

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

[1] The petitioner with the 1st Respondent and a one **Karungi Monica**, were candidates for District Woman Representative to Parliament for **Ntoroko District**, in the Parliamentary Election held on the 14th day of January, 2021. The 2nd Respondent returned the 1st Respondent as Validly Elected Woman Representative to Parliament for Ntoroko District having obtained **9,787** votes and the Petitioner obtained **9,679** votes with a winning margin of **108** votes while **Karungi Monica** obtained **2,276** votes and **393** votes were declared invalid and the said results were gazetted on the 17th day of February, 2021.

[2] The Petitioner was aggrieved with the declaration of the results and the electoral process and filed this petition on the following grounds;

1. That in conduct of the election of Woman Member of Parliament, Ntoroko District, there was non-compliance with the electoral laws and that the non-compliance and the failure affected the result of the election in a substantial manner.
2. That illegal practices or other offences under the P.E.A were committed in connection with the election by the 1st

Respondent, personally or with her knowledge and consent or approval.

3. That the 1st Respondent was not qualified to be a Woman Member of Parliament of Ntoroko District.

Counsel legal representation

- [3] The Petitioner was represented by **Counsel Caleb Alaka** and **Kato Fred** of **Ms Alaka & Co Advocates**, Kampala, the 1st Respondent was represented by **Counsel Usaamo Sebuufu** and **Esau Isingoma** both of **K & K Advocates** (formerly Kiwanuka Karugire Advocates), Kampala while the 2nd Respondent was represented by **Counsel Eric Sabiiti** of the **2nd Respondent's Law Chambers**, Kampala.
- [4] All counsel filed their respective written submissions as permitted by court and the evidence on record is by way of affidavit evidence filed by all the parties pursuant to the provisions of **Rule 15(1) of S.I 141-2** under the **P.E.A.** The submissions and the provided enormous authorities were very enriching and this court is therefore, grateful to all counsel involved. I have valuably utilized them.

Burden and Standard of proof

- [5] It is settled law that the burden of proof in Election Petitions lies upon the Petitioner who is required to prove every allegation contained in the Petition to the satisfaction of the court. The Standard of proof is a matter of statutory regulation by **Subsection 3 of Section 61 of the Parliamentary Elections Act, (P.E.A) 2005**. The Subsection provides that the standard of proof required to prove an allegation in an election petition is proof upon balance of probabilities; **MUKASA ANTHONY Vs DR. BAYIGA M.P. LULUME, Election Petition Appeal No. 18 Of 2007**.

- [6] In **ODO TAYEBWA Vs BASAJJABALABA NASSER & E.C, EPA No.13 OF 2021**, the expression in **Section 61 (1) and (3) PEA** ‘satisfaction of the court on a balance of probabilities’ was interpreted to mean proof that is ‘slightly higher than proof on a preponderance of probabilities but short of proof beyond reasonable doubt’. See also **OCEN PETER & E.C Vs. EBIL FRED, EPA NO. 83 OF 2016** where it was held that the standard of proof is higher in election matters than that required in ordinary suits because of the public importance and seriousness of the allegations normally contained in the petitions.
- [7] It follows therefore, a petitioner has a duty to adduce credible and or cogent evidence to prove the allegations to the stated standard of proof.

Agreed Issues

- [8] During scheduling, the following issues were agreed upon for the determination of this petition;
- 1) Whether the elections were conducted in compliance with the provisions of the electoral laws, if not, whether the non-compliance affected the results of the election in a substantial manner.
 - 2) Whether the person other than the one elected won the elections.
 - 3) Whether there were illegal practices and offences committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.
 - 4) Whether the 1st Respondent was at the time of her election not qualified for elections as a member of parliament.
 - 5) What remedies are available to the parties.

Preliminary Objection:

[9] During the 2nd part of the conferencing, counsel for the petitioner, **Mr. Caleb Alaka** intimated to court that he intended to raise certain preliminary objection to the effect that some of the affidavits sworn by the 1st Respondent and the 2nd Respondent in their answer to the petition were incompetent at law. It was however agreed by both counsel and court that the intimated preliminary objection forms part of the issues in the submissions. In his submissions therefore, counsel for the petitioner framed the objection as an issue as follows;

Whether some of the affidavits in support of the 1st and 2nd Respondent's answer to the petition are competent at law and if not, whether they should be rejected by this court.

[10] Counsel for the petitioner submitted and contended that the following affidavits named below in support of the 1st and 2nd Respondent's answer to the petition are not competent at law and should be rejected for the following reasons;

a) That the following 17 affidavits in support of the 1st and 2nd Respondent's answer to the petition offend the mandatory provision of the Illiterates Protection Act (IPA) Cap 78 and the Oaths Act Cap 19 and should be struck out and expunged from the record.

[11] The affidavits are:

- (i) **Balikighamba James** sworn on 20/4/21 (marked No.02)
- (ii) **Rugamba Daniel** sworn 20/4/21 (marked No.03)
- (iii) **Mulinewo Richard Kigango** sworn on 20/4/21 (marked No.04)
- (iv) **Rwatooro Muhammad** sworn on 20/4/21 (marked No.05)
- (v) **Kisembo Geoffrey** sworn on 20/4/21 (marked No.06)
- (vi) **Bisanga Emmanuel** sworn on 20/4/21 (marked No. 07)
- (vii) **Baluku Julyasi** sworn on 19/4/21 (marked No.08)

- (viii) **Tinambi Benezeri** sworn on 19/4/21 (marked No.09)
- (ix) **Basulene Julius.B** sworn on 19/4/21 (marked No.10)
- (x) **Balihale Nason** sworn on 19/4/21 (marked No.11)
- (xi) **Kosutama Isaya** sworn on 19/4/21 (marked No.12)
- (xii) **Bamwendyaki William** sworn on 19/4/21 (marked No.13)
- (xiii) **Happy Moses.B.** sworn on 12/8/21 (marked No.15)
- (xiv) **Tinkasimire Robert** sworn on 12/8/21 (marked No.16)
- (xv) **Kiiza Oliva** sworn on 12/8/21 (marked No.18)
- (xvi) **Kemigisa Jane** sworn on 12/8/21 (marked No.19)
- (xvii) **Biira Harriet** sworn on 12/8/21 (marked No.20)

[12] That all the above 17 affidavits bear a Certificate of translation either done by a one **Atuhaire Susan, Chambago Hellen** and or **Mutegeki Benjamin Mugeru** and that;

- a) The translators of these documents and contents of the affidavits to the illiterates have not written their true and full address as mandated by the Illiterates Act.
- b) The translators have not stated that the affidavits were drafted on the instructions of the Illiterates/deponents.
- c) That there is no indication that annextures were explained to the illiterates.
- d) That the Commissioner for Oaths throughout the affidavits did not certify that the document was read and explained in his presence to the deponents and that the language used was that understood by the deponents and all annextures were explained and that the Commissioner for Oaths did not make the affirmation and certification required by law.

[13] Counsel relied on the authorities of **KASAALA GROWERS CO-OP SOCIETY Vs KAKOOZA, S.C.C.APPN.No.19 OF 2010, NGOMA NGIME Vs E.C & ANOR, EPA No. 11 OF 2002, HON.OTADA SAM Vs TABANI IDI AMIN & ANOR, EPA No.93 OF 2016, MUGEMA PETER Vs MUDIIOBOLE ABEDI NASSER, EPA No. 16 OF 2016** and

PLAN VIRGINIA MUGYENYI Vs HON. TUMWESIGYE ELIODA & ANOR, EP.No.01/2018 for the proposition that **Section 3 of the Illiterates Act** enjoins any person who writes a document for or at the request or on behalf of an illiterate person to write in the jurat of the said document his/her true or full address and that failure to do so, it shall not be implied in a statement that he/she was instructed in respect of the document by a person whom it purports to have been written or that it literally represents the deponent's instructions. He therefore invited court to reject them and that the same be struck out for being incompetent at law.

[14] Counsel for the Respondent on the other hand, submitted that the 17 affidavits in question are competent and admissible for it is not true that they did not comply with **Section 3 of the IPA**. According to him, the submission of counsel for the petitioner portrays a misunderstanding of the requirements laid down in **Section 3 of the IPA**. That a literal interpretation of **Section 3** reveal that it is the writer of the document on behalf of an illiterate and not the translator who is required to write their full name and address. That therefore, in the instant petition, the affidavits queried by the petitioner all indicate that they were "Drawn and Filed" by K&K Advocates and the address of the 1st Respondent is clearly indicated as the address of the drafter. There is no legal requirement to have or include the address within the Certificate of translation **the true and full names and full address of the persons writing and translating the document to the illiterates**.

[15] As regards the impugned affidavits, there is no doubt that each of them relate to an illiterate because each of these affidavits has the translator's Certificate/Jurat.

[16] **Section 2 of the Illiterates Protection Act** provides thus;

“2. Verification of signatures of the illiterates

*No person shall write the name of an illiterate by way of signature to any document unless such **illiterate** have first appended his or her mark to it, and any person who so writes the name of the **illiterate** shall also write on the **document** his or her true and full name and address as witness, and his or her so doing shall imply a statement that he or she wrote the name of the **illiterate** by way of signature after the illiterate had appended his or her mark, and that he or she was instructed so to write by the **illiterate** and that prior to the illiterate appending his or her mark, the document was read and explained to the illiterate.”*

[17] Then, **Section 3** of the same Act provides thus;

“3. Verification of documents written for illiterates

Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her.”

[18] It is agreeable that the authority of **KASAALA GROWERS CO-OP SOCIETY Vs KAKOOZA JONATHAN, S.C.C.APPN. No. 19 OF 2010** provides the right position of the law as follows;

“Section 3 of the illiterates Protection Act (Cap78) of the laws of Uganda 2000 enjoins any person who writes a

document for or at the request or on behalf of an illiterate person, to write in the jurat of the said document his/her true name and full address. This shall imply that he/she was instructed to write the document by the person for whom it purports to have been written and it fully and correctly represents his/her instructions and to state therein that it was read over and explained to him or her who appeared to have understood it.”

- [19] In **ABUBAKER MASHARI Vs BAKUNDA (U) LTD & 3 ORS H.C.M.A.No.233 OF 2015**, Court observed:

*“The import of **Section 3 of the Act** is to ensure that the documents which are purportedly written for and on instructions of illiterate persons are understood by such persons if they are to be bound by their content...These stringent requirements were intended to protect the illiterate persons from manipulation or any oppressive acts of illiterate persons...The requirements of the Illiterates Protection Act are legal requirements and not procedural requirements. The law can therefore, not be bent under Article 126(2)(e) of the Constitution.”* See also **TIKENS FRANCIS & ANOR Vs THE E.C & 2 ORS, H.C.E.P No.1 OF 2012.**

- [20] First of all, from the reading of both **Sections 2 and 3 of IPA**, it is clear that the requirement to **write the full names and full addresses** is not only limited to the writer or drafter but also to the translator. Whereas **Section 3** of the Act refers to the writer/drafter, **Section 2** refers to the translator.
- [21] The stark difference therefore between preparation of a document on behalf of an illiterate and its translation referred to by counsel for the 1st Respondent is not helpful at all for the requirement to

have the full names of the writer/drafter and those of the translator remains mandatory as per both **sections 2 and 3 of the IPA.**

- [22] The issue now is whether the 17 impugned affidavits complied with the mandatory requirements of **Sections 2 and 3 of the IPA.** I have looked at the 17 impugned affidavits. I consider each as one document. Each of them has a Certificate/jurat by the translator that the contents of the affidavit were read, interpreted or translated to deponent in the language he/she understood and the deponent understood the content and signed before a Commissioner for Oaths. At the bottom of the document, there is a full address of the drafting firm of the document as

**“K & K Advocates
(formerly Kiwanuka & Karugire Advocates)
K & K Chambers, plot 5A Acacia Avenue,
P.O.Box 6061, Kampala.
Tel.+256-393-276464
Email:advocates@kandk.co.ug
Website:www.K and K.co.ug”**

- [23] I am alive to the provision of **Section 1 of the Oaths Act.** It provides;

“Oaths to be taken

The Oaths which shall be taken as occasion shall demand shall be the oaths set out in the First Schedule to this Act.”

- [24] In this case, the translations from English language to the language understood by the deponents were done by 3rd parties. I am aware that in the **1st Schedule of the Oaths Act Cap 19 Form B: Form of Jurat** (where a third person has read the affidavit to the deponent) require the affirmation and Certification that the document and all its annexures were read and explained to the

deponent to be done by the Commissioner for Oaths. In the impugned affidavits, the affirmations were done by a 3rd person/translator. The Commissioner for Oaths Certified each of the affirmations by Commissioning each affidavit and translator's affirmation thereon.

- [25] In this case, there was therefore a deviation from the **form** set out in the 1st **Schedule of the Oaths Act** as regards the relevant jurat. **Section 43 of the Interpretation Act** however, states that,

“43. Deviation from form

Where any form is prescribed by any Act, an instrument or document which purports to be in such form shall not be void by reason of any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead”

- [26] In the instant case, I find that the substance of the affidavits/documents was the requirement that the Commissioner for Oaths certifies each of the impugned affidavits, the contents were read over in his presence to the deponent/illiterate and the nature and contents of the exhibits referred to in the affidavits are explained to him or her in the language he/she understood before appending his/her name or signature thereto. In my view, the fact that the Commissioner for Oaths certified the translator's jurat by way of commissioning it, this was compliance with the requirements of **Section 1 of the Oaths Act** and any deviation from **Form B** schedule of the Oaths Act, form of jurat (where a third person has read the affidavit to the deponent) did not affect the substance of the instrument or document.

[27] The above was the position in **NAKATE LILIAN SEGUJA & ANOR Vs NABUKENYA BRENDA, EPA No. 17 and 21 of 2016** where Court of Appeal held;

*“We note that while the inclusion of a jurat in an affidavit is an indispensable matter of substance, the manner of certification or the person who does it is a matter of form; hence it is provided for under ‘Form B’ of the schedule to the Act; which is an appendix to the Act. By the Commissioner for Oaths administering the oath, after the certification by the third party interpreter that the affidavit was interpreted to the deponent, the Commissioner for Oaths attests in proof of the fact that such interpretation, though not done by him or her, was in fact done to his or her knowledge and satisfaction. Therefore, the commissioning of the affidavit by the Commissioner for Oaths, serves a certification too. We are therefore satisfied that the Certification of the Jurat by the interpreter, instead of the Commissioner for Oaths as provided for in **Form B of the first schedule to the Act**, should be considered as insubstantial deviation; which never seriously flouted the intention of the legislature. We believe that where a Commissioner for Oaths administers an oath in an affidavit to a deponent after a third party instead of the Commissioner for Oaths has effectively interpreted the contents of the affidavit to the deponent to his or her understanding the affidavit should not be regarded as irredeemably defective as to be rejected.*

Parliament could not have intended that such an insubstantial deviation from the statutory provision should suffer such a consequence.”

[28] The Court of Appeal adopted the same reasoning when considering a similar issue in **TAMALE JULIUS KONDE Vs**

SSENKUBUGE ISAAC & ANOR, EPA No.75/2016 and held that as much as the form in the **1st schedule to the Oaths Act** was not strictly complied with, the mischief sought to be addressed by the form was well taken care of by the certification done in accordance with **Section 2 and 3 of the IPA** which primarily seek to achieve the same goal.

- [29] As regards whether the instant impugned affidavits complied with both **Sections 2 and 3 of the IPA**, the **IPA** does not provide any specific form for the verification but it emphasizes the fact that any person who writes the name of the **illiterate** or **document** for or at the request, on behalf or in the name of any illiterate, writes his or her own true and full name and address as witness.
- [30] In this case, as I have already observed, each of the impugned affidavits bear the full name and address of the drafting firm and the full name of the translator although not necessarily that they appear in the jurat, but they appear on the document. One has to look at the document/affidavit as one document. At the bottom, after the translator has made his/her affirmation, it bore the full name of the firm that drafted and filed the document. It is my view that this full name of the firm and address suffice for the requirements of **Sections 2 and 3 of the IPA** as the address thereon is also shared by the translator.
- [31] There may have been none full compliance with **sections 2 and 3 of the IPA** but the substance of the law was complied with. As observed in **NANJIBHAI PRABHUDAS & CO LTD Vs STANDARD BANK LTD [1968] EA 670**, "The courts should not treat any in correct act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a fundamental nature."

- [32] As observed in **TAMALE JULIUS KONDE Vs SSENKUBUGA ISAAC (Supra)**, Courts have always adopted a liberal approach when dealing with affidavits in election matters given the peculiar circumstances it presents. Elections are matters of great public interest and evidence at trial is by way of affidavits. For court to reject evidence of a party to the petition therefore, the incorrect act complained of must be of fundamental nature. To require therefore, as counsel for the petitioner demands, that there must be a kind of certificate indicating the full names and address of the drafter and not an entity is to go into technicalities. It is my view that as long as the full names and address of the drafter are reflected on the document, that is sufficient and once the address is located at the bottom of the document, then it also suffices for the translator.
- [33] Once the provisions of **Section 2 and 3 of the IPA** have been found to have been complied with, it becomes implied that the writer of the document was instructed to write the document by the person for whom it purports to have been written and that it fully correctly represents his or her instructions and was read over and explained to him or her.
- [34] The annextures in this case, save for 2 affidavits, are mere Identity Cards of the deponents and their appointment letters as campaign agents for the Petitioner. It cannot therefore be said that the deponent's IDs and appointment letters require to be explained to the illiterate deponents who supplied or provided them for attachment to their affidavits.
- [35] In this case therefore, though there was no **strict** compliance with **Sections 2 and 3 of the IPA** and the **Oaths Act 1st Schedule**, there was substantial compliance as all the impugned affidavits show

that they were read, interpreted/ translated to the illiterate and were signed before the Commissioner for Oaths.

- [36] The petitioner's 1st preliminary objection is therefore found to be devoid of any merit and it is accordingly rejected.

b) Contravention of Section 7 of the Parliamentary Elections Act by Bahemuka Moses

- [37] Counsel for the petitioner submitted that in paragraph 5 of the affidavit of **Bahemuka Moses**, sworn on the 12th day of August, 2021(**marked No.16**) the deponent states that,

"I was appointed by the Electoral Commission as a presiding officer of Kacwamba Mosque polling station"

- [38] That as an election officer therefore, by swearing an affidavit in support of the 1st Respondent's answer to the petition, the said **Bahemuka Moses** revealed information before the making of the affidavit contrary to the Oath he undertook thus breaching **Section 7(6) PEA** and that under the authority of **OLOO PAUL Vs DR. LOKII JOHN BAPTIST & ANOR, E.P No.6 OF 2021**, his affidavit ought to be rejected.

- [39] **Section 7(6) of the Parliamentary Elections Act** provides thus;

"7. Secrecy required of Election officers and others

(6) An election officer who, without lawful authority reveals to any person any matter that has come to his or
of **Section 1 of the P.E.A.** I have looked at and perused the impugned affidavit and took critical interest in the contents for purposes of ascertaining whether the deponent divulged any matter that came to his or her knowledge or notice as a result of his or her appointment. Without necessarily reproducing the affidavit, I noted that the said **Bahemuka Moses** deponed largely on the role he played as an election officer during the voting

exercise that took place on the 14th day of January 2021 ranging from the time he opened the polling station up to closure, counting and tallying of the ballots. The exercise took place during broad day light under the prying eyes of the public. I found the contents of this affidavit being mere matters of public knowledge as regards what took place on the polling day of 14th January, 2021 and I am as a result unable to see, and counsel for the Petitioner also did not show, the matters the deponent revealed in his affidavit that would have come to his or her knowledge or notice as a result of his or her appointment which are prohibited by **Section 7(6) P.E.A.**

[41] Election petition hearings are in form of an inquiry (**S.63(4) P.E.A.**). It is not my finding that **S.7(6) P.E.A** bars election officers upon conclusion of elections from appearing in court as witnesses or parties in election related matters. What is prohibited is, without lawful authority, to reveal matters that came to their knowledge or notice as a result of their appointment which may have an effect of being antithetical to and would seriously damage the integrity of the employer, and also the proceedings of court. I have found none of such matter in the impugned affidavit.

[42] What I find in the impugned affidavit is instead evidence presented in good faith and fair dealing required in the hearing of petitions which is in form of inquiry. In such circumstances, the key players in the electoral process cannot be barred from participating in the inquiry. Admission or exclusion of election officer evidence must therefore be decided on a case by case basis considering certain factors in a balancing test, taking into account the protective purpose of **S.7 P.E.A** and the overwhelming interest in finding the truth in circumstances where the petition

proceedings are governed by the principle of party presentation and that it would not be detrimental to administration of justice.

[43] In the instant case, **Mr. Bahemuka Moses** besides deponing for the 1st Respondent, he also deponed for the 2nd Respondent Electoral Commission. The contents of both affidavits for the 1st and 2nd Respondent bear similar contents regarding the role played on the polling day. This explains the lack of protest from the 2nd Respondent about the assumed breach of **Section 7(6) P.E.A** by the deponent.

[44] In the absence therefore of any evidence that the contents of the impugned affidavit point to the breaching of **Section 7(6) P.E.A**, the impugned affidavit is admissible. Likewise, the affidavit of **Baguma Kasirinji** who also deponed for the petitioner on the events of the polling day and the role he played as a polling officer is also admissible. Besides, the fact that **Bahemuka Moses** deponed for both the 1st and 2nd Respondent Electoral Commission; and there was sharing of information by both the Respondents, authority from the electoral commission may be presumed, especially so, that Electoral Commission did not protest.

[45] This objection is also found lacking merit and it is accordingly rejected.

c) Affidavits offending the provisions of Sections 5 and 6 of the Oaths Act

[46] The affidavits of the 2nd Respondent in question alluded to by counsel for the petitioner as offending the provisions of **Sections 5 and 6 of the Oaths Act** are those of **Bahemuka Moses** (marked No.1), **Sikabyaholo Aineah** (marked No.2), **Kobugabe Lilian**

(marked No.4), **Biira Harriet** (marked No.5), **Kyomuhendo Cosbert** (marked No.6) and **Birungi Glady** (marked as No.7). That the said affidavits were prepared and drafted with jurats standing alone. That the jurat is typed and signed independent of the main body of the affidavit. It is counsel for the petitioner's submission that such jurats are suspicious in as far as they are merely attached to the body of an affidavit with large spaces between the 2 items. While relying on the authority of **DR. BAYIGA MICHAEL PHILIP LULUME Vs MUTEBI DAVID & ANOR, E.P No. 14 OF 2016**, insisted that the impugned affidavits offend the law and such must be struck out for such evidence is suspect and cannot be said to be owned by the deponents and court cannot rely on the same.

- [47] I have looked at the impugned affidavits; they are affidavits attached to the 2nd Respondent. I do appreciate what counsel is referring to as stand-alone jurats. However, what I see are a continuous document of more than one page and the jurats as usual are placed on the last page save for the affidavits of **Kobugabe Lilian, Biira Harriet, Kyomuhendo Cosbert** which are glaringly lacking the jurat and the signature of the deponent at the last page and therefore were never commissioned by the Commissioner for Oaths. The available jurats on record appear to be independent documents and one cannot ascertain whether they form part and parcel of the affidavits. The three affidavits of **Kobugabe Lilian, Biira Harriet** and **Kyomuhendo Cosbert** are therefore accordingly struck out for lack of commissioning and offending **Section 5 and 6 of the Oaths Act**. The last preliminary objection partially succeeds.

MERITS OF THE PETITION

Issue No. 1; Whether the elections were conducted in compliance with the provisions of the Electoral laws, if not, whether the non-compliance affected the results of the election in a substantial manner.

[48] Counsel for the petitioner submitted that the elections were not conducted in compliance with the provisions of the electoral laws and that there was failure to conduct the election in accordance with the principles laid down in those provisions; and that the non-compliance and the failure affected the result of the election in a substantial manner. **Article 61(a) of the Constitution of Uganda and Section 12(1) (e) of the Electoral Commissions Act Cap 140**, enjoins the Electoral Commission to ensure that regular, free and fair elections are held. That fairness should be demonstrated at all stages of the electoral process such as registration of voters, display of voters register, updating voters register, nomination of candidates, campaigns, polling dates, delivery of voting materials, casting votes, counting of votes, verification of results, declaration of winners, gazetting winners names, secure storage of electoral materials even after voting to cater for requirements of emerging disputes etc; **KIIZA BESIGYE Vs E.C & ANOR, PRESIDENTIAL ELECTION PETITION NO.1 OF 2001.**

a) Multiple voting and Ballot stuffing at Kachwamba Mosque polling station

[49] Counsel for the petitioner submitted that under **ground 6(a) i-XV**, the petition contends that contrary to **Section 31(1) PEA** as amended, the 2nd Respondent's presiding officer allowed army officers of the 2nd **Mountain Battalion of the Uganda Peoples Defence Forces (UPDF)** who were not registered to vote and therefore ineligible, voted multiple times and engaged in ballot stuffing. That the following were evidence to that effect:

1) **Biira Roset**, a registered voter and a polling agent of the petitioner at Kacwamba mosque polling station, her evidence is to the effect that the 2nd Respondent's officer at the said polling station abrogated and surrendered his duties to military personnel under the command of a one **Noel Muhwezi** at whose instance people engaged in multiple voting and ballot stuffing. That the said **Biira Roset** reported the said multiple voting and ballot stuffing anomalies to the presiding officer (**annexture 'C' to her affidavit**).

2) **Baguma Kasirinji**, **Magezi Deogratus** and **Adam Kahwa Rwabunoha** supported and corroborated the evidence of the petitioner and **Biira Roset** that the military men took control of the ballot papers and switched off the **Biometric Voters Verification Kit (BVVK)** machine which **Baguma Kasirinji** himself was personally in charge of, an act he brought to the attention of the chairperson of the 2nd Respondent (**Annexture "A" to his affidavit**). That **Magezi Deogratus**, a registered voter and an L.C.I chairperson of Kacwamba 1 cell also wrote a letter to the Returning officer of Ntoroko District, through the chairperson II of Kacwamba ward objecting to the inclusion of the names of persons who were not qualified to vote (**Annexture 'B' to his affidavit**).

[50] Counsel for the Respondents on the other hand, submitted that the election of Woman Member of Parliament Ntoroko District was conducted in compliance with the electoral laws and that the 1st Respondent was validly elected. Further, that if there was any non-compliance, such non-compliance did not affect the outcome of the elections in a substantial manner. They relied on **RTD COL.DR. KIZZA BESIGYE Vs E.C & ANOR (Supra)**.

[51] They further submitted that the petitioner in the instant case, had not adduced cogent evidence to satisfy the burden imposed on

her under the law and she failed to show that the election was conducted in non-compliance with the parliamentary elections Act and other prevailing laws. That in fact, all the allegations were rebutted by affidavit evidence of the 1st Respondent and her witnesses or were discredited for being unreliable or devoid of probative value.

- [52] As regards multiple voting, it is now well established at law that voting more than once constitutes an electoral offence under **Section 31 P.E.A.** As a result, the petitioner in this respect bears a higher standard of proof than when dealing with ordinary election irregularity. See **MUGISHA VINCENT Vs KAJARA ASTON PETERSON, FORT PORTAL H.C.E.P No.4 OF 2016** where Justice Wolayo held that,

“voting more than once is an offence under Section 31(4) of the P.E.A therefore the petitioner has a higher burden than in the case of an election irregularity.”

- [53] The same apply to ballot stuffing under **Section 76(f) of P.E.A.** In **SUUBI KINYAMATAMA JULIET Vs SENTONGO ROBINAH NAKASIRYE, E.P.A No.92 OF 2016**, ballot stuffing is an election malpractice which involves voting more than once at a polling station or moving to various polling stations casting votes in the names of people who did not exist at all or who are dead or absent at the time of voting and yet are recorded to have voted. Ideally, at the end of the polling exercise, the number of votes cast ought to be equal to the number of the people who physically turned up to vote, See also **TOOLIT SIMON AKECHA Vs OULANYA JACOB L’OKORI & E.C, E.P.No.19 OF 2011** and **HELEN ADOA & E.C Vs ALICE ALASO, E.P.A No. 5 OF 2016**.

- [54] In order therefore to prove ballot stuffing and multiple voting, one of the ways is to show that the number of ballots cast at a

particular polling station was not consistent with the number of ballots stated to have been issued to that polling station by the Returning officer and as a result, the number of ballots cast exceeded the number of ballots stated to have been issued by the Returning officer, or present a tally sheet or D.R. Forms to show contrary results.

[55] In the instant case, apart from the petitioner raising mere allegations that the deponents possessed voter location slips as claimed and voted multiple times on the election day, no evidence was led that shows for example, that more election materials than were allocated were utilized at Kacwamba polling station and or that a list of the persons who participated in the malpractice has been provided and that they were agents or supporters of the 1st Respondent.

[56] In her bid to prove ballot stuffing and multiple voting at Kacwamba mosque polling station, the petition relied on the affidavit evidence of **Masereku Kitobi Ogon, Asa Kimoni Tumwine, Alituha Ramathan, Asiimwe Clovis, Adam Kahwa Rwabunoha, Biira Roset, Magezi Deogratius and Baguma Kasirinji.**

[57] Under **Section 46 P.E.A**

*“The candidates’ agents and any voter present at a polling station may raise and present in writing complaints relating to the voting at the polling station and shall have the right to obtain information from the **presiding officer** concerning the counting process.”*

[58] In exercise of this right, it is the petitioner’s case that **Biira Roset**, her polling agent and **Magezi Deogratius**, an L.C.I Chairperson of the area raised their respective complaints with the presiding

officer and the Returning officer respectively for deliberations but were ignored.

[59] Both **Biira Roset** and **Magezi Deogratius** are self-confessed illiterates as evidenced by the jurat/certificate of translation in their respective affidavits. The complaints they respectively raised, (**annexture “C” and “B”** to their respective affidavits) were written in English and there is no indication that the said complaints were translated by or to the deponents at the time of their authorship so as for the authors to own them. In the absence of a certificate of translation of the 2 exhibits or evidence in the affidavits that the exhibits were read and their contents explained to each of them in the language they understood, it cannot be said that the 2 witnesses/deponents are the authors and therefore can own the contents of those documents; **KASAALA GROWERS CO-OP SOCIETY Vs KAKOOZA JONATHAN (supra)**.

[60] In the premises, this court has no option-but to strike out the 2 exhibits (annexture “C” and “B” to **Biira Roset** and **Magezi Deogratius** affidavits) for being incompetent at law and therefore of no evidential value.

[61] Besides, there is no evidence that any of these complaints were brought to the attention of the presiding officer and the Returning officer respectively as there is no indication whatsoever that they were received by these officials.

[62] As regards **Baguma Kasirinji**, he deponed to had been a polling official appointed by the electoral commission for Kacwamba polling station and this was not denied by the Respondents. He stated in his affidavit evidence in **paragraphs 4-6**;

“4. That in the afternoon at about 1:00pm the army officials, commanding officer Noel Muhwezi and political

*commissioner **Dennis Kakuru** came from the military Barracks located in Kacwamba and approached me and the presiding officer ordering me to switch off the biometric machine.*

*5. That the candidates' polling agents including those of the petitioner at the Kacwamba mosque polling station and I were ordered to **keep a distance from voting area**, were intimidated and threatened and we had to do what they wanted.*

6. That the presiding officer was told to tick any voter in the register so that the soldiers can vote in any way they wanted. And I heard them commanding all the soldiers to vote Hon. Tumwine Anne."

[63] The Respondents on the other hand rebutted **Baguma Kasirinji's** claims through the affidavit evidence of **Bahemuka Moses** who claim to had been in charge of the polling station, a fact that has not been denied by the petitioner and that of **Biira Harriet** in her affidavit in support of the 1st Respondent (Her affidavit in support of the 2nd Respondent was however expunged). He denied the claims of the petitioner, **Biira Roset** and **Baguma Kasirinji** regarding the switching off the B.V.V.K and takeover of the electoral process by the army officials.

[64] According to **Magezi Deogratus** an L.CI official in **paragraph 9** of this affidavit, he stated that he was able to use his phone and telephone the petitioner and inform her of the alleged illegal practices that were taking place but he does not explain why he could not film the event. The fact that he could use his phone to communicate, then any other person especially the polling official **Baguma Kasirinji** who claim that he was "ordered to keep a distance from the voting area" should have captured the alleged

malpractices with his phone for evidential purposes assuming that the chairman did not possess a recording smart phone. There is no explanation as to why they failed to secure vital cogent evidence to prove the malpractice but only opted to resort to writing a report to the Chairperson Electoral Commission (Annex “A” to **Baguma Kasirinji’s** affidavit) without any supporting proof on which the Electoral Commission could rely on to act.

- [65] In view of the totality of the above, I find the evidence of the petitioner and her witnesses un reliable as regards their claims of ballot stuffing and multiple voting. In contrast, the **Declaration of Results Form** (DRF) for Kacwamba Mosque for the election of District Woman Representative to parliament for Ntoroko county provided by the 1st Respondent (**Annexture E3**) which stood unchallenged, and were certified by the endorsement of the Petitioner’s agents, clearly revealed that a total of **850 ballots** were issued to the polling station, **653 valid votes** were cast, **9** were **invalid/rejected**, **2 ballot** papers were spoilt and **186 unused** ballots remained. I found therefore, the evidence of **Bahemuka Moses** more reliable compared to that of **Baguma Kasirinji** and **Magezi Deogratus**. It follows therefore, it has not been shown that there was any multiple voting or ballot stuffing at Kacwamba mosque polling station.

b) Voting by the dead and non-eligible persons at Kachwamba mosque polling station

- [66] It is the petitioner’s case and the affidavit evidence of **Magezi Deogratus** and **Bambalire Fred** that besides witnessing soldiers voting during the display of the voters roll, they identified several non-existent residents and others were dead.

[67] As regards the affidavit evidence of **Magezi Deogratius**, as correctly submitted by counsel for the 1st Respondent, he wrote a letter to the chairperson II of Kacwamba Ward objecting to the inclusion of names of persons who were not qualified to vote including a list of 125 people allegedly Identified by him as either non-residents, dead or in prison (**Annexure “B” to his affidavit**). The list does not in any way show how the persons mentioned therein are ineligible. There are neither death certificates and or any other form of evidence attached to validate the claim of those alleged dead nor proof of those allegedly in prison that they are in mates of any prison; **OBOH MARKSONS JACOB DR. OTIAM OTAALA, E.P.A No. 38 OF 2011.**

[68] As already indicated in this judgment, Annexure “B” to **Magezi Deogratius** affidavit has already been expunged for being incompetent as there is no evidence that it was either authorized by him or he knew its contents.

[69] Besides under **Section 25(3) and (4)** of the **Electoral Commission Act** during the period of the display of the voters roll, any person may raise an objection against the inclusion in the voters roll of any name of a person on grounds that the person is not qualified to vote or to be registered as a voter in the constituency, parish or ward etc and an objection shall be addressed to the **Returning officer** through the chairperson of the parish council of the person raising the objection. There is no evidence provided by the Petitioner that during this exercise of cleansing the voters roll, this list with proof, was provided to the Electoral Commission officials for action.

[70] As I have already observed, in his bid to exercise his rights under **Section 25 of E.C. Act**, **Magezi Deogratius** wrote the impugned annexure “B” to his affidavit but there is no evidence that it

reached the Returning officer as there is not any proof of its acknowledgment. It is most likely as an afterthought, that it was merely written for purposes of misleading court to believe the petitioner's allegations.

[71] As regards **Bambalire Fred's** affidavit evidence in support of the petition, I find it extremely unreliable. He is also a self-confessed illiterate by virtue of the certificate of translation on his affidavit. He is an L.C.I official who has an identity card (**Annexure "A"**). As per his National Identity card, he is a person "unable to sign" but his affidavit evidence bears his signature. In my view, in the absence of any explanation as to how he came to sign this affidavit yet at the time he acquired the National Identity Card, he could not sign, it becomes apparent that he is not the author of the affidavit. It therefore follows that his purported **annexures A1-A3** purporting to be a list of the army officers who no longer reside in Kacwamba ward but were on the voters roll is a hoax. In any case, it has no certification from any authority that it is a list of UPDF soldiers in Uganda. I have no option but to strike out and expunge his affidavit evidence on account of being incompetent;
HON. GEORGE PATRICK KASUJJA Vs FREDRICK NGOBI GUME & ANOR, E.P.A No.68 OF 2016.

[72] In conclusion, I find that the petitioner has not adduced any definitive evidence that the dead or ineligible persons were in the voters register and participated in the voting exercise at Kacwamba mosque polling station.

[73] As regards the allegations that the agents of the petitioner and the other candidate were forced to sign the Declaration of Results Forms (DRFs), both **Magezi Deogratus** and **Bambalire Fred** (whose affidavit has been expunged on account of being incompetent) never named any agent of the petitioner who were forced to sign the DRF. Neither of them ever raised any complaint of that nature. The sole **Biira Roset** therefore who claim to had been forced to sign the DRF under threats, requires corroboration before her evidence is believed since as a partisan witness who was a polling agent of the petitioner, there is need for caution before entirely relying on her evidence; **NAKATE LILIAN SEGUJJA & E.C Vs NABUKENYA (supra)**. Besides the claims that she was forced to sign the **DRF** never formed part of her complaint anywhere. In the premises, I still find the evidence of **Biira Roset** unbelievable and therefore unhelpful to the petitioner.

Hon. Rwemlikya Ibanda's notification of "FALSE PLAY AT KACWAMBA MOSQUE POLLING STATION."

[74] In **paragraph 22** of her affidavit, the petitioner states that on the polling day, at Kacwamba mosque polling station, she was served a copy of a complaint by the MP Elect, Ntoroko county in respect of the take over and alleged electoral irregularities at the polling station (**It is annexure "D" to the petitioner's affidavit**). The said **Hon. Rwemlikya Ibanda** did not depone any affidavit for purposes of disclosing his source of knowledge regarding the aforesaid allegations and or whether he was present at the polling station. As a result, its authenticity remains doubtful and if anything, it is mere hearsay evidence that is inadmissible.

[75] In conclusion, I find that the petitioner has not adduced sufficient evidence that unregistered military personnel voted at the polling station of Kacwamba and that the military personnel took over the

polling station and switched off the **B.V.V.K** to allow multiple voting, ballot stuffing and voting by non-residents.

Issue 2: Whether the person other than the one elected won the election

- [76] As has been shown above, the petitioner has failed to furnish cogent, credible evidence to satisfy court that there was any non-compliance with the electoral laws at the impugned Kacwamba mosque polling station. It cannot therefore be found that it is the petitioner and not the 1st Respondent that won the election for Ntoroko District Woman Representative. This issue is therefore in the premises found in the negative. No other person other than the 1st Respondent emerged as the winner of the aforementioned election.

Issue 3: Whether there were illegal practice and offences committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.

- [77] Counsel for the petitioner submitted that **Section 61(1) (c) of the P.E.A** provides that the election of a candidate as a member of parliament shall be annulled if it is proved to the satisfaction of the court that an illegal practice or any other offence under the act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval. The P.E.A creates many illegal practices and offences in **parts XI and XII of the Act**. As a general principle, proof of a single illegal practice or offence by or with the knowledge and approval of the candidate or by his agent is sufficient to invalidate the election.

- [78] In the instant case, it is the petitioner's case under **paragraph 11 of the petition**, that illegal practices or other offences under the Parliamentary Elections Act were committed in connection with the election by the 1st Respondent personally or with her knowledge and consent or approval.
- [79] In this regard, the petitioner pleaded that the 1st Respondent committed the illegal practices and offences of **bribery** of voters contrary to **Section 68(1) P.E.A.** The petitioner contends that the 1st Respondent personally and or through her known agents induced and or procured persons to vote during the election knowing that the persons were prohibited by law from voting at the election.
- [80] In specific regard to bribery of voters, corroboration of the petitioner's evidence was provided by, **Mugisha Rashid, Kor David**; an agent of the 1st Respondent, **Bigasaki Boduwe, Musemeza Augustine Patrick, Kiwanuka Vincent Salongo, Kabuusu Bosco, Kisembo Sulaiman, Subira Emmanuel, Kawe Peter, Asimwe Sharif, Mambo William, Baraka Bieven, Bamwendyaki William, Baranga Robert Bwambale, Kitsema Erisa, Balihali Phillip, Tinambi Innocent, Kule Benefasi, Comeboy Moses and Musoke Fabaian Lukula.**
- [81] These witnesses testified in their affidavits that the voters were bribed with cows, posho, clothes, shoes, plates, tarpaulins money and beans, distributed by the 1st Respondent personally and by her agents with her knowledge and consent or approval, during the electoral period between the month of December 2020 to January 2021. It is the petitioner's case that the beans and posho in particular were branded with the words **"Beans and posho donated by Anne Mary Tumwine Woman Mp Zabuli: 23. Not for sale"**.

- [82] That the distribution of the gifts and donations to the local residents/voters took place on the **23rd day of December 2020** at **Kanara Seed Secondary School** and that **Asiimwe Sharif** captured the pictures of **Kor David** carrying sacks of beans, **Mambu William** and **Baraka Bieven** also carrying and storing sacks of posho and beans at Kanara Town Council and on the **23rd of December 2020** at **Kanara Seed Secondary School**, took photos of the **1st Respondent** campaigning (**Annexture C1, C2 and C3**).
- [83] Further that **Bigasaki Boduwe, Subira Emmanuel, Kabuusu Bosco** and **Musemeza Augustine Patrick** witnessed the giving out of donations to vote for the petitioner at **Kanara Seed Secondary School** while **Kisembu Sulaiman**, also an agent of the **1st Respondent** together with **Kawe Kawe Peter** helped in their distribution and that **Kawe Kawe Peter** personally received posho and beans.
- [84] On the **26th day of December 2020**, **Kor David, Bigasaki Boduwe, Kiwanuka Vincent Salongo, Kabuusu** and **Kawe Kawe Peter** again witnessed the distribution of **2nd hand clothes** to voters and residents at **Kanara Seed Secondary School**. Both **Kawe Kawe Peter** and **Kabuusu Bosco** testified receiving a **shirt** and a **pair of shoes** respectively.
- [85] Again **Asiimwe Sharif** captured pictures of **Mambo William** and **Baraka Bieven** carrying and stocking sacks of posho and beans and the **1st Respondent's agents** with the **2nd hand clothes** (**Annextures D1, D2, and D3 to his affidavit**).
- [86] Lastly, that these photos were submitted to the Forensic Department of police for forensic analysis of their authenticity, date and time. **Enock Kineene**, a **certified digital forensic**

examiner attached to cyber-crime unit, Directorate of Forensic services of Uganda police, was requested and he retrieved and analyzed the photos that had been taken by **Asiimwe Sharif** and in his report (**Annextures B1, B2, B3, B4 and B5**) found that the photos were taken by a **mobile Tecno CF 7 phone** belonging to **Asiimwe Sharif** on the **19th day of December 2020**, on the **23rd day of December 2020** and on the **26th day of December 2020**.

[87] That therefore, the affidavit of **Enock Kineene** and the findings contained in his report having not been challenged by the 1st Respondent give credence to the evidence of **Kor David, Bagasaki Boduwe, Musemeza Augustine Patrick, Kiwanuka Vincent Salongo, Kawe Kawe Peter, Asiimwe Sharif, Mambo William and Baraka Bieven** as to the allegations and incidents of bribery at **Kanara Seed Secondary School** of distribution of bags of beans and posho, and 2nd hand clothes and shoes to the locals and registered voters.

[88] On the other hand, counsel for the 1st Respondent submitted that the 1st Respondent did not personally or through her agents with her knowledge and consent or approval commit any illegal practices.

That the petitioner's allegations on this issue are unfounded and she has not adduced evidence to the satisfaction of court to prove any of the allegations.

[89] The 1st Respondent in **paragraph 8** of her affidavit in support of the answer to the petition states that she did not personally or through her agents commit any illegal practice or offence as alleged before, during or after the election and none were committed with her knowledge, consent or approval if at all. Furthermore, in **paragraph 9** of her affidavit, she states that she did not personally or through her agents, with her knowledge and

consent or approval, **bribe** any voters with **beans, maize flour, money, second hand shoes and clothes, tarpaulins, plates and bulls** or any other items or use any **undue influence** before or during the campaign and on polling day or at all with intent that they should vote for her and refrain from voting for the petitioner or any other candidates.

[90] This is further corroborated by the evidence provided by **Biryabarema Elija** (No.1), **Balikighamba James** (No.2), **Mulinewo Richard Kingango** (No.4), **Baluku Julyasi** (No.8), **Kisembo Geoffrey** (No.6), **Tinambi Benezeri** (No.9), **Basulene Julius Balinandi** (No.10), **Balihale Nason** (No.11), **Kasutama Isaya** (No.13), **Happy Moses Bezara** (No.15) and **Tinkasimire Robert** (No.17) in their affidavits in support of the answer to the petition.

[91] As correctly put by counsel for the 1st Respondent, in cases of bribery, being a very serious allegation which on its own can overturn an election, the burden is on the petitioner to prove each and every allegation of bribery and all the statutory ingredients of bribery to the satisfaction of court; **BAKALUBA PETER MUKASA Vs NAMBOOZE BETTY, E.P No.4 OF 2009. (S.C).** In **KAMBA SALEH MOSES Vs HON.NAMUYANGU JENNIFER, E.P.A No.27 OF 2011**, Court observed;

“...bribery is such a grave illegal practice and as such it must be given serious consideration. The standard of proof is required to be slightly higher than that of the ordinary balance on probabilities applicable to ordinary civil cases. It does not, however call for proving the bribery beyond reasonable doubt as is the case in criminal cases, what is required is proof to the satisfaction of court.”

[92] **Section 68(1) of the P.E.A** provides that;

“A person who either before or during an election with intent, either directly or indirectly to influence another person to vote or refrain from voting any candidate , gives or provides or causes to be given or provided any money, gifts or other consideration to that other person, commits the offences of bribery...”

Black’s Law Dictionary 6th Edition defines **Bribery** as,

“the offence committed by one who gives or promises to give or offers money or valuable inducement to an elector, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, or as a reward to the voter for having voted in a particular way or abstained from voting.”

See also **APOLOT STELLA ISODO Vs AMONGIN JACQUILINE, E.P.A No.60/2016.**

In the instant case, the allegations of bribery are categorized under the following heads;

a) Distribution of food stuffs and second hand shoes and clothes at Kanara Seed Secondary School

[93] It is alleged that the 1st Respondent bribed voters with food stuffs to wit posho and beans branded with words **“Donated by Anne Mary Tumwine Woman MP, Zabuli:23, Not for sale”** and second hand shoes and clothes to the locals/voters at Kanara Seed Secondary School with a call to vote for the 1st Respondent and refrain from voting **Hon. Mujungu**, the petitioner.

[94] The 1st Respondent in **paragraph 20** of her affidavit in support of the answer to the petition states that she donated the said food items on **30th April 2020**, during the lockdown, to the **covid 19 District task force** to heed the call of the president that individuals should join in the fight and help. She attached a copy

of the register book where the people that donated to the **covid 19** task force were registered as **annexture "G"**. This was supported and corroborated by the affidavit evidence of **Biryabarema Elija**, the Resident District Commissioner who headed the **District covid 19 task force** but in addition, testified that no item was distributed by the 1st Respondent at **Kanara Seed School** as alleged by the petitioner. That however, when the area was hit by floods, as a result of the efforts of the President of Uganda, the District task force was asked to distribute food items that had been donated to the District task force including the 1st Respondent's food items that she donated in **April 2020**.

[95] As regards the allegation that on the **23rd December, 2020** the 1st Respondent distributed food items to local residents, who had been affected by the floods, the 1st Respondent denies this aspect. She states that the food items delivered in that period were delivered by the Relief Organizations, Office of the Prime Minister and religious organizations. This is supported and corroborated again by the evidence of **Biryabarema Elijah, Balikighamba James**, the chairperson of the Camp of the floods displaced persons, **Mulinewo Richard**, the chairman L.CI of Kanara Town Council and **Kisembo Geoffrey**.

[96] It is the submission of counsel for the 1st Respondent that the 1st Respondent attended meetings on **23rd December 2020** as one of the leaders invited to help chart the way forward regarding the effects of the floods in the area but did not engage in giving donations and bribes to voters.

[97] It is now settled that there are three ingredients of bribery;

- 1.A gift was given to a voter
- 2.The gift was given by a candidate or his agent and

3. That it was given with the intention of inducing the person to vote; **APOLOT STELLA ISODO Vs HON.AMONGIN & ANOR (supra)** and **COL (Rtd) Dr. BESIGYE KIZZA Vs MUSEVENI KAGUTA & ANOR (supra)**.

Ingredient No.1- A gift was given to a voter

[98] **Section 1 of the P.E.A** defines a voter as;

“a person qualified to be registered as a voter at an election who is so registered and at the time of an election is not disqualified from voting.”

In KAMBA SALEH MOSES Vs HON. NAMUYANGU JENNIFER (supra) and BAKALUBA PETER MUKASA Vs NAMBOOZE BETTY (supra). It was emphasized that it is absolutely necessary that it is proved to the satisfaction of court by those alleging the bribery that the people allegedly bribed were registered voters at the time of the alleged bribery. The standard requires *inter alia*, the motive of the giver to be established.

[99] In the instant case, the Petitioner’s witnesses deponing to be registered voters merely attached **Voter Location Slips** (VLS) without more. However, one may possess a VLS and a National ID when at the time of elections, he/she may have been disqualified from voting. These **VLS** and Identity cards are therefore not sufficient proof. In reality, the slips merely locate the voter on the National voters’ register. The instant ones in any case are in photocopy form and there has been no certification at all of their authenticity. However, even if they had been certified, as it was observed in **NABUKEERA HUSSEIN HANIFER Vs KUSASIRA PEACE & ANOR E.P.A No.72 OF 2016**,

“the position of the law (is) that conclusive proof of a registered voter is by evidence of a person’s name appearing in the National voters’ register.”

Section 18 of the Electoral Commission Act also emphasizes that the only source when proving whether a person is a registered voter, is the voters Register and voters roll. Nothing else therefore suffices.

In **KABUUSU MOSES WAGADA Vs LWANGA TIMOTHY, E.P.A No.53 OF 2011**, it was held that it is necessary to produce copy of the voters' register showing the name of the bribed person.

[100] The above has not been the case in the instant case and as a result, I find that it has not been proved to the satisfaction of court that the witnesses allegedly bribed with the food items were voters within the meaning of **Section 1 of the P.E.A.**

[101] In the premises, I find that the petitioner has not proved the 1st ingredient of the offence of bribery.

Ingredient No.2- The gift was given by a candidate or his agent

[102] The appropriate and good examples of the petitioner's witnesses relied upon to prove this ingredient are;

1) Kawe kawe Peter who claim to had received or was bribed with posho and beans and then a shirt by the agents of the 1st Respondent but did not name the agent.

2) Kabuusu Bosco who states that he was an agent of the 1st Respondent in 2021 parliamentary elections, and claim to had received or was bribed with a pair of shoes by the 1st respondent and her agents. He also did not give any name of the 1st Respondent's agents involved in the bribery.

[103] As regards the role the 1st Respondent allegedly played, it is clear from the affidavit evidence of **Asiimwe Sharif** in support of the petitioner's petition that from **19th December 2020** to **23rd December 2020** at around 4:00pm, he had been following and

covering the 1st Respondent's activities in the area by way of taking photos. Though he stated in **paragraph 4 of his affidavit** that on the **23rd December 2020** after the 1st Respondent had given a speech, she and her agents distributed **posho** and **beans**, none of his captured photos; **annextures C1-C4** and **D1-D3** portray the 1st Respondent carrying out the alleged distribution.

[104] The 1st Respondent on her part has denied any involvement in the distribution of the donated items and it is not clear as to why, if **Asiimwe Sharif's** claims are true, he did not take the photos of the 1st Respondent in the act of the distribution of the food stuffs and clothes to the locals. There is no evidence from the petitioner that **Nobi Jemima** named by **Asiimwe Sharif** as the agent of the 1st Respondent was actually her agent or any photograph of her in the act. Besides no other of the petitioner's witnesses alluded to the fact of **Nobi Jemima** as being one of the agents of the 1st Respondent.

3) Kisembo Sulaiman, Musemeza Augustine Patrick and Kor David claim to had helped in the carrying and distribution of the donated items on behalf of the 1st Respondent. There is no evidence to support this claim and or that if they did so, it was with the knowledge, consent and approval of the 1st Respondent

[105] I again find this 2nd ingredient of the offence of bribery not proved to the satisfaction of court.

Ingredient No.03- It was given with the intention of inducing the person to vote.

[106] It is the petitioner's case that the 1st Respondent on the **23rd and 28th of December 2020** distributed food stuffs and 2nd hand clothes to the locals and registered voters while campaigning for votes at **Kanara Seed Secondary school**. The 1st Respondent on

the other hand denies the allegations and contends that she donated the food stuffs on **30th April 2020** during the lock down to the **covid 19 District task force** heading the President's call that individuals should join and help. She attached a copy of the register book wherein people including herself donated to the **covid 19** taskforce cause (**Annexture "G"**) to the affidavit in support of the answer to the petition.

[107] This was corroborated by the affidavit evidence **Biryabarema Elijah** (affidavit No.1), the RDC who headed the **District covid 19 task force**. He was categorical that during the months of **April, May** and **June 2020**, very many people including the 1st Respondent, Office of the Prime Minister, Civil Society organizations donated food and non-food items to the District task force. The 1st Respondent's food items were labelled with the name and a bible verse. They were handed over to the Task force which kept the food in the store until when it was distributed by the committee. He attached a copy of the list of the people that donated the items and it is marked **Annexture "B"**.

[108] I find the list **annexture "B"** as unauthentic as it lacks any certification and authorship and therefore is inadmissible and I do hereby disregard it. The 1st Respondent however represented an excerpt of the register book for all members that donated to the COVID 19 DISTRICT TASK FORCE (**Annex "G"**) which has not been challenged. It is supported and corroborated further by the affidavit evidence of **Kisembo Geoffrey** an L.C.I chairperson of Kisenyi 'A' Kanara Town Council where under **paragraphs 10** and **11**, he testified that in **April 2020**, he attended a meeting for all the local council 1 chairmen of the villages in Kanara Town Council organized by the **Covid 19 Task Force-Ntoroko District** for distribution of food. That among the various food stuffs that

were given out in the meeting included beans that were branded **“Anne Tumwine, Zabuli 23,”** the 1st Respondent.

[109] Whereas in this case, as per the affidavit evidence of the petitioner’s witness; **Kor David, Kiwanuka Vincent** and **Mambo William**, claim to had seen and or participated in the offloading of posho and beans from a truck and store them in the Kanara Town council Hall on the **19th December 2020** for distribution on **23rd December 2020**, at the instance of the 1st Respondent, there is no independent evidence or source to support the petitioner’s claims. **Asiimwe Sharif** who assumed the responsibility of covering the events as they unfolded in the 1st Respondent’s campaign/camp never took any photo depicting the offloading of posho or beans from any truck on the **19th December 2020**.

[110] Secondly, no other independent evidence in form of, for example a person who was in charge of the Council Hall of the Town Council where the food items were stored to testify that the said food stuffs with the brand name of the 1st Respondent were brought for storage in the Council Hall on **19th December 2020** for distribution on the **23rd December 2020** to counter the 1st Respondent’s evidence that the food stuffs were donated on the **30th April 2020**.

[111] Such independent evidence is crucial and necessary because of the partisan nature of the evidence by the petitioner’s witnesses who all purport to be voters and supporters of the candidates in the impugned area of Kanara Town Council. In **AMORU & ANOR Vs OKELLO OKELLO, E.P.A No. 39 & 95 of 2016**,

“In Election matters, partisan witnesses have a tendency to exaggerate claims about what might have happened during

elections. In such situations, it is necessary to look for “other” evidence from an independent source to conform the truthfulness or falsity of the allegations.”

Besides, in this case where are accusations and counter accusations from both sides, again, court would require evidence from an independent source to confirm what really happened.

[112] In this case, such an independent evidence is lacking. In the absence of such evidence, I find the evidence of **Mr. Biryabarema Elijah**, the R.D.C of the area and **Mr. Kitembo Geoffrey**, an L.CI chairperson of the area credible and therefore believable compared to that of the petitioner’s partisan witnesses.

[113] Therefore, I find that the petitioner has not proved by way of cogent evidence that the referred to foodstuffs donated by the 1st Respondent were brought on the **19th of December 2020** but rather, I am satisfied by the 1st Respondent’s evidence that she donated them, like any other concerned citizen to the District covid 19 Task force on the **30th/4/2020** and had no role or played no role in their distribution thereafter.

[114] In the premises the petitioner has not proved that the donated items were intended to induce the recipients to vote for her or to influence any voter from voting another person. This ingredient has therefore not been proved to the satisfaction of court.

b) Distribution of Tarpaulins and plates in the villages of Kyamutema and Nyabikungu 1, II, & III.

[115] It is alleged by the petitioner that on the **5th of December 2020**, the 1st Respondent and her agents distributed 4 tarpaulins and 100 plates to the chairpersons of the villages of **Kyamutema** and

Nyabikungu I, II & III to influence voters to vote for her and refrain from voting the petitioner. The petitioner relied on the evidence of **Bamwendyaki William, Maranga Robert.B, Kitsama Erisa, Balihali Phillip, Tinambi Innocent** and **Kule Benefasi**. They claim to had personally seen and **benefitted** from the distributed items.

[116] The 1st Respondent denied the allegations. Her witnesses **Baluku Julyasi**, L.C chairperson of Nyabikungu I village, **Tinambi Benezeri**, a counselor for persons with disabilities, **Basulene Julius** and **Balihali Nason** all deponed in support of the 1st Respondent's denial that on **11th Feb,2020**, the chairman L.CII Nyabikungu parish **Mr. Bamwendyaki William**, convened a meeting of local council leaders wherein they agreed to seek the 1st Respondent's assistance in her official capacity as District Woman Representative to Parliament for Ntoroko District. They wrote a letter to her seeking assistance for saucepans, chairs, tarpaulins and plates for community use in functions like weddings, funerals and meetings because of the remoteness of the area. In **July 2020**, the 1st Respondent obliged and offered them plates and tarpaulins and they received them through the chairman L.CII for **Nyabikungu I, II & III**. That it is therefore not true that the 1st Respondent gave out the said items during the election period of **5th December 2020**.

[117] Again as I already observed, none of the petitioner's witnesses on this issue proved to be a voter within the meaning of **Section 1 P.E.A** so as to be said that the offering of the items in issue to them amounted to a bribe. The witnesses merely attached their National Identity Cards as proof that they are voters which in the view of this court is not enough.

[118] In **KABUUSU MOSES WAGABA Vs LWANGA TIMOTHY (supra)**

“In cases of bribery during elections, it must be shown that the person bribed was a registered voter. It is not enough to swear an affidavit that one is a registered voter and even quote the voter’s card. It is necessary to produce copy of the voter’s register showing the name of the bribed person.”

[119] Secondly, it is clear that by **Bamwendyaki William** deponing on behalf of both the petitioner and the 1st Respondent, he placed his integrity in question and therefore, he is such an unreliable witness. In **OURUM OKIROR SAM Vs THE E.C AND ANOR, MBALE H.C.E.P No. 08 OF 2011**, on recanting witness, justice Mike Chibita (as he was then) observed as follows;

“The practice of witnesses in election petitions switching sides is becoming two common...a court of law to rely on the evidence of such witnesses who appears on both sides of the case, stating contradictory statements is left considerably compromised. The safest course of action for court is to completely disregard his/her evidence...”

[120] In this petition, I follow suit and disregard the affidavit evidence of the said **Bamwendyaki William** who deponed for both the petitioner and the 1st Respondent.

[121] In view of the above, I find the evidence of **Baliku Kulyasi, Tinambi Benezeri, Basulene Julius** and **Balihali Nason** all for the 1st Respondent credible, that the alleged donated tarpaulins and plates were offered by the 1st Respondent in her capacity as a Woman Member of Parliament for Ntoroko district in **July 2020** before election period and therefore, the petitioner has failed to prove that they were given with the intention of inducing the person to vote or to refrain from voting for any candidate.

c) Contribution of Ugx 50,000/= to Agape church in Kagahiro village and donation of 4 bulls to soldiers in Kacwamba barracks.

[122] It is the petitioner's case that a one **Hellen Kyampango**, an agent of the 1st respondent donated 50,000/= as contribution towards church construction on the **10th day of January 2021**.

On the other hand, **Champango** alias **Kyampango Hellen** deponed on behalf of the 1st Respondent denying having ever been an agent of the 1st Respondent or any candidate and that she has never made any pledge to any church in January 2021, on behalf of the 1st Respondent.

[123] No evidence was led by the petitioner that the said **Kyampango Hellen** was an agent of the 1st Respondent (in form of an appointment letter to that effect) and that she contributed the said sum of money to the church on the alleged date. **Comeboy Moses** who claims to be the chairman in charge of construction at the church and **Musoke Fabian**, a church member, none of them attached any evidence that either they are voters or they are what they purport to be.

[124] As regards the donation of the bull, the petitioner relies on the affidavit evidence of **Masereka Kitobi Ogon** and **Mugisa Rashid**. The 1st Respondent on the other hand denies the allegation in her affidavit in support of the answer to the petition.

[125] Again, none of these witnesses attached evidence on their affidavit evidence that they are voters. There is also no evidence that the bulls in question were from the 1st Respondent, if at all they were there. What the witnesses are saying is what they allegedly heard from the driver of the truck carrying the bulls, telling his colleagues at the gate. This is definitely hearsay

evidence. There is no other independent evidence available to support the above claims.

[126] In conclusion, the petitioner's evidence on this issue is devoid of merit. All the petitioner's witnesses with voter location slips as proof that they are voters is not enough. Most of the petitioner's witnesses are partisan witnesses by virtue of their claims that they are voters in the area and therefore, must have been supporters of either party. Their evidence required other independent evidence for corroboration which is lacking in this case. In the premises, I find that the petitioner has not proved all the ingredients of bribery to the satisfaction of court and this issue is therefore found in the negative.

Issue No.4: Whether the 1st Respondent was at the time of her election not qualified for election as a member of parliament.

[127] Counsel for the petitioner submitted that the qualifications required before one can qualify to be a member of parliament are set out in the Constitution of the Republic of Uganda as amended and the Parliamentary Elections Act.

[128] **Article 80(1) of the Constitution** requires that for a person to qualify to be a member of parliament, the person must first be a citizen of Uganda, a registered voter and must have completed a minimum formal education of Advanced level standard or its equivalent. The same is spelt out under **Section 4(1) of the P.E.A.**

[129] It is the petitioner's case that the 1st Respondent was at the time of her election not qualified for election as a Member of Parliament in that first, the 1st Respondent has not completed a minimum formal education of Advanced level standard or its

equivalent and secondly, the Academic documents the 1st Respondent relied on for her nomination, bears different names.

[130] Then, that the 1st Respondent was not duly nominated. **Section 11(1) (c) of the P.E.A** requires the names and signatures of a minimum of ten persons who are registered voters in the constituency where the person seeks nomination as a candidate supporting the nomination and that each of the persons so signing shall state in the nomination his or her village, occupation and personal Voter Registration Number; See **HON. TUMURAMYE GENENSIO Vs TAYEBWA HERBERT MUSASIZI & ANOR, E.P.No. 3 OF 2021 (MBARARA)**.

[131] That the nomination paper of the 1st Respondent attached as annexure “C1” to the Petitioner’s affidavit in support of the petition is not supported by a minimum of at least ten voters. That under **Serial No.7**, it is clear that a one **Kahuma James** first signed the nomination document or signed it and later, his name was cancelled and a one **Muthahinga Bahamwithi Ben’s** name was inserted and the same did not sign. There are crossings from **serial NOs.4, 6, 7 and 8** that one cannot tell on a balance of probabilities that the ten members were raised.

[132] Counsel for the 1st Respondent submitted that the 1st Respondent in her Answer to the petition in **paragraph 5** clearly states that at the time of nomination, she had the prerequisite academic qualifications to stand and contest as Woman Member of Parliament and that she was duly nominated on the basis of academic documents as attached to her affidavit (**Annexure C1 - C5**).

[133] In **paragraph 9** of her affidavit, the 1st Respondent clearly states that all her academic documents bear the names of **Kobugabe**

Anne Mary which are her birth names and that once she got married, she adopted her husband's name of "**Tumwine**". She attached her marriage Certificate as proof (**Annexure "E"**).

- [134] That all her academic documents bear the 1st Respondent's birth name but later adopted her husband's name and has since sworn a deed poll renouncing use of the name **Kobugabe** and fully adopted her husband's name.

Variance in names on nomination and certificates

- [135] It is the petitioner's case that the 1st Respondent was nominated as **Tumwine Anne Mary** (**Annexure "C1"** to the affidavit in support of the petition and **Annexure "A"** to the affidavit of **Charles Joel M. Mugenyi**, the Returning officer of the 2nd Respondent) on the basis of her **Uganda Advanced Certificate of Education (U.A.C.E)**, **Hotel & institutional catering certificate Y.W.C.A**, **Diploma in Business Administration Ndejje University** and a **Bachelor of Business Administration Bishop Stuart University** which bear the name **Kobugabe Anne Mary**. That therefore, these academic documents are not for the 1st Respondent but they were illegally used as they belong to **Kobugabe Anne Mary** and not **Tumwine Anne Mary** whose nomination paper and **National Identity Card** bear the same.

- [136] Lastly, that the burden to confirm that the academic papers presented at nomination belong to the 1st Respondent lies with the person presenting them. That the 1st Respondent clearly put her academic documents in question and she tried to validate the names in order to be able to use those academic papers by swearing a **statutory declaration** and a **deed poll** thereby aggravating an already bad situation since that time, her names

had already changed by virtue of her National Identity Card that bore the name **Tumwine Anne Mary**.

- [137] Burden of proof; In **MAGOMBE VINCENT Vs THE E.C AND ANOR, E.P.A No.88 OF 2016**, the court of Appeal observed as follows;

“We adopt this court’s reasoning in Okello Charles Engola & Electoral Commission Vs Ayena Odogo Election petition No. 26 & 94 of 2016 where it was held that a petitioner who claims that a successful candidate does not have the requisite qualifications bears the burden, at all times to prove the allegation...We emphasized that more evidence, beyond a discrepancy in names must be adduced to prove that a person who sat and obtained certain academic qualifications is not the same person nominated for an election.”

See also **BALEKE PETER Vs E.C & ANOR E.P.A No.4 OF 2016** where it was held that it was incumbent on the Appellant to prove his allegations that the different names, on nomination and certificates, did not refer to the same person.

- [138] From the foregoing, it is therefore not correct to state that the burden to confirm that the academic papers presented at nomination belong to the 1st Respondent during an election is on the person presenting them. The burden is on the Petitioner to prove his allegations. The 1st Respondent is only required to prove the authenticity of her academic documents; **ABDUL BANGIRANA Vs PATRICK MWONDHA, S.C E.P.No.9 OF 2007**.

- [139] In the instant case, it is the 1st Respondent’s case that she was at all times known as **Kobugabe Anne Mary** and upon her marriage to a one **Tumwine**, she adopted her husband’s name. In **NINSIIMA Vs AZAIRWE NSHAIJA E.P.A No.5/2016**, Court of Appeal observed that,

“...on the issue of her husband's name, there is no requirement that a person should swear a deed poll upon marriage. We agree that use of the 1st Appellant of her husband's name does not amount to changing her name but rather adding her husband's name.”

[140] In the premises, I find that the petitioner has not adduced evidence to the satisfaction of court that the 1st Respondent is not the owner of the impugned academic documents. The 1st Respondent has instead adduced uncontroverted evidence to show that all the impugned names on her academic documents relate to her. No evidence has been led by the petitioner that challenged her identity to belong to someone else or that the academic documents are not hers or that they belong to another person.

Anomalies on the 1st Respondent's Nomination paper

[141] I have looked at the 1st Respondent's Nomination paper (**Annexure “A” to Charles Joel M. Mugenyi's affidavit**). It is true that the names of **Jamali, Kahuma James and Bonabana Vicky** were crossed and replaced by or the correct names inserted with their corresponding signatures. No evidence was led by the petitioner that the owners of the correct names signed before the crossings or corrections were made as counsel for the petitioner wants this court to believe. My understanding is that wrong names had been written and were corrected by way of crossing and the correct names were inserted and their respective owners signed accordingly. Any corrections on a form perse is not usually a critical issue. It simply means a mistake was made and the presiding officer corrected the error; **NGOMA NGIME Vs E.C & ANOR, E.P.No.11 OF 2012.**

[142] In the instant case therefore, I find that the Electoral Commission carried out its mandate and confirmed the veracity and authenticity of nomination forms and duly accepted it as sufficient to meet the requirements of **Section 11 P.E.A.** In the premises, I find that the 1st Respondent was duly and validly nominated by the 2nd Respondent to participate in the elections of Woman Member of Parliament as she was duly qualified and possessed the minimum academic qualifications.

Issue No.5: What remedies area available to the parties

[143] The petitioner has failed to prove her allegations in her petition that the election was not conducted in accordance with all the electoral laws and principles of the Constitution, that she personally or through her agents with her consent, knowledge or approval committed any illegal practice or electoral offence and that she was not qualified to be elected a member of parliament. The petitioner having failed to discharge the burden of proof and having failed to prove the allegations to the satisfaction of court, the petition is dismissed with the following declarations and orders;

1. The 1st Respondent is the validly elected Woman Representative to Parliament for Ntoroko District.
2. The Petitioner shall pay the costs of this petition.
3. A certificate of 3 counsel is accordingly issued.

Dated at Fort portal this 29th day of October 2021.

BYARUHANGA JESSE RUGYEMA
JUDGE

29th/10/2021

Parties present

Mr. Baguma holding brief Mr. Sabiiti for the 2nd Respondent

Mr. Esau Isingoma for the 1st Respondent

Mr. Kato Fred for the Petitioner

Mr. Mugenyi Joel-Representative of the 2nd Respondent

Court: Judgment delivered in open court in the presence of the above.

BYARUHANGA JESSE RUGYEMA

JUDGE

29th/10/2021