

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUBENDE**

ELECTION PETITION NO. 0002 OF 2021

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BABIRYE JANE ZANINKA.....PETITIONER

VERSUS

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1. BUKENYA MICHAEL IGA

2. THE ELECTORAL COMMISSIONRESPONDENTS

JUDGMENT

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BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

A brief background

- 1] The petitioner, the 1st respondent and two others were candidates for the position of Bukuya County Member of Parliament in Kasanda District for Elections which were conducted by the 1st Respondent on 14/1/2021 in which she secured 6,047 votes. The 1st Respondent was declared winner of the election by the Returning Officer of the 2nd Respondent with 15,190 votes and was subsequently gazetted in the Uganda Gazette of 17/02/2021.
- 20
- 25 2] Babirye Jane Zaninka the petitioner was aggrieved with the declaration of Bukunya as winner and contests the outcome of the said election and seeks

orders that there was failure by the 2nd respondent to conduct the elections in accordance with election laws on the following grounds:

- i. Manipulation of votes, ballot stuffing and falsification of results in 36 polling stations
 - 5 ii. Grave errors in the counting, tabulation and tallying exercise with clerical and other errors
 - iii. Bribery by Bukenya Michael Iga, the 1st respondent
 - iv. Violence and intimidation targeting her personally, her campaign managers, polling agents, election supervisors and voters
 - 10 v. Failure by the 2nd respondent on request to hand over certain election material, information and results to which she was entitled
 - vi. Lack of freedom, fairness and transparency in the entire exercise
- She contended that all the above substantially affected the final result of the election and prayed for a declaration that Bukenya was not validly elected, and a nullification or cancellation of the election results of the Bukuya County
- 15 Constituency in Kasanda District, and costs

3] In his brief response to the petition, Bukenya contended that the election which was conducted in compliance with the Constitution and electoral laws, was carried out under conditions of freedom and fairness and no illegal practices or electoral offences were committed or reported. He denied all

20 allegations of violence and contended that it is in fact Babirye and her agents/supporters who orchestrated intimidation and violence against NRM supporters. He continued that Babirye's agents duly witnessed the counting exercise, which were properly tallied and no false entries were reported save

25 one. He concluded that the entire electoral process was free, fair and transparent and Babirye never lodged any complaint to the 2nd respondent or

its agents to the contrary. In the alternative that if there was any noncompliance with principles of the electoral laws, such noncompliance did not affect the result of the election in a substantial manner. He prayed for the petition to be dismissed with costs.

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4] On their part, the Electoral Commission denied all allegations and claims raised in the petition, and supported the contention that the election which was fair and free from violence was conducted in accordance with the Constitution and electoral laws. They contend that they discharged their mandate in accordance with the law and that there was no bribery, harassment or interference with Babirye's agents by their agents, or in conjunction with Bukenya or his agents. That the entire process of counting, transmission, tallying of votes and eventual declaration of the poll was properly done with Babirye's agents raising no complaint. Further and any errors and inconsistencies if present, do not confer any electoral advantage to any candidate. And in the alternative if there were any irregularities or noncompliance, they did not affect the outcome of the election in a substantial manner. They too prayed for dismissal of the petition with costs.

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5] Each party adduced substantial affidavit evidence by themselves and their witnesses, and cross examination was allowed in respect of some evidence. For reason of space, the contents which are not reproduced here, will be considered in my final decision.

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6] Scheduling of this matter was done in Court on 28/8/2021. And the parties agreed on the following: -

Agreed Facts: -

- i. The petitioner and 1st respondent were candidates for election in the parliamentary election for Bukuya County Kasanda District held on 14/1/2021.
- 5 ii. The 2nd respondent declared the 1st respondent as the winner of the election with 15,190 votes and the petitioner as the runner up with 6,047 votes.
- iii. The 2nd respondent gazetted the results of the election in the Uganda Gazette on 17/2/2021
- 10 iv. The petitioner being aggrieved with the results of the election lodged this petition on 15/3/2021.

Agreed documents

- i. A certified voters register
- 15 ii. Certified copies of result transmission of tally sheets
- iii. Certified copy of the tally sheet of the constituency
- iv. Certified copies of Declaration of result forms (DR forms) in respect of the polling stations under contest and mentioned in Paragraph 6 of the petition and on Pages 2-7 of the affidavit in rejoinder filed for the petitioner on 20 18/8/2021

7] At a scheduling conference in Court held on 26/8/2021, parties agreed on five issues which are listed below with some minor adjustments: -

- 25 **i. Whether there was non-compliance with the electoral laws in the conduct of the election.**
- ii. Whether there were any illegal practices committed by the 1st respondent personally or by his agents with his knowledge and consent or approval.**

- iii. **Whether there were any electoral offences committed by the respondents or their agents**
- iv. **If so, did that substantially affect the result of the election.**
- v. **What remedies accrue to the parties**

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Representation:

Justine Semuyaba and Hakeem Muwonge for the Petitioner.

Kenneth Ben Lule for the 1st respondent

Godfrey Musinguszi for the 2nd respondent

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Preliminary Objections:

8] I note that by their submissions, 1st respondents' counsel raised several preliminary objections as follows:

- 15 i. Some affidavits stood alone separate from the *jurat* contrary to the Oaths Act
- ii. Some affidavits contained falsified evidence/falsehoods
- iii. Some deponents did not attach national identity cards to their affidavits as proof of their identities
- iv. Some affidavits were couched in similar words

20 Counsel then prayed for the offending affidavits to be struck off and not considered as part of the petitioner's evidence.

9] I do agree that most of the objections above would in the true sense be matters of law and thus objectionable even at the point of submissions. However, as
25 raised by Babirye's counsel the objections would not necessarily dispose off the petition in line with Order 6 rr 29 CPR which applies to these proceedings under Rule 17 of the Parliamentary Elections (Interim Provisions) Rules SI

141-2 (hereinafter the Rules). I agree with Mr. Semuyaba that Babirye’s principle affidavit in support of the petition (and indeed some other affidavits) were not contested (either at the scheduling or in the final submissions), which would leave Babirye’s petition secure under Rule 3(c) of the Rules. My task then would be to determine whether the objections raised against the individual affidavits mentioned have merit. I will handle each category in the sequence the objections were raised.

Affidavits offending the Oaths Act

10 10] It is contended for Bukenya that certain affidavits have a stand-alone *jurat* signed separately from the main body of the affidavit in contravention of Sections 5 and 6 Oaths Act. Citing authority, counsel Lule argued that not only are such affidavits defective, the inference is that the deponents did not appear before the commissioner for oaths to take the oath and the *jurats* were merely
15 attached to the main body of the affidavits. By illustration, counsel argued that the foot of the impugned affidavits shows that they were drawn by M/s Kizito Lumu & Co., Advocates (hereinafter Kizito Advocates) but the stand alone page indicates it was drawn and filed by M/s Nalukoola, Kakeeto & Solicitors (hereinafter Nalukoola Advocates), a firm that is a stranger to the proceedings.
20 In well worded reply, Babirye’s counsel states that although the affidavits were drawn by Kizito Advocates, they were translated to the deponents from English to Luganda by one Luyimbazi E. Nalukoola of Nalukoola Advocates, whose full particulars and address appear on that page in fulfillment of the requirements of the Illiterate Protection Act (hereinafter IP Act).

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11] This particular objection is raised against the affidavits of Kasumba, Ntyegyeka, Ssesaazi, Katende, Ssewikyanga, Muhwezi, Ssenyonyi, Matovu,

Mwine, Kalanzi and Ssemwogerere respectively. I am not prepared to subscribe to the submission made that the font used in the body of their affidavits differs from that on the page on which each one of them signed, which to Bukenya's counsel is an indication that either was made in a different place. No expert witness/evidence to confirm that fact was adduced. Further without cross examination of any of the stated witnesses to confirm that they disown the contents of their affidavit, the provisions of the Oaths Act would not apply here.

10 12] That said, I am more persuaded by counsel Semuyaba's arguments that the form of the *jurat* at the foot of each affidavit was an attempt to comply with the provisions of the IP Act. Indeed, it is not stated in the affidavits that the deponents are not conversant with English, the language of Court. However, inserting a *jurat* with a translation into English at the foot of each affidavit
15 lends the assumption that each one of them is an illiterate. An illiterate is defined in Section 1(b) of the Illiterates Protection Act to mean "*in relation to any document, a person who is unable to read and understand the script or language in which the document is written or printed*"

20 13] According to Sections 2 and 3 of the IP Act, any person who writes a document for, at the request, or on behalf of an illiterate, or one who acts as witness to the mark of an illiterate on any document, is by law expected to include his or her name and full address. By doing so, it shall imply that he or she added their signature after the illiterate added their mark, and that such
25 person had the instructions to write the document. It is in addition implied that prior to the illiterate appending his or mark, the document was read over and explained to them. The provisions which have previously been the subject of

debate in numerous actions are mandatory, designed to protect illiterate persons by ensuring that their oaths are not misinterpreted or changed. See for example **Kasaala Growers Co-Operative Society Vrs Kakooza & Anor Civil Application No. 19/2010** and **Rtd Col. Dr. Kizza Besigye Vs EC & Yoweri K. Museveni Pres. Election Petition No. 1/2006** followed in **Ngoma Ngime Vs EC & Hon. Winnie Byanyima EP No. 11/2002**. This Court was for similar reasons compelled to expunge affidavits in a recent election petition for not following the above provisions. See **Tumwesigye Fred Vs Museveni William & EC EP No. 3/2021**.

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14] In my view, this objection has been well answered by counsel Semuyaba. M/s Kizito Lumu & Co., Advocates was the firm that was instructed and did file the petition. Each deponent was then taken to the firm of Nalukoola Advocates in which counsel Nalukoola is a partner. It is Nalukoola who then took up instructions of translate the affidavits in support of the petition. It is likely that Nalukoola did not prepare the main body of the affidavit, but it is clear from the jurat that he fulfilled the most essential part in law. He made a declaration that he had the instructions and did explain the contents and meaning of each affidavit to each individual deponent and that the deponents understood before appending their marks to the affidavits. Beyond being the translator, he was witness as a commissioner for oaths. He indicated his full name and address as required by law. For that reason and in that stead, he is not a stranger to the proceedings but one necessary to confirm that what the illiterate deponents wanted and intended to state, is what is contained in their affidavits. Some of the witnesses cross examined on this point were all consistent in their explanation that they appeared before counsel Nalukoola who very well translated the affidavits to them.

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15] I thereby find no merit in the first objection and it is dismissed

5 **Affidavits containing falsified evidence/falsehoods**

16] An objection was raised against the affidavit of Ssewikyanga Moses and two affidavits of Nakiyemba Jalia. It was contended firstly that Ssewikyanga is a fictitious person because there was proof a different person, Ssewakilyanga Moses existed and was a voter in a different polling station. For Nakiyemba it was contended and shown that she was not registered to vote did not vote at the Kasambya Polling Station as claimed, but was instead a registered voter at the Kasekere Polling Station. Counsel Lule considered Nakiyemba's defection as serious and one which contaminated her entire affidavit evidence and even amounted to a criminality. He moved court to expunge all evidence of those two witness and for a recommendation to be made to the ODPP for the prosecution of Nakiyemba for acts in contravention of Section 64(2) PE Act. Counsel Semuyaba made no specific reply to those objections

17] I am aware that on 26/8/2021, an attempt by Babirye's counsel to withdraw Ssewikyanga's affidavit from the record. Giving reasons, I declined that request. It is clear from the uncontested submissions with regard to his identity that this witness does not exist. It was an affront to justice and a serious abuse of court process to have included his evidence. Although Babirye is principally blamed for his inclusion, her former lawyers are also strongly reprimanded for it is the duty of every advocate to protect the sanctity of the record. They should cross check the identity and authenticity of witnesses before they are presented. Thus the affidavit purportedly sworn and filed by

one Ssewikyanga Moses on 15/3/2021 in support of the petition is expunged from the record and Babirye will incur the costs thereby.

18] Likewise, the objections against Nakiyemba's affidavit are valid. There was
5 uncontested proof that she was in fact registered to vote in the Kassanda North
and not Bukuya South Constituency. Had she had evidence to the contrary,
she would have presented it in her supplementary affidavit filed in court on
20/8/2021. Indeed her actions were reckless, impertinent, fraudulent and
criminal. It is doubtful that the rest of the contents of her affidavit can be
10 believed. I would move to expunge the first two paragraphs of her affidavits.
The rest of her evidence will be treated as evidence given by a seriously
discredited witness.

**Deponents who did not attach national identity cards to their affidavits as
15 proof of their identities**

19] It was in addition contended that some deponents omitted to attach their
national identity cards which would put their identities in question, or it would
mean they are non-existent or fictitious persons. In the alternative that if the
court were to maintain those affidavits, it should not attach any weight to that
20 evidence since, even without cross examination, it would not be possible to
establish their identity or credibility. In reply, it was submitted that all
witnesses provided their Voter Registration Nin Numbers (NIN) which is
sufficient, and should the respondents required so, they would have verified
their authenticity against the Voter Register which the 2nd respondent failed to
25 adduce even after a definite court order in that respect.

20] Counsel Lule did not provide authority or law that requires a witness in an election petition to provide a national Identity card as proof of identification or a pre-requisite to testify in such proceedings. Indeed, as pointed out by counsel Semuyaba, the Voters Register created is the crucial document against which authentic voters can be determined. According to the proceedings of the scheduling conference held on 26/8/2021), the voters register was considered an agreed document. Without any other cogent evidence, the Court is convinced that the NIN mentioned in the contested affidavits were authentic.

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21] I note that Matovu, Kigozi and Mwine did not provide NIN. However, none of them professed to be voters of any particular polling station and the evidence given did not necessarily touch issues of direct individual voting. Matovu only claimed to be a person who noted that one ballot box was being used for two categories of candidates, Mwine complained of his arrest as a polling agent and Matovu, Babirye's spouse, only testified about what he knew about the alleged abduction of Babirye's agents from his home. None of those would necessarily require being identified by their national IDs or NIN. The authority of **Hon Geroge Patrick Kasaijja Vs Fred Ngobi Gume & EC EP Appeal No. 68.2018** is not applicable here. In that matter the Court struck out affidavits after noting inconsistencies in the identification documents attached, and the fact that some deponents who professed knowledge to sign documents, could not do so.

25 22]Accordingly the third objection fails.

Affidavits that were couched in similar words and those containing falsehoods

23] It is true that most of the affidavits filed in support of the petition on 23/8/2021 have nearly identical evidence. That alone would not discredit that evidence entirely. Indeed, in the authority provided by counsel Lule, Judge Batema did not expunge the evidence, but received it with much caution. An explanation
5 has been given by counsel Semuyaba that those particular witnesses gave testimonies on one similar incident. They were all allegedly appointed as Babirye's agents and arrested on the same day from the same place. It is hardly likely they would give varying accounts of the same incident. Since that evidence was accepted during the scheduling of the matter, it still remains the
10 discretion of the court to evaluate its strength and relevance within context of the entire petition.

24] Counsel Lule pointed out the affidavits of Lwere, Baruku, Ssebukeera, Luwazzo, Masinde, Matovu, Muliika, Kairu, Walusimbi and Mukasa as
15 containing falsehoods. In particular, that although those witnesses claimed to be Babirye's appointed agents, the DR Forms she adduced indicate different agents as signatories on her behalf. In response, it was submitted, and indeed the record shows that one of Babirye's main contention, is that her appointed agents were arrested on the night preceding election day. That she had to hand
20 pick replacements who appear on the declaration forms. This is clearly a matter of evidence that cannot be at clarified as falsehoods *per se* and certainly cannot be the subject of a preliminary objection at this point. This objection lacks merit as well.

25] 25] In conclusion, this Court finds merit in only the second objection with regard to the two witnesses Ssewikyanga and Nakiyemba. The three other

preliminary objections are dismissed with costs to Babirye. I will now turn my attention to the merits of the petition.

- 26] Likewise on page 15 of his submissions, Babirye’s counsel raised objections
5 against evidence filed for the EC, and prayed for certain affidavits to be expunged. It is prudent that I deal with that objection at this point.
- 27] It was contended that the affidavits of Mayanja Paul, Muhonjerwa Jackoine, Tumusiime Abassi, Haguminamana Vian, Wiize Deo, Kalega Brian,
10 Ndikubwimanma Elijah, Nsubuga Fred, Kalibata DAgarous, Katongere Mathew, Kato Esau, Kaumba Joyce, Kabali Rogers, Friday Amos, Nammuli Ludia, Bukirwa Grace, Muhumuza Godfrey, Ninsiima Olivious, Byamugisha Ronald, Nakabu Sarah Nansubuga, Mugisha Simon, Tumwesigye Emmanuel and Munaga David offended the Evidence Act, Illeterates Protection Act and
15 Oaths Act. Counsel continued that it was inconceivable that the affidavits were signed on the same day in Bukuya Kasanda, and Mugisha Simon a presiding officer failed to understand or read his affidavit in court, an inference that he was illiterate yet there was no certificate of translation attached to his affidavit.
- 20 28] The contested affidavits filed by the EC on 8/6/2021 were all stated to have been signed on 28/5/2021 in Bukuya, Kasanda before Gumisiriza Francis and Advocate and Commissioner for Oaths, whose address in in Mityana. Without tangible evidence, I would not find it strange for Gumisiriza to have travelled to Bukuya to start and complete the registration of 23 oaths. Mugisha Simon
25 did testify that he was in Bukuya “*with many others*”, presumably those who were also there to take oath on directions of the EC. The Court takes judicial notice that Kasanda and Mityana which were curved out of Mubende District,

are not of such a vast distance from each other. I would find no reason to disregard the contested affidavits.

29] Further, with regard to Mugisha Simon and Tumwesigye Emmanuel, the
5 Court noted that both had considerable difficulty in understanding the English language. Although each professed to have an Olevel certificate, half way through his testimony, Tumwesigye begged to testify in the Luganda language. Although each labored to show court that they could understand the contents of their affidavits, they relented to state that the affidavits were
10 translated to them by Gumisiriza. When prompted by Court, Mugisha read paragraph 8 of his affidavit in halting English and could not explain what it meant. I would deduce that both witnesses could attempt to read, but could not understand their affidavits, and they would both thus be classified as illiterates within the meaning of Section 1(b) of the Illiterate Protection Act (hereinafter
15 IP Act).

30] As pointed out by counsel Semuyaba, counsel Gumisiriza who translated the affidavits omitted to include a certificate of translation to confirm that he had executed his duties fully and effectively, which would offend Section 3 of the
20 IP Act. It is now settled that the provisions of the Act are mandatory. The maker of the document must do so with instructions of the deponent, they must translate the document before the deponent affixes their mark, and the maker must include their name and address and a certificate confirming that the translation was made in accordance with the law. See for example **Tikens Francis & Anor Vs The Electoral Commission & 2 Ors HC EP No. 1/2012 and Kasaala Growers Co-Op Society Vs Kakooza & Anor (supra)** citing
25 **Ngoma Ngime V EC & Hon Winnie Byanyima (supra)** I would for that

reason expunge the affidavits of Mugisha Simon and Tumwesigye Emmanuel. The EC shall incur the costs thereby.

31] It was also contended that the affidavits of all the other EC Presiding officers
5 filed on 8/6/2021 were drafted in a suspicious manner. In particular that they
were designed to have large spaces in between the paragraphs, and the *jurat*
appeared to have been conveniently attached afterwards. That the fact that
they have identical content points to the fact that the deponents signed but
never saw or read the contents of their alleged affidavits and were schooled or
10 couched to give the type of evidence the EC desired. Counsel invited the Court
to scrutinize the affidavits and find them incurably defective.

32] I have considered the above submissions and authorities presented. Sections 5
and 6 Oaths Act create the presumption that an oath must be taken when both
15 the deponent and the commissioner who administers the oath, are in the same
place. It is entirely a matter of facts and discretion of the judicial officer in
each case to confirm whether that rule has been followed. In **Dr Bayigga M.P.
Lulume Vs Mutebi David & Anor EP No. 14/2016**, and **Kabuusu Wagaba
V Lwanga Timothy Mutekanga EP No. 15/2011**, the courts considered the
20 fact that the affidavits had inexplicable blank spaces, strange format and a
stand-alone *jurat*. Those facts do not appear to be obvious in this case. The
only anomaly would be that the facts are stated in an identical manner, with
the only alteration being in paragraph 1, with regard to each successive polling
station.

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33] I am prepared to believe that since polling officials' work on polling day is
routine and has previously been a subject of their training, their evidence

would be more or less similar. However, those affidavits were being made in response to the petition and its supporting affidavits. It is clear that Babirye raised many issues and serious concerns against the conduct of the election and gave a separate account for each of the 37 contested polling stations. Such evidence would merit an equally serious and comprehensible response. It is also highly unlikely that the different EC officers could have had identical experiences and thus an identical account. However, the style of drafting alone would not be sufficient to discredit their affidavits entirely. The Court will not expunge the affidavits filed for the EC on 8/6/2021, instead, the weight given to them shall be commensurate to the blatantly bland and rhetorical manner in which they were drafted.

34] Having dealt with the objections, I shall now turn my attention to the merits of this petition.

Issue 1:

Whether there was non-compliance with the electoral laws in the conduct of the election.

The Law: -

35] Section 61 of the Parliamentary Elections Act (PE Act) sets down the grounds upon which an election of a member of Parliament shall be set aside. The following grounds which are relevant to this petition, must be proved on a balance of probabilities, **to the satisfaction of the Court**, and I quote:

- a. Noncompliance with the provisions of the PE Act relating to elections, if the court is satisfied that there had 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.

- b. That an illegal practice or any other offence under the PE Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.

The Court shall set aside the election on any of the above two grounds.
Emphasis of this Court.

36] As rightly pointed out by Babirye’s counsel, the burden of proof in election petitions always lies with the petitioner and remains with her, for the duration of the proceedings. Under Section 61 PE Act, she is expected to discharge that burden to the satisfaction of the Court, on a balance of probabilities. (See for example **Mukasa Anthony Harris Vs Dr. Bayiga Michael Phillip Lulume SC Election Appeal No. 18/2007** and **Paul Mwiru Vs Hon Igeme Nathan Nabeta Samson and 2 others EP Appeal No. 6/2011**. I note that for illegal practices, the standard has been placed even at a higher bar; one that is higher than that applied in ordinary civil cases, but not to the level of proof beyond reasonable doubt which is applied in criminal cases See for example: **Helen Adoa & EC vs Alice Alaso (EP Appeal No. 54 & 57/ 2016**.

37] The divergent views of the courts may appear to have left the required standard unclear. However, what is clear to me is that the evidence acceptable must be cogent i.e. compelling, clear, logical and convincing. See **Ernest Kiiza Vs Kabakumba Masiko EP Appeal No. 44/2016**. The Supreme Court in her decision of **Col. [Rtd] Dr. Kiiza Besigye Vrs. Museveni Yoweri & Another [2001-2005]3 HCB 4** (cited in **Odo Tayebwa Vrs Basajjabalaba E. P. No 13/2011**) explained that the standard is set at a high bar and to the satisfaction

of the Court, because the subject matter of election petitions is of critical importance to the welfare of the people of Uganda and their democratic governance.

5 38] CJ Odoki (as he then was) in **Kiiza Besigye Vs Yoweri Kaguta Museveni Presidential Election Petition No. 1/2001 (supra)** summarized the principles governing electoral laws. He advised that:-

- i. The election must be free and fair.
- 10 ii. It must be conducted in accordance with the law and procedure laid down by Parliament
- iii. It must be conducted with transparency.
- iv. The decision must reflect the will of the people, free of intimidation, bribery, violence coercion or anything intended to subvert the will of the people.
- v. The Court should consider the election process as a whole

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My decision

39] It was in general submitted for Babirye that the respondents violated the principles of a free and fair election and constitutionally guaranteed electoral process. In particular that the 2nd respondent's agents committed errors in
20 voting, counting and tabulation of results and committed irregularities and improprieties, while Bukenya by himself or his agents indulged in bribery during the election period. Counsel contended that the respondents' actions significantly affected the election result, and thus this petition.

25 40] The respondents on the other hand denied any election malpractice or offence. In particular, Bukenya who claimed to win the election with a considerable margin of 53.47% of the vote, deposed that he was not aware of and did not

instigate, order, participate in any voting malpractice, violence or intimidation. He also asserted that he could not be held accountable for the actions of police or other security organs. Similarly, it was stated for the 2nd respondent that all polling officials were duly equipped and well trained to
5 preside over elections and did not commit any legal acts or practices in contravention of electoral laws. That election was in general carried out in compliance with the Constitution and applicable law and was free from irregularities. In particular, that although complaints were entertained and addressed during campaigns, none was filed by the petitioner.

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41] The Electoral Commission (hereinafter EC) has the Constitutional mandate to organize, conduct and supervise elections that must be free and fair. According to Section 12 (f) Electoral Commission Act (hereinafter EC Act), it must do so under secure conditions and in accordance with the EC Act or
15 any other law. It is also her mandate Under Section 12(b) and (d) of the EC Act, to establish and operate polling stations and to design, print, distribute and control the use of ballot papers.

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42] It is contended for Babirye that there was wide spread intimidation against her and her agents by the respondents throughout the poling cycle. She also
20 complained of glaring noncompliance by the EC with Section 50PE Act with regard to the handling and filing of Declaration of Results Forms (DR Forms) under the following heads:

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vi. Clerical and mathematical errors and incorrect filling/posting of statistics into
25 the DR forms (in particular, votes omitted in final tally, non-tallying DR forms, DR forms that did not tally with entries in the Transmission of Results

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forms (TR forms), DR forms with wrong figures, wrong entries of number of voters on polling day vote stuffing, etc.

vii. Failure to show number of ballot papers issued at some polling stations

viii. Absence of balance DR forms or fictitious balance DR forms

5 ix. Forging signatures of her agents on DR forms

x. Destroying/hiding original DR forms

xi. Her agents and supervisors being denied opportunity to observe vote counting and tallying, and being denied access to the District tally centre

10 43] Counsel Semuyaba provided a detailed table itemizing in some detail 37 polling stations and the objections raised for each set of DR Forms, and in addition 26 that had irregularities that were not contested by the respondents. Those are duly noted but space constraints prevent their duplication here.

15 44] It was Semuyaba's contention that most errors highlighted were widespread, and had a clear and substantial effect on the final result in the Final Tally Sheet (hereinafter FT Sheet) submitted by the 2nd respondent. He blamed the irregularities partly on the decision of the EC to recruit and use untrained and illiterate officers, who were exposed through cross examination in court.

20 Citing the decision of **Rtd. Col Kiiza Besigye Vs EC & Anor 2001(supra)**, he argued that numbers are just as important as the conditions that produced the numbers in making adjustments for any irregularities. In his estimation, if the results of all the contested polling stations are nullified, the final result would substantially change

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45] In his response, counsel Lule submitted that in all the contested polling stations raised, there is proof that for each, Babirye's agent signed without

contest, and that no agent who signed was called to testify that their signature was forged. Counsel continued that no complaint was lodged by Babirye or her agents to the EC or her agents, or police at the polling or tally centre in line with Sections 46 and 48 PE Act. Further that, one Mugalula her Chief Agent having signed the Return Form for Transmission of Results, Babirye would be bound by the actions of her agents. Counsel Lule continued that some errors (e.g. the number of voters by sex) should be regarded a human error by presiding officers especially if no deliberate falsification or alteration by them is shown. He too compiled and presented a detailed table of the contested DR Forms showing that the final results for the two candidates on each separate form were identical with only minor discrepancies.

46] On their part, the EC contended that the election was conducted in accordance with the law. They contested the fact malpractices could have happened in the presence of Babirye's agents who signed the DR forms. They contended further that Babirye who professed knowledge of the electoral processes, filed no written complaints during the polls. In their view, the three most important documents being the DR Forms, TR form and Tally Sheet should and did bear the same correct results of the poll.

47] Citing authority, counsel contended that any unaccounted votes (irrespective of their volume) cannot be used as a basis for annulling an election since neither candidate benefits from them, and that in this particular case, such inconsistencies were minor. In their view, the substantiality test did not favour Babirye who lost the vote with a margin of 9,143 votes. In conclusion that the results declared reflected the will of the people and if at all there were any

irregularities or noncompliance, it did not affect the outcome of the election in any substantial manner.

48] The presentation, preparation and transmission of DR Forms is the preserve
5 of EC presiding officers under Section 50 PE Act. Once the vote count is complete, each respective polling officer fills the required set of forms, signs them and then allows each candidate or their agent present (and wish to do so) to counter sign each copy. Only then is the final result of a particular polling station declared and one DR Form sealed and then delivered to the returning
10 officer at the Sub County. Each candidate is entitled to a copy and other copies are also dealt with in accordance with the law. The Court had the opportunity to view copies of some DR Forms given to Babirye through her agents on polling day, and compared those with certified copies adduced by the EC.

15 49] According to Section 61 PE Act, the Court shall set aside an election only when there is failure to conduct the election in compliance with the law, and such failure and noncompliance affected the election in a substantial manner. The Court is thus mandated to investigate the legitimacy of the entire election calendar or journey covering the pre, present and immediate-post-election
20 period. Again, beyond balancing the rights and merits of the opposing parties, the Court must determine whether a valid election has been held, having due regard to the rights of voters. See **Kyakulaga & EC vs Waguma. EP. Appeals No. 15 & 20/2016** citing **Frederick N. Mbaghadi & Anor Vs Frank Wilson Nabwiso EP Appeals Nos.14 & 16/2011.**

25

Arrest of Babirye's polling agents

50] A prominent complaint by Babirye was that 57 of her appointed polling agents were prevented from manning the polling stations which opened up opportunities for all manner of malpractices and irregularities on voting day. It was her testimony that on the night of 13/1/2021, an unspecified number of her agents were picked up from her home in Mundade and detained in Bukuya Police station. She also learnt the next day that her supervisors in Makokoto Sub County, Buselegenyu Parish, Kiziika and Kisiita Parishes had also been arrested and detained in the same place. She was as a result disorganized and hurriedly arranged for replacements in the affected areas through Mugarula and Bukenya her supervisors. That the replacements arrived late towards closing of the poll; many were mocked by Bukenya's agents. She then advised her agents at Nabugabe Polling Station not to sign the DR Forms. Kigozi Ibrahim, Babirye's spouse confirmed his presence at their home when the house was raided by one Okello the OC Bukuya police post and Babirye's agents arrested.

51] Lwere Joseph, Mukasa Samuel, Baruku Lamanzani, Luwazo Sam, Ssekitoleko Yusufu, Masinde Ali, Matovu Ashilafu, Mulika Yokaniya, Kairu Siyaka and Walusimbi Yasin deposed that they were on 11/1/2021 appointed as Babirye's agents during the election. Each stated that on 14/1/2021 while they were sleeping in the Namyalo Guest House in Bukaya Town, at exactly 3am, police and red top military army men knocked on their doors which they opened. The intruders then assaulted and tied them with ropes then locked them up in Bukuya Police station. Save for form, there was little contest to that evidence. Each deponent attached a letter of appointment that Babirye signed and a Bond Release executed before the District CID officer, indicating that her were released from custody on 19/1/2021 and 20/1/2021 about one

week after election day. With that strong evidence, the Court is satisfied that 10 or so of Babirye's agents were arrested and kept in custody at the Bukuya Police Station on polling day. They were thus unable to carry out their duties on voting day. Indeed, there was no urgent necessity to carry out the arrests using considerable force and during the night. The actions of Okello and his team would constitute intimidation and violence which is an election offence.

Clerical errors and incorrect filling/posting of statistics into the DR Forms and RFTR.

52] Queries were raised in the petition against 37 polling stations which were represented in tables in the pleadings and reproduced in the submissions. The respondents did not contest anomalies in 26 polling stations, preferring to treat them as the result of human error given the exigencies and time limits that the EC officials have to work under on polling day.

53] The 199 excess ballot papers at Kyetume PS are indeed unexplained. However, it is not indicated that they were awarded to either candidate and would not affect the final tally which is not contested. Similarly, for Lwankonge Trading Centre and Kijwanganya polling stations, although the unused ballots appeared on the EC but not Babirye's copy, those ballots were not applied to favour either party and Bukenya remained the victor with 75 and 85 votes respectively. Babirye had agents at both stations. For Kiduuzi PS, the actual computation indicates that there were 196 unused ballot boxes. It could have been an inadvertent error not to fill in that figure in Babirye's copy, but her agent did sign the form. The same mistake was made at Ggunga Church for omitting women and men that voted and in Nfuka for omitting the number of 500 issued ballots.

54] Yet again in Nabutiti PS, the discrepancy appears only in the spoilt votes which did not affect either party's final tally. For Mabirizi A-M PS and Kigunda PS, the inadvertent entries resulted into entries made into the wrong
5 corresponding compartments. In particular, it is not possible that for Kigunda where 114 ballots were issued, there would be 250 spoilt votes. I note indeed that, the candidate and total scores were not affected.

55] Babirye claimed her agents at Kijjwa Primary School PS and Ddingo PS were
10 arrested. In her appointment letters, she appointed one Matovu Ashilafu and Masinde Ali (respectively) for those polling stations, who testified being arrested on the night of 14/1/2021. Her complaint that her vote was unprotected would be justified. However, she lost by 32 to 72 votes to
15 Bukenya in Ddingo and the discrepancy between the total number of voters and valid and invalid votes was three votes; on both accounts, a negligible score to the final result. For Kijjwa Primary School Polling Station, the EC DR form copy indicated she had no agents which confirms her complaints. However, her copy indicated two signatures of Ociira and Mugerwa as her
20 agents. The EC copy would be the correct representation of the status of that PS on polling day.

56] On the other hand, Babirye claimed but produced no evidence to show that her agents at the Nabutiti NS and Kamodo polling stations had been arrested the previous night. She did not therefore satisfy court that the two appearing
25 on the DR forms were not her agents. The same would apply to Kisiita Trading Centre where there was a large margin between Bukenya and Babirye of 297 votes. For Kamwalo PS, the discrepancy was four votes. However, those were

actually invalid votes which it appears, were wrongly added to the total tally, most likely an inadvertent but not intentional mistake by the presiding officer which did not favour or disfavor either candidate. For Nfuka PS, the EC and not Babirye's form contains ballot boxes issued. The Court is prepared to believe that the EC would issue ballot boxes to all polling stations and indeed polling took place there. This again would be an inadvertent but not intentional mistake.

57] I note that for Lugazi and Lukoola Polling Stations, Babirye's copy has two polling agents and the EC has one. All the other information (including the fact that Byesero and Arinaitwe the second polling agent are the same). Since Babirye concedes that her copy was received through her agent, then they should have noted the anomaly on polling day. She is bound by her agent's decision. Save that some information was omitted in Babirye's DR form in Luginji C and Buwejje polling stations, the information pertaining to the issued and total votes cast tallied on the EC form and each candidate's final tally was clear and untampered. She was represented by Mukama Rogers, Musisi Jackson and Katende Swaib all who duly signed the forms, which would bind her. In Kamwalo polling station although the EC copy indicated 20 total cast ballots, after computation, the correct sum is 208 which is indicated on Babirye's copy. Again, the omission of including total ballots cast and issued in Luginji, is remedied by their inclusion in Babirye's copy.

58] I do note that at Buseregenyu PS, there were discrepancies between the total number of voters and total valid votes cast (by 15 votes). However, that discrepancy is minor and would not affect Bukenya's vast victory of 226 votes as compared to Babirye's 24 at a polling station where she had an agent who

signed the DR form. The court noted no serious discrepancy in the entries at Kazikiza Polling Station where both candidates had relatively high scores of 92 and 154 votes. Still Bukenya led with a good margin. There is indeed a discrepancy in the number of women and men who voted at Nchwamazzi PS. However, the court has tallied the numbers appearing in the two DR forms and it is the same total of 200, which is the total number of the ballot papers counted. That anomaly did not affect the tally of either candidate and both forms were signed by the same two agents of either candidate.

59] The complaint for Mabirizi (N-Z) PS appeared to be valid. With 299 unused ballot papers, there would be an unexplained 70 votes issued by the EC. However, since the total number of valid votes cast (362) were well accounted for as the tally for the four candidates, the extra votes which were actually unused could be explained by human error. Bukenya still won by a high margin of 161 votes against Zaninka who was at that station represented by one Ssebukeera Matia who signed the DR forms. On the other hand, at Gunga Church Polling station, the manner in which the figures were entered was quite different on either form, and Babirye's purported agent was recorded as Kabachenga Robertson on the EC form and as Kabachenga Robert on Babirye's form. However, Babirye did not disown Kabachenga as her agent and he too did sign the form.

60] The contested number of four unaccounted votes at Kitokolo and Bulyambidde polling stations would be inconsequential to the final tally. What may have appeared to be grave inconsistencies at Kjjukira polling station did not favour Bukenya or affect his final tally. On the other hand, there was a grave inconsistency in the Kamusenene (A-M) tally. Although 300 ballots

were issued, 335 were cast, and that count does not even tally with the count for individual candidates or unused ballots.

61] It was also a grave irregularity to have used one ballot box for two categories
5 of candidates at Nabagabe Polling Station. However as explained by
Kiwanuka Kintu, Bukenya’s polling agent, the EC officials and agents agreed
that voting should continue notwithstanding that anomaly. Babirye’s agents
declined to sign the DR Forms but were present during the tally. Further, the
excess 12 votes at Kimbejja was also unexplained although it ultimately did
10 not affect the final tally for each candidate. Likewise, at Beria Road PS, the
total number of votes cast did not tally with the counted ballots. However,
although 56 votes were unaccounted for, it is not automatic that all belonged
to Babirye and would have given her a significant advantage. Again her agent
Ssemata Ronald is recorded as present at this polling station. I note that
15 Babirye’s counsel made an erroneous computation at Kicucuula polling
station. The correct entries in the EC DR form is that 380 ballots were issued
and cast. It is a correct observation that 270 unused ballots were indicated, but
those were not used for either candidate’s advantage.

20 **xii. Absence of balance DR forms or fictitious balance DR forms and
destroying/hiding original DR forms**

There was no evidence adduced to show that DR forms allotted to any polling
station were hidden, destroyed or un accounted for

25 **xiii. Forging signatures of her agents on DR Forms**

54] Forged signatures were highlighted with respect to Kazikiza polling station.
Forgery is a serious allegation that would have required expert evidence which

was never adduced. The Court is not prepared to interfere with important civil and political rights by mere allegations.

5 62] That said, it is a cardinal rule that a candidate's interests at the polling station is best protected or guaranteed by the presence of their polling agent. It would thus be understandable that using new and untrained agents, hurriedly appointed as replacements, would affect the quality of security for Babirye's votes. However, save for Ddingo PS, no evidence was adduced to confirm to which particular polling stations new agents were appointed and none were
10 presented as witnesses to illustrate the difficulties they encountered or irregularities they were unable to observe as novice or untrained agents. What is clear, is that apart from Nabagabe Polling Station, Babirye's agents went ahead to sign the DR Forms after the vote count was concluded without raising any complaint.

15

63] Beyond not signing the forms, the agent at Nabagabe was permitted to record the reasons for declining to confirm the poll and it is not shown that in other areas, that opportunity was denied the others. The other complaint that agents' names and signatures were interchanged on the different forms or one agent
20 omitted (for example in Lugazi, Gunga Church, Kijjuna, Bulinimula, Buseregenyu, Kasamba and Kizibawo), could be explained by the exigencies of polling day. All agents signed and Babirye did not disown them as her appointees. What is important is that EC official signed the DR forms before transmission to the Tally Centre.

25

64] In view of the above, it is safe to conclude that the Court has attempted a critical evaluation of the contested DR forms. Serious errors pointing to

deliberate tampering and irregularities were noted only at the Kisiita, Kamusenene A-M and Nabagabe polling stations. That evidence would constitute noncompliance with Parts IX of the PE Act. Other discrepancies noted were minor and others could be explained by human error, fatigue and sheer carelessness. The arrest of some of Babirye's agents notwithstanding, she did not disown the majority of those who she said represented her at short notice. She may have faced some disadvantage by using inexperienced agents, but their decisions to sign the DR forms would bind her. More important, that fact alone would not, and in fact it was not shown, that it affected the tally for either candidate at different polling stations.

Intimidation

65] It was contended for Babirye that she faced harassment and violence from police officers during campaigns, targeting her as a woman and one belonging to the opposition camp. She stated that the violence was relentless and at some point firearms were used and she suffered injuries for which she was treated. Bukenya's counsel strongly disagreed. He contended that only two incidents of violence were mentioned and at one, Babirye was addressing a political rally contrary to Covid 19 rules. That she claimed and did not show that at one such gathering she had adhered to her harmonized program and conceded never to have made any formal complaint to the EC. Counsel continued that beyond her evidence, no other person witnessed Babirye being assaulted and all her agents who claimed to have been arrested on polling day were persons whose addresses were outside the constituency and thus suspect.

66] I agree with the law quoted that it is the duty of the EC to ensure that every candidate in an election conducts their campaign freely without intimidation,

interference, torture or violence. Therefore, in accordance with Section 21(1) PE Act, every public officer, or institution is mandated to give equal treatment to all candidates. Force and violence are in fact offences under the PE Act, and their commission is so abhorred to the extent that if proved, can be basis to overturn an election. See for example **Katutuntu Abdul Vs Kirunda Kivejinja Ali & Anor EP No. 7/2006** (upheld on appeal in **EP Appeal No. 24/2006**). Further, Courts have routinely looked out for and treated reports of violence and intimidation made to police and the EC as sufficient proof of their occurrence and impact on the election. It was thus held in **Toolit Simon Akecha Vs Oulanyah Jacob L’Okori EP Appeal No. 19/2011** that

“..in the absence of a police report indicating violence or intimidation of voters during the campaign period, it would be safe to conclude that the period prior to voting day was generally peaceful”

67] Babirye stated in her pleadings that on 27/12/2020, while conducting a lawful gathering in Lugingi Parish, one Tumwesigye Bonny, OC Lugingi Parish and other police officers, taunted and then attacked her and her supporters, in the process tearing her dress and exposing her nakedness. That they concentrated on her gender and uttered discriminatory and partisan statements e.g. *“how can a woman contest against a man like Bukenya?”*. That in addition, Bonny fired bullets at her feet and in the air sending her supporters in disarray. That later during the early morning hours of 14/1/2021, the police and army forcefully entered and ransacked her home without a warrant, arrested some of her agents there, and then moved to the Namyalo Guest House from where they arrested another group of her agents. In her estimation, the raids were designed and did succeed to prevent her agents from superintending her vote, which would be in favour Bukenya

68] If true, Babirye's allegations against one Bonny would be serious because it involved violence and discriminatory attacks. Sadly despite her testimony that the attack took place during a gathering of about 20 people, it was her single
5 account and thus uncorroborated. She admitted knowing the EC complaints procedure but still made no formal report to the EC, leaving it to a mere phone call. Her testimony that she reported that incident to police was also not sufficiently proved because she did not attach the PF3A for examination of her injuries, and undertook, but did not produce the CRB number under which
10 her case was recorded. She was later to turn around in cross examination to state that the police refused to hand over her statement or give her details of her report. It is doubtful then, that the attack ever took place. Even so, no evidence was adduced to show that the effects of the alleged attack trickled down to influence her intending or confirmed voters not to vote for her on
15 polling day. The Judge in **Katuntu Vrs Kivejinja (supra)** considered the petitioner's failure to report the serious harassment to the EC a flaw which that would exonerate the EC from not doing more to curb the violence.

69] I also would agree with counsel Lule that for both incidents, Babirye conceded
20 that Bukenya does not control the police or army and did not request or sanction those attacks. Likewise she testified that the police poll constables in charge of polling stations committed no electoral offences or irregularities and as such, the EC cannot be directly linked to either attack or failing to prevent them, especially when the evidence appears to be that Babirye was holding
25 not a gathering but a political rally in contravention of Covid 19 restrictions.

70] I would thus conclude that Babirye proved to the satisfaction of the Court, only one incident of noncompliance with the electoral laws, when her agents were arrested by State operatives on the morning of 14/1/2021, and irregularities at three polling stations on the same day. I have specifically
5 found that the respondents or their agents cannot be held responsible for the arrest of Babirye’s agents but the Electoral Commission through their polling agents, is held accountable for the irregularities at the three polling stations.

10

Issue two

Whether there were any illegal practices committed by the 1st respondent personally or by his agents with his knowledge and consent or approval.

71] Provision is made for illegal practices and offences under Parts XI and XII PE
15 Act. I do agree with Babirye’s counsel that a single illegal practice or election offence proved to the required standard is sufficient to invalidate an election. See **Nabukeera Hussein Hanifa Vs Kusasira Peace Mubirr EP Appeal No. 72/2016** and **Nakate Mary Annet Vs Babirye V. Kadogo E.P Appeal No. 89/2016**. Only the offence of bribery was pleaded and argued.

20

72] the offence of bribery is created by Section 68 of the EP Act. It is provided that:

*Any person who either before or during an election with intent, either before or during an election, either directly or indirectly to influence another person to vote or refrain from voting for any candidate, gives or provides or causes
25 to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable to conviction to a fine not*

exceeding seventy currency points or imprisonment not exceeding three years or both.

73] It has now been established that the offence has three ingredients:

- 5 i. A gift or money was given to a registered voter who under Section 1(q) LGA is described to be one whose name is entered on the voters' register.
- ii. The gift was given by a candidate personally or through their agent with his/her knowledge, consent and approval, and
- 10 iii. It was given with the intention of inducing the person to vote (for a particular candidate or in a certain manner) Addition by this court.

See **Oyo Tayebwa Vs Basajjabalaba Election Petition Appeal No. 13/2011** citing **Col (Rtd) Dr. Kizza Besigye Vrs Yoweri Kaguta Museveni & EC (Supreme Court Presidential Election Petition No. 1/2001)**.

15

74] Bribery is considered a grave illegal offence and the standard of proof required has been placed slightly higher than that of ordinary civil cases and other electoral offences. It will require cogent evidence, that is truthful and free from inconsistencies or contradictions proved to the satisfaction of the court. See **Amuru & EC Vs Okello Okello (supra)**, citing **Bakaluba Peter Mukasa Vs Nambooze Betty Bakireke Supreme Court EP No. 4/2009**). It is also settled that an allegation of bribery must be proved by unequivocal evidence and not mere suspicion. See **Mukasa Anthony Harris Vs Dr. Bayiga Michael Lulume SC EPA No. 18/2007** and **Wanyoto Lydia Mutende Vs EC & Nakayenze Connie Galiwango. EP No. 02/2021**. Further, the Court should only consider direct evidence given first hand, See **(Kiiza**

20

25

Kabakumba Masiko citing Kwijuka Geoffrey Vs EC & Anor EP. No 7/2011).

75] Also because of its gravity, where the evidence is by a witness considered sympathetic to a particular candidate and thus partisan, the court will look for cogent, independent, evidence. **See Mbayo Jacob Robert Vs Talisonya Simon EP Appeal No. 2/2006.** The reason given, and I agree is that, the character of our elections is such that witnesses on either side are often ardent supporters during the elections for the side/party/candidate of whom they now represent in court. It is reasonable for them to aspire to gain victory and thus political power (lost at the poll) from the judicial process. **See Kasta Hussein Bukenya Vs Bukenya Balibaseka Gilbert & EC EP no. 29/2011 and Kabuusu Moses Wababo Vs Lwaiga Timothy Mutekanga & EC EP No. 11/2011.**

15 76] The courts have further held that it is necessary that persons said to have committed the offence and those said to have been bribed be clearly identified. Therefore, the actual act of bribery needs to be described with precision or at least with sufficient detail for the Court to determine that happened. Questions as to “*actually who gave what to who, when and for what purpose*”, need to be arraigned and answered to the required standard. **See (Kyamadidi Mujuni Vincent Vs Ngabirano Charles & EC EP. Appeal No. 84/2016).**

77] In brief it was submitted for Babirye that Bukenya bribed voters at Bukuya, Bulinimula, Wandagi and Nfuka polling stations. Babirye herself admitted that she did not see Bukenya hand out any bribe and relied on reports from her agents and supporters. She thus presented several witnesses to corroborate her

claims. I will deal with each incident of bribery as presented in the submissions.

Bribery at Kichumbanswa Trading Centre

5 78] Mugisha Ephraim a registered voter at Kichumbanswa polling station claimed that on 12/2/2020, Bukenya went to Kichumbanswa Trading Centre and joined a village meeting. That during the meeting, he gave Mugisha Shs. 300,000 with instructions he distributes it among his village mates, and a request that they vote for him on 14/1/2021. That those at the meeting decided
10 to buy chairs, and Mugisha made the purchase for Shs. 250,000 and used the balance for transport. A receipt of the purchase and a photograph of the chairs were attached to his affidavit. It is stated that Ndagire Scovia who appeared as Bukenya's witness corroborated that evidence. Bukenya strongly contested that evidence and presented a copy of the harmonized campaigning
15 programme for the Bukuya County South indicating that on the material date, he was elsewhere in Kitumbi. Mugisha was at the material time the NRM chairman for Kichumbaswa village. I would for that reason give special attention to his evidence, which was being given against the flag bearer of his party.

20

79] Mugisha claimed to have received the above bribe in front of others in a meeting. None were called to support it and thus Bukenya's evidence that he was elsewhere in Kitumbi would be unrebutted. Even so, there was no proof to show that Mugisha purchased the chairs from those proceeds or that in fact
25 the chairs in the undated photograph were the chairs he meant. Instead, counsel Semuyaba sought to use the evidence of Ndagire Scovia and

Ssendegeya Milson (presented for Bukenya), who he deemed his agents, to support it.

80] I have in my decision of **Buwembo Monday Kalule Vs Busulwa Atanansi**
5 **& EP No. 6/2021** found that there is no precise rule as to what constitutes evidence of being an agent. Even so, it is incumbent upon the person alleging the existence of agency to prove that the candidate authorized, knew of, and/or sanctioned the actions of the agent. Also see **Ernest Kiiza Vs Kabakumba Maskio EP Appeal No. 44/2016**.

10

81] In her evidence, Ndagire stated that as NRM treasurer, she was tasked with the duty of distributing money to District village NRM chairpersons, and Mugisha received that sum as chairperson of Kichumbanswa village, at a meeting that Bukenya did not attend. That appears to be the same sum and for
15 the same purpose that Lugendo Noah received money for Kasambya village. In the receipt attached to Lugendo's affidavit, it is indicated that the money was meant for "*mobilization of voters*". I would deduce that it was money being paid by the NRM party for mobilization generally. I note that the voters to be mobilized or paid is not clear and by merely belonging to the NRM party
20 would not mean that Bukenya knew about or authorized the payment. Again, the NRM political party cannot be Bukenya's agent within the meaning of the PE Act and "*mobilization funds for candidates*" cannot be, without compelling evidence be presumed to be bribery money that Bukenya allegedly handed over to Mugisha. Courts have been warned only to accept unequivocal
25 evidence but not that based on mere suspicion.

82] Further, it was stated by Ssendegeya Milson, the NRM chairperson Mbirizi Sub County that he was also aware that Mugisha had received the sum of Shs. 300,000 for mobilization. However, he later confirmed that Mugisha had instead relocated the money to purchase chairs, an action Ssendegeya considered a misappropriation of the money. Mugisha did not rebut that evidence. To my mind, there must have been some disagreements between Mugisha and his party members with regard to that money. It cannot be dispelled that he may have for those reasons chosen to give false evidence against the party flag bearer. As a whole, his evidence was unreliable and seriously discredited because he offered no satisfactory response to certain clarifications made by Bukenya’s witnesses. I would accordingly find that the offence of bribery in Kichumbanswa has not been proved to the required standard.

15 **Bribery at Bwerenga Village**

83] Kasumba did not profess to have received the saucepan and plates directly from Bukenya and his evidence of those facts would only be hearsay and inadmissible. Again the undated and unmarked photographs of the items add no value to his evidence because they are unauthenticated. Kizza Joseph being Babirye’s professed mobilizer could be partisan and his evidence to support that incident is to be taken with much caution. Again, Namirimu Annet’s evidence that during February 2021 Kasumba hired from her a saucepan and plates belonging to the “Mukama Afayo Women’s Group”, appeared to point to the fact that these could be the items he was attaching to the alleged bribe. I would for that reason also find that the incident of an alleged bribe at Bwerenga village was not proved to the required standard.

Bribery at a tournament in Katuugo Village

84] Ssesazi Godfrey testified that on 3/1/2021, Bukenya organized a tournament in Katuugo village in which many youth participated. He was present when it ended and he gave out money gifts of Shs. 200,000 to Katuugo FC the winning team, and Shs, 100,000 and 50,000 (respectively) to Nfuka FC, Mundade A & B and Namulanda FCs, to share among themselves with a request that they vote for him. That evidence was supported by Ssenyonyi Brian, Kalanzi Charles and Sewakiryanga Moses.

10 85] I agree with counsel Lule's observation that reference is made to Ssewakilyanga Moses yet the evidence is by Ssewikyanga Moses, one whose affidavit I expunged. The other evidence supporting this accusation, being of those I would consider partisan, was not cogent or compelling. None of the accusers reported the alleged bribery to the EC or police, and as pointed by
15 counsel Lule, it is suspicious a tournament could have taken place during a time when gatherings were prohibited to curb the spread of covid 19. Again, Bukenya's evidence from the harmonized program that he was infact in Bukaya was not rebutted. Generally the evidence was also not strong enough to support the accusation of bribery.

20

Bribery of boda bodas at Kigudde Village

86] Akoziregye Isaac was the lone witness of the alleged bribery of the Kigudde Boda Boda group. He simply stated that he received Shs. 200,000 on
25 12/12/2020 and more from Bukenya at an unspecified place and on an unspecified date. He stated but did not identify who else was present when the money was handed over and the reason given that it was to solicit for votes. It

would be dangerous for the court to accept the lone evidence of any witness who stepped forward to pin a candidate of bribery. The bar was set much higher than that. I do reject that evidence as well.

5 87] I note that in all cases of alleged bribery, none of the recipients (and in this case, there were quite a good number) found it important to report the alleged bribes to any EC official or the police. This leaves their evidence suspect and weak. I find therefore that none of the allegations of bribery were proved to the required standard.

10

Issue three

Whether there were any electoral offences committed by the respondents or their agents.

15 88] I agree with counsel Lule's observation that counsel Semuyaba made no discernable submissions under this issue. Illegal practices (which include bribery) are created under part XI of the PE Act, while offences fall under part XII of the PE Act. I note also that the petition did not properly categorize election offences and some offences (e.g. misconduct during campaigns, offences relating to voting and wrong election returns) were readily covered
20 in the submissions made with respect to the first issue. I would accordingly make no decision on this issue and Babirye would suffer no prejudice thereby.

Issues 4:

25 **If so, did the noncompliance with the electoral laws substantially affect the results of the election.**

89] I repeat that non-compliance *per se* is not enough to overturn an election. The principle is that the non-compliance must be substantial. Justice Benjamin Odoki considered the provisions of Article 126(2)(e) of the Constitution to hold in **Dr. Kizza Besigye Vrs EC & Yoweri Musevni 2006 (supra)** that:

5 “*some noncompliance or irregularities of the law or principles may occur during the election, but an election should not be annulled unless they have affected it in a substantial manner. The doctrine of substantive justice is now part of our constitutional jurisprudence.... Courts are therefore enjoined to disregard technicalities or errors unless they have caused substantial failure*
10 *of justice.*”

90] In a subsequent decision, the Supreme Court considered the importance of elections and their significance as a national expression of civil and political rights. Justice Katurebe advised that the proven defects should seriously affect the result to the extent that the result could no longer reasonably be said to represent the true will of the majority of voters. See **Amama Mbabazi Vs Yoweri Museveni EP No.1/2016**. Similarly in **Kizza Besigye Vs Museveni Kaguta Presidential EP No. 1/2001**, Justice Mulenga advised that:

15 “*....to succeed, the petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his/her winning majority would have been reduced but such reduction however would have to be....such that would put the victory in doubt*”
20

91] The substantiality test entails the use of both the quantitative and qualitative methods, and the entire election cycle is always at stake. The decision of Justice Odoki in the **Kiiza Besigye’s case (supra)** followed in **Kisirye Vs Bazigatirawo & Anor EP. No. 8/2016**, is instructive. He stated:

“...in assessing the effect of such noncompliance, the trial court must evaluate the whole process of the election by using both the qualitative and quantitative approaches with the quantitative taking the numerical approach to determine whether the noncompliance significantly affected the results, and the qualitative approach looking at the overall process of the election especially, voter information, the process of counting and tallying and declaring results and the ability of each voter to cast their vote. . In this process of evaluation, it cannot be said that numbers are not important just as the conditions which produce those numbers. Numbers are useful in making adjustments for irregularities. The crucial point is that there must be cogent evidence direct or circumstantial to establish not only the effect of non-compliance or irregularities, but to satisfy the court that the effect on the election was substantial” Emphasis of this Court.

I would add that although the quantitative test which takes a numerical approach, is more likely to suit circumstances where the margin is large, it cannot be used in isolation of the qualitative test, that in general investigates compliance with the Constitution and electoral laws during the election.

92] Babirye’s counsel adopted both qualitative and quantitative tests to argue that the non-compliance substantially affected the final result. He rejoined that bribery was proved through the evidence of Ndagire, Ssendegeya and Lugendo. Further that the trail of transmitting results from the polling stations to the EC returning officer lacked transparency, was inefficient, flawed and resulted into declaration of wrong results. Further that the RO failed to use all the available physical and electronic systems meant to ensure that voters were properly identified, to cross check results from each polling stations, and also

did not file a report of the election in contravention of Section 58(2) PE. Counsel continued that ballots were not properly counted, and ballots of his client were not given equal treatment which led to disenfranchisement of some of her voters. In his estimation, wrong entries in the DR forms were serious arithmetical mistakes and not clerical errors, resulted into a wrong tally which meant that Bukenya was awarded an undeserved and unexplained victory. He contended that if all queried DR forms were to be eliminated the voter margin of 9,143 votes between the two candidates would change.

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10 93] Bukenya's counsel disagreed. He argued that Babirye failed to cast doubt that the winning margin would reduce and there was virtually no evidence that any voter was prevented from exercising their right to vote. Further that the evidence of intimidation and violence which was not proved, was isolated to cover only Babirye and her alleged poll agents whose evidence was belated and suspect. He continued that unused votes which do not benefit any candidate, could not be used as a basis of annulling an election, and all complaints against entries in DR forms and tallying could not be sustained since Babirye's agents were present at the polling station and did not disown any results. He concluded by asserting that any noncompliance did not affect the results of the vote in a substantial manner. He then prayed that the will of the people of Bukuya constituency as exercised in voting Bukenya as the candidate with the highest number of votes, be maintained.

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25 94] 2nd respondent's counsel substantially agreed with the above submissions and contended that there was total compliance by them with the law and that the final result is a true reflection of the will of the people of the constituency. He argued that with the large margin between the candidates, the quantitative test

did not favour Babirye because the errors raised were minor and inconsequential to the final result. He contended that bribery was not proved and Babirye and her agents' failure to report the same as trained, was an indication that it did not happen. He too concluded that any noncompliance could not have affected the final outcome in a substantial manner.

95] I have found that it is the duty of the EC to protect the sanctity of the vote. They do so through their agents at different levels, right from the polling station, through to the sub county, District and finally national tally centre. They must do so by ensuring that only registered voters are allowed to vote, the vote count is transparent, the prescribed DR forms are fully and correctly filled and the forms, transmission forms and report books are properly secured and transmitted to the tally centre.

96] Having carefully perused the contested DR forms I found only two had serious unexplained errors that would point to deliberate tampering. Going by the large margin between the two candidates, even when completed discounted, there would be only a small effect to the final tallies, and certainly Bukenya's tally would not significantly reduce. As already pointed out, most anomalies were minor and be explained by human error and fatigue that are associated with the exigencies of election day. Inadvertent errors could also be explained by lapses in training but not deliberate tampering. Bukenya who had no control of the ballot could not be blamed for the anomalies and no evidence was adduced to show that he directed or connived with EC officials to tamper with DR forms.

97] Counsel Semuyaba argued that 4,852 votes were unaccounted for. That conclusion is not supported by the evidence adduced and even so, it was not shown that such votes benefited Bukenya to raise his tally, or were denied Babirye to reduce hers. Similarly, in their decision in **Amoru Paul & EC Vs Okello Okello JB EP Appeals No. 39 & 95/2016**, the Court of Appeal decided that unused and invalidated votes could not be used as a basis of annulling an election, since neither party had benefited from it.

98] Under Section 32(1) PE Act, a polling agent is stationed at a station to safeguard their candidate's interests. I note that in the face of all the complaints raised for Babirye with regard to voting and vote counting, tallying and transmission, her agents were present and signed many DR forms without complaint to the polling agents, RO or police. Only one complaint was made in Nabagabe. It is inconceivable that those polling agents sat back and watched gross irregularities and wrong tallying being done with no demure. As I previously noted, none came forward to register any complaints during voting, tallying and transmission of the poll result.

99] In cross examination Babirye conceded that her chief campaign manager attended trainings at the EC and it is expected that most of her agents knew or should have known how to handle irregularities. It is conceivable then that there were no irregularities, the kind that would raise concern, or if those existed, their silence would bind Babirye their principal. The Courts has developed consensus that a candidate is bound by the actions of their polling agent, including the signing of the DR forms, and that when they sign the form, the agent is confirming to the candidate, his principal, that the correct result is what transpired at the polling station. See for example **Babu Edward**

Francis Vs Elias Lukwago EP No. 10/2006. It is my view then that, the agent's signature on a form is an indication that they are in agreement with all the processes before and during that endorsement. Similarly, no single voter registered a complaint or came forward in court to show that they were prevented from voting by the respondents or their agents.

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100] Babirye's complaint is that the intimidation of her agents and supporters and interruptions in her campaigns substantially affected her chances to win the vote. I have found her own intimidation doubtful. For that of her agents and supporters, evidence has to be adduced to show that such intimidation was relentless, widespread and effective. I would take a leaf from the **Katuntu Vs Kivejinja case (supra)** in the Bugweri Constituency. The Court overturned the election after considering the fact that the petitioner and his supporters were hunted down, attacked and assaulted throughout the constituency and for the duration of the campaigns and voting. The Judge found that the respondent run a campaign which he equated to a full "war" in which he mobilized, trained and deployed armed militia and youth (called the Black Mamba and Yellow Members) to intimidate and frustrate the petitioner's campaign. There were vivid accounts of intimidation and violence of many witnesses from all parts of the constituency and reports to the police, and other authorities were frequent and well documented.

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101] The recorded and proven incidences in this particular election are no match of the above. I would thus agree with Bukenya's counsel that although incidences of intimidation were recorded in this election, there were not the type that affected the final result in a substantial manner.

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102] In summary, the anomalies noted were not deliberate and infact minor. I would consider those on the backdrop of the final tally which gave Bukenya a margin of 9,143 votes, a margin, too strong to be significantly dented by what little was proved. The decision in **Mbowe Vs Eliuffo (1967)EA 241** offered an explanation that:

5 *“The result may be said to be affected, if after making adjustment for the effect of proved irregularities the context seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then*
10 *it cannot be said the result of the election would be affected by any particular non compliance of the rules”*

103] Further Babirye’s complaints of widespread violence and intimidation, were not matched by her evidence. I have when handling the first issue, dealt with those complaints in great detail. Only two incidents stand out; that of her alleged assault and mistreatment in Lugini Parish and the arrest of her polling agents in Bukuya Town. I was not convinced that the first incident happened and if it did, its effects did not profoundly trickle down or across the constituency to substantially affect the vote or final tally. I consider the second incident a serious violation of the named agents’ constitutional rights to liberty, Should the arrests turn out to be bogus and unprosecuted, the victims of those violations may consider seeking reparations against the police and army under the Constitution and the Human Rights (Enforcement) Act, after confirming the particular state operatives who made the arrests.

25 104] However, as I have already held, it was not proved that Bukenya or the EC had a hand in their arrest. Further, it was shown that only ten agents were

arrested. Bukuya Constituency posted 94 polling stations and Babirye managed to organize an agent (and sometimes two agents) at all, polling stations. Save for Nabugabe, no complaints were raised by an agent and I have confirmed that Babirye is bound by their decisions to sign the DR forms. I found only a few unexplained irregularities. On the whole, the confirmed but isolated irregularities connected to voting and tallying and the one incident of harassment, could not and did not amount to irregularities that would in my estimation affect the final result in a substantial manner

105] In summary I find that although there was noncompliance in the conduct of the election of the member of Parliament for Bukuya Constituency, such non-compliance did not affect the result of the election in a substantial manner

Issue Four:

What remedies are available to the parties?

106] In conclusion, I find that on the evidence available, Babirye Jane Zaninka the petitioner, failed to prove her claims in the petition on a balance of probabilities, and to the satisfaction of the court. All declarations and prayers she sought in the petition are denied. Accordingly, the petition stands dismissed with costs to the respondents.

I so order.

Eva K. Luswata

JUDGE

Dated: 12/9/2021