John Bosco of **M/s LOI Advocates**.

For determination of this petition, the parties filed a joint scheduling memorandum on 25<sup>th</sup>  
August 2021 and agreed on number of issues thus;

- 75 1. *Whether during the 14<sup>th</sup> January, 2021 Parliamentary election for Gogonyo County Constituency, there was non-compliance and failure to conduct the election in accordance with the principles laid down in the provisions of the law relating to elections.*
2. *Whether if the first issue is answered in the affirmative, such non-compliance and the failure, affected the result of the election in a substantial manner.*
- 80 3. *Whether the 2<sup>nd</sup> respondent personally committed an illegal act or any other offence under the Act in connection with the said election or with his knowledge and consent or approval.*
4. *What remedies are available to the parties?*

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## **The burden and standard of proof**

90 A petitioner, who has come to Court seeking to overturn the election results, bears the burden to prove his case according to the case of ***Col (Rtd) Dr. Kiiza Besigye versus Yoweri Kaguta Museveni & Electoral Commission - S.C. Election Petition No 1 of 2001.***

**Section 61(3)** of the Parliamentary Elections Act, 2005 provides that in a petition of this nature, the burden of proof is cast on the petitioner to prove the assertions to the satisfaction of the court on a balance of probabilities.

## **Resolution of issues**

95 **Issue No. 1:** *Whether during the 14<sup>th</sup> January, 2021 Parliamentary election for Gogonyo County Constituency, there was non-compliance and failure to conduct the election in accordance with the principles laid down in the provisions of the law relating to elections.*

### *Non-compliance with Electoral laws*

100 Counsel for petitioner submitted that according to Paragraphs 8,13 and 14 of the petitioner's affidavit in support of the petition, several votes obtained by the petitioner were not included in the tally sheet and wrong entries were deliberately posted in the declaration of results forms. Counsel further submitted that the 2<sup>nd</sup> respondent purportedly won the petitioner by 66 votes, however, according **Appendix A to Counsel for the petitioner's submission**, there is 152 excess or stray votes which is a big margin.

105 Furthermore, Counsel submitted that during cross examination, the Pallisa Returning Officer Mr. Kimbowa Erasmus (RW1) confirmed the excess votes and the errors on the declaration form. In conclusion, Counsel submitted that the errors and the manipulation of results affected the results in a substantial way.

110 In addition, counsel for the petitioner submitted that these surplus votes could only have come about by fraudulently casting these votes at various polling stations through ballot stuffing.

On the issue of the petitioner's agents being forced to sign declaration forms (DR), Counsel for the Petitioner submitted that according to paragraphs 20 and 22 of the affidavit in support of the petition, the petitioner's agents were forced to sign DR forms in  
115 a number of polling stations such as Gogonyo, Obutet, Kaukura and Apopong Sub-Counties. Counsel further submitted that this malpractice meant that the election did not meet the constitutional and legal thresholds which requires the election to be free and fair.

On the issue of denial of the right to vote, Counsel submitted that according to paragraphs  
120 13 and 23 of the affidavit in support of the petition, the 1<sup>st</sup> respondent's officials in connivance with the yellow brigade deliberately disenfranchised voters purporting to vote on their behalf by mounting road blocks leading to polling stations such as Kapala, Kadumire, Obutete and Opeta hence preventing the voters from exercising their constitutional right to vote.

Counsel for the petitioner also submitted that as part of the grounds of non-compliance with the law, the 1<sup>st</sup> respondent was misleading, misinforming and duping illiterate, blind and older voters and causing these groups of people to cast votes that were not of their choice. Furthermore, Counsel submitted that in accordance with the paragraph 19 of the affidavit in support of the petition, there was pre-ticking of ballots hence the lack of secrecy  
130 of the ballot which is contrary to the cardinal principles of the electoral process.

In conclusion, Counsel for the petitioner submitted that the petitioner had fully discharged his onus of proof that the electoral process of Member of Parliament, Gogonyo County, Pallisa District was not free and fair and that the results were fabricated and falsified.

In reply, Counsel for the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent submitted that on the 14<sup>th</sup> day  
135 of January 2021, the Parliamentary elections for Gogonyo Constituency were conducted in accordance with the laws governing Parliamentary elections. Counsel further submitted that the petitioner did not adduce any evidence to the effect that his votes were not included in the tally sheets and that all the petitioner's agents confirmed that they had witnessed the tallying of the votes at their respective polling stations and the thereafter  
140 signed at the back of the Declaration of Results forms (DR forms). Counsel relied on the case of **Hon. George Patrick Kasaja versus Fredrick Ngobi Gume & E.C EPA No.**

**68 of 2016 at page 23** where it was held that it is trite that signed DR forms are proof that the agents are satisfied with what transpired at the time of voting.

145 On the issue of 152 stray votes as per appendix A of Counsel for the Petitioner's submissions, both Counsel submitted that it is rather speculative for the petitioner to claim that the 152 votes belonged to him.

150 On the issue of Katukei Fellowship church polling station, Counsel submitted that there was no deliberate falsification of results. Furthermore, counsel submitted that according to the DR forms of Katukei Fellowship church polling station marked as exhibit **RE-2 (b)**, clearly indicates that the Petitioner garnered 71 votes and not 171 votes as claimed. In addition, counsel submitted that the Petitioner's agents namely Ochan Peter and Ariong Peter appeared in court for cross examination and confirmed that they signed on the declaration forms confirming the results. More to that, Counsel for the 2<sup>nd</sup> respondent submitted it is a wonder why the petitioner did not bring up this issue during the application  
155 for recount but rather raised it over 60 days after gazettelement.

On the issue of the petitioner's agents being forced to pre-sign declaration forms, Counsel submitted that there were no reported incidents of pre-signing of DR forms and that all the polling agents at the affected polling stations confirmed that the elections were conducted in strict compliance with the electoral laws.

160 On the issue of disenfranchisement, counsel submitted that the petitioner had not adduced substantial evidence to prove this electoral offence and that rather the petitioner ought to have produced actual voters who were allegedly disenfranchised.

165 In relation to the issue of intimidation and harassment of voters, counsel submitted that it is evident from the evidence adduced in court, that the election was conducted in a fair and free environment. More to that, counsel stated that there are no known agents of the 2<sup>nd</sup> respondent that were involved in intimidation or harassment of voters, taking over of polling stations and grabbing of election materials.

170 On the issue of ballot stuffing, counsel submitted that the said 152 stray votes arose from the number of male and female voters who according to the 1<sup>st</sup> respondent's officials were used in gender participation analysis but not in ascertaining the winner of the election.

Furthermore, counsel submitted that the 1<sup>st</sup> respondent's officials testified that some of the voters were only interested in voting for President and not Member of Parliament and as such voter turn up in respect of gender cannot be used as a yardstick to determine the outcome of the election.

175 In addition, counsel submitted that there was no reported incident of ballot stuffing, pre-ticking or impartiality on the part of the election officials since everything was done by the 1<sup>st</sup> respondent in the presence of all the candidates' agents and as such issues of bias were baseless.

180 Finally, on the issues of misleading of illiterate voters, not observing the requirement of the secret ballot, failure to use indelible ink, preventing of the petitioner's agents from raising complaints and refusal by Electoral Commission (EC) to resolve complaints, counsel submitted that the petitioner had not adduced substantial evidence to prove any of the above claims. Furthermore, counsel for the 2<sup>nd</sup> respondent submitted that the 1<sup>st</sup> respondent put in place avenues to record complaints from the candidates and their  
185 agents however, the petitioner and his agents did not record any complaints but rather the petitioner's agents signed at the back of the declaration forms after the tallying of the results. Counsel invited court to find that the 14<sup>th</sup> of January 2021 Parliamentary elections of Gogonyo Constituency were conducted in accordance with the law.

**Article 61 (1) (a), (b), (f), and (g) of the 1995 Constitution of the Uganda, (as**  
190 **amended)**, the Electoral Commission (herein referred to as the 1<sup>st</sup> respondent) has the following functions;

- a) To ensure that regular, free, fair elections are held;
- b) To organize, conduct and supervise elections and referenda in accordance with this Constitution;
- 195 c) To hear and determine election complaints arising before and during polling;
- d) To formulate and implement voter educational programmes relating to elections;

Bantalib Issa Taligola (PW1) testified that his polling agents participated in opening of polling material and counting of ballot papers. Furthermore, PW1 testified that most of his

agents were above 18 years and that they were given declaration forms from the polling  
200 stations.

PW1 equally testified that he was personally present at the tally center with some of his  
agents and that he supervised the polling stations through his agents. During his cross  
examination by counsel for the 2<sup>nd</sup> respondent, PW1 told court that there were  
mechanisms for filing complaints at the polling stations however, these complaints were  
205 not lodged. Furthermore, PW1 testified that by the time he applied for a recount, he had  
gone through all the declaration forms however, in his application for recount, he did not  
mention the results of Katukei Fellowship Church polling station where the petitioner  
claims that he garnered 171 votes instead of the 71 votes that the 1<sup>st</sup> respondent recorded  
but rather PW1 raised this issue in his supplementary affidavit which was filed on the 19<sup>th</sup>  
210 of April 2021.

PW1 testified that he did not agree with the results because at Osiepai LC 1 polling  
station, 261 people were recorded to have voted but the votes counted are 258 i.e. 248  
votes cast and 10 as rejected votes, there was only one spoilt vote and 138 unused  
ballots. At page 31 of the Petitioner's supplementary affidavit, (Volume II filed on 19<sup>th</sup> April  
215 2021), PW1 deposed that at Aujabule Church polling station (Annexure D), there was a  
total number of 376 ballot papers cast however, the declaration form shows 373 votes  
with 224 unused ballots from the 600 issued ballots. PW1 further testified that in respect  
of Kakurach Town Council polling station the figures do not add up because the scores  
for candidates when added one does not get 326 votes as recorded. According to PW1  
220 the total votes scored for all candidates is 325 instead of 326.

PW1 also testified that in the DR form of St Grace polling station, 266 people voted and  
261 ballots were counted hence a balance of 5 unaccounted for votes. PW1 also testified  
that at Opeta Primary school polling station, 237 votes were cast and 18 were invalid  
making a total of 255 votes. At Cheele polling station, PW1 testified that there were 2  
225 unaccounted for votes. According to PW1's evidence in cross examination, at Cheele  
polling station 369 people voted and the ballot papers issued were 367 which left a deficit  
of 2 votes that were not counted.



230 Ariong Peter (PW8) testified that he was the petitioner's polling agent at Katukei Fellowship church polling station and that he left the polling station at around 4:30pm and that that voting was closed at 4:00pm. Furthermore, PW8 also testified that he waited until the completion of the voting process. PW8 Told court that the petitioner scored 171 votes and that 2<sup>nd</sup> respondent scored 60 votes. He further testified that he was forced to sign the declaration forms by the presiding officer. One would wonder why the petitioner did not raise an issue in respect of the Katukei Fellowship church polling station results during the vote recount application and raised this issue in his supplementary affidavit.

240 Secondly, according to the evidence on record, PW1, PW2, PW3 among others testified that the election process was peaceful and they did not witness any malpractices. In addition, the petitioner (PW1) testified that he together with his agents attended electoral training as provided by the 1<sup>st</sup> respondent. It thus baffles me when some of the petitioner's witnesses testified that they did not know about the procedure of filing complaints on election day, or that they were forced to sign the declaration forms without producing any evidence to that effect.

245 Article 68 (3) of the 1995 Constitution and Section 47 (3) of the Parliamentary Elections Act, entitles a candidate to be present in person or through their agents at each polling station and at the place where the returning officer tallies the votes for each candidate. In the case of **Amoru Paul & EC versus Okello John Baptist Election Petition Appeals No. 39 and 95 of 2016**, the Court of Appeal noted that "*a candidate is entitled to be present in person or through his or her representatives or polling agents at the polling station throughout the period of voting, counting votes and ascertaining of the results of the poll. This is for the purpose of safeguarding the candidate's interest with regard to all stages of the counting, tallying recounting process.*"

255 In the instant case, the petitioner (PW1) told court that his agents were present at the polling stations and this was corroborated by his witnesses who testified that they were present at their respective polling stations as agents. They further testified that they witnessed the counting and tallying of the votes after which the respective declaration forms were signed.

Whereas some of the witnesses claim that they were forced to sign the declaration forms, there is no proof of the same since there are no complaints recorded to that effect on the declaration forms. I have studied the declaration forms attached to the petitioner's  
260 petition, there is space on page 2 of each declaration form which states, "*where any agent refuses to sign he/she should record reasons in the space provide below*" "*where any agent refuses to sign or fails to record the reasons for his/ her refusal to sign, the presiding officer must record the facts of the refusal or failure.*" I have not seen any single complaint raised by any of the petitioner's agents.

265 Furthermore, some of the petitioner's witnesses claim that they made verbal complaints and did not record the complaints themselves since they are illiterate. I find that this is an excuse. RW1 (Mr. Erasimus Kimbowa, the Pallisa District Registrar of Electoral Commission) testified that he conducted electoral training which evidence was corroborated by RW7 and other respondents' witnesses. This means that even if the  
270 petitioner's agents had refused to fill in their complaints, at least, the presiding officers in the respective polling stations would have filled in the complaints. However, that is in not the case but rather the respondents' witnesses testified that they counted the votes in the presence of all the candidates' agents which evidence is proved by the petitioner's agents' signatures on the declaration forms.

275 In relation to Katukei Fellowship church polling station where the petitioner claims that he scored 171 votes as opposed to the 71 votes that the 1<sup>st</sup> respondent's agent announced, the declaration forms are public documents which are kept in the custody of the 1<sup>st</sup> respondent and are produced upon application by anyone upon being certified by the electoral commission. According to exhibit RE2 (b) being a declaration form for Katukei  
280 Fellowship Church, having been certified as the true copy by the Secretary of Electoral Commission on the 28<sup>th</sup> day of April 2021, it shows that Bantalib Issa Taligola (petitioner) scored 71 (seventy-one) votes while Orone Derrick (2<sup>nd</sup> respondent) scored 60 (sixty) votes.

**Section 75 of the Evidence Act**, requires certification of public documents. I am alive  
285 to the provisions of **Section 1 of the Evidence Act which makes it inapplicable to evidence adduced by affidavit**. However, it should be noted that what is in contention

is a public document which was attached to the 2<sup>nd</sup> respondent's supplementary affidavit in the answer to the petition. As earlier mentioned, declaration forms are public documents. A party who wishes to rely on them has to have them certified in accordance  
290 with Section 75 of the Evidence Act. In the case of **Kakooza John Baptist versus EC & Anthony Yiga Supreme Court Election Petition Appeal No. 11 of 2007**, *it was held that without certification, such documents cannot prove any fact which they sought to prove. The position of the law is that documents had to be proved by primary evidence except as provided in Section 64 of the Evidence Act which is to the effect that a party*  
295 *wishing to rely on uncertified documents is required to give notice to the party in possession of the original document.*

The 2<sup>nd</sup> respondent attached a certified copy of the declaration form of Katukei Fellowship polling station which is proof of what each candidate scored at the said polling station and as such by law that is what this court is bound to rely on unless the contrary is proved  
300 with authentic evidence.

The petitioner raised several complaints such as the 1<sup>st</sup> respondent not including some of his votes in the final tally sheet, forcing of the petitioner's polling agents to sign declaration forms, denial of the petitioner's voters from voting, intimidation and harassment of voters, the 2<sup>nd</sup> respondent's agents storming and taking over the polling  
305 stations, ballot stuffing by the 1<sup>st</sup> respondent's agents, pre-ticking of ballot papers, bias by the 1<sup>st</sup> respondent's officials, misleading of illiterate voters, failure to observe the requirement of a secret ballot, failure to use indelible ink, preventing of the petitioner's agents from presenting complaints, and refusal of the 1<sup>st</sup> respondent to resolve complaints.

Whereas, the petitioner raised these complaints, it is clear from the evidence on record  
310 that the petitioner and his agents were present at the polling stations and they were able to supervise the said polling stations. Furthermore, petitioner's and respondents' witnesses testified that the elections were conducted in a peaceful manner and that the petitioner's agents signed the declaration forms because they were present during polling,  
315 vote counting and tallying of the votes at their respective polling stations. For instance PW3 told court that he was at Odukurwo polling station and there was no violence.

The petitioner has not brought any substantive evidence to prove the complaints raised in his petition in relation to ballot stuffing, harassment and intimidation of voters, misleading of illiterate voters among others. The petitioner did not adduce any evidence  
320 to prove these claims.

In the case of **Amoru Paul & EC versus Okello John Baptist (supra)**,

*“.... none of the respondent’s agents recorded any complaints or raised any objections. Rather, they signed declaration of results (DR) forms confirming the results from various polling stations. It was not sufficient for them to depose in their  
325 affidavits that they made complaints to the returning officers and polling assistants which were not addressed. Cogent and sufficient evidence had to be produced to prove these allegations to the satisfaction of the court. DR forms contain provision for registration of complaints and where agents have not taken advantage of the same, they are generally estopped from raising the complaints subsequently  
330 though this is not a hard and fast rule.....”*

In this case, it is not enough for the petitioner to claim in his affidavit that the respondents are guilty for pre-ticking of ballot papers, bias by the 1<sup>st</sup> respondent’s officials, misleading of illiterate voters, among other without adducing any cogent evidence.

Therefore, I find that the petitioner has failed to discharge his burden on a balance of  
335 probabilities that there was non-compliance and failure to conduct the election in accordance with the principles laid down in the provisions of the law relating to elections.

**Issue No. 2:** *Whether if the first issue is answered in the affirmative, such no-compliance and the failure, affected the result of the election in a substantial manner.*

Counsel for the petitioner submitted that the malpractices complained of by the petitioner  
340 in issue 1 swung the contest in favour of the 2<sup>nd</sup> respondent hence affecting the election in substantial manner as against the petitioner hence substantially reducing the petitioner’s chances of winning the election. Counsel relied on the case of **Rtd Col. Kizza Besigye versus Yoweri Kaguta Museveni & Electoral Commission Presidential Election No. 1 of 2001.**

345 Furthermore, Counsel submitted that as far as the reduction of the votes in Katukei  
Fellowship Church from 171 to 71, the petitioner would have won the entire election by  
34 votes. More to that, Counsel also submitted that there was an excess of 152 votes in  
several polling stations such as Kapala LC I, Ogurutap, Kachang, Angodi, Odukurwo,  
Aujabule, Kakurach, Katukei, Agurur and Osiepai. Counsel argued that there were 42  
350 uncounted votes in Cheele Central, Oluwa Aperosi and Agurur Primary School, Kapala  
Primary school, Kapala market, Opeta Primary School, Osiepai LCI Court, and Kakurach  
T/C. In conclusion, Counsel submitted that all these malpractices substantially reduced  
the petitioner's chances of winning the election and should the results of these polling  
stations be cancelled, the petitioner shall win the election by 343 votes.

355 In reply, Counsel for the 1<sup>st</sup> respondent submitted that **Section 61 (1) (a) of the  
Parliamentary Elections Act**, requires the petitioner to prove that noncompliance  
affected the petitioner in a substantial manner.

Counsel submitted that it has been proved that the Parliamentary election of Gogonyo  
Constituency was conducted in compliance with the electoral laws and that the  
360 Petitioner's polling agents freely signed the DR forms after tallying of results was done in  
their presence.

Secondly, counsel submitted that there is no proof that the 42 uncounted votes belonged  
to the petitioner and equally there is no evidence to prove that the 152 stray votes were  
equally in favour of the petitioner and as such it would be wrong of the petitioner to  
365 assume such.

Thirdly, counsel submitted that the petitioner's polling agent at Katukei Fellowship Polling  
station confirmed in court that he signed the declaration form confirming the votes the  
petitioner's votes as 71 votes and not 171 votes. Furthermore, counsel submitted that  
with close scrutiny, it is shows that there was an alteration of the results by inserting "one  
370 hundred" above the already written "seventy-one".

Counsel for the 2<sup>nd</sup> respondent submitted that the alleged excess votes in Kapala LC1  
and other polling station rose only from the differences between the male and female  
voters which were used for gender voter participation analysis and this did not affect the

375 candidates' actual votes. Therefore, counsel submitted that outcome of the Member of Parliament election for Gogonyo Constituency was not substantially affected and the results of the election are the true will of the people of Gogonyo Constituency.

It is important to note that non-compliance with electoral law per se is not enough to overturn the outcome of an election. The non-compliance has to be so significant as to substantially affect the results.

380 **Section 61(1) (a) of a Parliamentary Elections Act** requires the petitioner to prove that the non-compliance affected the results or the outcome of the election in a substantial manner. Furthermore, the election of a candidate as a Member of Parliament may be set aside for 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  
385 principles laid down in those provisions and that the non-compliance and the failure affected the result of the election in a substantial manner. This position was confirmed by the Court of Appeal in **Akuguzibwe Lawrence versus Muhumuza David and Mulimira Barbara and Electoral Commission Election Petition Appeal No. 22 of 2016** where the non-compliance identified by the trial judge related to 2 out of 91 polling stations. The  
390 Court of Appeal held that this did not justify nullifying the election, as this would have the effect of disenfranchising the people in the remaining 89 polling stations. That is is not mentioning the tension among the population that is normally experienced during campaign and election time.

The courts have come out to say that the test of substantial effect may be both qualitative  
395 and quantitative which means that the quantitative approach takes a numerical approach to determining whether the non-compliance significantly affected the results. In the case of **Opendi Achieng Sarah versus Electoral Commission & Ayo Jacinta Election Petition No. 59 of 2016**, *it was held that in assessing the effect of non-compliance, the court had to consider the effect of each category of non-compliance individually and also*  
400 *the process of the election. Court had to evaluate the whole process of the election to determine substantial effect.*

In the instant case, the petitioner raised several electoral malpractices as against the respondents. Furthermore, the petitioner also raised issues with 18 polling station out of the 62 polling stations. I shall reiterate my decision on the issue of discrepancy in the

405 results of Katukei Fellowship polling station, the 2<sup>nd</sup> respondent produced a certified copy of the declaration form of the said polling station which shows that the petitioner scored 71 votes as opposed to the 171 votes that the petitioner claims to have scored.

According to Appendix A to the Counsel for the Petitioner's submissions, the following analysis and observations were made by Counsel for the Petitioner;

- 410 **1)** In Kapala LC1 Court Mango Tree, there is an excess of 5 ballots that are not accounted for.
- 2)** In Kachango Primary School, there is an excess of 9 votes.
- 3)** In Angodi Kateki T/C, there is an excess of 16 votes, a deficit of 1 vote and 17 unaccounted for ballots.
- 415 **4)** At Aujabule PAG Church, the total number of cast votes was 376 and yet there is an entry of 373 votes cast leaving 3 extra votes that were counted.
- 5)** In Odukurwo T/C, there is an excess of 6 votes.
- 6)** In Ogurutap LC Court, there is an excess of 108 ballots which according to the petitioner's lawyers are indicative of stray ballots, ballot stuffing and multiple voting.
- 420 **7)** At St. Grace Nursery & Primary School, there is a deficit of 5 votes and an excess of 4 votes.
- 8)** In Cheele Central PAG, there are 2 unaccounted for ballot papers.
- 9)** In Oluwa Aperosi Mango Tree polling station, there are 2 unaccounted for votes.
- 10)** In Katukei Fellowship Church polling station, there is an extra 1 vote that is not  
425 accounted for. Furthermore, Counsel for the petitioner submitted that 100 of the petitioner's votes were removed. More to that, the petitioner claims that he and two other candidates namely Emurwon Micheal and Mukula Francis attached their original DR forms of Katukei fellowship polling station that were given to them the 1<sup>st</sup> respondent's agents which the 2<sup>nd</sup> respondent did not do and such the exhibit  
430 RE2 (b) is doctored.
- 11)** In Agurur Primary School polling station, 1 vote was omitted and also there is an excess of 2 votes because the voter turnout is allegedly higher than the recorded number of votes cast.
- 12)** At Kakurach T/C, there is 1 vote that was omitted.

- 435       **13)**In Oseipai LC1 Court, there are 3 that are not accounted for.
- 14)**In Opeta Primary School polling station, there are 18 extra ballot papers that were  
          not accounted for by the 1<sup>st</sup> respondent.
- 15)**In Kapala Market, there were 10 excess votes.
- 440       **16)**Finally, at Kapala Primary School polling station, the ballot papers counted are  
          more than the voters of the day and as such an excess of 4 votes.

Whereas, Counsel for the Petitioner has made this analysis the question in this Court's mind is **“what shows that these excess votes belonged to the petitioner and not any of the other five candidates that contested for the Member of Parliament seat for Gogonyo County, Pallisa District.**

445       PW1 testified that he did not witness the electoral malpractices but rather that he was just told. PW1 also testified that on the declaration forms, there is space for recording reasons for refusal to sign. However, PW1's polling agents who testified told court that they received electoral training from the 1<sup>st</sup> respondent before the elections. For instance, PW2 told court that he participated in the meetings with EC prior to voting. This implies that the  
450       petitioner's agents must have participated in the trainings by the EC.

In **Adoa Hellen and Electoral Commission versus Alaso Alice Election Petition Appeal No. 57 and 54 of 2006**, *it was held that it is not sufficient for the respondent to only establish that electoral malpractices or irregularities did occur. The respondent had a duty to establish that the said electoral malpractices were of such a magnitude that they*  
455       *substantially and materially affected the outcome of the electoral process and as such she failed to discharge this burden.*

In the instant case, there are clear arithmetic errors but it would be unjust to order for a bye election without proof that the excess votes indeed belonged to the petitioner as opposed to any other candidate. Furthermore, the petitioner has not discharged his duty  
460       and burden of proving the electoral malpractices and if any that they were committed by the 2<sup>nd</sup> respondent or his agents with the 2<sup>nd</sup> respondent's consent. In such petitions, one candidate will say what favours his case or the other party which is why there is need to prove one's case on balance of probabilities.



In **Adoa Hellen and Electoral Commission versus Alaso Alice (supra)**, at the Trial  
465 Court, the respondent alleged that the following irregularities had occurred;

- a. Excess unused ballot papers, unexplained ballot papers and alteration of results which affected the results in a substantial manner.
- b. Harassment and arrest of supporters of the respondent by military personnel.
- c. Bribery
- 470 d. Donation of an ambulance by the appellant.
- e. Validity of the election due to non-compliance with the law and commission of electoral offences

Although the Court of Appeal came to the same conclusion as the High Court that the Electoral Commission should conduct a fresh election, it also noted that the total number  
475 of ballot papers exceeded the ballot papers that had been issued, it was the decision of the appellate court that the said irregularity did not have effect on the actual votes cast. Court further held that there was no evidence adduced to suggest that at the time of voting there were any ballot papers already in the ballot boxes at the polling station.

In the instant case, the petitioner has not been able to prove that the said arithmetic  
480 irregularities affected the petitioner's results in a substantial manner or would have changed the outcome of the election in favour of the petitioner. On the issue of the results of Katukei Fellowship polling station, the 2<sup>nd</sup> respondent produced a certified copy of the DR form for Katukei Fellowship polling station as certified by the 1<sup>st</sup> respondent.

It is not sufficient to show that there had been irregularities in the election. It has to be  
485 proved that the non-compliance/ irregularities affected the result of the election in a substantial manner. The principle is that an election should not be set aside basing on trivial errors and informalities.

The 1<sup>st</sup> respondent is the custodian of electoral documents and in this case declaration of results forms which documents are public documents. Under Section 75 of the  
490 Evidence Act, public documents must be certified if they must be adduced in court as evidence. Whereas the petitioner claims that exhibit RE2 (b) is a forgery, there is no proof to that effect apart from the petitioner's assertions.

Therefore, I find that the petitioner has failed to prove that alleged non-compliance affected the results of the election in a substantial manner.

495 **Issue No. 3:** *Whether the 2<sup>nd</sup> respondent personally committed an illegal act or any other offence under the Act in connection with the said election or with his knowledge and consent or approval.*

Counsel for the petitioner submitted that the 2<sup>nd</sup> respondent committed bribery contrary to Section 68 of the Parliamentary Election Act which is proved by the evidence of Kowa Joseph and confirmed by Mukaya Alex during his cross-examination. Counsel relied on the cases of **Achieng Sarah Opendi & Anor versus Ochwo Nyakecho EPA No. 39 of 2011 and Yorakamu Katwiremu Bategana versus E.D Mushemeza & ors Election Petition No 1 of 1996.**

505 Counsel also submitted that the 2<sup>nd</sup> respondent turned up at a number of polling stations while being escorted by armed policemen and that the 2<sup>nd</sup> respondent has not adduced any evidence to prove that he was entitled to move with armed police officers as was held by **Justice Engonda Ntende in Musinguzi Garuga James versus Amama Mbabazi & Anor at pages 62-64.**

510 Thirdly, Counsel for the petitioner submitted that the Presiding officers made false returns contrary to Section 78 of the Parliamentary Electoral Act. Counsel further submitted that during cross examination, the presiding officers confirmed that there were errors and falsehoods in the DR forms which made their actions criminal.

515 Counsel for the 2<sup>nd</sup> respondent submitted that the petitioner claims that the 2<sup>nd</sup> respondent in connivance with the 1<sup>st</sup> respondent committed several electoral offences such as bribery, canvassing for votes at a polling station, armed personnel escorting the 2<sup>nd</sup> respondent at polling stations, sectarian statements and making of false returns were not proved by evidence.

520 In reply to these accusations, Counsel for the 2<sup>nd</sup> respondent submitted that the petitioner has not adduced any evidence to prove these claims against the 2<sup>nd</sup> respondent. In addition, counsel submitted that during cross-examination, none of the witnesses were able to adduce evidence of the money that was received from the 2<sup>nd</sup> respondent and

neither were they able to prove that the 2<sup>nd</sup> respondent canvassed votes on election day, was controlling security officials on election day or that the former authored any purported sectarian statements. Therefore, Counsel submitted that the 2<sup>nd</sup> respondent or his agents  
525 did not personally commit any illegal acts or electoral offences and neither did the 2<sup>nd</sup> respondent have any knowledge or consent of the same.

## **Bribery**

**Section 68 (1) of the Parliamentary Elections Act** provides that;

530 *“A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy-two currency points or imprisonment not exceeding  
535 three years or both.”*

In the case of **Apolot Stella Isodo versus Amongin Jacqueline Election Petition Appeal No. 60 of 2016** while citing the case of **Dr. Kizza Besigye versus Yoweri Kaguta Museveni & the Electoral Commission Presidential Election Petition No. 1 of 2001**, the **Court of Appeal** stated that the offence of bribery has three ingredients: i)  
540 a gift was given to a voter; ii) the gift must be given by a candidate or their agent and iii) it must be given with the intention of inducing the person to vote a particular candidate.

In the case of **Amoru Paul & EC versus Okello John Baptist, Election Petition Appeals Nos. 39 and 95 of 2016**, it was held that bribery is a grave illegal practice and had to be given serious consideration. The standard of proof is required to be slightly  
545 higher than that of ordinary civil cases. It does not, however require proof beyond reasonable doubt as in the cases of a criminal nature. What is required is proof to the satisfaction of the court. It was held inter alia that the court is required to subject each allegation of bribery to thorough and high level scrutiny and to be alive to the fact that in an election petition, in which the prize was political power, witnesses who are invariably  
550 partisan might resort to telling lies in their evidence in order to secure judicial victory for their preferred candidate.

In the instant case, PW4 (Omudu Simon) testified that an agent of the 2<sup>nd</sup> respondent called Buyinza gave him Ugx 230,000 in denominations of Ugx 1,000. He further testified that he was not aware about Mr. Buyinza's letter of appointment as the 2<sup>nd</sup> respondent's agent. This evidence is corroborated by PW9 (Kowa Joseph), PW13 (Olupot Mubaraka), PW14 (Okiriyo Magidu) who testified that they got money from the 2<sup>nd</sup> respondent which they distributed to other people to vote for the 2<sup>nd</sup> respondent.

According to the Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 15, paragraph 695, clear and unequivocal proof is required before a case of bribery would be held to have been established. Mere suspicion is not sufficient and the confession of the person alleged to have been bribed is not conclusive.

In the instant case, save for the petitioner's witnesses stating that they were given money by the 2<sup>nd</sup> respondent and the 2<sup>nd</sup> respondent's agents, there is no cogent evidence to prove the offence of bribery. In the case of **Aisha Kabanda versus Mirembe Lydia Daphne, EC and Returning Officer EPA No. 90 of 2016**, *it was held that a court of law cannot annul an election on mere alleged voter bribery and non-compliance by the respondent and speculation without cogent evidence to prove the said allegation.* Furthermore, the courts have also stated that during election petitions which are highly partisan and supporters are likely to go to any lengths to establish adverse claims. Therefore, it is important to look for cogent, independent and credible evidence to corroborate claims to satisfy court that the allegations made by the petitioner are true. This position was stated in **Kabusu Moses Wagabo versus Lwanga Timothy Mutekanga & Electoral Commission Election Petition No. 15 of 2011.**

It is not enough for the petitioner and his witnesses to allege that the 2<sup>nd</sup> respondent bribed the voters without any concrete proof. The petitioner's witnesses during cross examination were asked to produce concrete evidence to prove that they were bribed but they did not produce any evidence apart from their assertions.

Therefore, the offence of bribery has not been proved to the satisfaction of this court.

**Canvassing for votes at a polling station contrary to Section 81 (1) (a) of the PEA**

580 **Section 81 (1) (a) of the PEA** prohibits canvassing of votes within 100 metres of any polling station or the use of slogans on polling day. During the hearing, the petitioner and his witnesses testified that the 2<sup>nd</sup> respondent openly canvassed for votes on election day. PW5 testified during cross examination that he witnessed police men carrying guns threatening voters and telling them to vote the 2<sup>nd</sup> respondent. PW5 testified that he was  
585 he was the petitioner's polling agent at Obudet Sub-County but later he testified that the 2<sup>nd</sup> respondent spoke to him at Manga Polling station and at the end of voting he was at Oburuta Polling station. Court wonders where exactly this witness was on voting day.

The petitioner has not adduced any cogent evidence to show how the 2<sup>nd</sup> respondent canvassed votes on election day. Canvassing has not proved to the satisfaction of this  
590 court. Mere allegations and assertions do not amount to evidence. There must be proof.

#### **Armed Personnel escorting the 2<sup>nd</sup> respondent at polling stations**

**PW5** testified that the 2<sup>nd</sup> respondent found him at Manga Polling station while being accompanied by police officers who were armed with guns. This evidence is corroborated by PW6 (Twaha Kisu)'s evidence who testified that he also saw the 2<sup>nd</sup> respondent at  
595 Gogonyo accompanied by a police officer. PW6 later testified that at Ogurutap LC I polling station, the 2<sup>nd</sup> respondent came with an armed police man and he protested verbally but did not make a formal complaint.

PW6 testified that he holds a Masters' Degree and was the Petitioner's strategist. One then wonders why this witness did not make a formal complaint. PW6 in his testimony  
600 said that the 2<sup>nd</sup> respondent is not a security operative but on election day was with a security operative.

The question at hand is what is the nexus between the 2<sup>nd</sup> respondent and the security operatives. The petitioner has not proved whether the security operatives were found under direct employment by the 2<sup>nd</sup> respondent. Therefore, the 2<sup>nd</sup> respondent has failed  
605 to prove this electoral offence

#### **Sectarian statements contrary to Section 22 (6) and (9) of the PEA and Making false returns contrary to Section 78 of the PEA.**

The petitioner claims that the 2<sup>nd</sup> respondent falsely and maliciously linked the petitioner to the Jihad war with the intention of inciting voters against voting for the petitioner. In  
610 respect of the offence of making false returns, counsel for the petitioner submitted that the presiding officer confirmed errors and falsehoods in the declaration forms.

As earlier stated, the petitioner has still not produced cogent evidence to link the 2<sup>nd</sup> respondent to the offence of sectarian statements. Furthermore, there is no evidence to prove that the 2<sup>nd</sup> respondent authored the letter dated 11<sup>th</sup> January 2021 and with an  
615 intention of inciting voters. (Annexure “C” to the supplementary affidavit of Odongo Micheal in support of the petition filed on 17<sup>th</sup> March 2021 paragraph 6 thereof).

On the issue of making false returns, whereas the RW1 (Erasmus Kimbowa, Returning Officer of Pallisa District) confirmed that there were arithmetic errors in some of the DR forms, the issue is whether these arithmetic errors would have made a difference in the  
620 outcome of election. More to that there is no proof that the excess votes belonged to the petitioner.

I shall reiterate my earlier decision, this is an election petition, witnesses will make all sorts of assertions to prove their case but without cogent evidence to prove that the 2<sup>nd</sup> respondent participated in these offences hence these claims cannot stand.

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

Counsel for the petitioner submitted that the petitioner had discharged his burden of proving all the above grounds and as such prayed that this court finds that the petitioner was the one who won the election. Furthermore, Counsel submitted that in the spirit of not wasting the scarce resources in holding a fresh election, that the petitioner should be  
630 announced the winner of the parliamentary election of Gogonyo County, Pallisa District.

In reply Counsel for the 2<sup>nd</sup> respondent submitted that this Court upholds the 2<sup>nd</sup> respondent's victory and dismisses the petition with costs.

Having found that the petitioner has failed to produce sufficient evidence to prove his case against the respondents, I find order as follows;

- 635 a. The 1<sup>st</sup> respondent conducted a free and fair election for Gogonyo County constituency, Pallisa District.
- b. The 2<sup>nd</sup> respondent was validly elected as Member of Parliament for Gogonyo County Constituency, Pallisa District.
- c. The petitioner's petition is dismissed with costs to the respondents.

640 **I SO ORDER**

Judgment delivered at the High Court, Mbale Circuit this 12th day of October 2021.

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**IMMACULATE BUSINGYE BYARUHANGA**

645 **JUDGE**

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## OBITER DICTUM

660 On the 7<sup>th</sup> day of September 2021, Counsel for the petitioner wrote a letter to the Registrar High Court, Mbale under reference number AA/OK/157/21 where he stated that Advocate Angura Emmanuel who commissioned the 2<sup>nd</sup> respondent's affidavits purportedly did so without having been gazetted as commissioner for oaths in accordance with Section 1 (3) of the Commissioner for Oaths (Advocates) Act and as such makes all the 2<sup>nd</sup> 665 respondent's affidavits that were commissioned by Advocate Angura null and void. Counsel for the petitioner noted in his letter that once an illegality is brought to the knowledge of the Court, it overrides all issues of the court.

This letter has no bearing on the proceedings in the instant case. First, on the 31<sup>st</sup> day of August 2021, I had Counsel for the petitioner's submissions on the preliminary points of 670 law particularly on the issue Counsel Angura Emmanuel's practicing certificate and evidence was adduced to prove that Counsel Angura Emmanuel had a valid practicing certificate that had been issued on the 26<sup>th</sup> March 2021 and Counsel commissioned the 2<sup>nd</sup> respondent's affidavits on the 27<sup>th</sup> of March 2021. At no single point did counsel for the petitioner bring to court's notice the issue of gazetting.

675 The trial of this petition was finalized on the 1<sup>st</sup> day of September 2021 and counsel for the petitioner was supposed to file his submissions on the 7<sup>th</sup> of September 2021 and that is when he equally filed this letter in question. It would be unfair for me to consider the issue of gazetting at this point without affording the respondents an opportunity to rebut the same.

680 In the land-mark of **Makula International ltd versus His Eminence Cardinal Nsubuga Civil Appeal No 4 of 1981**, it was held that court cannot sanction an illegality and once an illegality is brought to the attention of court, it overrides all issues of pleadings..." however, in the instant case, Counsel for the petitioner brought this issue to the attention of the Registrar after the trial had been finalized, therefore this principle does not apply.

685 In conclusion, I shall not comment on the above mentioned letter because Counsel did not raise this issue during the trial of this petition but rather after the petition's trial had been completed. The other side did not have an opportunity to reply.



**I SO ORDER**

Judgment delivered at the High Court, Mbale Circuit this 12th  
690 day of October 2021.

A handwritten signature in blue ink, appearing to read 'Busingye', is written over a horizontal line.

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**IMMACULATE BUSINGYE BYARUHANGA**

**JUDGE**

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