

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUBENDE
ELECTION PETITION NO. 01 OF 2021

NABAKOOBA JUDITH NALULE..... PETITIONER

5

VERSUS

1. ELECTORAL COMMISSION

2. BAGALA JOYCE NTWATWA RESPONDENTS

BEFORE: HON. JUSTICE EMMANUEL BAGUMA

10

JUDGMENT

Introduction.

15 The Petitioner (**Nabakooba Judith Nalule**), the 2nd Respondent (**Bagala Joyce Ntwatwa**) and a one **Nabalisa Brenda** contested for elections for Woman Member of Parliament for Mityana District which were held on the 14th January 2021. The 2nd Respondent polled 64,633 votes, the Petitioner polled 48,322 votes and Nabalisa Brenda polled 1,515 votes. The 1st Respondent (**Electoral Commission**) declared the 2nd Respondent (**Bagala Joyce Ntwatwa**) as the validly elected Woman Member of Parliament for Mityana district.

20 The Petitioner being dissatisfied with the decision of the 1st Respondent (**Electoral Commission**) filed this Petition, challenging the results of elections alleging a number of irregularities, non-compliance with the law and electoral offences.

25 **Pleadings.**

In the Petition, the Petitioner states that the election was invalid on grounds that it was not conducted in accordance with the principles laid down in the provisions of the **Constitution of the Republic of Uganda 1995**, the **Parliamentary Elections Act 2005** and **Electoral Commission Act Cap 140**, and that the non-compliance affected the results in a substantial manner.

The Petitioner further contends that offences and illegal practices under the **Parliamentary Elections Act 2005** were committed by the 2nd Respondent (**Bagala Joyce Ntwatwa**) personally or with her knowledge and consent or approval.

The Petitioner filed a total number of 91 affidavits in support of her Petition.

The Petitioner prayed that the election of the 2nd Respondent (**Bagala Joyce Ntwatwa**) as a Woman Member of Parliament for Mityana district be annulled and or set aside, that fresh elections be conducted in accordance with the law and that the Respondents pay the costs of the Petition.

The 1st Respondent (**Electoral Commission**) filed an answer to the Petition denying each and every allegation of fact contained in the Petition and contended that the election of the Woman Member of Parliament Mityana district was conducted in accordance with **the Constitution 1995**, the **Electoral Commission Act Cap 140**, the **Parliamentary Elections Act 2005** and all other relevant enactments.

The 1st Respondent filed a total number of 21 affidavits in reply supporting the answer to the Petition.

The 2nd Respondent (**Bagala Joyce Ntwatwa**) also filed an answer to the Petition and denied each and every allegation of fact contained in the Petition and she contended that the election was conducted by the 1st Respondent (**Electoral Commission**) in accordance with the law and that she was lawfully declared as a

winner having polled and emerged the winner with the highest number of votes against the Petitioner with a margin of over 16,000 votes.

40 The 2nd Respondent denied any offences and illegal practices alleged in the Petition. She filed a total number of 69 affidavits in reply supporting the answer to the Petition.

Representation.

45 The Petitioner was represented by Mr. Okello Oryem Alfred together with Mr. Omoloi Ivan, from M/S Okello-Oryem & Co. Advocates, the 1st Respondent was represented by Mr. Musinguzi A. Godfrey from the Electoral Commission while the 2nd Respondent was represented by Mr. Katumba Chrisestom together with Mr. Ssekanjako Abubaker and Mr. Caleb Alaka from M/S Lukwago & Co. Advocates.

50 During the scheduling conference, all Counsel agreed to file a joint scheduling memorandum and framed 4 issues for this court's determination.

Issues

The following issues were framed for determination; -.

- 55 1. *Whether there was non-compliance with the electoral laws and the principles laid down in the electoral laws during the conduct of elections for the Woman Member of Parliament Mityana district in the 2021 general elections.*
2. *If so, whether the non-compliance affected the result of the election in a substantial manner.*
- 60 3. *Whether the 2nd Respondent personally or through her Agents, with her knowledge or consent and approval committed the alleged electoral offences and illegal acts?*
4. *Whether the Petitioner is entitled to the remedies sought.*

65 **Burden of Proof.**

In *Col (RTD) Dr. Kiiza Besigye Vs Yoweri Museveni Kaguta Election Petition No. 1 of 2001* Odoki CJ (as he then was) stated;

“In my view the burden of proof in an election Petition as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the court.”

70 Also in the case of **Odo Tayebwa v Basajjabalaba Nasser & Electoral Commission, Election Petition Appeal No. 13 of 2011**, Mpagi Bahigeine DCJ (as she then was) observed;

“Before evaluating the submissions of Counsel it is noteworthy that in accordance with the general principles of evidence, the burden of proof in an election contest rests ordinarily upon the contestant, to prove to the satisfaction of court the grounds upon which he relies to get the election nullified.”

Standard of proof.

The standard of proof in election Petitions is also now settled. See **Section 61 (3) of the PEA 2005** which provides that;

80 *“Any grounds specified in subsection (1) shall be proved on the basis of a balance of probabilities.”*

However, though the standard of proof is on a balance of probabilities, it is slightly higher though lower than beyond reasonable doubt (see ***Mukasa Anthony Harris Vs Dr. Bayiga Michael Philip Lulume S.C.C.A No. 18 of 2007.***

85 Where court noted that;

“The standard of proof is a matter of statutory regulation by Subsection 3 of Section 61 of the PEA, 2005. The Subsection provides that the standard of proof required to prove an allegation in an election Petition is proof upon a balance of probabilities. The standard of proof is on a balance of probabilities but slightly higher though lower than beyond of reasonable doubt.”

In the case of **Fred Badda and Another vs. Prof Muyanda Mutebi Election Petition Appeal No. 25 of 2006**. Court observed that;

95 *“The standard of proof required of the Petitioner, though on a balance of probabilities, is higher than that in ordinary civil cases but not to the level of beyond all reasonable doubt as is called for in criminal cases. Nevertheless, it must be to the satisfaction of court.”*

At the closure of the hearing/cross-examination, all Counsel agreed to file written submissions on the agreed issues for court’s determination.

100 Both Counsel for the 1st and 2nd Respondents in their written submissions, raised Preliminary Objections to the effect that;

- i. *The Petition is incompetent for being supported by a defective affidavit which was commissioned by a one Mr. Owakukiroru Raymond whose practicing certificate had not been renewed.*
- 105 ii. *Electoral Officials giving evidence without lawful authority from the Electoral Commission.*
- iii. *Affidavits filed out of time without leave of Court.*
- iv. *Affidavits with offending jurats.*
- v. *Non certification of voter Location slips.*
- 110 vi. *Translator not on oath contrary to the provisions of the illiterates Protection Act.*
- vii. *Deponents not on oath.*
- viii. *Commissioning on separate sheet.*

115 I therefore find it necessary to resolve the Preliminary Objections at this stage before I go into the merits of the Petition.

Submissions by Counsel for the 1st Respondent on Preliminary Objection (i).

It was Counsel’s submission that the Chief Registrar by letters dated 5th May 2021 and 17th September 2021 informed M/S Byamukama & Co. Advocates and M/s Lukwago & Co. Advocates that **Mr. Owakukiroru Raymond** was issued with

120 the Practicing Certificate for 2021 on 19th March, 2021 vide Certificate No. 14812.

Counsel cited the case of **Inid Tumwebaze v Mpweire Stephen & Anor** CV-CA No. 39 of 2010 where Justice Andrew K Bashaija cited the well-known case of **Makula International Ltd v. His Eminence Cardinal Nsubuga & Anor** [1982] HCB 11, where it was held that; “*A court of law cannot sanction what is illegal, and an illegality once brought to the attention of court, overrides all questions of pleading, including any admission made thereon*”.

Counsel concluded that court should find that the only affidavit in support of the Petition is incurably defective given that it was commissioned by a person who had not renewed his Practicing Certificate and as such the Petition immediately collapses on this Point of Law brought to the attention of court.

Submissions by Counsel for the 2nd Respondent on Preliminary Objection (i).

Counsel submitted that the Chief Registrar by a letter referenced A/267 dated 17th September 2021 informed M/s Lukwago & Co. Advocates that Mr. Owakukiroru Raymond was issued with the Practicing Certificate for 2021 on **19th March 2021** vide Certificate No. 14812. Counsel attached the correspondences and marked them ‘A’ and ‘B’ respectively.

It was Counsel’s contention that Mr. Owakukiroru Raymond commissioned the Petitioner’s affidavit in support of the Petition on **10th March 2021** way before he was authorised to practice law and administer oaths in Uganda for the year 2021, contrary to the provisions of *S. 1 of the Commissioner for Oaths (Advocates) Act, S. 11, 14 and 18 of the Advocates Act* and for that reason, the affidavit of the Petitioner is invalid thus should be struck out with costs.

In support of Counsel’s submissions, he referred court to the authorities of *Suubi Kinyamatama Juliet Versus Sentongo Robinah Nakasirye Election Petition Appeal No. 92 of 2016*; *Abala David versus Acayo Juliet Lodou & Anor (HC EP*

No. 004 of 2021) and Apama Amato Boroa versus Obiga Kania and the EC (HC EP No. 002 of 2021).

Counsel for the 2nd respondent raised other preliminary objections as follows;

150 **ii. Electoral Officials giving evidence without lawful authority from the Electoral Commission.**

Counsel for the 2nd Respondent submitted that under **Section 7 (6) of the PEA**, an election officer who, without lawful authority reveals to any person any matter that has come to his or her knowledge or notice as a result of his or her
155 appointment, commits an offence.

iii. Affidavits filed out of time without leave of Court

Counsel for the 2nd Respondent submitted that the Petitioner filed a total of Ninety (91) affidavits on the **23rd day of April 2021** and this was after the 2nd Respondent had filed her Answer to the Petition on the **22nd March 2021**. Counsel
160 stated that the affidavits were given different names ranging from “**PW2 to “PW90”** named as affidavit in support.”

iv. Affidavits with offending jurats.

Counsel for the 2nd Respondent submitted that a number of these affidavits are punctuated with offending jurats which purport to be translated but in a manner
165 that offends the **oaths Act** and the **Illiterates Protection Act**.

v. Non-certification of voter Location slips.

Counsel for the 2nd Respondent submitted that the Petitioner seeks to rely on alleged voter location slips which are not certified by the Electoral Commission.

170 **vi. Translator not on oath contrary to the provisions of the Illiterates Protection Act.**

Counsel for the 2nd Respondent listed the affidavits to the above effect.

vii. Deponents not on oath.

Counsel for the 2nd Respondent listed affidavits to the above effect.

viii. Commissioning on separate sheet.

175 Counsel for the 2nd Respondent listed the affidavits to the above effect.

Reply to the Preliminary Objections by Counsel for the Petitioner.

- i. That the Petition is incompetent for being supported by a defective affidavit which was commissioned by a one Mr. Owakukiroru Raymond whose practicing certificate had not been renewed.**

180 Counsel for the Petitioner submitted that Points of law are best raised at the hearing and the hearing of this Petition ended on 5th **September, 2021**. Counsel added that the point of inter party hearing is fairness and justice and evidence that is not placed before the Court at hearing cannot be smuggled to the Court record in submissions and by letters.

185 Counsel stated that evidence in election matters is by way of affidavits. He referred to **Rule 15 of the Parliamentary Elections (Election Petitions interim provisions) Rules**).

It was Counsel's submission that the Petitioner contests the authenticity of the letters allegedly written by the Chief Registrar about the status of the
190 Commissioner for Oaths at the time he commissioned the affidavit in question and the Petitioner also contests the contents of the letter as being inaccurate.

Counsel also submitted that the Respondents cannot at law be allowed to introduce documents during submissions without an affidavit and also to introduce a new matter of defence after the hearing of the Petition. He referred
195 to the case of **Mutembuli Yusuf vs Nagwomu Moses Muamba and EC, Election Petition Appeal No. 43 of 2016**.

ii. Electoral Officials giving evidence without lawful authority from the Electoral Commission.

200 Counsel submitted that there is no law which prohibits an election officer from giving evidence of what transpired in an election.

iii. Affidavits filed out of time without leave of Court

205 Counsel submitted that at the hearing each of the affidavits were admitted on record upon application of each party and marked as admitted and the ones where cross-examination was required were dealt with separately and admitted on record.

iv. Affidavits with offending jurats.

Counsel submitted that Counsel for the 2nd Respondent had an opportunity to cross examine the deponents of the affidavits in question but they did not.

v. Non certification of voter Location slips.

210 Counsel submitted that the voter location slips attached to the affidavits are part of the affidavit evidence on record. That they were admitted by the court as uncontested documentary evidence at the hearing.

vi. Translator not on oath contrary to the provisions of the illiterates Protection Act.

215 Counsel submitted that apart from a list of some witnesses, Counsel for the 2nd Respondent did not make any submission on this point thus they are not able to rejoin because the point is not clear.

vii. Deponents not on oath.

220 Counsel contended that apart from a list of some witnesses, Counsel for the 2nd Respondent did not make any submission on this point.

viii. Commissioning on separate sheet.

Counsel submitted that apart from a list of some witnesses, Counsel for the 2nd Respondent did not make any submission on this point.

225 **Court's determination of the Preliminary Objections.**

- i. **That the Petition is incompetent for being supported by a defective affidavit which was commissioned by a one Mr. Owakukiroru Raymond whose practicing certificate had not been renewed.**

230 **Rule 15 (1) of the Parliamentary Elections (Interim provisions) Rules S.I 141-2 provides that;**

“Subject to this rule, all evidence at trial, in favor of or against shall be by affidavit read in open court.”

235 In the case of **MS Fang Min v Belex Tours & Travel Ltd SCCA No. 6 of 2013**, court found that the even where an illegality is raised, this cannot be used to derogate from the right to a fair hearing. It was held by the Supreme Court that;

“The right to a fair hearing is a non-derogable Constitutional right. It must be observed even when an illegality/fraud is raised.”

240 Also in the case of **Pontrilas Investments Ltd v Central Bank of Kenya & Anor Ref No 8 of 2017 EACJ** the court while considering Preliminary Objections held that;

245 ***“A Preliminary Objection was in the nature of what used to be a demurrer. It raised a pure point of law, which was argued on the assumption that all facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or what was sought was the exercise of judicial discretion. A Preliminary Objection could only be properly taken where what was involved was a pure point of law, but where there was any issue involving the clash of***

facts, the production of evidence and assessment of testimony it should not be treated as a Preliminary point.”

250 I have considered the written submissions by all Counsel and I note that it is trite that in election matters evidence is by way of affidavit but in these particular Preliminary Objections, there is no affidavit to support the allegations being raised. Counsel for the 1st and 2nd Respondents instead attempted to bring evidence through written submissions after the hearing and pleadings had been closed. Allowing evidence through written submissions would amount to
255 allowing evidence from the bar instead of witnesses.

I note that Counsel for the Petitioner in his Rejoinder challenged the authenticity of the letters introduced by the Respondents in their submissions which would require production of evidence for court to establish the truth of the matter. In the instant Preliminary Objection, there were some issues involving the clash of
260 facts about the two letters from the Chief Registrar with 2 different dates.

It was shocking and disturbing to this honorable court to find that Counsel for the 1st Respondent referred and attached a letter from the Chief Registrar dated **5th May 2021** alleging that the said Owakukiroru Raymond renewed his practicing certificate on **19th March 2021**. Yet when this matter came up for pre-session
265 meeting on **16th August 2021**, this issue was not raised neither was it raised at Scheduling on **20th August 2021** or at any time during the trial, but Counsel for the 1st Respondent decided to keep it a secret until they raised the Preliminary Objections through written submissions which defeats the principles of fair hearing. It is therefore my view that this was done intentionally either to wait for
270 this stage where the Petitioner would have no opportunity to respond to the same, or to deny the court the opportunity to establish the authenticity of the two letters.

I find that even if there was illegality which Counsel for the Respondents want this court to believe, it is my considered view and opinion that the right to fair

275 hearing should not be suppressed. **Article 28 (1) of the Constitution 1995** provides that;

“In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.”

280 The fair hearing would mean that the Preliminary Objections should be raised at the hearing so that the other party is given an opportunity to respond.

In **Akugizibwe Lawrence vs Muhumuza David and Others Election Appeal No. 22 of 2016**, the Court of Appeal, in emphasizing the Article 28 Constitutional right to a fair hearing, found that it was a fatal error for the trial court to rely on
285 the evidence of a non-existent witness in the Petition i.e. one who has neither sworn an affidavit or testified in person.

Basing on the above findings, Preliminary Objection (i) is overruled.

Turning to the other Preliminary Objections raised by Counsel for the 2nd Respondent, I shall resolve them as follows;

290 **ii. Electoral Officials giving evidence without lawful authority from the Electoral Commission.**

I find that the cited **Section 7 (6) of the PEA** does not prohibit election officers from giving evidence in election petitions. I further find that Counsel of the 2nd Respondent did not adduce evidence to support the alleged lack of lawful
295 authority by the Election officers to testify. For the reasons given, this objection is overruled.

iii. Affidavits filed out of time without leave of Court.

When the petition came up for Scheduling, the said affidavits were admitted upon application of each party and were accordingly marked and put on court record,
300 thus this Objection is overruled.

iv. **Affidavits with offending jurats.**

I have considered the above point and find that all affidavits were marked and admitted as evidence in chief in the presence of all parties and there was no contestation, thus this Objection is also overruled.

305 v. **Non certification of voter Location slips.**

I find that the voter location slips attached on the affidavits are already on court record and were agreed to at the Scheduling by Counsel for the 2nd Respondent. This Objection is therefore overruled.

310 vi. **Translator not on oath contrary to the provisions of the Illiterates Protection Act.**

I find that this issue was not raised when the affidavits were tendered in court, thus the Objection is overruled.

vii. **Deponents not on oath.**

315 Counsel for the 2nd Respondent did not submit on this issue to guide court on how the Deponents were not on oath, thus this Objection is overruled.

viii. **Commissioning on separate sheets.**

Counsel for the 2nd Respondent did not submit on this issue to guide court on how the commissioning was done on separate sheets thus, this Objection is overruled.

320 In the final result, the mere fact of producing 2 separate letters with different dates from the Chief Registrar is enough to show that there are clashes of facts where the other party should have been afforded an opportunity to respond at an early stage. This Court was faced with one story of the alleged illegality in the written submissions by the Respondents when the case had already closed. This
325 court finds no merit in all Objections raised in this Petition. I therefore deem it

fair and just to overrule the Preliminary Objections and proceed with the Petition on its own merit.

Having resolved the Preliminary Objections, I will now proceed to consider the Petition on its own merit.

330 **Issue No. 1: Whether there was non-compliance with the electoral laws and the principles laid down in the electoral laws during the conduct of elections for Woman Member of Parliament Mityana district in the 2021 general elections.**

Submissions by Counsel for the Petitioner on issue No. 1.

335 Counsel for the Petitioner submitted that during cross-examination and re-examination, the witnesses **PW2, PW5, PW6, PW7 and PW9** who were Polling Officials unequivocally stated that they were under instructions of their respective superiors by the names of **Mr. Paul Nsubuga** who was a Parish Supervisor and **Mr. Makubuya Stephen** who was the District Returning Officer
340 of Mityana District to allow unregistered voters to vote. That Agents were forced to sign DR forms before voting commenced. That the Polling Officials were not allowed to verify voters/use the Bio-Metric Voter Verification Kit machine which led to multiple voting.

Counsel contended that the evidence of the above Officials was corroborated by
345 way of affidavit evidence of the Petitioner's witnesses that is, **PW15, PW17, PW19 and PW20** among others who demonstrated that there were indeed unregistered voters who were allowed to participate in the voting process and the Electoral Officials never stopped them but instead acted as accessories to their unauthorized voting.

350 **Submissions by Counsel for the 1st Respondent on issue No. 1 & 2.**

Counsel for the 1st Respondent argued issues 1 and 2 together.

Counsel submitted that the allegations of non-compliance by the Petitioner in her Petition and Affidavits in support are unfounded, lack merit and should be treated with the contempt they deserve.

355 Counsel contended that during cross-examination of the Petitioner by Counsel for the 1st Respondent, the Petitioner clearly stated that she knows the election processes; and that she knows the process for complaining to the Electoral Commission; but neither did she nor her Agents make any written complaint to the Electoral Commission as required and expected of a candidate who is
360 questioning the manner in which the Election is conducted.

Counsel further submitted that though the Petitioner alleges that she attempted to lodge complaints with the Electoral Commission, she did not adduce any evidence to show that she actually made any attempts to complain to the Electoral Commission as alleged in her Petition and affidavit in support.

365 It was Counsel's submission that the allegation by the Petitioner could not have affected the results in any substantial manner as the elections were conducted peacefully.

Submissions by Counsel for the 2nd Respondent on issue No. 1.

Counsel submitted that there were no acts of non-compliance during the course
370 of the election as alleged by the Petitioner.

It was Counsel's contention that the Petitioner and her witnesses as shown under para 4 (e) of the Petition and her affidavit in support and those of PW 12, 15, 24, 28, 38, 40, 41, 44, 45, 46, 50, 52,53, 62, 65, 67, 69, 75 and 87 testified on irregularities which occurred at non-existent Polling stations to wit; **Bukalagi Church Of Uganda, Mityana Primary School, Busimbi, Zigoti, Kasambya, Kiyinda B (N-Z), Kigalagi COU, Kalagi COU, Saza Ground, Merryland (O-Z), Kiyinda B (A-N), (N-NAM), Mityana Public School, Matutuma, Gombolola (N-Z), Kiyinda B, Luzzi, and Kasita.** Counsel added that those Polling stations are non-existent as stated in the uncontroverted affidavits of the 2nd Respondent and

380 **Makubuya Stephen**, the District Returning Officer thus Court should disregard all alleged irregularities premised on the mentioned Polling stations.

Counsel submitted that some witnesses that is; **PW10, PW13, PW42, PW46, PW67 and PW80**, failed to prove the allegations in their affidavits. He added that **RW2 (1) –RW2 (67)** stated that there was compliance with the electoral laws and
385 that no Agent was forced or unduly influenced to sign the DR forms before the polls had been concluded.

Further, Counsel submitted that the Bio-Metric Voter Verification Kit machines were working throughout the district during elections. Counsel’s arguments were based on affidavits of **RW2 (32), RW2 (5), RW2 (19), RW2 (20), RW2 (23), RW2 (50), RW2 (56), RW2 (49), RW2 (68), RW2 (4), RW2 (25) and RW2 (62)**.
390

In rejoinder, Counsel for the Petitioner reiterated his earlier submissions.

Analysis of court on issue No. 1.

The Petitioner’s contention in paragraph 4 of the Petition was that there was non-compliance with **Article 61 of the Constitution, Section 12 (1) (e) and (f) of the ECA, and sections 27, 30, 31, 32, 48, 50, 51, 52, 53, 58, 59, 71, 76, 77, 78, 79, 80(1) and 83 of the PEA**. As far as court can ascertain, the specific acts of non-compliance complained of and that were brought forth in evidence included the following;
395

1. Voting by non-registered voters.
- 400 2. Forcing Agents to sign Declaration of Result Forms before voting.
3. Non-verification of voter details from the Voter Register.
4. Not using the Bio-metric Voter Verification Kit Machine at various Polling stations.
5. Multiple voting.

405 **Section 61 (1) (a) of the Parliamentary Elections Act 2005** provides 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 that;

410 *“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 failure affected the result of the election in a substantial manner.”*

1. Voting by un-registered voters.

415 **Nabulya Ruth PW7** a Polling Assistant at **King Faisal (ND-Z) Polling station** stated that on 14th January 2021, the Presiding Officer instructed her to give unregistered voters more than one ballot paper which she did. In cross-examination, she stated that she was given orders from the Chief Supervisor **Ambrose** and Presiding Officer **David Kigozi** who told her to give more than one ballot paper to voters which she did.

420 This evidence is corroborated by that of **Kigozi Davis Mbuga, PW26**, a Presiding Officer at **King Faisal (ND-Z) Polling Station**, (See DR form marked annexure **RW (F)** who stated that unregistered voters showed up on Polling day and were allowed to vote and given more than one ballot paper to cast their votes.

425 **Katana Doreen Cyria PW23** a registered voter at **Kiyinda A (A-M)** stated that on 14th January 2021, two gentlemen, Mr. **Lukonge Mukambwe** and a one **Maxwell** joined her and they mobilized students who went to different voting areas and they were given 2 to 3 ballot papers and were allowed to vote even when they were under age and not registered voters.

430 **Lunkuse Mary Josephine, PW 34**, a Presiding Officer at **Kiganwa Primary School Polling station**, (see DR Form marked **RW1 (I)**) stated that on 14th January 2021, while at the Polling station, she allowed unregistered voters to vote at her station.

Sabiiti Donozio PW81 stated that on 14TH January 2021, he arrived at **Kiganwa P/S Polling station** and was given 9 ballot papers to tick for the 2nd Respondent yet he was not a registered voter.

435 **Myalo Ernest PW9** a Polling Assistant at **Kawoko Playground** Polling station stated that he was approached by the District Registrar **Paul Nsubuga** who requested that he allows people with a mark P to vote whether registered or not and he allowed them to vote.

It is expected that evidence in election Petitions will come from partisan
440 witnesses since the reality is that in an election, the populace is called upon to take one side or the other. They are not neutral. This does not mean that the evidence is not credible on that count alone. However, the courts have cautioned against relying on such evidence without corroboration (See the Court of Appeal decision in **Betty Muzanira Bamukwatsa vs Masiko Winifred Komuhangi and**
445 **Another Election Appeal No. 65 of 2016**).

The evidence in proof of this allegation has not only been made out by the Petitioner and her Agents but has been corroborated by 1st Respondent's own Officials like PW7, PW34 and PW9. I find that the allegation of voting by unregistered voters has been proved on a balance of probabilities to the
450 satisfaction of court.

2. Forcing Agents to sign Declaration of Result Forms before voting.

Nantongo Norah PW 10 a Polling Agent for the 2nd Respondent at **Mityana A Kanamba Polling station** stated that on 14th January 2021, she was told by Electoral Officers to sign the DR forms which she did before the voting
455 commenced.

I find the evidence of **PW10** who was an Agent for the 2nd Respondent (**see appointment letter PW10 (A)**) and she also signed on the DR form (**see RW1 (H)**) credible. Thus, the allegation has been proved to the satisfaction of court on a balance of probabilities.

460

3. Non-verification of voter details from the Voter Register

Bazira Deograsious PW13 a Presiding Officer at **Busimbi Gombolola Area (A Nak)** (see DR form marked **RW1 (III) (II)**) stated that on the 14th January 2021, he allowed Agents of the 2nd Respondent to vote without any verification.

465

Ndiwalana Noah PW 76 a Presiding Officer at **Nandegejja Primary School Polling station** (see DR form marked **RW1 (L)**) stated that on 14th January 2021, unverified voters were allowed to vote.

470

Lubega Jamadah PW31 a voter at **Comprehensive S.S campus** Polling station stated that on 14th January 2021, he witnessed a Polling Assistant giving out ballot papers to voters without verifying whether they were registered voters at the Polling station.

Therefore, I find that the allegation of non-verification of voters has also been proved to the satisfaction of court on a balance of probabilities.

4. Not using the Biometric Voter Verification Kit Machine.

475

Nabakooba Proscovia Birungi PW 49 a Presiding Officer at **Kiyinda A (A-M)** (see DR form marked **RW1 (N)**) stated that on 14th January 2021 she had express instructions from the Returning Officer to allow those whose finger prints had failed to use her finger print/code instead which led to many voters voting without fingure print verification from the BIO-METRIC VOTER VERIFICATION KIT machine.

480

Najjuko Harriet PW5 a Polling Assistant at **Kiyinda B (Nak z)** Polling station stated that on 14th January 2021, various people dressed in red attires approached her and she gave them 2-3 ballots and she never verified them through the Bio-Metric Voter Verification Kit machine.

485

Bakojja Tony PW 6, a Presiding Officer at **Kiyinda B (Nak Z)** (see DR form marked **R2 exh (I)**) stated that on 14th January 2021, he ordered the Machine

Operator to stop using the Bio-Metric Voter Verification Kit machine to verify voters.

490 **Nyonyitono Willy Ssemanda PW 80**, a Polling Assistant at **Busimbi railway A-M** Polling station stated that on 14th January 2021, people dressed in red attire would come and the machine would not recognize them so he used his passcode and allowed them to cast their votes.

I find that the above allegation of failure to verify voters using the BVVK machine has been proved to the satisfaction of court on a balance of probabilities.

5. Multiple voting

495 **Nabakiibi Josephine PW48** a Polling Assistant at **Busimbi/Kasimbi (A-M) at Merryland** stated that on 14th January 2021, she witnessed many voters who had already voted at other station and voting the second time at her station. Many supporters of the 2nd Respondent were seen ticking ballot papers in groups.

500 I find the evidence of **PW48** credible thus this allegation of multiple voting has also been proved to the satisfaction of court on a balance of probabilities.

Court finds that there were acts of non-compliance in different Polling stations in particular, at; **King Faisal (ND-Z), Kiyinda A (A-M), Kiganwa Primary School, Kawoko Playground, Mityana A Kanamba, Busimbi Gombolola area (A Nak), Nandegejja, Primary School, Comprehensive S.S Campus, Kiyinda B (Nak z),**
505 **Busimbi Railway (A-M) and Busimbi/Kasimbi (A-M) at Merryland** Polling stations which stood out in non-compliance.

In conclusion, this court finds that there was non-compliance specifically in 11 Polling stations listed above out of the 13 Polling stations where the allegations of non-compliance were made. This was a failure to ensure that the electoral
510 process is conducted under conditions of freedom and fairness as required by

Article 61 of the Constitution and S. 12 (1) (e) and (f) of the Electoral Commission Act; and thus issue No. 1 is answered in the affirmative.

515 **Issue No. 2: whether the non-compliance affected the results of the election in a substantial manner?**

Submissions by Counsel for the Petitioner on issue No. 2:

Counsel submitted that many witnesses including the Petitioner, **PW5, PW6, PW7 and PW8** testified that the DR Forms at their Polling stations and in many others were signed by Agents prior to Polling or during the Polling but certainly before counting of votes. Counsel contended that the DR Forms are supposed to be signed by Agents of candidates to confirm that the Polling and counting of votes was done without irregularities and in accordance with the law.

520 It was Counsel's submission that the Polling Agents are witnesses to the Polling exercise, the counting and adding of votes. By signing DR forms, the Polling Agents confirm the authenticity of results at the Polling stations. But if they are signed prior to Polling and counting of votes, the entire purpose of representation and authenticity of the results from the Polling stations is affected negatively.

530 Further, Counsel contended that in the instant Petition, the election was not free and fair. That the numbers on the DR Forms were unreliable given that the events of the day proved to have afflicted the Polling and counting processes at the Polling stations. He added that if those numbers are questioned as they should be, the winner of the election is unascertainable. In addition, Counsel stated that all the principles of a free and fair election were violated and the 2nd Respondent had unfair advantage because her party functionaries and Agents took over the election and dictated the will of the people.

535 Counsel concluded that the impugned election was afflicted by non-compliance with the electoral Laws that is; it was afflicted by massive intimidation of voters and Agents of candidates including the Petitioner. It was afflicted by obstruction

540 of voters, unauthorized voting and or voting more than once, making wrong
returns of the election, personation of voters, undue influence and Obstruction
of Election Officers.

He added that all the shortcomings affected the numbers that were produced
and ultimately affected the quality and the numbers in the election in a
545 substantial manner.

Counsel for the 1st Respondent on issue No.2.

Counsel for the 1st Respondent argued this issue No. 2 together with issue No. 1
on pages 14-15.

Submissions by Counsel for the 2nd Respondent on issue No.2.

550 Counsel submitted that all irregularities at non-existent Polling stations however
grave cannot affect the outcome of the results for polls conducted at 377 Polling
stations across Mityana District.

Counsel added that the 2nd Respondent obtained 64,633 votes from the race
thereby overwhelmingly winning the Petitioner who only scored 48,322 with a
555 margin of 16,311 votes.

It was Counsel's contention that no evidence was led by the Petitioner to show
how the irregularities complained of reduced the votes she was entitled to.
Further, that the Petitioner attempted to generally raise various electoral
malpractices in the Petition but failed to adduce evidence sufficient enough or at
560 all to discharge the burden and standard of proof.

Counsel also submitted that although the Petitioner's submissions indicate that
all DR forms at the 13 Polling stations complained about and the other non-
existent ones, the evidence regarding this irregularity on record is in respect of
just 2 (two) Polling stations i.e. **Kanamba and Kiyinda B (NAK - Z)** Polling
565 stations. That the Petitioner failed to establish how this anomaly at only 2 Polling
stations, if at all happened, affected the results from all the 377 Polling stations.

Counsel averred that the discernible Polling stations which the Petitioner complained about are just 13 to wit; **Katakala A, Busundo Coop. Store, Bufuuma, Luguzi, Comprehensive SS Campus, Nsambya, Busimbi/ Kasimbi [A-M] - at Merry Land, Namamonde, Busimbi Gombolola Area [A-NAK], Kyakkosi, Kibanyi Church of Uganda, Busimbi/ Kasimbi [O-Z] - at Merry Land, and Butalale Church Compound** where in aggregate the 2nd Respondent obtained **3,259 votes** whereas the Petitioner **1,748** votes only. Counsel contended that this had no impact on 377 Polling stations in the constituency and the margin of **16,311 votes**.

In his final submissions, Counsel stated that there were no electoral irregularities and, or non-compliance in the aforesaid elections, and that the 2nd Respondent's win was not tainted by any non-compliance. It was not as a result of electoral irregularities but was an expression of the free will of the people.

580

Analysis of court on issue No. 2:

In the case of **Col. Rtd. Kiiza Besigye - vs. - Museveni Yoweri Kaguta & Anor, SC Election Petition No. 1/2001**; Odoki CJ (as he then was) defined the phrase "substantial manner" as follows:

585 *"The effect must be calculated to really influence the results in a substantial manner. In order to assess the effect, the Court has to evaluate the whole process of the election to determine how it affected the result and then assess the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important, just as the conditions which produced those*
590 *numbers. Numbers are useful in making adjustments for the irregularities. The crucial point is that there must be cogent evidence not only to the effect of non-compliance or irregularities but to satisfy the Court that the effect was substantial."*

595 In the case of **Kyakulaga & EC v Waguma E.P.A No. 15 and 20 of 2016**, court held that;

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

600 In the instant case, court has found that there were acts of non-compliance at **King Faisal (ND-Z), Kiyinda A (A-M), Kiganwa primary school, Kawoko Playground, Mityana A Kanamba, Busimbi Gombolola area (A Nak), Nandegejja, Primary School, Comprehensive S.S Campus, Kiyinda B (Nak z), Busimbi Railway (A-M) and Busimbi/Kasimbi (A-M) at Merryland Polling**
605 stations.

In the final result, it is well settled that non-compliance with electoral law per se, however, is not enough to overturn an election. Rather the non-compliance must be so significant as to substantially affect the result of the election. **See S. 61 (1) PEA 2005.**

610 It should be noted that the 2nd Respondent polled 64,633 votes while the Petitioner polled 48,322 votes. The winning margin between the two was 16,311 votes. The total number of issued ballot papers at the 11 Polling stations where non-compliance was proved was 6,749 thus under the quantitative test, if the Petitioner was added the 6,749 votes from the 11 Polling stations to her 48,322
615 votes, she would Poll 55,671 votes which is still below the 64,633 votes Polled by the 2nd Respondent. In the circumstances, I find that the non-compliance did not therefore affect the results in a substantial manner.

Issue No. 2 is thus resolved in the negative.

620 **Issue NO. 3: Whether the 2nd Respondent personally or through her Agents, with her knowledge or consent and approval committed the alleged electoral offences and illegal acts?**

Submissions by Counsel for the Petitioner on issue No. 3.

625 Counsel submitted that section 61 (1) (c) of the PEA provides that the election of a candidate as a member of parliament shall be annulled if it is proved to the satisfaction of court that an illegal practice or any other offence under the Act was committed in connection with the election of a candidate, personally or with his/her knowledge and consent or approval.

630 Counsel contended that the Petitioner set out illegal practices and offences against the 2nd Respondent which were committed in different Polling stations and have been proved by the Petitioner through affidavit evidence on court record.

Counsel prayed that court finds that the Petitioner has proved the illegal practices and offences to the satisfaction of court.

Submissions by Counsel for the 1st Respondent on issue No. 3.

635 Counsel for the 1st Respondent submitted that most of the allegations indicated that the illegal practices and offences were done allegedly by Agents of the 1st Respondent and the 2nd Respondent but no evidence was adduced to prove the principal - agency relationship nor that they were committed with the knowledge and consent of the 2nd Respondent.

640 **Submissions by Counsel for the 2nd Respondent on issue No. 3.**

Counsel for the 2nd Respondent addressed each alleged offence denying its committal and added that some evidence adduced lacked the required corroboration.

645 Counsel added that no evidence was adduced to prove the principal-agency relationship where the Petitioner alleged that the acts were done by the Agents of the 2nd Respondent.

Analysis of court on issue No. 3

I have perused the affidavits for all parties that is; the Petitioner and the
650 Respondents. I have also considered written submissions by Counsel for the
Petitioner, 1st Respondent and 2nd Respondent. I have analyzed the facts and law
applicable to all allegations of bribery and other illegal practices.

It is important to note that Counsel for the Petitioner specified various polling
stations where bribery and other illegal practices were allegedly carried out by
655 the 2nd respondent. I will proceed to evaluate the evidence accordingly.

a. Bribery

The essential elements of bribery have been settled by the Court of Appeal to
include:

- a) Money or a gift was given to a voter
- 660 b) It was given by the candidate personally or by his/her Agent
- c) That it was given with intent to influence the voter to vote in a certain
way or refrain from voting;

(See: **Ernest Kiizza vs Labwoni Masiko EPA No. 44 of 2016; Mujuni Vincent
Kyamadidi vs Charles Ngabirano & Electoral Commission EPA No. 20/2016;
665 Tunde Mary vs Kunihira Agnes and the Electoral Commission EPA No. 36 of
2016)**)

Under **Section 61(1) (c) of the Parliamentary Elections Act**, a single illegal
practice or election offence under the PEA, once proved, by the Petitioner, to the
satisfaction of the court, suffices to prove a ground for setting aside an election.
670 The weight or significance of the bribe would not matter as long as it is proved
that it was given for the purpose of influencing a voter to vote for the candidate
giving it or to refrain from voting for another candidate.

In **Mujuni Vincent Kyamadidi vs Charles Ngabirano & Electoral Commission
Election Petition Appeal No, 20/2016**, the Court of Appeal held that because a
675 single act of bribery by or with the knowledge and consent of the candidate or

his Agents, however insignificant it might be, is sufficient to annul an election, the Petitioner has to prove to the required standard that indeed the Respondent or his or her Agent bribed voters. It is not enough for the Respondent to state that he saw persons in a line being bribed.

680 The Court of Appeal in **Ernest Kiizza vs Labwoni Masiko EPA No. 44 of 2016** recognized that it is not easy to prove bribery especially when it is done secretly, given the dire consequences it carries on the person alleged to have committed it. The court however held that bearing this in mind, court cannot be satisfied by anything less than the best evidence which is always direct evidence given
685 first hand.

The Court of Appeal in the same case also held that the act of bribery has to be described in sufficient detail for court to reach a determination that indeed such bribery took place.

690 There are numerous instances of bribery that have been alleged by the Petitioner in her evidence. Court will proceed to evaluate the ones that stand out with the above principles in mind.

i. Bribery at Kabuwambo H/C Polling station.

695 **Ssebwarinda Varitino PW 85** a registered voter and an Agent of the 2nd Respondent at Kabuwambo H/C stated that on the 13th January 2021, he was given 200,000/= by **Emmanuel Butebi Sembusi** a supporter of the 2nd Respondent to distribute to people in the village and tell them to vote the 2nd Respondent. That he gave people 3000/= to 5000/= telling them to vote the 2nd Respondent.

700 While this witness has been found by court to be truthful, the connection between **Emmanuel Butebi Sembusi** to the 2nd Respondent is not apparent in this evidence alone. This shall be subjected to further review below.

ii. **Bribery at Namyeso P/S Polling station.**

705 **Kalema Bonny PW4** a registered voter at Namyeso P/S stated in paragraphs 3,4,6 and 7 that on 13th January 2021, a one **Butebi** whose name came out in cross-examination as a supporter of the 2nd Respondent, gave him 300,000/= to distribute to the registered voters to vote the 2nd Respondent. He stated that he gave 50,000/= to **Kiwanuka Kasule** a registered voter and told him to vote for the 2nd Respondent. Further, PW4 stated that he distributed the balance of
710 200,000/= in denominations of 5000/= to the registered voters in line. Again, **Emmanuel Butebi Sembusi** gets adverse mention by this witness as a perpetrator of bribery on behalf of the 2nd Respondent.

Kasenge Joseph PW 22 a registered voter at Namyeso P/S stated that he was bribed with 50,000/= by a one **Nasanayiri Wasswa** to vote the 2nd Respondent.

715 **Sebuguzi Dixon PW83** a registered voter at Namyeso P/S stated in paragraph 10,13 and 16 that on 13th January 2021 Mr. **Nasanayiri Wasswa** gave him 600,000/= to give voters as they lined up to vote. He also stated that he gave the police officer at the station 30,000/= to allow him carry out his duties. The day of voting, he gave people masks and money telling them to vote the 2nd
720 Respondent.

Tebulindya Disan PW89 a registered voter at Namyeso P/S stated in paragraphs 4 and 5 that he received sugar, salt, soap and bread from **Nasanayiri Wasswa** to distribute to the elderly and youths telling them to vote the 2nd Respondent's party candidates. That he positioned himself near the Polling station and would
725 give out 3,000/= to whoever was going to vote and told them to vote the 2nd Respondent.

I find that **PW22** was a registered voter who was bribed and in turn he also bribed other voters and the purpose was to influence them to vote the 2nd Respondent. Further, the evidence of **PW83 and PW89** corroborates that of **PW22**.

730 Whether **Nasanayiri Wasswa** was an Agent of the 2nd Respondent however is not clear. The said **Nasanayiri Wasswa RW2 (55)** swore an affidavit denying all the allegations against him. However, given that no cross-examination was carried out, it remains a case of oaths against oaths with neither side being able to
735 *'penetrate the patina of the oath to discover the truth'* as was held in the case of **Kintu Alex Brandon vs Electoral Commission and Walyomu Moses EPA No. 64 of 2006.**

iii. **Bribery at Kabuwambo COU Polling station.**

740 **Nalugo Harriet PW 61** a registered voter at Kabuwambo COU stated in paragraphs 3,5 and 6 that on the eve of 13th January 2021, a one **Wasswa Magere, Bernad and Silver Noga** told her to convince people around the village to vote for the 2nd Respondent and she would be rewarded by **Butebi**. That on 14th January 2021, she went to the Polling station and gave money to people to vote the 2nd Respondent.

745 In the view of court, the voters who were bribed were not mentioned and there is no direct evidence from this witness involving **Butebi**.

iv. **Bribery at Katakala P/S Polling station.**

750 **Nalubega Justine PW60** a registered voter at Katakala stated in paragraph 4 that on 14th January 2021, she was approached by a certain gentleman who gave her a face mask and 10,000/= and asked her to vote the 2nd Respondent which she gladly took.

I find that since **PW60** was unable to identify the person who bribed her and the connection to the 2nd Respondent can not be established, the necessary
755 ingredients for proof of the allegation of bribery have not been made out in this alleged incident.

v. **Bribery at Mizigo A Polling station.**

760 **Ssebuufu Isaac PW 84**, a registered voter at Mizigo A stated in paragraphs 4, 5 and 6 that on 14th January 2021, he was approached by a gentleman who requested him to vote the 2nd Respondent and he agreed to do so and was paid 10,000/= That he cast his vote for the 2nd Respondent as instructed.

765 I find that since **PW84** was unable to identify the person who bribed him and the connection of the unidentified person to the 2nd Respondent can not be established, the necessary ingredients for proof of the allegation of bribery have not been made out in this alleged incident.

Allegations of bribery were also made by several witnesses who testified as follows:

- 770 i. **Nabulya Ruth PW7** a Polling Assistant at **King Faisal (ND-Z)** Polling station stated that on 14th January 2021, the Presiding Officer of **King Faisal (ND-Z)** gave her 30,000/= as a deal to help unregistered voters of the 2nd Respondent to vote. That she also witnessed coordinators giving out masks and money telling voters to vote the 2nd Respondent.
- 775 ii. **Namaganda Pauline PW 8** a Presiding Officer at **Busimbi Gombolola area (AL-Z)** Polling station stated that on 14th January 2021, she witnessed many Agents of the 2nd Respondent giving out money to voters telling them to vote the 2nd Respondent.
- 780 iii. **Nsamba Emmanuel PW 78** a Presiding Officer at **Busimbi/Kasimbi (O-Z)** Polling station stated that on 14th January 2021, he witnessed coordinators of the 2nd Respondent who brought food and drinks for the Agents and also gave voters encouraging them to vote the 2nd Respondent.
- iv. **Mwanje Francis PW47** a registered voter and Ward Supervisor at **Kabule R/C Primary School** Polling station stated that he was given money by the 2nd Respondent to give voters to vote for her and he gave the money to

785 Kawesi Sam, Walugembe David, Nyanzi Joseph, Muchume Andrew and other registered voters. **Mwanje Francis PW47** was not subjected to cross-examination on alleged allegations of bribery and nor was proof brought that Kawesi Sam, Walugembe David, Nyanzi Joseph, Muchume Andrew were registered voters.

790

v. **Kalema Bonny PW4**. As noted above, **Francis Butebi Sembusi** has been mentioned adversely by several witnesses including **PW4 Kalema Bonny** a registered voter who was bribed with 300,000 by **Butebi** and used some of it to bribe others as well; **PW2 Nakaggwa Annet** a Polling Assistant at **Kabuwambo HC Polling Station** who saw **Butebi** known to her as an Agent of the 2nd Respondent leading a group of people engaged in unauthorized voting; **PW11 Alumaiya Annet** who was given 10,000 by **Butebi**, whom she knew as a father of the area **MP Francis Zaake**. That Butebi facilitated her to vote whereas she was not a registered voter; **PW85 VARITINO SEBWARIDA** stated that he was an Agent of the 2nd Respondent and was given 200,000 by **Butebi** to distribute to the voters.

805 The evidence of **PW2, PW4, PW11** and **PW85** is indicative of the illegal activity that Francis Butebi Sembusi was engaged in. However, **PW2** does not make out a case for bribery; **PW11** is not a registered voter which is an essential ingredient for the offence of bribery; **PW85** does not identify the registered voters who were bribed. These incidents do not support the allegation of bribery by the 2nd Respondent, not because they are not truthful but because they lack an essential ingredient of the offence. In cross-examination, **PW4** was clear in his evidence that Butebi gave him money to vote for the 2nd Respondent.

810 The 2nd Respondent did not bring any evidence from **Butebi** to answer the allegations against him. The 2nd Respondent was asked in cross-examination about Butebi's activities allegedly done on her behalf. Her answer was that she

815 did not know a businessman in Mityana called **Butebi**. She however conceded that she knew the father of **Hon. Francis Zaake**, the area MP whom she said was called **Francis Sembusi**.

I find that this was simply an attempt by the 2nd Respondent to be evasive since the witnesses had variously identified the individual in question as **Francis Butebi Sembusi**. I find that the account of **PW4 Kalema Bonny** regarding bribery by **Francis Butebi Sembusi** to be truthful. I also find truthful, the allegation that 820 **Francis Butebi Sembusi** was acting as an Agent of the 2nd Respondent as testified to variously by **PW2, PW4, PW11** and **PW85**.

There is no precise rule as to what constitutes being an Agent. Any person whom the candidate puts in his or her place to do a portion of his or her task, namely to procure his or her election as a Member of Parliament is the person for whose 825 acts the candidate will be liable. (See: **Odo Tayebwa vs Nasser Basajjabalaba EPA 13 of 2001** per Mpagi Bahigeine DCJ).

vi. **NAKYAGABA TOLOPHINA PW58** testified that she is a registered voter at Nanyeso Primary School. She states that 3 days before the election she was 830 invited to the home of **Hon. Francis Zaake** together with others and was bribed with 10,000/- to vote for the 2nd Respondent. She also describes in detail how **Nasanayiri Wasswa**, who was also implicated by others in electoral malpractice, gave her money to bribe other voters.

835 The 2nd Respondent did not bring any evidence from **Hon. Zaake** to refute or otherwise explain the circumstances surrounding this allegation. The 2nd Respondent also chose not to cross examine **Nakyagaba Tolophina PW58**.

As stated above, any person whom the candidate puts in his or her place to do a portion of his or her task, namely to procure his or her election as a Member of 840 Parliament is the person for whose acts he or she will be liable.

The 2nd Respondent was asked about the activities of **Hon. Zaake** in cross-examination and she conceded that **Hon. Zaake** did campaign for her. She therefore put him in her place to do a portion of her work and is therefore liable for his activities. The 2nd Respondent had an opportunity to deny the bribery by
845 **Hon. Zaake** but did not do so.

It is therefore my finding that the allegation that **Nakyagaba Tolophina PW58** a registered voter at Namyeso Primary School was bribed by **Hon. Zaake**, an Agent of the 2nd Respondent, has been proved on a balance of probabilities to the satisfaction of this court.

850 I have been mindful of the holding in **Kikulukunyu Faisal v Muwanga Kivumbi Mohammed, Election Petition Appeal No. 44 of 2011**, where court held that;

“The well-known principle is that there is no specific number of witnesses required to prove a given fact. Even one witness can prove a case as long as he or she is credible.”

855 Further, in **Col Kizza Besigye v Yoweri Kaguta Museveni & anor (supra)** the Supreme Court by majority agreed that;

“Court does not require a multiplicity of incidents of bribery to annul an election.”

In **Odo Tayebwa v Arinda Gorson Kakuuna & EC Election Petition Appeal No.**
860 **86 of 2016** court held that;

“In the case of an electoral offence or an illegal practice, a single electoral offence or illegal practice, once proved under the requisite standard of proof, is a sufficient ground for setting aside an election.”

It is my finding from the evidence of **PW2 Nakaggwa Annet, PW4 Kalema Bonny,**
865 **PW11 Alumaiya Annet** and **PW85 Varitino Sebwarida** confirm that **Francis Butebi Sembusi** who bribed voters was an Agent to the 2nd Respondent given that all these witnesses identified him as a person who was providing money to voters

to vote in favor of the 2nd Respondent. This finding is corroborated by the admission made by the 2nd Respondent during cross examination when she
870 clearly stated that she actually knew **Francis Sembusi** as a father to **Hon. Zaake Francis**. Taking this evidence as a whole, leads this court to the conclusion that on a balance of probabilities, the bribery of voters by **Francis Butebi Sembusi** were carried out with the knowledge, consent and approval of the 2nd Respondent. This finding is supported by the decision in the case of **Odo Tayebwa v Arinda Gorson Kakuuna & EC Election Petition Appeal No. 86 of 2016**. Thus the
875 Petitioner has proved the allegations of bribery against the 2nd Respondent.

b. Unauthorized voting

Submissions by Counsel for the Petitioner

880 Counsel submitted that the 2nd Respondent committed the offence of unauthorized voting or voting more than once, and he relied on the affidavits of **PW3, PW23 and PW37** as evidence of persons who participated in recruiting unauthorized persons to vote. Counsel also relied on affidavits of other witnesses who testified that they voted in different Polling stations that they
885 were not authorized to vote from. That is; **PW17, PW24, PW42, PW71 and PW75** among others.

Submissions by Counsel for the 1st Respondent.

Counsel submitted that no single report or evidence was adduced to show that there was the offence of unauthorised Voting in the alleged Polling Stations.

Submissions by Counsel for the 2nd Respondent.

890 Counsel relied on the evidence in the affidavits in rebuttal on the offence of unauthorized voting and stated that the Petitioner's evidence can not be believed since no person was allowed to vote without being verified.

Analysis of court.

895 **S. 77 of the PEA 2005 provides that a person who knowingly-**

(a) Votes at an election at which that person is not entitled to vote or

(b) Votes more than once at an election commits an offence and is liable on conviction to a fine not exceeding one hundred and twenty currency points or imprisonment not exceeding five years or both.

900 I have considered the submissions of all Counsel on this issue. However, I find that this allegation has not been proved to the satisfaction of court upon a balance of probabilities.

c. Canvassing for votes on Polling day.

905 **Submissions by Counsel for the Petitioner.**

Counsel submitted that the Petitioner listed the places where the 2nd Respondent canvassed for votes on Polling day personally and through her Agents, with her knowledge and or approval in paragraph 4 (e) of the Petition. Further, that the Petitioner listed witnesses who testified that Agents of the 2nd Respondent were
910 campaigning as voters were casting their votes at the Polling stations while convincing them to vote the 2nd Respondent. The witnesses include; PW16, PW27, PW32, PW49 and PW78 among others.

Submissions by counsel for the 1st Respondent.

Counsel for the 1st Respondent did not submit on this issue.

915 **Submissions by Counsel for the 2nd Respondent.**

Counsel submitted that there were anomalies set out in the affidavits of the Petitioner's witnesses which court should not believe.

Counsel submitted that the Petitioner did not name the Agents of the 2nd Respondent who were campaigning at the alleged Polling stations.

920 **Analysis of court.**

S.81 (a) of the PEA 2005 provides that;

“A person shall not, within one hundred metres of any Polling station on any Polling day canvass for votes.”

I have evaluated the evidence on this issue and it is my finding that this allegation
925 has not been proved to the satisfaction of court on a balance of probabilities.

d. Offence of undue influence/intimidation.

Submissions by Counsel for the Petitioner.

Counsel submitted that the 2nd Respondent during the election committed various election offences personally and through her Agents, with her knowledge and
930 consent or approval.

Submissions by Counsel for the 1st Respondent.

Counsel submitted that the allegations of undue influence/intimidation could not have occurred in the presence of the Petitioner’s Agents, who were present at all Polling stations.

935 **Submissions by Counsel for the 2nd Respondent.**

Counsel submitted that the Petitioner pleaded the offence of undue influence under paragraph 4(e) of her Petition but she did not plead specific persons who had been subjected to the offence of undue influence.

940

Analysis of Court.

I have considered this allegation of undue influence/intimidation, and I find that the evidence is not sufficiently credible to sustain the allegation thus it has not
945 been proved to the satisfaction of court upon a balance of probabilities.

In conclusion, court finds that on a balance of probabilities the Petitioner has adduced sufficient evidence to prove that the 2nd Respondent through her agents, with her knowledge or consent and approval committed the alleged Electoral Offence of bribery.

950 Issue No. 3 is therefore answered in the affirmative.

Issue No. 4; whether the Petitioner is entitled to the remedies sought.

Submissions by Counsel for the Petitioner on issue No. 4.

Counsel submitted that the Petitioner discharged her evidential burden and prayed that the Petition be allowed, fresh elections be conducted and costs of the
955 Petition be borne by the Respondents.

Submissions by Counsel for the 1st Respondent on issue No. 4.

Counsel for the 1st Respondent prayed that the Petition be dismissed with costs to the Respondents.

Submissions by Counsel for the 2nd Respondent on issue No. 4.

960 Counsel prayed that the Petition be dismissed with costs to the 2nd Respondent.

Analysis of court on issue No. 4.

Upon finding that there is enough evidence in this petition to prove that the 2nd Respondent through her Agents, with her knowledge and consent or approval committed the electoral offence of bribery and court makes the following Orders;

- 965 a) **The election of the 2nd Respondent as Woman Member of Parliament for Mityana District Constituency is set aside.**
- b) **A by election is ordered to be held in Mityana District Constituency for the Woman Member of Parliament.**
- c) **The Petitioner is awarded the costs of this Petition.**

970 **I so order**

Dated, Signed and Delivered by email at Mubende this 22nd day of October 2021.

Emmanuel Baguma

975 **Judge**